A

TREATISE

ON

THE LAW OF

CERTIFICATES.

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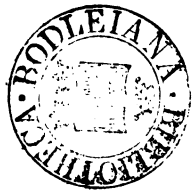

I. Ecclesiastical.
II. In Bankruptcy.
III. Judicial, *with regard to Costs, &c.*
IV. By Magistrates.
V. By Public Officers.
VI. Parochial.
VII. Professional.
VIII. Of the Registry of Ships.
IX. Sundry Certificates, *not classed as above.*

BY

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PREFACE.

In offering this Treatise to the profession, the Author is desirous of anticipating an observation which may possibly arise; namely, that the matters contained in it are for the most part to be found severally embodied in other volumes. With regard to this, and not at all adverting to the apparent advantage which may be derived from arranging legal questions belonging to the same subject under one head, he begs to point out the first, fourth, fifth, seventh, and ninth, chapters, and many detached sections of the rest, as entirely unconnected with any existing publication as far as his inquiries have led him; and with reference to the other chapters, while he has ever been anxious to avail himself of the information supplied by other writers, so far from incorporating any part of their labours, unless by occasional and sparing quotation, he has investigated every principle, and

searched every case in the Treatise which he now submits to the public.

To unite together all the certificates employed by public officers, or others, on every occasion, would be necessarily a fruitless undertaking, especially, as many such are identified with the common practice of the day, neither impeached nor opposed: the principal object of this volume has been rather to combine the legal discussions and decisions arising from a variety of these documents, and to notice such legislative enactments as have introduced certificates of great general interest.

The first chapter has been appropriated to the consideration of ecclesiastical certificates; the second to those which are employed by the Lord Chancellor, and more particularly the bankrupt's discharge; the third comprises such as the judges of England issue on certain occasions, and especially those which relate to costs; the fourth treats of certifications by magistrates, as, with respect to highways, &c.; the fifth, of the same, by high public officers, the Speaker of the House of Commons, for example, &c.; the sixth embraces the subject of parochial certificates; the seventh speaks of professional certificates; the eighth of such as are required on the registry of ships; the ninth of many of those

instruments which could not be classed under any particular head; and the tenth points out how they may be received in evidence, such as are of themselves conclusive, and such as stand in need of collateral testimony to support them.

King's Bench-Walk, Temple,
January 21, 1826.

A

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WITH THEIR INCIDENTS.

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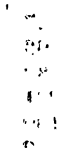

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A TREATISE

ON

CERTIFICATES, &c.

CHAP. I.

OF ECCLESIASTICAL CERTIFICATES.

THERE are not many certificates in the Ecclesiastical Courts upon which disputed questions have arisen, the principal either being acquiesced in as mere matters of form, or connected with other transactions on which litigation may have taken place independently of the certificates.

Thus, for instance, when a process of citation has gone forth to summon a party before the Court, the notice which the apparitor gives of his having executed a personal service, or of his inability to do so, is registered as of course, and so it is where a return is made to the second process, which in cases of non-appearance is *viis et modis*, the summons being affixed to the outer door of the person's residence, and to the church-door. Exceptions will indeed be made to these certificates if there has not been a service, or if it has been defective in the prescribed forms; but the first of these objections rests on a matter of fact; and with regard to the second, the form of it is seldom, if ever, discussed: nevertheless, a

perfect certificate formerly contained the names of the party citing, and of him who was summoned, together with the day and place of his citation: it was directed to the Judge by his accustomed style, and the seal of the Archdeacon, Official, Commissary, or rural Dean, was affixed. (*a*) Indeed, for want of this latter form, a well reputed author states, that he has known a certificate of this kind invalidated. (*b*) A successful opposition may be made to such an instrument, if the party show that he was in another place when the supposed service was made, that another person was summoned by mistake, that the summoner was absent, &c. (*c*) It is the same in a commission *ad partes*, which is issued for the purpose of examining witnesses at a distance: the certificate pursues the common form: it is made by the Bishop or his Vicar General; and after stating that the testimony has been taken according to the requisition, it is confirmed by the notary public, who adds his certificate to the effect that he has been present at the examination. (*d*) Neither is there any objection in point of law to the customary documents, (which, by the way, are not produced unless called for by the opposite side,) which certify that a party has conformed himself to the orders of the Ecclesiastical Jurisdictions, that a husband, for instance, in a suit for restitution of conjugal rights, has taken his wife home, &c.; such a statement may be incorrect, but will in that case be denied by the opposite party, and the question will be resolved by a reference to the fact itself. A husband will, however, be ordered

(*a*) Oughton's Ordo Judiciorum, vol. i. p. 51.
(*b*) Ibid. p. 51. and see note (2) there.
(*c*) Ibid. p. 52. (*d*) Ibid. p. 146.

to amend his return if he have not provided his wife with a suitable provision, or have not received her in a manner conformably to the intention of the decree.

Of this description also are certificates to stop the payment of a ship to a pretended administrator (*a*), of the service of a warrant from the Admiralty to arrest a ship (*b*), for the enlarging of a church with the consent of the rector and churchwardens (*c*), the return of churchwardens upon a monition to seat a parishioner (*d*), and several others. (*e*)

But as it is the design of this work not to enumerate the various certificates occasionally employed, but to direct the reader's attention to such as have been, or are likely to be questioned, we shall hasten to examine some of these, beginning with the ecclesiastical, in their order.

SECT. I.

Of the Bishop's Certificate previous to the Writs de Excommunicato Capiendo, *and* de Contumace Capiendo.

WHEN a party remained under the sentence of excommunication for forty days, it was the custom for his diocesan, to certify to the Court of Chancery the

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(*a*) Clerk's Instructor in the Ecclesiastical Courts, p. 238.
(*b*) Ibid. p. 488. (*c*) Ibid. p. 412.
(*d*) 1 Hagg. Consist. Rep. 314.
(*e*) Clerk's Instructor, in the Index, tit. Certificate. Oughton's Ordo Judiciorum, vol. ii. p. 312., for union of Churches, &c.

contempt which he had incurred, upon which the writ *de excommunicato capiendo* immediately issued. (*a*) But now by 53 G. 3. c. 127. this penalty is abolished, except in definitive sentences, and by that act two certificates are prescribed. Thus it is declared, that if a party disobey the citation of the Ecclesiastical Court, or commit a contempt in the face of such Court, and the Judge pronounce him contumacious, signifying the same into Chancery within ten days afterwards, a writ *de contumace capiendo* shall issue out of Chancery, directed and returnable, and of like force as the former writ *de ex. cap.*, and that upon the appearance, obedience, or submission of the party, the Ecclesiastical Judge shall pronounce him absolved from the contumacy, and shall order him to be discharged. In this provision the first certificate is pointed at. With respect to the excommunication, which is appropriated to definitive sentences, it is provided, that no person so excommunicated shall incur any civil penalty or imprisonment whatever, except such imprisonment, not exceeding six months, as the Ecclesiastical Court shall direct, and which sentence shall be signified into Chancery; and thereon the writ *de ex. cap.* shall issue and be forwarded, and the party be kept in custody for the term directed, or until absolved. In this clause we find the second certificate. (*b*) Dr. Burn observes, that the term *significavit* has been applied at times to the certificate by virtue of which the writ issues, as well as to the writ itself, which begins with the word *significavit*; but that the latter adaptation seems to be the

(*a*) Burn's Eccles. Law, by Tyrrwhitt, vol. ii. p. 248. citing Lind. 350. Swin. 109. (*b*) 53 G. 3. c. 127. *s.* 1 & 2.

more correct. (*a*) In the observations, therefore, which will be offered below, the *significavit* will be mentioned as the writ, and not as the certificate.

It seems, that the legal doctrines applicable to the old certificate are not in any way altered by the recent statute, and therefore the form of these instruments, together with the discretion of granting them, are now, as much as ever, proper subjects of attention.

Who may certify.

The Bishop was, in general, the officer whose duty it became to certify upon these occasions; but one who had ordinary jurisdiction, and was the immediate officer to the King's Courts, as the Archdeacon of Richmond, or the Dean and Chapter in time of vacation, might do it. (*b*) And if the Bishop were beyond sea, or *in remotis*, it is said, that his official or commissary might have been allowed to testify (*c*); and there is a dictum in Lord Coke's Reports, that the Vicar General might be in some cases a substitute for this purpose. (*d*) Indeed, these officers of the Bishop might anciently perform this duty at all times, but they were restrained by authority of Parliament because of the mischief that ensued. (*e*) So Fitzherbert says, that this writ shall not issue upon the certificate of the Commissary, Abbot, or Official (*f*); but it shall be under the seal of the Ordinary. (*g*) Thus, the certificate of the Bishop of Lincoln's Commissary was refused, because he was not the officer of the Court. (*h*) And in an action of

(*a*) Burn's Eccles. Law, vol. ii. p. 248.
(*b*) Co. Litt. 134. a. (*c*) See Co. Litt. 134.
(*d*) 8 Rep. 69. (*e*) See Co. Litt. 134. (*f*) F. N. B. 65.
(*g*) 1 Ro. Ab. 883. and see 8 H. 6. 3. 20 H. 6. 1. Bract. 426, 427. (*h*) 7 E. 4. 14.

excommunication made by the Abbot of St. Alban's, his certificate was refused for the same reason. (*a*) For such disability followed upon this denunciation, before the late statute, that it was a material benefit for the party to obtain absolution; and it was equally necessary that the Court should know to whom they should write to absolve the excommunicated in case of his submission, and this power rested solely in the Bishop. (*b*)

Further, a certificate upon the report of another Bishop will not be sufficient, so that if one Bishop certify that his brother has certified the excommunicated person, the instrument will not be available (*c*); but he may certify an excommengement by his own commissary or official. (*d*) But that delegate cannot make a commission to take an inquisition and certify, so that, when a writ of this kind was awarded to the Archbishop, who returned that his delegate had entrusted the business to a commissioner, it was ordered, that the certificate should be amended. (*e*)

Yet, a certificate by special commissioners delegated by the Queen's commission under their common seal, upon an appeal from a definitive sentence in the Prerogative Court of Canterbury, was allowed in the Common Pleas; and this decision is mentioned by Lord Coke. (*f*) But Lord C. J. Dyer adds a quære to his report of the case (*g*); and the Chancellors of the Universities of Oxford and Cambridge are so privileged, for they act by the King's charter. (*h*)

(*a*) 12 E. 4. 15. (*b*) 8 Rep. 68.
(*c*) F. N. B. 65. Co. Litt. 134. 8 Rep. 68. (*d*) 8 Rep. 68.
(*e*) 2 Brownl. 301. (*f*) 4 Inst. 327.
(*g*) Dy. 371. *Bloure*'s case.
(*h*) Reg. Orig. 67. b. 8 Rep. 68.

Now, however, by 53 G. 3. c. 127. s. 1., it shall be lawful for the Judge or Judges who issued out the citation, or whose lawful orders or decrees have not been obeyed, or before whom contempt in the face of the Court shall have been committed, to pronounce such person or persons contumacious and in contempt, and within ten days to signify the same in the form to this act annexed, to His Majesty in Chancery, as hath heretofore been done in signifying excommunications; and the writ *de contumace capiendo* is then directed to issue.

Form of the Certificate.

Sir Matthew Hale, speaking of the *significavit* in cases *de heretico comburendo*, observes, that a certain form is necessary for the satisfaction of the temporal Judges, and that the same reasoning holds in granting the writ *de ex. cap.*, for that affecting the liberty of a man's person concerns a temporal interest. (*a*)

It is material that the name of the party, and the special reason of his excommunication, or contumacy, should be set forth. Thus, where the principal cause of the punishment was omitted, the Court refused their allowance of the Archbishop's letters; and Hankford C. J. said, that he had consulted a doctor of the law, who was of the same opinion. (*b*) This authority is sustained by Fitzherbert and Lord Coke, who are express that the cause and the suit should be specially stated in the certificate. (*c*) And the reason is, that the Judges of the law may know whether the Spiritual Court has cognisance of the original cause; for if it were not so, the excommunication would be against law. (*d*) And so

(*a*) 1 Hale's Hist. 409. (*b*) 14 H. 4. 14 B.
(*c*) F. N. B. 65. 2 Inst. 623. 8 Rep. 68. 1 Ro. Ab. 883.
(*d*) 8 Rep. 68., and see 1 Salk. 293.

it is, that the name of the party should be inserted; for if the sentence turn out to be illegal, it would be necessary that the Court should write to the Bishop to absolve him, which, if the certificate were general, could not be done. (*a*)

Again, where a party became excommunicated for non-payment of costs, the Court, on a habeas corpus brought, held the *significavit* ill, because it did not thereby appear that these costs had been adjudged in a case of ecclesiastical cognisance; and they discharged the defendant, saying, that a clear cause ought to have appeared in the writ. (*b*)

So, two *significavits* were quashed, for they were said to have been in a cause which came by appeal in a matter merely spiritual; and Lord Talbot declared, that no assistance could be afforded, except where the jurisdiction clearly appeared; and he cited *Fowler*'s case, 1 Salk. 293. (*c*) And in a recent case, where the defendant was brought up by habeas corpus, and the reason assigned for his detention was, "for not paying the amount of costs taxed in a certain cause of appeal and complaint of nullity lately depending in the Arches Court of Canterbury, &c.," it was objected, that it did not appear on the face of the warrant that the suit was within the jurisdiction of the Ecclesiastical Court, and the Court acceded to the application, thinking the writ insufficient. (*d*)

The same objection seems to have been taken in a

(*a*) 8 Rep. 68., and see 1 Salk. 293.

(*b*) 2 Ld. Raym. 817. *Regina* v. *Bp. of St. David's*, 7 Mod. 56. 117. S. C., and see 1 Salk. 294.

(*c*) 2 Stra. 1067. *Rex* v. *Eyre*, in Canc.

(*d*) 5 B. & A. 791. *Rex* v. *Dugger*.

case in Strange, which, indeed, was referred to by the Court in *Rex* v. *Dugger*, but upon another ground; and there the Court discharged the rule for quashing, although the cause was stated in the same manner as in the last case, on appeal and complaint of nullity; yet there might, nevertheless, have been some additional matter in the *significavit* not reported, which induced the determination of the Court. (*a*)

It seems, also, that the day should be certainly set forth, on which the excommunication took effect, and in an early case, the Court referred with approbation to an episcopal certificate, in which the day had been properly specified. (*b*)

This document must come from the Court which has received the contempt complained of; for a certificate of an excommunication in Chancery will not serve in any other court, and so it was held in the Exchequer upon a plea of excommunication against the plaintiff in that Court. (*c*)

Lastly, with respect to its direction, we have seen that it must be certified before His Majesty in Chancery, in the same manner as excommunications were certified before the passing of 53 G. 3.

Other matters relating to this certificate.

If there be an exception to the *significavit*, it has been held proper to make the Judge a party; and that, if the defect complained of be well-founded, the Bishop will be liable to costs. (*d*) And it is clear, that he is amenable in case of a corrupt or fictitious certificate, a circumstance which, for the honour of our clergy, can scarcely happen in the present day.

(*a*) 2 Str. 1189. *Rex* v. *Eyre*, Clerk.
(*b*) 20 H. 6. 25. (*c*) 8 Rep. 68. *John Trollop's* case.
(*d*) 2 Str. 1190. *Rex* v. *Eyre* Clerk.

The death of the Bishop after the certificate has been received will not invalidate it; but it is otherwise if that event should happen before its allowance, in which case his successor ought to certify. (*a*) And although Lord Coke says in his Institutes, that if the Bishop certify the excommunication under seal, the instrument will serve notwithstanding his death; yet, if we understand such a certificate as having been received, there will not be any inconsistency in the two passages. (*b*)

SECT. II.

Of the Bishop's Certificates of Marriage and Bastardy in Real Actions.

"SPIRITUAL Courts," says Mr. Phillipps, in his Law of Evidence, "have the sole and exclusive cognisance of questioning or deciding directly the legality of marriage. And the temporal Courts have an inherent power of deciding incidentally, as far as temporal rights are concerned, either upon the fact or legality of a marriage, when they form a part of some more general issue within their cognizance, or are in some way connected with the decision of the proper object of their jurisdiction." (*c*) Yet the temporal Courts pay respect to a sentence of the spiritual, affirming or annulling a marriage, and hold it conclusive when it is produced in evidence. (*d*)

(*a*) 8 Rep. 69. (*b*) Co. Litt. 134. a.
(*c*) Phil. on Ev. 2d edition, p. 243. (*d*) Ibid.

It is in cases of writs of dower, and other real actions, where the legality of the marriage comes in question, that the old method of trying the issue of the certificate of the Ordinary is still the proper evidence (*a*); but as such writs have latterly fallen into extreme disuse, it is desirable, perhaps, that a very cursory view of the law on this subject should be presented to the reader.

Certificate to be express.

The issue of *ne unques accouple en loyal matrimonie* introduces the certificate, which ought to declare expressly whether the parties have been so joined or not. And for want of this certainty certificates have been held ambiguous and insufficient. (*b*) Where, however, the certificate is short and direct to the point, giving an affirmation or negative in express terms, it is said that no exception can possibly be taken. (*c*) And, therefore, the cause of bastardy need not be certified, for it is sufficient that the Bishop has certified the fact. (*d*) So, where sufficient evidence had been certified to establish the marriage, but the matter itself had not been positively returned, it was ordered, that the Bishop should amend his certificate to that effect. (*e*)

Again, it was objected against a certificate of marriage, that neither the day nor the place of the nuptials was mentioned, and that the Bishop's return of a clandestine union was not good; for that he ought to have said positively that the parties had been joined together. But neither of these objections prevailed; for as to the first, it was said, that the form was not material, since

(*a*) See Park on Dower, p. 12. Phil. on Ev. 2d ed. p. 244.
(*b*) See Dy. 305. 313. 368. 2 Ro. Ab. 591.
(*c*) 9 Rep. 20. (*d*) Jenk. 44.
(*e*) Barnes, 1. *Easterby* v. *Easterby.*

the testimony as to the fact itself was conclusive; and with regard to the other, the secrecy of the marriage did not vitiate it, and the Court held the instrument good. (*a*)

Certificate is conclusive.

It may be easily concluded from these cases, that the episcopal seal is not to be traversed or replied to upon these occasions; and in a comparatively recent case, this point was solemnly decided. Dower was brought for lands in Staffordshire. One of the pleas was, *ne unq. accouple*, &c., to which there was a replication of a decree in the Court of Arches, that the demandant was the wife, and is the widow of J. R., to which the demandant demurred. After much argument, the Court of Common Pleas declared, that they had never met with a precedent of this kind; that to allow this mode of pleading would be to oust the plaintiff of her only legal mode of trial, by the Bishop's certificate; and they observed, that as a sentence in the Spiritual Court was not, even in that Court, final, much less should their Court be bound by it, and they agreed, that the testimony of the Bishop should be deemed incontrovertible. (*b*) However, where the Bishop's certificate cannot be duly had, as where, for instance, the espousals have taken

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(*a*) Cro. Car. 351. *Wickham* v. *Enfield.*

(*b*) 2 Wils. 118. 122. 127. *R[redacted]* v. *Crutchley*, and see 1 Keb. 530. in *Holdy* v. *Hodges*, where the conclusiveness of this proceeding was alluded to. Willes, 549., where it is said, that to admit the certificate of the minister of the fact of the marriage at a place where there is no Bishop, might perhaps be equal, and be resembled to the certificate of the Bishop here, which, in some cases, is conclusive evidence of a marriage.

place in Scotland, the matter must be tried by the country, that there be not a failure of justice. And there is no analogy between the certificate in cases of general bastardy and dower, because in the latter case the writ goes to the Bishop of that diocese in which the lands are situate, whereas in the former it is directed to the diocesan of the place where the espousals are alleged to have been celebrated. (*a*) Therefore, where *ne unques accouple* was pleaded to a writ of dower, *unde nihil habet*, and the replication was, that the parties had been accoupled in lawful matrimony, at Edinburgh, in that part of Great Britain called Scotland, and concluded to the country, the Court held on demurrer, showing for cause, that the trial ought to have been by certificate of the Bishop, that, as episcopacy had been abolished in Scotland, and as the certificate should come from the Bishop of that diocese in which the marriage was had, the mode of trial argued for by the tenant could not be granted; and such being the case, that the incontrovertible proposition resulting from it was, that the enquiry must take place by the country. And it was added, that if, under any circumstances, the writ went to a Bishop within whose diocese the espousals were in fact not celebrated, it was pretty clear that he might decline certifying. (*b*)

The writ which is awarded to the Bishop should not be taken without a motion in Court; for where the plaintiff, against whose cause of action the plea of *ne*

(*a*) 2 H. Bl. 157. per Eyre C. J.

(*b*) 2 H. Bl. 145. *Ilderton* v. *Ilderton*. The judgment of Eyre C. J., in this case, is replete with learning upon the subject of the Bishop's certificate.

unques accouple had been put in, took the writ from the Bishop's secretary, through a suspicion that a certificate was about to issue to his prejudice, and the defendant had another writ without motion in Court, on which the Bishop certified in favour of the plea, the document was holden void for this irregularity, and another writ awarded. (*a*)

Evidence in the Bishop's Court before the granting of the certificate.

The learned writer on Dower, who seems to have investigated this subject with great attention, expresses himself very doubtfully regarding the evidence on which the Bishop should act before he grants his certificate. It may be gathered, however, that regular testimony should be tendered on the inquisition, and that it should be independent of the admissions of either of the parties. In cases within the marriage act, Lord Mansfield has intimated that the solemnities of that statute should be adhered to. (*b*) And where that act is not applicable, with respect to Jews or Quakers, for instance, it is probable that circumstantial evidence may properly be received, although no direct authority may have arisen out of proceedings which are so rare. (*c*)

Exceptions.

The two exceptions in which this mode of trial in real actions is not available, are where the marriage has taken place in a foreign country, or in Scotland, where there is not any episcopal jurisdiction. (*d*) And it appears from Hardres, that during the Commonwealth the mode of trial here was *per pais*, since the hierarchy was at that time abolished. (*e*)

(*a*) Sir Tho. Jones, 38. *Smith* v. *Smith*.
(*b*) 1 Sir Wm. Bl. 367. (*c*) See Park on Dower, p. 13.
(*d*) Park, p. 12. (*e*) Hardr. 65.

The course, as we have already seen, is to apply by motion to the Court, that the writ for obtaining this certificate may be awarded, and as the document itself concludes the right of the party, it is clearly unnecessary to plead it at any time, for in itself it is the end and decision of the proceeding. This certificate is never pleaded.

It is no matter of surprise that the certificate in cases of bastardy should have fallen into disuse at the same time with the discontinuance of real actions; and on this account it may be sufficient to observe, that the certificate was the mode of trial only upon pleas of general bastardy, and that it went to the Bishop of the diocese in which the lands lay, but that special bastardy was, on the contrary, tried *per pais*, since it was not by any means probable that a certificate in this latter case would proceed upon the true foundation, which was, that the birth in wedlock should be intended to have taken place in the county where the lands lay. (*a*) Certificates in cases of bastardy.

SECT. III.

Of the Bishop's Certificate under 54 G. 3. c. 54. in Cases of Non-residence.

IT is well known, that in consequence of certain derelictions on the part of some of the established clergy with regard to residence on their respective cures, a

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(*a*) 2 H. Bl. 156, 157. 12 Rep. 67.

statute was passed (*a*) inflicting certain penalties upon offenders who had not procured licences from their diocesans for such neglect of residence. Many individuals, however, who had good cause of absence, had omitted to avail themselves of the protection which their Bishop could have afforded them, and were of course exposed to the punishments of the act. It happened, that a certain person, who had filled an official situation in some of the dioceses, was disposed, in conjunction with another, to take advantage of these accidental, or, at the most, venial errors; and in pursuance of this scheme he instituted prosecutions against several clergymen who were, nevertheless, proper objects for licences. This inconvenience and injustice being felt and acknowledged by the legislature, the statute, which introduces the certificate now before us, was passed. By 54 G. 3. c. 54. s. 1. it is enacted, that all licences for the non-residence of any spiritual persons, which shall have been granted, or which shall be granted on or before the 1st day of July, 1814, by any Archbishop or Bishop, under and subject to the provisions of the 43 G. 3. c. 84., and upon which the Archbishop or Bishop granting the same shall certify, that they verily believe, that the causes of granting such licences really and truly have existed for many periods antecedent to the granting thereof, such causes being specified in such certificates respectively, and that the Archbishop or Bishop giving such certificates would have granted the licences to which they refer, from the periods specified in such certificates, if proper application had or could have been made to him

(*a*) 43 G. 3. c. 84.

in due form for the same, and that the conditions, if any, upon which such licence would have been granted, have been performed and complied with; and also, all certificates given by any Archbishop or Bishop to any spiritual persons of their respective dioceses, which shall certify that the Archbishop or Bishop giving such certificate would have granted licences for the non-residence of such spiritual persons for and during the periods specified in such certificates, for causes of a temporary nature, to be also specified in such certificates, and which they are satisfied and verily believe did really and truly exist, and which may have ceased, if proper application had or could have been made to him in due time for the same, and that the conditions, if any, upon which such licences would have been granted have been performed and complied with; shall be deemed and taken to be good and valid as licences under the said act of 43 G. 3., for the purpose of exempting such persons respectively from any pecuniary penalties and forfeitures for non-residence, from, and for, and during the periods specified in such certificates respectively, as fully and effectually as if licences had been duly granted at and for such periods, and had been duly registered, and all the provisions of the said act of 43 G. 3. in relation thereto duly observed. The second section prescribes the mode of registering the licence and certificate. By s. 4. a party against whom any suit for penalties of this nature had been brought before the 6th of Dec. 1813, may apply to the Court, or to a Judge, in order that the proceedings may be discontinued, upon payment of the costs incurred up to the time of such application being made, such costs being taxed as between attorney and client, and such Court or Judge is authorized, upon such ap-

plication, and proof by affidavit of the granting and registering of any licence and certificate, or of the notification of any exemption, and that sufficient notice thereof, together with a copy of the licence, certificate, or notification, as the case may be, has been given to the plaintiff or plaintiffs, or his or their attorney, and of the application, and of the ground upon which the same is made, to make such order of discontinuance.

The 43 G. 3. c. 84. has been repealed, as we shall see presently, by 57 G. 3. c. 99. s. 1., but previous to that repeal, it had been fruitlessly contended that 54 G. 3. c. 54. had cancelled its provisions; so that where the directions of the former act had not been complied with, the remedy proposed by the legislature was holden not to be applicable. Thus, where the defendant was sued for non-residence on the livings of Glympton and Oddington, it was moved, that the action should be discontinued, on the ground, that the Bishop of Oxford, in whose diocese these places were situate, had granted the defendant a licence for non-residence, assigning as a reason the defendant's having obtained a similar licence from the Bishop of Exeter in respect of a royal donation within that diocese, there being no parsonage-house there, and his having performed the duties of that donation regularly. But the Court considered this as a licence for a special purpose, and so within the 20th section of 43 G. 3. c. 84., which requires such a licence to be confirmed by the Archbishop, and as that ceremony had not been observed on this occasion, they discharged the defendant's rule. (*a*) With respect, however, to

(*a*) 6 Taunt. 52. *Wright* v. *Flamank*, Clerk. 1 Marsh. 368. S. C.

Oddington, the Archbishop's confirmation of the special certificate was obtained, and as far as related to that living, the suit was discontinued. (*a*)

An attempt was soon made to destroy the beneficial operation of this enactment by an assertion, that the date of the 1st of July, 1814, equally restrained and limited the granting of certificates and licences. So that if a licence were not duly applied for before that day, it was contended, that a certificate under 54 G. 3. could not be valid. But this question was soon set at rest in an action which was brought for non-residence upon the living of T. It was moved to discontinue on the following grounds: The Bishop of London had granted the defendant a licence to be absent from his parsonage-house from Nov. 16, 1813, until Jan. 1, 1815; and upon this licence he indorsed, on the 18th Nov. 1814, a retrospective certificate, that he verily believed the cause of granting the licence to have existed from the 21st of February, 1812. It was urged, that the time for granting the certificate had been limited to the 1st of July, 1814; but the Court, referring to the act, held, that this restriction applied only to the notification of exemption and to the licence. (*b*) The same point arose immediately afterwards, when this decision was cited with approbation. (*c*)

And in a case where a learned Judge had refused an application to discontinue because the Archbishop's confirmatory certificate had not been obtained, upon which the clergyman asked for and obtained the archiepiscopal

(*a*) 6 Taunt. 56.

(*b*) 5 Taunt. 843. *Wynne* v. *Kay*, Clerk. 1 Marsh. 387. S. C.

(*c*) 6 Taunt. 56. *Wright* v. *Flamank*, Clerk.

notification, the Court were of opinion, that as the licences had been obtained in time, the subsequent allowance of them was sufficient. (*a*) A question arose upon the 2d section of the statute now under our consideration, whether a licence of non-residence upon a benefice within an Archbishop's peculiar, but locally situate within another diocese, should be registered within the diocese or within the Archbishop's registry? The words of 43 G. 3. c. 84. s. 2. were relied on, which requires copies of the certificates to be filed within the registry of the diocese within which such benefice, in respect whereof any such licence shall be granted, shall be locally situate; but it was answered, that the 39th section saved the jurisdiction of the Archbishop with respect to his peculiars, although they might be locally situate in another diocese; and the Court agreed with the latter opinion. (*b*)

Pleading this certificate.

With respect to the use of this certificate as a plea to bar the action, the words of Gibbs C. J., in the case of *Wynne* v. *Kay*, are very important. The inclination of the learned Judge was, that it could not be put upon the record, for the defendant might in that case lead the plaintiff to suppose that he had no defence; he might even obtain his certificate the day before the trial, and so ensure all his costs. The Chief Justice added, that in this point of view it was most material for the plaintiff to have as early a notice of the remedy granted as possible. The proper course, therefore, seems to be by motion to discontinue, upon which the Judge will exer-

(*a*) 1 Marsh. 372. *Wright* v. *Lamb*, Clerk. 5 Taunt. 807. S.C.
(*b*) 5 Taunt. 757. *Wynne* v. *Moore*, Clerk.

cise a sound discretion, and prevent the defendant from taking an unfair advantage. (*a*)

Although the 43 G. 3. c. 84. has been entirely repealed, by 57 G. 3. c. 99., the 16th section of the act last mentioned has continued the provisions respecting the Archbishop's allowance of the episcopal certificate in cases not enumerated in previous sections relating to licences for non-residence, and, it is to be observed, that the 54 G. 3. c. 54. is still in full force, so that, the retrospective certificate may be yet granted by the Bishop, and the confirmation of the certificate is, in certain cases, still necessary.

By 57 G. 3. c. 99. s. 14. every spiritual person having any house of residence upon his benefice, who shall not reside thereon, shall, during such period or periods of non-residence, whether the same shall be for the whole or part of any year, keep such house of residence in good and sufficient repair; and every such spiritual person who shall not keep such house of residence in repair, and who shall not, upon monition issued by the Bishop of the diocese in which the same shall be locally situate, put the same in repair, according to the requisition of such monition, within the time specified therein to the satisfaction of the Bishop of the diocese, and to be certified to the Bishop upon such survey and report as shall be required by the Bishop in that behalf, shall be liable to all penalties for non-residence, notwithstanding any exemption or licence, during the period of such house of residence remaining out of repair, and until the same shall have been put in good and sufficient repair, to the satisfaction of the Bishop of the diocese.

(*a*) 1 Marsh. 390. 5 Taunt. 848.

And by s. 44., the Court in which any action, bill, plaint, or information shall be depending for the recovery of any penalty or forfeiture for non-residence under this act, may and shall, upon application made for that purpose, require by rule or order of the said Court, or any Judge thereof, the Bishop of the diocese within the limits of which the benefice shall be locally situate, or to whom the same shall be subject according to the provisions of this act, for or by reason of non-residence in, at or upon which the penalties and forfeitures shall be sought to be recovered by such action, bill, or information, to certify in writing under his hand to the said Court, and also to the party for that purpose named in the said rule or order, the reputed annual value of such benefice; and upon such rule or order being left with such Bishop, or the registrar of such Bishop, such Bishop shall accordingly certify such reputed annual value; and such certificate shall, in all subsequent proceedings upon such action, bill, plaint, or information, be received and taken as evidence of the annual value of such benefice, for the purposes of this act; without prejudice, nevertheless, to the admissibility or effect of any such other evidence as may be offered or given respecting the annual value thereof.

SECT. IV.

Of the Rector's Certificate to the Bishop under the 33d Canon, that a Clergyman is provided with the cure of Souls.

THE 33d canon confirming the decrees of the ancient fathers, provides, that the Bishop shall keep and maintain every person ordained with all things necessary, till he prefer him to some ecclesiastical living, unless the party show a presentation of himself to some ecclesiastical preferment then void in the diocese; or shall bring to the Bishop a true and undoubted certificate, that either he is provided of some church within the said diocese, where he may attend the cure of souls, or of some minister's place vacant either in the cathedral church of that diocese, or in some other collegiate church therein also situate, where he may execute his ministry; or that he is a fellow, or in right as a fellow, or to be a conduct or chaplain in some college in Cambridge or Oxford; or except he be a master of arts of five years' standing, that liveth of his own charge in either of the universities; or except by the bishop himself that doth ordain him minister, he be shortly after to be admitted either to some benefice or curateship then void. (*a*) The Bishops, therefore, are not accustomed to ordain except on some one of the titles above mentioned. It is of the certificate that we have in this place more especially to speak, and there arose a very important question upon the subject in the Court of King's Bench some years since, the decision of which

(*a*) See Burn's Eccles. Law, vol. iii. p. 29.

established that the Curate might maintain an assumpsit upon his Rector's title. The defendant was the rector of St. Ann's Westminster, and he had ordained the plaintiff to his curacy with the usual clause in the certificate, that the plaintiff should continue to officiate in the church, until he should be otherwise provided of some ecclesiastical preferment. Two notices were given to the plaintiff that he should quit his cure, which were afterwards put in as evidence for the defendant; and the plaintiff then instituted proceedings against his rector for a breach of the contract. There were three objections made against the plaintiff's right to recover on this occasion, the first was, that the certificate was no promise or undertaking on the defendant's part to maintain the plaintiff as his Curate, but merely an indemnity to the Bishop against the provisions of the 33d canon. But this was wholly unavailing, for Lord Mansfield, who delivered the judgment of the Court, held, that as soon as the Bishop is certified of some benefice, church, or curacy being vested in the party ordained, he is entirely released from his liability to a penalty, and, that so far from the certificate operating as an indemnity to the Bishop, there was a contract on the face of it to pay a certain salary, and to continue the Curate until afterwards provided for. The action was resisted, secondly, on the ground that the plaintiff had not been licensed by the Bishop, but the Court were clear, that by ordaining him on the title, the Bishop had most solemnly approved of Mr. Martyn, as the Curate of Saint Ann's. Lastly, a readership of 30*l.* a year to which the plaintiff had been appointed, was relied on as a species of preferment within the canon; and it was admitted as the best objection which

had been made, but the Court after due consideration, disallowed this also; for they said, that the term "reader," known in the canon law, is always put in opposition to that of "clergyman," and besides, the consent of the Rector was necessary to permit the fulfilment of the reader's duty. What, again, said Lord Mansfield, if the parish should think fit not to have a reader? The appointment and salary are only during pleasure, and the office such as requires no licence or authority. And so the rule for a new trial on the defendant's part was discharged. (*a*) However, three years afterwards, the defendant in the case just mentioned, accepted of other preferment, and relinquished the living of St. Ann's, notwithstanding which, Martyn the plaintiff, renewed his claim, and brought another action; but upon a case reserved, Lord Mansfield declared, that there was not any color for the demand then set up. True it was, that the Rector could not oust the plaintiff at his pleasure, but he had not bound himself, or his executors, to maintain him for life, or to continue all his own life-time Rector of Saint Ann. The Curate took the risk of the Rector quitting the living, and the undertaking of the latter, was to pay the person who officiated in his parish of Saint Ann; when he left that parish, it ceased consequently to be his. The postea was delivered to the defendant. (*b*) To guard against misunderstanding respecting the provision for Curates, the form now used is, that the party may continue to officiate in the church, until he shall be provided with

(*a*) Cowp. 487. *Martyn* v. *Hinde.*
(*b*) Dougl. 137. *Martyn* v. *Hinde.*

some other certain place where he may exercise his ministerial function.

SECT. V.

Of the Certificate of a Clergyman's good Behaviour after a temporary Suspension.

THIS certificate is now occasionally made part of an ecclesiastical sentence against clergymen, but in one case which came before the High Court of Delegates on appeal, the Court entertained considerable doubts as to the propriety of requiring the certificate. Very serious charges having been established against a clergyman of Yorkshire, the sentence against him concluded by a decree that he should at the expiration of three years, (the time for which he was suspended), exhibit and bring into the registry of the Court (*a*), a certificate under the hands of three clergymen in his vicinity, of his good behaviour and morals during the said time of his suspension; and that the said certificate should be exhibited and approved of by the Court before such suspension be taken off or relaxed; and that the said suspension should continue in full force, notwithstanding the expiration of the aforesaid time of three years, until the aforesaid satisfactory certificate should be exhibited and approved of. It was argued by the appellant's counsel, that were this part of the condemnation legal, it would be in the power of three

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(*a*) The Consistorial Court of Durham.

clergymen to deprive the offending party of his benefice for life; and that such an act was beyond the power of the Court requiring a certificate. On the other side, it was said, that the Dean of the Arches alone was invested with the power of depriving a parson, and a case of *Dicks* v. *Huddersford* (*a*), was cited, in which the suspension had been pronounced for two years, and a similar certificate had been demanded.

The Court doubted as to the requiring the certificate; and also as to the approval of it by the Judge, but as they considered that a decision against the certificate might be appealed against, they affirmed generally the judgment of the Court below. (*b*)

SECT. VI.

Of sundry Ecclesiastical Certificates.

THE author trusts, that mention has been made of the chief certificates employed in the Ecclesiastical Courts; amongst the variety of these, however, (some of which have been cursorily noticed in a prior page), there are a few, which, although they be much disused, may yet form the subject of a short section, as they serve to illustrate the law with reference to other questions of an analogous nature. The certificate in cases

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(*a*) Arches, June 16. 1794. 1 Phil. Ec. Rep. 278.

(*b*) 1 Phil. Ec. Rep. 269. *Watson* v. *Thorp*, cor. the High Court of Delegates.

De heretico comburendo.

de heretico comburendo, for example, although now, and for ever, as we should hope, abolished, is yet a material guide to that which precedes the arrest of a contumacious or excommunicated person, since the latter, by specifying in particular the person menaced, with the nature of his offence, follows legitimately the form of the old writ.

Recusancy.

Little need be said concerning the certificate of recusancy, the supposed offence itself being now abolished by various acts of parliament passed at different times for the relief of religious sects. The restraint on the Roman Catholic rites was taken off by 31 G. 3. c. 32. Nevertheless, a party might have been indicted in old times upon such a certificate, and it was debated in Bishop Bonner's case, whether he should be allowed, upon the issue of not guilty, to show that the Bishop of Winton who had certified him as a recusant, was not a Bishop when he tendered the oath. It was resolved, that such evidence might be so received. (*a*)

Certificate from Bishop of Durham.

With respect to the Bishop of Durham's certificate of matters tried in the county palatine, an objection arose in one case wherein the Bishop had certified, on error brought, *mandavi recordum justiciariis;* whereas, it was said, that the Bishop was himself a justice; but the Court were satisfied to hold the instrument well enough, for they said it was the same thing as though it had been written, *habui recordum coram justiciariis.* (*b*)

Certificate of Plenarty.

The question whether a church be or be not full, is to be tried by the Bishop's certificate, which is in this instance conclusive; but in a *quare impedit*, the plenarty must be tried by a jury, for that the right itself is con-

(*a*) Dy. 234. *Bonner's case.*

(*b*) Hob. 138. *Morton* v. *Orde.*

cerned. (*a*) And it is no objection to the certificate that mention is not made of the induction, for the church is full by admission and institution, unless it be in the case of the King. (*b*)

Where a *quare impedit* was brought against the Bishop and an incumbent, and the Bishop claimed nothing but as ordinary, it was holden, that the Bishop was not estopped from certifying, that the church being void, pending the issue, another had presented a clerk, of whom the church was then full, and it was said, that on a false return the plaintiff might have a *quare non-admisit*, and a *scire facias* against the new incumbent to have execution. (*c*)

If issue be taken in a *quare impedit*, whether a clerk presented be able, or not able, he shall be examined; and it shall be certified by the Bishop; but if the presentee be dead, his ability shall be tried *per pais*, for the Bishop cannot cause him to be examined. (*d*)

Clergyman's certificate of cause for refusing the sacrament.

Another ecclesiastical certificate is where the parson has refused to administer the sacrament to some one desirous of being a communicant, and continues his opposition on being required by the Bishop to do so; in this case, the clergyman is bound to certify the cause of his objection. For, if such a refusal be without just cause, it may occasion a temporal prejudice to the applicant, and may thus become the subject of an action at law. (*e*)

(*a*) 6 Rep. 49.
(*b*) Dy. 217. 6. and see 11 H. 4. 7. 6 Rep. 49, 50.
(*c*) Dy. 260. (*d*) 12 Rep. 67.
(*e*) 1 Sid. 34.

Certificate of non-payment of first fruits and tenths.

A certificate by the Bishop that a beneficed person had not paid his first-fruits or tenths, was in former days the occasion of very severe penalties, and is still the first step towards the institution of a suit for their recovery. By 26 H. 8. c. 3. s. 17. and 2 & 3 E. 6. c. 20. a clergyman so offending was deprived of his benefice, and the reason of this severity is said to be, that many parsons withheld their tenths at the reformation, conceiving them to be properly the Pope's dues. (*a*) It was held under the statutes, that the Bishop's certificate was traversable, and not final; for he acts in this Court only as an officer, and not as a Judge, as in case of bastardy. And it was further said, that if this matter were not triable *per pais*, all the parsons of England might be deprived of their benefices upon bare surmise, and certificate without answer. (*b*) Again, where it appeared, that a demand had been made for tenths to be paid to one whose competent authority to receive them was not explained, the Judges declared, that their duty was to abide by the verdict, notwithstanding the certificate, and a case to that effect was cited by Popham C. J. (*c*)

But now, by 3 G. 1. c. 10., if any person charged with the payment of tenths shall not pay or duly tender the same yearly before the last day of April succeeding the feast of the Nativity whereon the same shall become due, then, upon certificate thereof made by the collector or receiver on or before the 1st day of June following, he

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(*a*) Burn, vol. ii. p. 282.

(*b*) Cro. El. 81. *Regina* v. *Blaucher*. Mo. 915. The *Queen* v. *Blanehall*, S. C.

(*c*) Mo. 541. *Reyner* v. *Parker*. See with respect to Tithes, Savil. Rep. 1. Degge. part 2. c. 15.

shall be allowed, upon his account, all such sums as any persons against whom such certificates shall be made, should or ought to have paid. And in every such case, the treasurer, chancellor, and baron of the Exchequer shall issue, upon every such certificate, such process as to them shall seem proper and reasonable against every such person against whom such certificate shall be made, his executors or administrators, whereby the same may be truly levied or paid to the said collector or receiver. And, by s. 3. every sum so levied and paid, the collector or receiver shall bring to account, and charge himself therewith in his next account. It is observable, that the certificate is still liable to be traversed, and the truth of it was ascertained by verdict.

By the 2d canon 134., if any registrar, or his deputy or substitute whatsoever, shall receive any certificate without the knowledge or consent of the Judge of the Court; or willingly omit to cause any person (cited to appear upon any court-day) to be called, or unduly put off and defer the examination of witnesses to be examined by a day set and assigned by the Judge, &c. he shall by the Bishop of the diocese be suspended from the exercise of his office for the space of one, two, or three months, or more, according to the quality of his offence; and that the said Bishop shall assign some other public notary to execute and discharge all things pertaining to his office during the time of his said suspension.

By 45 G. 3. c. 84. s. 1. Bishops, &c. shall enquire into the value of benefices returned into the Exchequer, and certify the same to the Governors of Queen Anne's bounty, who shall be empowered to act upon such new certificate as they were enabled to do before the passing of the act with respect to livings not returned into the

Exchequer. The second section provides, that the discharge of livings being so entitled, from first-fruits and tenths, shall not be affected by the statute.

It has been intimated, that the question, whether a clergyman has resigned his benefice should be tried *per pais*, and not by certificate; but no determination is reported in the case alluded to (*a*), and as two considerable classes of resignations are laid aside at this day, in consequence of decisions that general or special bonds to resign cannot be enforced, it is not probable that any argument will be again raised upon this point, and, in effect, the trial should clearly be by the county, since the Bishop would occasionally, in cases of lapse, for instance, be Judge of his own cause.

(*a*) 2 Keb. 446. *Baker* v. *Watson*. 1 Sid. 387. pl. 24. March. Rep. 158. pl. 220.

CHAP. II.

OF THE BANKRUPT'S CERTIFICATE.

SECT. I.

Of the origin of this Certificate, the Statutes which introduced it, with other general Matters concerning it. (*a*)

Origin of this certificate.

THE bankrupt's certificate, which changed very considerably the severe laws existing upon this subject, originated in a conviction of the insufficiency and rigor of enactments which placed the insolvent at the entire mercy of his creditors, with scarcely any hope of a surplus; and in most instances, without the most slender prospect of a final discharge. No honesty, no openness of conduct in the discovery of his affairs, could procure a legal alleviation of the bankrupt's situation under the ancient system; the general feeling of pity, which is now prevalent in the commercial world, in cases of failure, had no place, at a time when a debtor's misfortune irritated the minds of his creditors, and induced a presumption of crime against him. When at length, the prosperous state of our traffic rendered commercial failure an accident of no uncommon occurrence, and,

(*a*) See the 9th Section of this Chapter, for an exposition of the new Bankrupt act as it relates to Certificates.

on many occasions, indeed, from inevitable disasters; it was deemed both humane and equitable to protect the person who was willing to surrender all for the general benefit of his creditors, which was done by the enactments now introduced to the reader's notice.

The statutes relating to the certificate shall be now shortly mentioned, with some general matters which have reference to this subject at large.

The reader should here be apprised, that an act entirely new, and repealing all the previous provisions in cases of bankruptcy, has received the sanction of the legislature, and will take effect from the 1st day of next September; with the exception of the enactments respecting certificates, the subject of this chapter, which operate from the passing of the act. As, however, some parts of it differ from the original enactments, although, for the most part, it may have been organized from the various laws in force at the time of its adoption; it is proposed to deal with it by setting forth its regulations in a separate section at the end of this chapter, noting any departures from the old code, which may happen to present themselves.

The certificate was introduced in the first instance by 4 & 5 Ann. c. 17. s. 19., which declared, that the bankrupt should not advantage himself of the act in question, unless the Commissioners should certify his conformity, and the certificate be allowed by the Chancellor. The consent of the creditors, four parts in five, was superadded by a subsequent act, and both descriptions of signatures were required by 5 G. 1. c. 24. s. 16., and 5 G. 2. c. 30. s. 10. The 49 G. 3. c. 121. reduced the number of assenting creditors to three parts in five. The bankrupt's oath, that the discharge was obtained

without fraud, came in under 5 G. 1. c. 24. s. 16., and was continued by 5 G. 2. The second act of Queen Anne made void all securities given by a bankrupt to his creditors, as an inducement to their signing his certificate; and the stat. of G. 1. enabled parties sued upon such securities to plead the general issue, the 5 G. 2. c. 30. s. 11. adopted these precautions most strictly. The bankrupt was declared free from his debts by 4 & 5 Ann. c. 17. s. 7., and 5 G. 1. c. 24. s. 14., and with a different scale of allowance by 5 G. 2. c. 30. s. 7. But the 13th section of this latter statute was new, and extended his remedy to cases where the certificate was allowed and confirmed after judgment obtained against such bankrupt; whereas the 7th section merely related to mesne process. The debts from which the bankrupt was declared free by these statutes were such as existed at the time of the bankruptcy; but this emancipation was more largely given by 46 G. 3. c. 135. s. 2., which threw open to creditors the proof of debts previously to the suing forth of the commission.

The punishment of bankrupts for undue expenditure, gambling, &c., was prescribed by the 12th and 15th sections of the 4 & 5 Ann. c. 17. All such persons were excluded from the benefit of the act, who had given above 100*l.* in marriage with any of their children, unless they were able to show, to the satisfaction of the Commissioners, an ability at the time of such gift to balance accounts with their respective creditors, if any such existed; and the latter section equally excluded the remedy from persons losing more than a certain sum at cards, dice, &c. These provisions were incorporated in

the 19th section of 5 G. 1. c. 24.; and in the 12th section of 5 G. 2. c. 30. gambling in the public funds was included. In cases of a second commission, or a previous compounding with creditors without a commission, the 9th section of 5 G. 2. declares, that although the bankrupt's person shall remain free from arrest, his future effects shall continue liable, unless he have paid 15*s.* in the pound under such second commission, or such first commission, if he have previously compounded.

Next came the general bankrupt act 5 G. 4. c. 98., now repealed: the 118th section extended the number of creditors necessary to a perfect certificate to four fifths; but by s. 119. the original number was allowed in cases of bankruptcy which occurred before the passing of the act, and, after six months from the last examination, three fifths in number and value, or nine tenths in number were prescribed as the due proportion of creditors. And by the 120th section, after 18 calendar months, although there might be a signature by three fifths or nine tenths, whose signatures were necessary, with the exception of one creditor, the Lord Chancellor was empowered to allow the certificate.

The 127th section, in addition to the causes of refusing a bankrupt's certificate, adds the destruction of his books, or the making fraudulent entries in them.

And by s. 128. a bankrupt's promise to revive a debt must be in writing.

Most of these provisions are used in the new act of 6 G. 4. c. 16.

Having stated a general outline of the provisions bearing upon certificates, this section shall be closed with

the notice of two or three matters not arranged under any of the subsequent divisions. (*a*)

First, as to the calculation of the signing creditors, according to their proportions.

Calculation of creditors who ought to sign.

Professor Christian has illustrated this point in his Treatise on the Bankrupt Laws; and it may be deemed excusable if the information which he has supplied is introduced in this place. "In calculating the number of creditors, who must sign out of the whole number who have proved, whose debts are 20*l.* or more each, if there is a fraction, one for that fraction must sign; and if seventeen have proved, then three fifths of seventeen are equal to ten and one fifth; and as ten would be less than three fifths, though eleven is something more, yet eleven must sign, and so of every other number not divisible by five." (*b*) Speaking of the stat. 49 G. 3. c. 121., he says, "The mode of reckoning the number of creditors is the same as before. Where there is a fraction, one of course must sign; for without the fraction the number would not satisfy the statute; and where a part of a man is required to sign, it is necessary that the whole should be present; as if there are four creditors, three fifths are two, and two fifths of another; three, therefore, must sign. The Court of Chancery not long ago were puzzled two or three days, whether ten or eleven out of seventeen ought to sign; three fifths of seventeen are ten, and one fifth of another. It was said by counsel, that Commissioners gave the turn of the scale in favour of the creditors. The Commissioners give the statutable

(*a*) These Sections are more or less adverted to in a subsequent part of this Chapter.

(*b*) 1 Chr. B. L. 338.

weight. The certificate would be absolutely void with ten only; and it is not made worse by having four fifths of a creditor more than necessary. Money may be divided to the fraction of a farthing, but the certificate would be void without the fraction; so the whole farthing must make part of the aggregate value. (*a*)

Operation of certificate not destroyed by death of bankrupt.

The decease of the bankrupt, it should seem, ought not to destroy the efficacy of his certificate as it regards his executors, for the allowance of that document by the Chancellor would be sufficient evidence that the party had done all in his power previous to his death to merit his discharge. A case occurred, in which, after the granting of a joint certificate by the Commissioners, one of the bankrupts died without making the usual affidavit of its having been obtained fairly and without fraud, upon which it was allowed, as the separate certificate of the survivor. (*b*)

Joint and separate certificates.

Under a joint commission there may be a joint or separate certificate; but if the joint creditors assent to the certificate of one, while they dissent to that proposed for the other, there must be a separate certificate. (*c*)

Certificate vacated.

If the commission under which the certificate has been obtained be superseded, the instrument will be vacated. So, that where a certificate was obtained under a separate commission afterwards superseded, it was held, that this certificate had fallen to the ground, as though it had never existed. (*d*)

(*a*) 2 Chr. B. L. 501. This nicety is avoided by 6 G. 4. c. 16. s. 123., and see 5 G. 4. c. 98. s. 120.

(*b*) 10 Ves. jun. 51. *Ex parte Currie.*

(*c*) 1 Chr. B. L. 341.

(*d*) 10 Ves. jun. 94. *Everett* v. *Backhouse,* and see 1 Atk. 145. *Ex parte Leaverland.*

There seems to have been some doubt whether a certificate under a second commission, pending the first, would be of any effect. It has been affirmed, that all the proceedings under such second commission would be null and void (*a*), which would include the certificate, and that in law such second commission would be good for nothing. (*b*) But it has been observed on the other hand, by a writer very conversant on the subject, that the judges could not treat a certificate so acquired as a nullity; for that the creditor should have removed it by petitioning the Chancellor to supersede the commission from whence it sprang (*c*); and the more approved practice is to supersede one of the two commissions as may best answer the ends of justice. (*d*)

It has been observed, that a bill by an attorney for obtaining the signature of a bankrupt's certificate, must be delivered with the usual formalities prescribed by 2 G. 2. c. 23.; that is to say, a month's notice, with the usual signature. (*e*)

(*a*) Cowp. 823. *per* Buller J.

(*b*) 16 Ves. jun. 236. *per* Lord Eldon.

(*c*) 1 Chr. B. L. 324.

(*d*) 16 Ves. jun. 236. *per* Lord Eldon. See now 6 G. 4. c. 16. s. 16 & 17. In cases of a second or other commission being issued, the Lord Chancellor may direct that such commissions be proceeded in separately, or in conjunction.

(*e*) 1 Chr. B. L. 344.

SECT. II.

Signature of Certificate. — 1. *By the Creditors or their Representatives.* 2. *By the Commissioners.*

Signature by the creditors.

IT appears, from the statutes set forth in the preceding section, that the law, formerly so severe and rigid against the bankrupt, became considerably relaxed in his favour; not so much, indeed, in the first instance, from a principle of compassion towards him, as from a conviction of the insufficiency of its harsh proceedings in checking the tide of fraud and concealment. When, therefore, three parts of five creditors in number and value, whose debts are respectively not less than 20*l.*, unite in signing and sealing the bankrupt's certificate; when, again, the Commissioners, authorized by the particular commission, certify to the Lord Chancellor, upon the same instrument, that the bankrupt has in all respects conformed himself to the provisions of the various statutes upon the subject; as soon as the certificate so signed is allowed by the Lord Chancellor, the bankrupt becomes entitled to the allowances and benefits which the legislature has permitted him to receive as a reward for his obedience. The signatures of creditors, with the discussions relative to the parties who may sign, and in whose right the acknowledgment may be made, will come first under our consideration.

Not compellable to sign.

It is, however, to be premised, that there are no means of compelling such signatures; all creditors are left at liberty to do so or not as they think proper (*a*);

(*a*) Dougl. 229. *per* Lord Mansfield C. J. and see 3 Ves. & B. 103. Montague, B. L. 333.

and general experience has testified, that this discretio has been commonly exercised with great forbearance and humanity.

Who may sign.

Of course, the creditor whose debt amounts to 20*l.*, is generally capable of signing this instrument, but he must be a creditor entitled to receive a dividend; and, therefore, a party who claims under a judgment to indemnify, who, in fact, has not been damnified, cannot sign. (*a*) After the debt has been proved, the creditor may authorize another person to do this on his behalf. And it must be done by a special authority, for a general power to receive debts, &c. is said to be insufficient. (*b*) It is the opinion of Mr. Christian, that an agent cannot, merely in that capacity, be admitted to sign, but that the principal, or some one deputed by him under seal, can alone give the discharge, and he decided to this effect as a Commissioner in the case of the Durham bank. (*c*) It is customary for two witnesses to subscribe this power (*d*), and an affidavit of its due execution must be sworn by one of such witnesses (*e*); upon which an exhibit is indorsed or subscribed by the Commissioners with the affidavit, and the letter of attorney is then left at the bankrupt's office when the certificate is taken there. (*f*) It has been holden, that two creditors can-

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(*a*) Co. B. L. 462. *Ex parte Buckner.*

(*b*) Christian's Instructions, 1820. p. 212.

(*c*) Ibid. (*d*) Id. p. 214.

(*e*) Ibid. 214, 215. When the creditor executes such a letter abroad, the affidavit of the subscribing witness is not required.

(*f*) Id. 215.

not join in a letter of this description, but that there must be a distinct stamp for each party. (*a*)

By 24 G. 2. c. 57. s. 10., where any creditor or creditors of any bankrupt reside in foreign parts, the letter of attorney of such creditor, attested by a notary public in the usual form, shall be a sufficient evidence of the power and authority by which any person thereby authorized shall sign any bankrupt's certificate.

Signatures in respect of different rights.

The principle deducible from the decisions on this point, seems to be, that where there are two distinct debts due in respect of different rights, a personal and executorship account, for example, the creditor may not sign twice with reference to each right, but that where his signature will be available to conclude the rights of other persons in different interests, he may do so. Thus, if a debt be proved by a party as due to himself, another due to him as an executor, a third as a trustee, guardian, &c.; still, as he is in effect but one creditor, he shall not sign more than once. (*b*) But if there be a debt due to one on his own private account, and another on his partnership concern, it seems that he may sign in respect of both interests, for, conjunctively, there are in this case two creditors. (*c*) And one partner may sign for ano-

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(*a*) 2 Chr. B. L. 102. *Ex parte Wolley*, July 4. 1809.

(*b*) 1 Atk. 84. *Ex parte Saumarez.* 1 Rose, 66. *Ex parte Stracey.*

(*c*) 1 Chr. B. L. 332. Mr. Christian adds: "So it could not be doubted, I apprehend, if after proofs are made by different creditors, one of them becomes the representative of one or more by operation of law, that he may sign in his own right, and also for every creditor he represents. So,

ther; for there are a vast number of acts in bankruptcy, upon which, if one partner is not permitted to act for the others, the inconvenience is obvious (*a*): and besides, it is presumed, that all consent to the act of one, who signs in the name of the whole. (*b*) And so may one partner sign after the dissolution of the partnership, and his act will bind the firm, for the debt still subsists due to the aggregate body. (*c*)

One executor may sign this certificate; but if he be the representative of a *cestui que trust*, he will, especially in cases of infancy, be exposed to danger by so acting; for it is his duty at all events, if possible, to consult the *cestui que trust*. (*d*) And even a bankrupt may, on a special occasion, sign his own discharge; as where the assignee's father, the principal creditor under the commission, had chosen himself sole assignee, and then died intestate, leaving his only child, the bankrupt, his sole personal representative; the bankrupt chose himself upon this sole assignee, and signed his own certificate: whereupon the creditors petitioned the Chancellor for his removal, and that he would not confirm the certificate; but Lord Hardwicke declared, that there was no allegation of fraud, and that, as the operation of law was not calculated to work an injury against any man, there being no other creditor qualified to discharge the

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one creditor might have a power of attorney from several others to sign, then of course he would sign for himself and each creditor, from whom he had such a special authority."

(*a*) 14 Ves. 598. *Ex parte Mitchell, per* Lord Eldon.

(*b*) 1 Chr. B. L. 333.

(*c*) 17 Ves. jun. 62. *Ex parte Hall.* 1 Rose's Cases, 2. S.C. 2 Rose, 174. *Ex parte Hodgkinson.*

(*d*) 5 Ves. jun. 839. *Powell* v. *Evans.*

bankrupt, he must dismiss the petition. (*a*) However, the signature of one trustee will not be sufficient without that of his co-trustee, or an authority from the latter person to sign, and the Lord Chancellor adverted to the distinction between trustees and executors. (*b*) And it seems that it is not competent for a receiver to sign (*c*), nor for a party who has assigned a debt without the authority of the assignee. (*d*) But if a debt be fairly sold, the original creditor may probably sign as trustee. (*e*)

Joint signatures.

There are some occasions on which a joint signature is requisite, and this especially takes place where there is a surviving interest. Thus, if a single woman proves a debt, and then marries, it is necessary that her husband should join with her in signing the certificate; for there is an independent, and by possibility, a surviving interest. (*f*) And so it is, when a creditor becomes a bankrupt after proof of his debt; for although it is said, that an assignee of such second bankrupt has sometimes been allowed to sign alone (*g*), yet, as the one has interest in the increase of the dividend, and the other in the increase of his allowance and surplus, the better opinion seems to be, that there should be a double signature; and that, if such bankrupt or his assignees dissented, the Chancellor would allow the objection. (*h*)

(*a*) Co. B. L. 464. 1 Chr. B. L. 332.
(*b*) 17 Ves. jun. 463. *Ex parte Rigby.* 2 Rose, 224. S. C.
(*c*) Montague, B. L. 332. *Ex parte Evans.*
(*d*) 1 Glynn & Jameson. 399. *Ex parte Taylor.*
(*e*) Montague, B. L. 333. *Ex parte Boultbee.*
(*f*) Co. B. L. 440. 1 Chr. B. L. 333.
(*g*) 1 Chr. B. L. 333. (*h*) Ibid. Co. B. L. 440.

Where a testator had proved a part of his debt, the remainder of which was proved by his executor, although the testator had signed, the Commissioners thought that the executor should also sign, since each was a creditor, who had duly proved a debt under the commission. (*a*) The proof made by the petitioning creditor upon opening the commission, will not of itself entitle him to sign the certificate. (*b*)

It is worthy of notice, that in cases of a second certificate, the creditors who have signed the former, need not sign again; whereas we shall find, that the Commissioners must do so. (*c*)

Time for signature.

Formerly it was very customary for creditors to sign before the third meeting, when the full disclosure of the bankrupt's affairs ordinarily takes place; but as such a practice naturally opened a door to fraud on the part of bankrupts, Lord Eldon first threw out a doubt whether a signature previous to the last examination was such as the act of parliament intended (*d*), and afterwards sent back a certificate on petition, complaining of such a premature signing (*e*), conformably to an order made by his Lordship in April 1809. (*f*) Nevertheless, it seems, that if creditors were to sign between the 42d day and the adjourned or enlarged time, and the certificate were allowed by the Chancellor, its validity would not be affected, so that a court of law could hold it void, as unfairly obtained. (*g*) And a distinction is pointed out

(*a*) 2 Chr. B. L. 502.
(*b*) Ibid. 2 Cox. 398. *Ex parte Davis.*
(*c*) 1 Chr. B. L. 336.
(*d*) 11 Ves. jun. 424. *Ex parte King.*
(*e*) 1 Rose, 176. (*f*) 1 Chr. B. L. 334.
(*g*) Ibid.

here between a signature by creditors and by Commissioners. (a)

Form of signing.

By a general order dated August 8. 1809, it was ordered by the Lord Chancellor, that the creditors at the time of giving their consent, should write opposite to their respective names the day of the month and year on which they sign the same. (b) This was done for the more precisely ascertaining the time of the creditors' signatures. (c) The next formulary requisite is an affidavit by some person, testifying that he has seen each creditor subscribe his assent, and on the day annexed to the name. It is said to be usual for two or more to join in the same affidavit (d), though one person alone may swear that he has seen all the signatures, or he may depose to a certain number, specifying them. (e) Where two partners obtained separate commissions, it was urged to the Commissioners for the sake of saving much expence, whether any objection would be made to their mutually witnessing the signatures of each other's certificate by the creditors; and it was allowed on the ground that under a separate commission, one partner has no interest in another's certificate. (f) Upon this affidavit, as upon the letter of attorney before mentioned, the Commissioners subscribe an exhibit. (g)

Signature by the Commissioners.

It was said by the Earl of Macclesfield, when Chancellor, that the Commissioners in the first instance certified the bankrupt's conformity, then the creditors cer-

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(a) 1 Chr. B. L. 335. and see Chr. Instr. p. 211.

(b) See 2 Chr. B. L. 213. (c) Ibid.

(d) Though probably the same objection might be made as where two joined in the same letter of attorney. Chr. Instr. p. 216.

(e) Ibid. (f) Id. 215. (g) Id. 217.

tified their consent on the same parchment; at the foot of which the Commissioners certified that the creditors had consented according to the act. (*a*) And it is observable, that the statute of 5 G. 1. was the same as 5 G. 2., which till lately was the act in force. (*b*)

It is a clear doctrine, that these signatures cannot, more than those of the creditors, be obtained through compulsion; and thus Lord Hardwicke declared, that he did not know that a *mandamus* would lie to compel an allowance. (*c*) Since his time, however, the principle has been incontrovertibly established by the united decisions of the Lords Eldon and Erskine in the Court of Chancery, and by the Court of King's Bench. The result of the opinions of those learned Lords was, that the Commissioners have a judicial discretion, and that the Lord Chancellor cannot control, advise, or counsel them upon the subject. (*d*) And when the same applicant moved the Court of Law for a *mandamus*, they held, that the legislature had vested a discretion in the Commissioners to judge of the bankrupt's conformity or non-conformity, with which discretion they could not interfere. (*e*) Nevertheless, Lord Hardwicke expressed the equity of the maxim, when he said, that it ought not to be arbitrary in the Commissioners or the Chancellor, to allow or refuse a certificate; but that they ought to be governed entirely by fairness or fraudulent behaviour in

(*a*) 7 Ves. Ab. 132. in Burdock's case.

(*b*) 1 Chr. B. L. 335.

(*c*) 1 Atk. 82. In *ex parte Williamson.* 2 Ves. sen. 250.

(*d*) 11 Ves. jun. 417. *Ex parte King.* 13. Ves. jun. 181. *Ex parte King*, by Lord Erskine. 15 Ves. jun. 126. *Ex parte King*, by Lord Eldon.

(*e*) 7 East, 92. *Ex parte John King*, a bankrupt.

the bankrupt. (*a*) And Lord Eldon is represented as having frequently said, that the Commissioners have no concern with the bankrupt's conduct before the Commission, however infamous it may have been; but that if he has conformed and acted fairly in his character of a bankrupt, they are not justified in withholding their signatures, provided a sufficient number of creditors testify their assent. (*b*)

It has been holden, that if a certificate be sent back for the admission of other creditors, the discretion of the Commissioners revives to the same uncontrollable extent as though they had not signed the first. For the proofs of subsequent creditors may satisfy such Commissioners that the bankrupt had not made a full discovery, and he, therefore, could not be certified as having conformed to the provisions of the act. (*c*) And the Commissioners must sign the second certificate, and give the time of their new signatures and seals as precisely as before. (*d*)

How examined.

When the certificate is examined, it is customary and prudent for the three Commissioners to meet together, but when it is desired that the certificate should be advertised before three Commissioners can meet, it is the practice to carry the proceedings and certificate to one Commissioner, who carefully examines and signs it; it is then carried to two others, who sign it on the credit and authority of the first. (*e*)

(*a*) 1 Atk. 82. In *ex parte Williamson.* 2 Ves. sen. 250.
(*b*) 1 Chr. B. L. 335.
(*c*) 15 Ves. jun. 126. *Ex parte King.*
(*d*) 1 Chr. B. L. 336. (*e*) Chr. Instr. 211.

When to be signed, and how attested.

There is not any particular period fixed for the solemnity of the Commissioners' signatures; but as soon as the examination of the bankrupt is fully finished (*a*), the assent of the creditors obtained, and sufficient time has elapsed for the proofs of distant creditors, supposing that there may be such, it seems, that the certificate may be forwarded to the Chancellor with great propriety. But the convenience of creditors residing abroad must be consulted. So, that where the parties lived at Guernsey, and the Commissioners signed soon after the bankrupt's last examination, Lord Hardwicke censured the act as too precipitate, and stayed the document, that the Guernsey creditors might come in and prove. (*b*) Again, the same learned Lord considered three months too short a delay where the bankrupt had been a trader in Ireland. (*c*) So, where it did not appear that any creditors resided abroad, and the certificate was not signed until three months after issuing the commission, the Chancellor (*d*) declared notwithstanding, that he extremely disapproved of precipitation in signing certificates. (*e*)

By the general order before referred to, the solicitor to the commission, or his clerk, or the messenger to the commission, or some clerk of the Commissioners, must attest the signature and sealing of the Commissioners; and by the same instrument, for the purpose of avoiding

(*a*) 1 Chr. B. L. 335.

(*b*) 1 Atk. 84. *Ex parte Saumarez.*

(*c*) Id. 82. *Ex parte Williamson.* 2 Ves. sen. 249. S. C.

(*d*) Lord Hardwicke.

(*e*) 1 Atk. 84. *Anon.* See the observations of Mr. Christian on this subject. 1 Chr. B. L. 339.

frauds upon the Commissioners, they, or one of them, is directed to keep a list of all creditors above 20*l.* who prove their debts from time to time, and of the amount of their respective debts; which list is to be made up and signed from time to time by three of such Commissioners. Where there was a want of conformity to these provisions the certificate was sent back for the Commissioners to recertify, although the Commissioner who had signed it had subsequently acknowledged his signature. (*a*)

The certificate being now prepared, it must be taken to the bankrupt's office and left there, with the affidavits of seeing the creditors' signatures, and an affidavit to be made by the bankrupt, certifying his conformity and the consent of his creditors; and that the assent so given has been obtained fairly and without fraud. (*b*)

If there be any letters of attorney they should also be left; and by a late order of the Chancellor, the certificate cannot be received at the office without all the other necessary papers. (*c*)

Creditors assenting to, or dissenting from, the certificate under joint and separate commissions.

We mention this subject here briefly with reference only to joint and separate commissions. Thus, for the purposes of assent or dissent, a joint creditor may prove his debt under a separate commission, and so may a separate creditor under a joint commission. But a creditor who is proceeding at law must waive all benefit resulting from his action and the action itself before he can prove for any purpose whatsoever, although the old law enabled him to avail himself of both advantages. (*d*)

(*a*) 1 G. & J. 186. *Ex parte Jones.*
(*b*) Christian Instr. 226. 1 Chr. B. L. 341.
(*c*) Ibid. 5 G. 2. c. 30. s. 10.
(*d*) See 49 G. 3. c. 121. s. 14. Co. B. L. 442.

SECT. III.

Of the Allowance of the Certificate by the Lord Chancellor, Lord Keeper, &c. and the Grounds of Opposition to it, &c.

As soon as the certificate is duly signed and deposited, an advertisement is inserted in the Gazette by the messenger, to the effect, that it will be allowed and confirmed unless cause to the contrary be shown before a certain day, which is generally three weeks after the notice so given. (*a*) And, although not material, a memorandum of the Commissioners, certifying the bankrupt's conformity, may be made. (*b*) If, after this public advice, no petition be presented within twenty-one days, the discharge and allowances will be confirmed by the Great Seal. (*c*) And if an order be made for staying the certificate, and it be not drawn up and taken away within three months after it issues, the certificate will be allowed. (*d*)

The Court of Chancery is very strict with respect to the time. Where, therefore, a petition to stay a bankrupt's certificate on the ground of fraud was sent up from the country, but for want of a regular signature could not be received on the day in question, being the last day for presenting a petition against the certificate, the Court refused to allow it to be received two days after-

(*a*) Chr. Instr. pp. 227. 229. (*b*) Id. 228.
(*c*) Id. 229.
(*d*) 2 Chr. B. L. 201. General Order, March 22. 1796.

wards, and considered as presented on the previous day. (*a*)

The legislature deemed it fit to entrust the Chancellor for a short time with the power of granting certificates without the consent of creditors, but the act has expired. (*b*) And at present, the Chancellor, or the Lord Keeper, or the Lord Commissioners of the Great Seal, or two of the Judges, or Barons, to whom the matter may be referred by the Great Seal, have this authority confided to them. (*c*) Indeed, it is said that all certificates were formerly referred to the Judges; but that the Court of Chancery, finding the practice inconvenient, has assumed the entire cognisance of them. (*d*) And from the silence of the new act respecting these judicial references, they may now be considered as utterly abolished. (*e*)

In strict conformity to the rule established respecting the creditors and Commissioners, it seems, that no mandamus will lie to compel the allowance of the certificate; for, as Lord Hardwicke has declared, it is a matter of judgment; yet, he adds, that no arbitrary refusal can be justified. (*f*) And thus, where good grounds are shown, the same power extends to a postponement of the allowance, as when parties residing abroad have not been able to prove. (*g*) And, even where there is no opposition,

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(*a*) 1 Maddock, 111. *Ex parte Emmet.*

(*b*) 18 G. 3. c. 52. Chr. Instr. 232.

(*c*) Whitmarsh, B. L. 275. (*d*) Ibid.

(*e*) Eden's New B. L. 377.

(*f*) 2 Ves. sen. 249. *Ex parte Williamson.* 1 Atk. 82. S. C. 3 V. & B. 103. *Ex parte Cridland.*

(*g*) See the cases ante, p. 49.

the Great Seal may, if expedient, still disallow the instrument. (*a*)

Having now adverted to the respective powers of the Commissioners and the Chancellor, the persons who may oppose the certificate, the proper opportunity for them to do so, and the manner of the opposition, claim our next consideration.

Who may oppose, and when.

By 5 G. 2. c. 30. s.10., any of the bankrupt's creditors are to be heard, if they think fit, before the respective persons (mentioned in the act, *i. e.* the Commissioners, &c.) aforesaid, against the making such certificate, and against the confirmation thereof. Therefore, it is no objection, for this purpose, that the debt of the opposing creditor may be under 20*l.* (*b*) So that every claimant under a commission may have a voice upon this subject. (*c*) And even such creditors as have signed the certificate may petition against it; for facts may have come to their knowledge subsequently to their signatures, disclosing fraud or other misconduct in the bankrupt, which will be a sufficient ground for refusing him his remedy. (*d*) But a creditor who has been tampering with the bankrupt for money as an inducement to sign his certificate, cannot petition against it. (*e*)

But the certificate of a bankrupt will not be staid on the application of a person whose right, as a creditor, is in abeyance, until an issue at law be determined. As

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(*a*) 2 Burr. 718. *per* Lord Mansfield.

(*b*) 7 Vin. Ab. 134. *Ex parte Allen.*

(*c*) Co. B. L. 443. 2 Christian, B. L. 501. *Ex parte Ramsbottom*, in the case of a mortgagee.

(*d*) See Co. B. L. 442.

(*e*) 1 Rose, 404. *Ex parte Paterson.*

where one insisting on his right to stop in transitu wished for an opportunity of proving under the commission, in case his action should fail. (*a*) A mortgagee has been held competent to present such a petition. (*b*)

It was formerly permitted, that persons might prove their debts for the purpose of opposing the certificate without being restrained from proceeding at law (*c*): now, by 49 G. 3. c. 121. s. 14., the proving a debt under the commission for any purpose whatever is of itself an election by that creditor to take the benefit of the commission. However, in a case of oppression, before the passing of that act, Lord Eldon said, that the petitioner should have made his application before the bankrupt had obtained his certificate, and he dismissed the complaint with costs. (*d*) Still, if a creditor elects to proceed at law, he may lay a ground for staying the certificate, provided he has not proved under the commission. (*e*)

Petition of the opposing creditor, and the form observable in prosecuting it.

The persons capable of opposing having been noticed, we proceed to their acts, the presenting and prosecution of their petitions to stay or disallow the bankrupt's certificate. It is observable, that whilst the petition is in the bankrupt's office any creditor may petition (*f*);

(*a*) 6 Ves. jun. 613. *Ex parte Heath.*

(*b*) 1 G. & J. 71. *Ex parte Whitchurch.* So held on an appeal from the Vice Chancellor's Court.

(*c*) See Whitm. B. L. 267. 276., and the cases there cited.

(*d*) 14 Ves. jun. 138. *Ex parte Warwick.*

(*e*) 14 Ves. jun. 493. *Ex parte Parquet.* [And so if he proceeds under the Commission he waves his remedy at law.] 10 Ves. jun. 351. *Ex parte Granger.*

(*f*) Christian Instr. 229.

but such petitions cannot be withdrawn as of course, since it has happened, that a creditor has been induced by money to withdraw his opposition (*a*), a perversion of justice which prompted the Chancellor to make this order. By two general orders, affidavits in support of the petition, excepting such of course as are made in reply, must be left with it at the office of the secretary of bankrupts. (*b*)

It is indispensable, that the bankrupt be served with notice of a petition, which notice must be served two clear days before the petition-day. (*c*) When, therefore, such a precaution had been neglected, although the bankrupt took office copies of the affidavits, the Lord Chancellor allowed his discharge, for it was not necessary that the petition should have been noticed at all. (*d*) And an admission by the bankrupt that a copy of a petition has been received, is not a waiver of the personal service. (*e*) And when the petition is not served in time, the bankrupt may either wait till the petition is called on, or petition for the allowance of his certificate with costs, if opposed. (*f*)

This should be a short petition, praying for the al-

(*a*) 6 Ves. jun. 5. *Ex parte Gibson* cited.

(*b*) 2 Chr. 202. General Order, April 12. 1796. Id. 208. General Order, November 16. 1805. Chr. Instr. 229. 1 Ves. & Bea. 5. *Ex parte Royal Bank of Scotland.*

(*c*) 1 G. & J. 63. *Ex parte Hopley.*

(*d*) 1 V. & B. 543. *Ex parte Kendall.* 1 Buck. 38. *Ex parte Harford.* Ibid. 40. *Ex parte Grove.*

(*e*) 1 G. & J. 254. *Ex parte Furnival.*

(*f*) Montagu, B. L. 357. *Ex parte Brenchly.*

lowance of his certificate; since, if he unnecessarily extend his petition, he will not have costs. (*a*)

An application to make the service of a petition good service must be made before the petition-day, unless an earlier application be prevented by the bankrupt's conduct. (*b*)

The petition must be attested by the solicitor of the petitioner or his agent, and it is not sufficient that the solicitor's agent makes the attestation. (*c*)

If these applications are unsuccessful, as where the petition is presented after too great a lapse of time, (eight months, for example,) (*d*), the usual rule is to dismiss them with costs; not as noting the conduct of the petitioners in an unfavourable light, but preventing bankrupts from being crushed by the expence of obtaining their allowances. (*e*) Yet, if there be any thing disgraceful in the conduct of the bankrupt, although the certificate may not be thereby affected, an instance will be furnished for the refusal of the costs. (*f*)

The affidavit in support of the petition.

The affidavit in support of the petition must state that the petitioners are creditors, or the certificate will not be stayed. (*g*) They must be delivered with the petition at the office of the secretary of bankrupts, except such

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(*a*) 1 G. & J. 253. *Ex parte Moore.*

(*b*) 1 G. & J. 71. *Ex parte Harrison.*

(*c*) Id. 76. *Ex parte Hirst.*

(*d*) Id. 195. *Ex parte Smith*, and see Ibid. 352. *Ex parte Wright*, where three weeks after the notice in the Gazette were considered too long, although the certificate had been previously suspended under another petition.

(*e*) Id. 7. *Ex parte the Royal Bank of Scotland.*

(*f*) 1 Chr. B. L. 344.

(*g*) 1 Buck. 69. *Ex parte Cutten.*

affidavits as are necessary to be made in reply to any affidavits made in answer to the petition. (*a*) And they cannot be read if filed after the twenty-first day. (*b*) Where an affidavit of personal service of a petition to stay the certificate was sworn, but not filed on the day of hearing, it was treated as a nullity, and the petition dismissed with costs. (*c*) These affidavits are said to be exceptions to the rule, that affidavits sworn previous to answering a petition are inadmissible. (*d*) If the petition and affidavits are left in the office on the nineteenth day, and notice is given on the twenty-first day that the petitioner will read affidavits filed on a former petition, in which the bankrupt made an affidavit, and such notice is before the Chancellor has signed his fiat, such notice is sufficient to authorise the reading such affidavits. (*e*)

A petition to stay a certificate before it has been allowed by the Commissioners cannot of necessity be supported. (*f*) And it is essential to state in a petition for proving and staying a certificate, the reason of the Commissioners for rejecting the proof. (*g*) So also must the ground for staying the instrument be stated generally in the petition; for it has been determined that affidavits in reply cannot supply a defect in the original statement. (*h*)

(*a*) Montagu, B. L. 356. Lord Rosslyn's Order, 10 Ves. jun. 360.

(*b*) 1 V. & B. 46. *Ex parte Gardner.*

(*c*) 1 G. & J. 351. *Ex parte Long.*

(*d*) 2 Rose, 257. *Ex parte Overton.*

(*e*) Montagu, B. L. 357.

(*f*) 16 Buck, 40. *Ex parte Gordon.*

(*g*) 1 Rose, 274. *Ex parte Curtis,* and see 1 G. & J. 179. *Ex parte Blaydes.*

(*h*) 1 G. & J. 37. *Ex parte Cundall.*

What will be a successful opposition.

It is worthy of particular remark, that the grounds on which the Chancellor proceeds in disallowing certificates arise partly from the equitable jurisdiction imparted to him by the statute of G. 2., and partly from express enactments. And it is further to be observed generally, that it by no means follows, that the same reason which would operate in staying a certificate will necessarily vacate it. (*a*)

It once happened, that the proceedings on a commission were lost, but a list of the debts had been preserved by a deceased clerk; the assignees had divided the property, and the bankrupt desired to have his certificate. The Commissioners on this admitted proof of the loss of such proceedings, of the clerk's hand-writing, and of his having managed the business. The assignees proved that they believed the list of debts to be correct, and produced vouchers from each creditor named in the list, and that nothing was left in their hands. The evidence being given, the Commissioners signed the certificate, and the Chancellor allowed it. (*b*)

We shall see at the close of this section how far the coming in of new creditors will operate towards the staying of a certificate; it is sufficient to say in this place,

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(*a*) 6 Ves. jun. 614. *per* Lord Eldon.

(*b*) 2 Chr. B. L. 503. Co. B. L. 451. Montagu, B. L. 339. *Ex parte Lushbrooke.* The Commissioners annexed the following special certificate: We the undersigned, hereby humbly certify to the Lord Chancellor, that it has been proved before us, that the proceedings against A. B. are lost, but that we are satisfied, from the depositions hereunto annexed, that the certificate has been duly signed by creditors sufficient in number and value, who had proved their debts under the Commission. Ibid.

that if grounds be not shown within a reasonable time for the denial of it, it will be allowed in a summary manner by the Chancellor. (*a*) By 5 G. 2. c. 30. s. 7., if the certificate has been obtained unfairly and by fraud, or if any concealment has been made to the value of 10*l.*, the certificate will be of no avail.

Fraud: The great inducement to withhold the bankrupt's discharge is the discovery of fraud in any stage of the proceedings; whether it be by concealment, by the adoption of fraudulent agreements, or constructive fraud under the statute. Thus, if it be proved to the Chancellor's satisfaction, that the bankrupt has not made a full discovery of his effects he will stop the certificate (*b*): but the proof must be positive; for an affidavit that the deponent had been informed of, and that he believed in such concealment, was deemed insufficient. (*c*) And where the circumstances of the concealment had been disclosed, and all the property delivered up to the assignees, on which the Commissioners thought proper to sign the certificate, the Lord Chancellor would not stay it on the ground of concealment. (*d*) However, where the Chancellor ordered a debt of 940*l.* to be struck out as thinking it impossible to have been due, he said, that the certificate could not be allowed, though that debt did not affect the validity of the instrument with reference to number or value; for it was the bankrupt's duty to explain in the first instance how he suffered so vast a debt to be proved. (*e*)

(*a*) See *post*, in this Chapter. Co. B. L. 436.
(*b*) 17 Ves. jun. 117.
(*c*) 1 Rose, 184. *Ex parte Joseph.*
(*d*) 1 G. & J. 205. *Ex parte Bryant.*
(*e*) 2 Chr. B. L. 502.

So it is, if a party knowingly suffers a fictitious debt to be proved (*a*), or where he produces a book evidently compiled from other documents (*b*); for he will not in that case have made the full disclosure prescribed by the act; and Lord Eldon has intimated, that he would refuse a certificate on such an event. (*c*) And by 24 G. 3. c. 57. s. 9., it is enacted, that if any person shall sign a certificate in respect of any fictitious or pretended debt, unless the bankrupt shall disclose such fraud, and object to the reality of the debt before the Commissioners have signed his certificate, it shall be null and void, and the bankrupt deprived of all benefit or allowances which would otherwise have arisen from it.

Fraudulent agreements, and, in some cases, even without the bankrupt's privity, will vitiate the certificate. If, therefore, the Chancellor be made acquainted with the existence of such frauds he will deny the certificate.

And thus, if a creditor be induced by money to withdraw his petition against the certificate, or sell his debt after such a petition, with an agreement to withdraw it, the certificate will be avoided, and the general order forbidding parties to withdraw their petitions without leave of the Court was made in consequence of such an act. (*d*) And so, if money has been given for the ac-

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(*a*) 1 Rose, 330. *Ex parte Laffert.* 2 Rose, 71. *Ex parte Shirley.*

(*b*) 17 Ves. jun. 117. *Ex parte Bangley.*

(*c*) 1 Ves. & Bea. 142. *Freydeburgh's* case. The noble Judge had done this in *Ex parte Shirley, ante,* n. (*a*)

(*d*) 6 Ves. jun. 5. *Ex parte Gibson* cited.

quisition of the certificate, Lord Eldon has declared, that it is of no value, even though the bankrupt be ignorant of the transaction. (*a*)

The 11th section of 5 G. 2. c. 30. makes all agreements and securities void which are given as a consideration for the bankrupt's discharge. It was decided upon this clause, that where a bankrupt gave a bond for the payment of his whole debt in consideration of the obligee withdrawing his petition, he could not be relieved in equity. (*b*) But the authority of this case has been overturned by many subsequent decisions, which will be noticed hereafter. (*c*) Much more will be said upon this subject in the following section, when we come to treat of the invalidity of agreements.

Suspicion, however, will not induce a Chancellor to disallow a document of this kind; so that, although great doubt may have hung over the bankrupt's transactions, unless fraudulent conduct absolutely appears, it will not affect the allowance. (*d*) Yet, where a commission issued against a person with a description differing from his real business and place of residence, and describing him by a character which his creditors could not suspect that he had, the Court directed that the certificate should be stayed, and ordered an advertisement, that all persons who stood in the relation of creditors might come in and

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(*a*) 10 Ves. jun. 359. in *Ex parte Butt.* 17 Ves. jun. 62. *Ex parte Hall.*

(*b*) 1 P. Wms. 620. *Lewis* v. *Chase, per* Lord Macclesfield.

(*c*) See 1 Christian, B. L. 345.

(*d*) 2 Ves. sen. 249. *Ex parte Williamson.*

prove their debts (*a*); for little less than manifest trick was apparent on the face of such a proceeding.

But where the assignees allowed the bankrupts to carry on their business on the same premises, and under the same firm, and to continue in their houses with the use of their furniture, the certificate was allowed, and a petition against it was dismissed with costs. (*b*) And it is a general rule, except under circumstances which actually exclude the bankrupt from any favour, to dismiss these petitions with costs. (*c*) And so it was, where the bankrupts retained money in their hands as assignees under former commissions. (*d*) But the 4th section of 49 G. 3. c. 121. enables the Commissioners of bankrupts to charge such persons with interest at the rate of 20 *per cent.* during all the time they have so misapplied the original funds: and by s. 6., whenever assignees become bankrupt, having 100*l.* of the bankrupt's estate in their possession, it is ordained, that their future effects shall be liable to satisfy such claims, and that their certificate should be available only for the protection of their persons.

Negligence or want of form.

This benefit will not be withdrawn through a negligence in the bankrupt's accounts, so that, where they had been found in a slovenly state it was considered no reason for staying the certificate, although, had the party refused his assistance in explaining them it would have been different. (*e*) And where the proof of a debt was

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(*a*) Co. B. L. 451. *Ex parte Malkin.*

(*b*) 1 Rose, 93. *Ex parte Anderson.*

(*c*) Id. 67. n. (*a*). *Ex parte Black, Ex parte Nicholls,* Lincoln's Inn Hall, April, 1811.

(*d*) Id. 93. Co. B. L. 450. See 49 G. 3. c. 121. s. 4.

(*e*) 1 Christian, B. L. 344. *Ex parte Rawson.*

objected to for want of form when the certificate was before the Chancellor for his allowance, the Chancellor would not sustain the objection. (*a*)

So, where a certificate was altered in two instances after the stamp had been put upon it, but before the allowance, it was petitioned to stay it; but it being asserted that the certificate needs no stamp in its progress, the Lord Chancellor overruled the objection. (*b*)

Again, where the day of the month and the year of the signature of the creditors were not inserted at the time, and the affidavits of the parties witnessing their signatures did not state the time of such signatures, an application to stay the certificate on these grounds was refused. (*c*)

Irregularities.

But for serious omissions and irregularities a contrary practice will prevail, since justice may be mainly defeated by inattention to the proper conformity of the bankrupt to the existing laws. Thus, if the certificate has been signed before the last examination, it is clear that its allowance will be withholden, for so early a signature was not contemplated by the act of parliament. (*d*) So, where a creditor upon a judgment of indemnity, who has sustained no damage, signed, the document was sent back, for the creditor was not entitled to express an assent upon the occasion. (*e*) So, if it be proved, that one of two partners dissented at the time of signing the certificate, probably it would be stayed, for although the act of one is presumed to conclude the remainder of the firm as to their consent and authority, yet it may not

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(*a*) 1 Rose, 66. *Ex parte Stracey.*
(*b*) 17 Ves. jun. 244. *Ex parte Sawyer.*
(*c*) 1 G. & J. 348. *Ex parte Laing.*
(*d*) Co. B. L. 451. (*e*) Ibid. 439.

avail where the contrary is distinctly ascertained. (*a*) Thus, if the bankrupt be indebted to A. and B. by a note, or bond, and A. refused his assent to the certificate, the assent of the other would hardly be sufficient in equity. (*b*) But it should seem that there ought to be an affidavit at the time of dissent, verified by affidavit. (*c*)

Other matters,

Where a long account must be taken to decide the claims of petitioners against an allowance, and the bankrupt will swear that no balance is due, whilst the petitioners will not venture to do so, the Chancellor will not stay the allowance. (*d*) Barely coming before the Commissioners, and saying that there is such a debt, will not suffice without an affidavit. (*e*)

And it is not sufficient to say, that the bankrupt has not obtained his certificate under a former commission (*f*), nor that there is a petition pending to supersede the commission. (*g*) Where creditors abroad had not an opportunity of proving their debts, although they were proved to have known that the bankrupt's circumstances were embarrassed, the certificate was stayed on their behalf. (*h*) But no such indulgences are given to Scotch creditors who had not come in under an idea that a subsequent sequestration was valid. (*i*)

(*a*) 1 Chr. B. L. 333. (*b*) Id. 334. (*c*) Ibid.
(*d*) 1 Atk. 81. *Ex parte Johnson.*
(*e*) 2 Ves. sen. 252. *per* Lord Hardwicke.
(*f*) 1 Rose, 285. *Ex parte Thompson.*
(*g*) 2 Rose, 61. *Ex parte Bonsor.*
(*h*) 2 Rose, 492. *Ex parte Lord.* 1 Rose, 266. *Ex parte Basarro.*
(*i*) 2 Rose, 234. *Ex parte Cochrane.*

So, if a creditor under a joint and separate bond neglect to prove against either estate before the certificate is signed, upon the supposition that it would be an election, the certificate will not be stayed. (*a*) And it is observable, that this power of staying certificates is altogether discretionary in the Chancellor. (*b*) So, where the bankrupt's partner prayed that the certificate might be stayed until the partnership accounts were taken, it was granted on proof that no want of diligence was attributable to the petitioner. (*c*)

By 5 G. 2. c. 30. s. 12. all bankrupts who have given more than 100*l.* as a marriage-portion to their children, unless at the time of such gift they were in possession of sufficient assets to satisfy all their just debts, proof of which must appear before the Commissioners; or who have lost 5*l.* in one day, or 100*l.* in the whole within the twelve months preceding their bankruptcy, in playing at cards, dice, tables, tennis, bowls, billiards, shovelboard, cock-fighting, horse-races, dog-matches, foot-races, or other pastimes, game or games whatsoever, or in or by bearing a share or part in the stakes, wagers, or adventures; or in or by betting on the sides or hands of such as do or shall play, act, ride, or run as aforesaid; or who shall lose within one year before such bankruptcy 100*l.* by one or more contracts for the purchase, sale, refusal, or delivery of any stock of any company or corporation whatsoever; or any parts or shares of any government or public funds or securities, where

(*a*) 2 Cox, 218. *Ex parte Bentley.*
(*b*) Montagu, B. L. 343. *Ex parte Young.*
(*c*) 1 G. & J. 193. *Ex parte Hadley.*

every such contract was not to be performed within one week from the time of making such contract, or where the stock or other thing so bought or sold was not actually transferred or delivered in pursuance of such contract, are declared incapable of acquiring a certificate.

These clauses are penal, and so to be construed strictly; therefore, where an insolvent trader gave his niece 1000*l.* as her marriage-portion, it was ruled, that his certificate was not avoided, for the statute must be confined to the children of the bankrupt. (*a*)

The keeping of a lottery-office has been adjudged no bar to the allowance of a certificate (*b*), and even the fact of obtaining goods under false pretences will not operate to prevent it. (*c*) Where the Chancellor was petitioned against the allowance of a certificate on the score of gaming, and the affidavits were in direct opposition to each other, Lord Eldon permitted it to pass, leaving it to the petitioner to avoid it at law, or to indict the party for perjury. The costs were refused. "It ought to be clear," said the noble Lord, "that the law has been violated, as, refusing a bankrupt his certificate, I refuse him the trial of the fact by a jury." (*d*)

Application by creditors to prove when a ground to stay certificate.

Sometimes there is an application by creditors who have omitted to prove, that they may come in, and this is occasionally done for the purpose of dissenting from the certificate. But some good reason must be assigned for the delay, or the petition will be dismissed (*e*); yet,

(*a*) 1 Atk. 84. *Ex parte Saumarez*, and see 1 Chr. B. L. 348.

(*b*) Co. B. L. 442. *Ex parte Richardson.*

(*c*) Ibid., and see Cullen, B. L. 1800, p. 385. n. (132.)

(*d*) 1 V. & B. 193. *Ex parte Kennet.*

(*e*) 2 Bro. 48. *Ex parte Adams*, and see Co. B. L. 439.

such persons have been allowed to prove, although the certificate was not stayed on that account. (*a*)

However, if the applicants can show that the instrument has been fraudulently obtained, a very different course will necessarily be adopted. (*b*) And if suspicious circumstances be shown to the Court, or a good ground for delay be exhibited, the Court will allow a petitioner to prove his debt and stay the certificate meanwhile. (*c*)

The decisions of the Court of Chancery have established, that a certificate having come before the Lord Chancellor for allowance, shall not be easily defeated by suing out a joint commission. (*d*) And so, where under such circumstances a joint creditor petitioned that a separate commission against one partner might be superseded, it was holden, that as the proceeding had come thus far, it would be hard that any obstacle should be opposed to it, and the discharge was granted. (*e*)

If a satisfactory reason for the petition be assigned, the certificate will be sent back, and upon such occasions a supplemental certificate is annexed to the former, reciting, first, that the petitioner had liberty to assent or dissent; and then stating, that the proof of the said petitioner's debts, and of other creditors, if any, have been taken: the Commissioners then go on to testify in

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(*a*) 1 Chr. B. L. 344. *Ex parte Dyson.* 1 Rose, 67. S. C. n. (a.) (*b*) 1 Atk. 73. *Ex parte Fydell.*

(*c*) 1 Madd. 600. *Ex parte Birch.*

(*d*) 1 Atk. 145. *Ex parte Leaverland.* 17 Ves. jun. 403. *Ex parte Hamper.*

(*e*) 1 V. & B. 308. *Ex parte Tobin.*

the usual form, that four parts in five of the creditors in number or value still remain as assenting to the bankrupt's discharge, and the usual signatures are affixed. (*a*)

SECT. IV.

How the Certificate may be impeached in Courts of Justice after its Allowance.

Impeached in Chancery.

THE Chancellor's allowance of a certificate by no means constitutes it final and unimpeachable; for the legislature has pointed out several cases of misconduct, of which, if the bankrupt be guilty, he will lose the benefit of an instrument which was only intended for the relief of the honest debtor. And this is dealing out a fair measure of justice; for if, by a skilful tissue of frauds and concealment, the insolvent person were to shield himself from the penetration of the creditor, the Commissioners, and the Great Seal, and yet, on a discovery of such practices were to be held acquitted by virtue of a writing so iniquitously acquired, he would be enabled to advantage himself of his own wrong; a principle utterly unknown to the law of England.

It appears, however, that some very great men (*b*) were formerly inclined to think that a certificate could

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(*a*) Christian Instr. 230.

(*b*) Lord Cowper and Lord Talbot, while they were at the bar.

not be recalled after its allowance for want of jurisdiction in the Chancellor. (*a*) Yet the writer who quotes these opinions gives a case in which this authority was exercised by Lord Macclesfield. (*b*) It is never put in force except in cases of fraud, and then it would be void in every Court, as having been obtained unfairly, and without equity. Thus Lord Eldon ordered such a document to be recalled of two years' standing, on a proof of very gross fraud; such as the issuing of a fraudulent commission, and the preponderance of fictitious debts, for the whole transaction was concocted in deceit. (*c*) But an attempt to gain a discovery of such fraudulent practices must be made in the ordinary way; and, therefore, where the creditor petitioned the Chancellor for an inspection of the bankrupt's books, in order that he might discover gaming transactions which would vitiate the certificate, Lord Eldon said, "I doubt very much, when the certificate has been allowed, and has its legal effect, whether a person, no creditor under the commission, can come in this way for a discovery, to obtain which he may file a bill. I do not think you can get rid of a certificate that has been obtained in every case in which you can stay a certificate." (*d*) And it has been subsequently holden, that although circumstances of suspicion appear, a very clear case must be made out for recalling a certificate. (*e*)

(*a*) Davies's B. L. 437. (*b*) Ibid.

(*c*) 2 Rose, 186. *Ex parte Cawthorne.* See 1 Ball & Beattie, 321. *Ex parte Fallis;* and see 1 G. & J. 163.

(*d*) 6 Ves. jun. 614. *Ex parte Mawson.*

(*e*) 1 G. & J. 219. *Ex parte Hood.*

We shall see presently, that an illegal inducement to sign a certificate, although given without the bankrupt's knowledge, will render his discharge of no avail; if, notwithstanding, such bankrupt can satisfy the Chancellor that such an act has resulted from officious interference by a friend, or the malice of an enemy, the certificate will be cancelled, in order that the bankrupt may be enabled to obtain another. (*a*) And if the creditor who has received a bribe thinks proper to repay the money, and release the promise, it should seem that he may still sign the instrument. (*b*)

Certificate, how rendered unavailable in courts of law.

First, by 5 G. 2. c. 30. s. 7., a discharged bankrupt is declared to be freed from his debts, and a verdict must pass for him in any action brought against him in respect of them, unless the plaintiff can prove that the certificate was obtained unfairly and by fraud, or can make appear any concealment by the said bankrupt to the value of 10*l*.

But the defendant may show, if charged with a debt, on an allegation that his certificate is void through concealment, that such concealment was neither wilful nor fraudulent. (*c*)

Where money is given to a creditor as a bribe that he may sign, the instrument is rendered nugatory. As where the defendant applied to be discharged on common bail, it was opposed, on the ground that his

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(*a*) 1 Chr. B. L. 343. *Ex parte Harrison.* Whitm. B. L. 270. S. C.

(*b*) 1 Chr. B. L. 343.

(*c*) Cullen's B. L. 384. *Cathcart* and *Blackwood.* House of Lords, 1765.

certificate had issued through fraud; and on a feigned issue directed by the Court, who refused to try the case upon affidavits, it appeared that a confidential friend of the bankrupt had, without his privity, given money to two of the creditors to induce their signing the certificate; upon which it was urged, 1. that as the defendant was not cognizant of the transaction, he ought not to suffer by it; and, 2. that the statute applied only to the signing of the creditors, not to the allowance by the Chancellor. But the Court went on the broad ground, that a certificate obtained by fraud, under any circumstances, was void; and that in the case before them there had been a fraud upon the creditors at large, though without the bankrupt's knowledge. (*a*) In the last case, the bankrupt knew of the bribe before his certificate was allowed, though not at the time of signing by his creditors; yet the Court went the length of saying, that an utter ignorance of the bankrupt throughout would not have saved the certificate.

And this point was expressly adjudged sometime afterwards, when C. J. Eyre remarked on an observation of Buller J. with great approbation, which was, that, whether the bankrupt knew of the bribe or not, it might be that a considerable creditor, influenced by money, would put himself at the head of the list, and thus a majority in number and value might be combined by the example of that partial person; and it was added, that a malicious payment would equally avoid the benefit. (*b*) However, we have seen that relief may be had in equity

(*a*) Dougl. 228. *Robson* v. *Calze.*

(*b*) 1 B & P. 95. *Holland* v. *Palmer.*

against this artifice. (*a*) And though the inducement holden out be for the benefit of all the creditors, and not in prejudice of any particular individual, it is an act equally destructive of the certificate; and though Lord Mansfield thought differently at Nisi Prius, yet he afterwards said, that great corruption and oppression might arise from a combination of all the creditors, to exact conditions for signing. (*b*)

So, fraudulent promises will be fatal to a certificate; as, where the fourth of several signatures had been obtained by the bankrupt's promise to pay his creditors so signing the whole debt; and it was resolved, that as there were several subsequent signatures, and as a sufficiency of creditors, in number and value, had not signed previous to the interested creditor, the certificate was not available: for the persons who signed after the fourth might have been influenced by his example; and the principle of *Holland* v. *Palmer*, was recognized. (*c*) *

However, where the bankrupt promised to give evidence for the assignees, and to release them, in consideration of their procuring his certificate, the Court of Exchequer held it a common and by no means an improper transaction; and so, when the plaintiff filed a bill for a discovery whether creditors had not signed by

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(*a*) Ante, p. 70.

(*b*) Dougl. 694. (a.) n. (3.) *Jones* v. *Barkley*.

(*c*) 15 East, 248. *Phillips* v. *Dicas*.

* Qu. Whether, if there had been a sufficiency of signatures before the fourth, who had been tampered with, the same result would have happened, for the Court expressly enquired into the order of the signatures?

such a procurement, the defendants demurred, and the demurrer was allowed. (*a*)

By 5 G. 2. c. 30. s. 11., every bond, bill, note, contract, agreement, or other security whatsoever, made or given by any bankrupt, or by any other person, unto or to the use of, or in trust for any creditor or creditors, or for the security of the payment of any debt or sum of money due from such bankrupt at the time of his becoming bankrupt, or any part thereof, between the time of his becoming bankrupt and such bankrupt's discharge, as a consideration, or to the intent to persuade him, her, or them to consent to or sign any allowance or certificate, shall be wholly void, and of no effect, and the monies thereby secured, or agreed to be paid, shall not be recovered or recoverable; and the party sued on such bond, &c. shall and may plead the general issue, and give this act and the special matter in evidence.

Not only, by virtue of this statute, are all these fraudulent securities made void, so that a bankrupt is not bound to fulfil or discharge them, but money paid under such an influence may be recovered back in an action for that purpose. With respect to the avoidance of securities, we have already noticed a case in which the Court of Chancery declined to relieve the bankrupt against a bond (*b*); this decision has, however, been much impugned by later opinions. Thus, where a creditor took a bond as a condition of withdrawing a petition which

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(*a*) 2 Anst. 504. *Selby* v. *Crew*, and in *Thorpe* v. *Goodall*, 17 Ves. jun. 392., it seems, that a certificate may be signed upon the bankrupt's promising to execute a power.

(*b*) *Lewis* v. *Chase*, ante, p. 61.

he had presented to the Chancellor, it was held, that the act of G. 2. distinctly applied a remedy against such a compromise; that the creditor should have pursued his complaint; and the case of *Lewis* v. *Chase* was denied, as utterly unprincipled, and directly contrary to the true construction of the act. (*a*)

Although not immediately relevant to the present subject, it may be observed, that the principle of these cases on the bankrupt acts has been extended to those fraudulent connivances by which an insolvent debtor is persuaded to give a preference to some creditor or creditors in particular, in consideration of their signing a composition deed; for the principle being, that there shall not be a fraud upon the general body of creditors, an interested signature upon such a deed must be considered as giving no right of recovering under a private agreement, both on the ground of oppression as it regards the bankrupt, and improper influence on the minds of other persons, who might join from the example of a former signature procured in effect by illegal means. These decisions, which are referred to beneath, become the more interesting, as they entirely recognise the overruling of *Lewis* v. *Chase*.

So that, whether the transactions thus condemned be carried on by a promissory note (*b*), or through the medium of private agreements of various kinds (*c*), the

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(*a*) 1 H. Bl. 647. *Sumner* v. *Brady*, and others.

(*b*) 2 T. R. 763. *Cockshott* v. *Bennett*.

(*c*) 4 T. R. 166. *Jackson* v. *Lomas*, where the principle, that the signature of an interested creditor is a fraud, if it were only because it influences, by example, the signing of subsequent creditors, was recognised by Buller J. p. 170.

insolvent person has been discharged from the operation of such negociations as tending to precipitate the settlement of his affairs in an undue manner, and, possibly, to prevent in some measure a fair distribution of his effects.

So, where a promise was given by the bankrupt's friend, that if the assignees would forbear to have certain matters enquired into before the Commissioners, he would pay such sums as the bankrupt had received and had not accounted for; it was holden, on error from the Common Pleas, that the consideration had failed, for that the promise of the assignees was not within their power to perform, since the Commissioners' right to examine the bankrupt had been left untouched, notwithstanding the collusion in favour of the plaintiffs before, and the judgment was reversed. (*a*)

But where, under a composition-deed, ten shillings and five shillings in the pound were to be paid at certain times and by certain securities, and one creditor, who had signed the deed, took bills from the debtor, accepted by his friend, for fifteen shillings in the pound, but payable at the same times as the bills in the deed of composition, it was the opinion of the Court, that here was no fraud, or want of good faith, but only an additional security; the plaintiff, in fact, had not entitled himself to receive more than the rest of his creditors. (*b*)

We have said, that the law goes further than the

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4 East, 372. *Leicester* v. *Rose.* 15 Ves. jun. 52. *Ex parte Sadler* and *Jackson*, and see 3 T. R. 551. *Jackson* v. *Duchaire.*

(*a*) 3 T. R. 17. *Nerot* v. *Wallace and others, Assignees, &c. in error.*

(*b*) 6 T. R. 146. *Feise* v. *Randall.*

mere protection of the bankrupt from these agreements, and that money thus unduly paid may be recovered back again.

Thus, Lord Mansfield had declared previous to the considerable case upon the subject, that where the bankrupt gets money from a friend or relation, by way of example, and thus induces a creditor to sign his certificate, though he renews his trade with all the advantage of the certificate, he may still bring his action for money had and received against such creditor. (*a*)

Soon afterwards, an action was brought by the bankrupt's sister against the defendant, a principal creditor, who could not be persuaded to sign her brother's certificate until he had received 40*l.*, to recover back the sum so paid; and Lord Mansfield said, that it was iniquitous and illegal in the defendant to take, and as much so to detain the money in question. The learned Lord added, that where the act itself is immoral, and both parties are equally criminal, the rule, *potior est conditio defendentis* truly applies; but that the case before him was reached by laws calculated to protect the subject against oppression and deceit; and the plaintiff had a verdict. (*b*)

Professor Christian observes, that the statute takes no notice of bonds, &c. given for the purpose of inducing parties to refuse their signatures to a certificate; and considers such engagements void, as *turpes contractus*, and he adds, that there, if the money were paid, it could not be recovered back, the plaintiff being *particeps criminis*. (*c*)

(*a*) Cowp. 792.
(*b*) Dougl. 4th ed. 695. *Smith* v. *Bromley*.
(*c*) 1 Christian B. L. 346, 347.

The stat. 24 G. 3. c. 57. s. 9. has been mentioned in a former section (*a*); it is only introduced here for the purpose of illustrating a point of evidence arising out of its provisions. As, where a bankruptcy was pleaded in bar, and the plaintiff was desirous of establishing fraud, by showing that some person had proved fictitious debts: contrary to this statute, Lord Kenyon was of opinion, that the parties who had proved those debts, however suspicious their testimony, and open to observation, ought to be called as witnesses, although even the plaintiff's counsel had doubted their competency on the ground of their being perjured one way or the other. One of these persons proved the fraud, and the plaintiff had a verdict. (*b*)

The twelfth section of 5 G. 2. c. 30., already stated in the preceding section, exempts gamesters, jobbers in the funds, and persons who have given marriage portions to a larger amount than 100*l.*, and who afterwards become bankrupts, from the benefits of the act. It has been determined, that insuring in the lottery was not within the clause; and thus, where the defendant, taken in execution, moved to be discharged by virtue of his certificate, an affidavit was produced, stating, that the bankrupt had lost 500*l.* within twelve months (*c*) before his bankruptcy, by insurances in the English and Irish lotteries, the Court made the rule absolute, saying, that this was not gaming within the statute. (*d*) A question

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(*a*) Ante, p. 60. (*b*) 3 Esp. 264. *Edmonstone* v. *Webb*.

(*c*) Qu. If the affidavit should not have said, "next before?" &c.

(*d*) 1 H. Bl. 29. *Lewis* v. *Piercy*.

was made recently, whether evidence of gaming could be given at Nisi Prius; and in a case where bankruptcy had been pleaded, and the plaintiff was preparing to rebut the discharge by evidence of this kind, it was insisted, that the twelfth section related, as to impeaching the certificate, solely to petitioning the Chancellor against its allowance. Mr. Justice Bayley reserved the point (*a*), but the Court held, that the twelfth section of the act must be considered as virtually incorporated with the seventh, and as communicating its exceptions to those contained in the seventh section. (*b*) Another objection was made, that, admitting such a transaction to be the subject of investigation in a court of law, the special matter should have been disclosed in the replication, whereas there was the similiter only; but the Court disallowed this argument: for, as they had decided that there could not be a special replication to a plea which concluded to the country, how could evidence of the fact alleged be adduced unless under the general issue? (*c*) But under that issue evidence of one act alone can be admitted; and, therefore, a plaintiff was put to his election whether he would prove one loss of 5*l.* in one day, or several losses amounting to 100*l.* (*d*) In this case the jury disbelieved the plaintiff's witness, and found for the defendant; but the Court of King's Bench granted a new trial, as the verdict was against evidence. (*e*)

(*a*) Holt, N. P. 520. *Hughes* v. *Morley.*

(*b*) 1 B. & A. 22. S. C. in banco. (*c*) Ibid.

(*d*) Holt, 521. S. C.

(*e*) 1 B. & A. 22. S. C., and see 1 B. & P. 429. *Lister* v. *Mundell.*

Lastly, it seems that the certificate may be impeached by showing, that no petitioning creditor's debt ever existed sufficient to support the commission. As, where it was proposed to prove, that the bankrupt's house had given the petitioning creditor a bill without any consideration, for the purpose of making him such, Lord Kenyon said, that, although in general the certificate only, and not the commission could be impeached, he would admit the evidence proposed. This attempt failed, but it being satisfactorily proved by other evidence, that the plaintiff had gambled largely in the funds, and had lost considerable sums on account of differences, the plaintiff had a verdict. (*a*)

Petitioning creditor's debt bad.

SECT. V.

Of the Effect of the Bankrupt's Certificate.

IF the certificate be allowed, and the bankrupt have so conducted himself as to prevent it from being impeached with success, it will produce, under the beneficial regulations of the stat. of G. 2., certain effects very favourable to the insolvent. It is proposed to consider them —

I. As they deliver the bankrupt from his debts.

II. As they operate in protection of his person.

III. As they regard his property, present, and future.

IV. As they affect his bail.

(*a*) 4 Esp. 43. *Bateson* v. *Hartsink.*

It may not be amiss, however, to dispose of one or two general questions before we enter upon the main subjects of this section. And, first, with regard to the period at which the certificate begins to be in force. Lord Hardwicke is reported to have said, that the operative force of a certificate arises from the consent of the creditors; that the reason of the Chancellor's allowance is to prevent surprise, and if made a condition, is but a condition subsequent, and that when the certificate is confirmed, it has its effect from the beginning. (*a*) But, on a case sent from Chancery while Sir Robert Henley was Lord Keeper, the Court of King's Bench held, that a legacy fallen in to the bankrupt after his creditors had signed, but before his discharge had been allowed by the Great Seal, belonged not to the bankrupt's executor, who had filed a bill in equity against the executor of the testatrix, and the assignee of the Commissioners to whom this property had been assigned for the benefit of the creditors, but that it vested in the bankrupt's assignee. (*b*) So, where a lottery-ticket, given by a creditor to the bankrupt as a mark of approbation, was drawn a considerable prize between the signature and allowance of his certificate, it was claimed and shared by the creditors at large. (*c*)

(*a*) 1 Atk. 77. in *Bromley* v. *Goodere.*

(*b*) 2 Burr. 716. *Tudway* v. *Bourne,* and see 1 Chr. B. L. 340.

(*c*) 7 T. R. 297., related by Lord Kenyon C. J., and see 1 T. R. 361. *Cullen* v. *Meyrick.* 1 B. & P. 427. *Lister* v. *Mundell,* and the observations of Professor Christian upon *Cullen* v. *Meyrick.* 1 Chr. B. L. 358. 7 Taunt. 589. *Stapleton* v. *Macbar.*

The effect of certificates obtained in Scotland or Ireland, or in a foreign country, will next be shortly considered.

The principle seems to be, that such a discharge will be effectual against a debt, if obtained where the debt is contracted, but not so, if the debt be incurred in one country, and the certificate acquired in another; and this latter question is mainly determined by the domicile of the party. (*a*) Thus, where a bill was drawn upon the plaintiff in equity at Leghorn, which he accepted, but his acceptance became vacated according to the local laws of that country, Lord King C. said, he would relieve the plaintiff under such circumstances, although the Attorney General insisted that the plaintiff should take advantage of this defence at law, and the defendant in equity was perpetually enjoined against suing on the bill. (*b*) And the extent of the discharge depends upon the law of the country where the certificate is obtained. (*c*)

So, where a bill had been drawn in Ireland, and payable by the defendant who resided there, but who obtained afterwards a bankrupt's certificate under the Great Seal of Ireland, it was moved to enter an *exoneretur* on the bail-piece; and by Lord Mansfield, "it is a general principle, that where there is a discharge by the law of one country, it will be a discharge in another."

(*a*) See 2 V. & B. 231.

(*b*) 2 Str. 733. *Burrows* v. *Jemino*, in Canc. Mosely's Rep. 169. S. C. 2 Eq. Ca. Ab. 524. S. C., and see the analogous authorities there cited.

(*c*) 1 Atk. 255. *Ex parte Burton.*

The noble Judge cited a case in Chancery of a *cessio bonorum* in Holland, which is held a discharge in that country, and said, that it had the same effect here. The counsel gave up opposition to the rule on the authority of *Burrows* v. *Jemino*. (*a*) So, where a bill was given by the defendant to the plaintiff, both being resident in America, drawn upon a person in London by the defendant, which was protested in England for non-acceptance, and the drawer afterwards became bankrupt, and obtained a certificate according to the law of the United States; the Court were perfectly clear, that the case came within the established principle upon the subject, that where the debt and certificate unite in the same country, the latter will operate as a discharge: (*b*) But if the debt arise in this country, and the certificate relied on be under the Great Seal of Ireland, the courtesy of nations ceases, and the debtor shall not evade payment by seeking protection under the laws of a foreign country. (*c*) So, where the plaintiff was resident in England, and the defendant at Hamburgh, where the latter had obtained a discharge by certificate from his debts, on a rule to show cause why an *exoneretur* should not be entered on the bail-piece, the Court refused the application, by reason of the plaintiff's domicile in England (*d*); for it must be a very clear case to induce an interference

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(*a*) Co. B. L. 464. *Ballantine* v. *Golding*. See 4 T. R. 182. *Hunter* v. *Potts*.

(*b*) 5 East, 123. *Potter* v. *Brown*.

(*c*) 2 H. Bl. 553. *Quin* v. *Keefe*. 4 B. & A. 654. *Lewis* v. *Owen*. 5 Moore, 331. *Bamfield* v. *Anderson*.

(*d*) 8 T. R. 609. *Pedder* v. *M'Master*.

in this summary way. (*a*) Again, a discharge under the law of Maryland was pleaded to assumpsit for goods sold, to which the plaintiffs replied, that the causes of action, &c. severally occurred to the plaintiffs within this kingdom of England, upon which there was a demurrer, which was allowed; and Lord Kenyon stated broadly, that the Court could not say, that a contract made in one country was to be governed by the laws of another. (*b*) And Lord Talbot's opinion, when at the bar, is cited to intimate, that a certificate here would not bar a debt contracted in the West Indies, although a commission here will reach a bankrupt's effects there. So that a suit commenced against him at Barbadoes, or the other plantations, might, under these relations, be successful. (*c*)

Yet, where a planter at Demerara shipped sugars to a mercantile house here, and drew bills for payment, and a commission afterwards issued against the firm, under which one of the members obtained his certificate, such certificate was considered to be a bar in Demerara against a suit by the planter. (*d*)

Determinations on these subjects in Scotland, have proceeded upon a similar principle, the locality of the contract. As, if a debt were payable here, or the instrument executed here, and made payable here, it would be considered an English debt, and the English certificate would be held a bar, and *vice versâ*. (*e*) So,

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(*a*) 2 H. Bl. 554. *per* Eyre C. J.
(*b*) 1 East, 6. *Smith* v. *Buchanan*.
(*c*) Co. B. L. 465. Davis, B. L. 439.
(*d*) Buck. 56. *Godwin* v. *Forbes*.
(*e*) Cullen's B. L. 398. citing *Rochead* v. *Scott*.

where the bankrupts were natives of Scotland, and traded both there and in England, and committed an act of bankruptcy in the latter country, on which a commission issued there, the Lords of Session held, that all the bankrupt's personal property in Scotland passed over to the assignees; so that the Scotch creditors could have the full benefit of the English commission, and they refused a sequestration, which is in the nature of a commission of bankruptcy, (*a*)

What debts are discharged by certificate.

By 5 G. 2. c. 30. s. 7, it is declared, with reference to the provisions of the act, that every such bankrupt shall be discharged from all debts, by him, her, or them due or owing at the time that he, she, or they did become bankrupt.

And by 46 G. 3. c. 135. s. 2., debts contracted between the act of bankruptcy and the date of the commission may be proved by *bonâ fide* creditors, provided they be unacquainted with any prior act of bankruptcy.

It has been said by Lord Hardwicke, that the privileges of creditors to come in, and bankrupts to be discharged from debts, are co-extensive and commensurate. (*b*) It seems, however, that this rule will not apply to costs due after bankruptcy, nor to debts due to the Crown. (*c*)

It is not our province here to remark upon the possible failure of nearly all general principles which refer to matters of complexity and extensive research, but it

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(*a*) 1 Rose, 462. *Royal Bank of Scotland* v. *Cuthbert.* 2 Chr. B. L. 489. 4 B. & A. 655.

(*b*) 1 Atk. 119. (*c*) See 1 Chr. B. L. 361.

may be safely asserted, that all debts proved or proveable under the commission, will be barred in this manner.

Joint and separate debts.

The 10 Ann. c. 15. s. 9. provides, that the certificate of the bankrupt shall not discharge his partner or co-obligor: but the bankrupt himself is freed from all joint and separate debts. As, where the plaintiff was a separate creditor, and had arrested the defendant, who had obtained his certificate under a joint commission, the Court discharged him on common bail, for the plaintiff might have come in under the joint commission. (*a*)

However, in conformity with the statute, it has been decided, that the signature of creditors to the certificate of surviving partners does not by any means release the estate of deceased partners. (*b*)

It is a very general rule, that whatever debts may be proved under the commission are discharged by the certificate, and the reader may, on that account, be referred with great propriety to the various treatises on bankrupt laws for information on the subject of proveable debts. (*c*) Some particular cases, nevertheless, shall be introduced here for the purpose of elucidating the general nature of this benefit.

Debts by different representatives, &c.

Thus, debts due in different rights may be avoided. As where a legacy of 50*l.* vested in an executor, who became bankrupt, it was held, that his certificate had

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(*a*) 2 Str. 995. *Howard* v. *Poole*. Id. 1157. *Wickes* v. *Strahan*. 1 Atk. 67. *Twiss* v. *Massey*. 3 P. Wms. 24. *Ex parte Yale*, cited note (a.) Cullen, 474. Co. B. L. 452.

(*b*) 1 Mer. 570. *Sleech's* case in *Devaynes* v. *Noble*.

(*c*) See Cullen, chap. iii. Cooke, chap. vi. Whitmarsh, chap. xii. Christian, *passim*.

made him a new man, and a bill filed by the legatee was dismissed. (*a*)

So debts due from the wife, *dum sola*, are barred by the husband's certificate, since they become his incumbrances upon the marriage. (*b*) So, a bankrupt cannot be sued in debt for rent accrued subsequent to the bankruptcy and commission, for the action is founded on privity of estate, and the assignment under the commission is virtually with the assent of the lessor. (*c*) But upon a distinct, detached, collateral, independent covenant and contract, the party will still remain liable; for, it is not a covenant that runs with the land, and damages arising from the breach of it cannot be proved under the commission. (*d*) For there is a distinction clearly established between debt and covenant in such cases; in the one case there is only the privity of estate, in the latter the privity of contract is obligatory; and, consequently, the bankrupt is liable in covenant for rent. (*e*) And so he is upon an agreement to pay rent during the tenancy (*f*): but all these authorities are to be read carefully with the subsequent statute 49 G. 3. c. 121. s. 19., by which it is enacted, that bankrupts entitled to leases, or agreements for leases, and delivering up the same to

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(*a*) Co. B. L. 460. *Walcot* v. *Hall*. 2 Bro. 305. S. C.

(*b*) 1 P. Wms. 249. *Miles* v. *Williams*, and see 1 Chr. B. L. 485.

(*c*) Barnes, 61. *Cantrel* v. *Graham*. 1 H. Bl. 487. n. *Wadham* v. *Marlowe*.

(*d*) 4 Burr. 2439. *Mayor* v. *Steward*, and see 1 T. R. 90. *Ludford* v. *Barber*.

(*e*) 1 H. Bl. 433. *Mills* v. *Auriol*, affirmed on error brought in K. B. 4 T. R. 94.

(*f*) 8 East, 311. *Boot* v. *Wilson*.

their assignees, shall not remain liable in respect of the rents or covenants.

It has been determined that an assignee of a lessee, having become bankrupt, is not within the protection of that statute. So that, where such a person gave a bond to indemnify the lessee generally from the effect of the lease, he was held liable notwithstanding his bankruptcy; for the act applies only to cases between a lessor and lessee, and the assignee of the lessee. (*a*)

Although we are not called upon in this place to notice every case in which instruments of various kinds may or may not be proved, it is worthy of observation, that whatever may be the state or progress of legal proceedings upon any forfeited security pending a bankruptcy or commission, the principal point for consideration is, unquestionably, the accruing of the debt. So that, where a bail-bond was forfeited for non-appearance, though judgment was not obtained for the breach till the certificate had been allowed, it was considered that the debt was at an end, for it had become due on the happening of the breach. (*b*) But a bail-bond forfeited after the bankruptcy was resolved to be a new and distinct cause of action; and as, therefore, it was not proveable, it could not be barred. (*c*)

Yet, by 46 G. 3. c. 135. s. 2., such a debt will be barred if it accrue before the date of the commission. As

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(*a*) 2 Moore, 326. *Young* v. *Taylor*. 8 Taunt. 315. S.C. 3 B. & A. 521. S. C. affirmed in error.

(*b*) Cowp. 25. *Bouteflour* v. *Coates*.

(*c*) 1 Burr. 436. *Cockerill* v. *Owston*. 2 B. & P.1. *Bamford* v. *Burrell*.

where the commission was sued out on the 19th April, on which day a bail-bond was forfeited, the defendant was discharged out of custody, and this, although the defendant in the original action had four days after the *quarto die post* to put in bail. (*a*)

Again, where an attorney employed to recover a debt, retained part of the money, and between the making of a rule absolute to refer it to the master to pay what was due, and the proceedings upon that rule, the attorney became a bankrupt, the Court were clearly of opinion that his certificate barred the demand. (*b*) So, where a defendant, sued on a bail-bond which he had given in an action of debt against himself, became a bankrupt between plea and verdict, and obtained his certificate after judgment, a rule for restoring a sum of money paid by him under a writ of *ca. sa.* was made absolute; Dallas C. J. saying, that *Bonteflour* v. *Coates* was directly in point. (*c*) It was observed by Burrough J. in the last case, that had the action been trover, the result might have been different; which brings us to the distinction between tort and other actions in this respect. For this latter action, not being founded on a contract, and sounding generally in uncertain damages, may be frequently brought where the same cause of action, if sued for in assumpsit, would be barred by the certificate. (*d*) It is not asserted, that a claim, capable of being sustained in trover can never be proved under the commission; for, if it be positive and

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(*a*) 2 B. & C. 626. *Coulson* v. *Hammon.*
(*b*) Co. B. L. 452. *Bird* v. *Jones.*
(*c*) 2 B. & B. 8. *Dinsdale* v. *Eames.* 4 Moore, 350. S. C.
(*d*) See Dougl. 167. *Johnson* v. *Spiller.*

liquidated, doubtless, it may (*a*); but that where there has been a contract, on the breach of which a tort has arisen, a plaintiff may waive the tort and proceed on the contract; in doing which, however, he will be barred by the defendant's certificate. (*b*) And it has been determined, that bankruptcy will not bar an action of trover, although the conversion happen afterwards, for it is founded upon a tort. (*c*) It was, indeed, held on one occasion, where the defendant moved to be discharged from damages and costs given against him in an action of slander, that there was no distinction between a tort and a contract, upon such an emergency where a judgment follows the verdict; and the defendant was discharged upon his application. (*d*) But this case was overruled upon an issue from the Lord Chancellor to the Court of King's Bench, when it appeared, that a trader had committed an act of bankruptcy between verdict and judgment in a case of breach of promise of marriage, when the Judges declared by their certificate, that a demand of this kind was not a good petitioning creditor's debt; intimating, of course, that such a debt would not be avoided by a certificate. (*e*)

Lord Eldon had expressed a disapprobation of the decision in *Longford* v. *Ellis* previously to the statement of the last case. (*f*) And thus it is in an action of tres-

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(*a*) Dougl. 168. *per* Buller J.

(*b*) Id. 167. *Johnson* v. *Spiller.*

(*c*) 6 T. R. 695. *Parker* v. *Norton,* and see 12 East, 605. *Forster* v. *Surtees.*

(*d*) 1 H. Bl. 29. n. *Longford* v. *Ellis.* 14 East, 202. n. (a.)

(*e*) 14 East, 197. *Ex parte Charles.*

(*f*) 11 Ves. jun. 646. *Ex parte Hill.*

pass for mesne profits; for, by Lord Mansfield, "the form of the action is decisive." The plaintiff goes for the whole damages occasioned by the tort, and when damages are uncertain, they cannot be proved under a commission of bankruptcy. (*a*)

But the judgment, even in an action of tort, is a debt contracted. So, that where the plaintiff signed final judgment in an action of trespass after the act of bankruptcy, but before the issuing of the commission, it was held a proveable debt, and the defendant was discharged. (*b*)

Unliquidated damages.

And every description of unliquidated damage will survive the certificate. Thus, a promise to pay so much *per* week for the maintenance of an illegitimate child is not satisfied by a bankruptcy, for an aggregate value could not have been fixed under the commission in respect of a sum promised under such circumstances, and which was in its nature uncertain. (*c*) So, where there was a breach of covenant, no penalty being annexed, the Court had no doubt that a plea of bankruptcy could not be supported. (*d*)

And thus it was, where the defendants had covenanted with the plaintiffs, commissioners of the navy, that they had a good title to a ship which they conveyed to the plaintiffs, and afterwards became bankrupts; whereas the plaintiffs had been obliged to pay the proceeds of the sale of that ship to other persons, being the true owners, the Court held, that the certificate was no bar:

(*a*) Dougl. 584. *Goodtitle* v. *North.*
(*b*) 2 B. & C. 762. *Robinson* v. *Vale.*
(*c*) 1 Campb 428. *Millen* v. *Whittenbury.*
(*d*) 6 T. R. 489. *Banister* v. *Scott.*

for, although the cause of action might have arisen before the bankruptcy, the plaintiffs were not obliged to go before the Commissioners for the ascertaining of their damages; they might wait, as indeed they had done, for the verdict of the jury, and the stat. of G. 2. only respected such debts as might be reduced to certainty. (*a*)

By parity of reason, contingent debts will remain as a charge against the bankrupt. The obligor bound himself and his representatives to pay within two months after his decease a certain sum to one M. L. Before his death he became a bankrupt, and was certificated, on which, debt on bond was brought against his executors, and judgment was given for the plaintiff. (*b*) So, where one became bail for another, and paid the debt and costs ten months after an act of bankruptcy by the party bailed, the Court considered, that this debt could by no means have been proved, for it was uncertain and contingent whether the plaintiff would ultimately suffer any damage. (*c*) So, where a bastardy-bond became forfeited, and the obligor afterwards was a certificated bankrupt, the Court of King's Bench sustained the overseers' claim to recover expences subsequent to the bankruptcy, for here was a contingent debt totally incapable of valuation, and, therefore, not proveable; and the

(*a*) 7 T. R. 612. *Hamond* Bart. v. *Toulmin.*

(*b*) 2 Str. 867. *Tully* v. *Sparkes.* 2 Ld. Raym. 1546. S. C. Id. 1048. *Hockley* v. *Merry.* Id. 1160. *Crookshank* v. *Thompson.* 4 Burr. 2444.

(*c*) 3 Wils. 262. *Goddard* v. *Vanderheyden,* 2 Sir Wm. Bl. 794. S. C. Id. 346. *Young* v. *Hockley.* Dougl. 160. *Alsop* v. *Price.*

authority of *Shutt* v. *Procter* in C. P. (*a*) was somewhat impugned. (*b*) But an overseer of the poor, who held a sum of money in his hands belonging to the parish at the time of his bankruptcy, was considered as free from this charge by his certificate, although the year of his office had not expired, before which time he could not be compelled to account, because it was *debitum in præsenti, solvendum in futuro*, and it seems that any of the parishioners might have proved. The rule for a habeas corpus to discharge him out of custody from Devon County Gaol, whither he had been sent by the justices for not accounting, was made absolute upon his verifying his account and undertaking not to bring any action. (*c*)

Equitable debts.

It was once urged, that the 5 G. 2. relates to legal debts only; but in that case, where a bankrupt had been attached for a contempt in not paying a sum of money pursuant to the order of a Court of Equity, he was discharged on his application, having obtained his certificate. (*d*)

And it has been resolved, that an attachment for non-performance of an award will not prevent a bankrupt's discharge after his certificate, for debt will lie for such

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(*a*) 2 Marsh, 226. Where on payment of the penalty and costs, that Court stayed proceedings in an action on a bastardy-bond. See 6 T. R. 303. *Wilde* v. *Clarkson*. 6 East, 110. *Cole* v. *Gower*.

(*b*) 1 B. & A. 491. *The Overseers of St. Martin-in-the-Fields* v. *Warren*.

(*c*) 5 M. & S. 508. *Rex* v. *Tucker*.

(*d*) 2 Rose, 196. *Wall* v. *Atkinson*.

a demand, and, therefore, it is avoided according to the statute. (*a*)

Where the costs of an action can be ascertained, as in cases where final judgment has been signed, they relate back to the bankruptcy; or since 46 G. 3., to the issuing of the commission, and may be proved. To such costs, therefore, the certificate will be a bar. And the principle seems to be, that costs should not be proved in any case whatever, unless they are taxed, and judgment has been signed before the bankruptcy. (*b*) And the old authorities which seem at variance with this position, and the opinion expressed conformably to it by Lord Eldon, have been greatly shaken by subsequent decisions. So that, whether it be a claim to be discharged from interest and costs generally (*c*), or costs arising upon a nonsuit at Nisi Prius (*d*), if the judgment be not signed before the suing out of the commission, it will not now be safe for a bankrupt to contest their effect against him, notwithstanding his certificate. Indeed, it had been holden before these decisions, that costs in Costs.

(*a*) 2 Str. 1152. *James Baker's* case, and see Cowp. 136. *Rex* v. *Stokes*.

(*b*) *Per* Lord Eldon in *Ex parte Hill*. 11 Ves. jun. 646. See 1 G. & J. 385. *Ex parte Poucher*.

(*c*) Cowp. 188. *Blandford* v. *Foote*. 2 Sir Wm. Bl. 1317. *Aylett* v. *Harford*. 1 H. Bl. 29. n. *Longford* v. *Ellis*. 2 T. R. 161. *Gulliver* v. *Drinkwater*. 1 H. Bl. 29. *Lewis* v. *Piercy*. 2 New. Rep. 190. *Willett* v. *Pringle*. 1 G. & J. 385. *Ex parte Poucher*.

(*d*) 5 T. R. 365. *Hurst* v. *Mead*. 1 B. & P. 134. *Watts* v. *Hart*, and see 2 Str. 1196. *Graham* v. *Benton*. 5 Taunt. 183. *Brind* v. *Bacon*. Barnes, 368. *Palmby* v. *Masters*. Co. B. L. 467.

ejectment, where the defendant had become a bankrupt before the judgment, could not be proved; for that costs were connected with the judgment, and did not become a debt until it had been signed. (*a*) And in *Ex parte Hill*, Lord Eldon considerably shook the decisions above referred to, observing, that the authority of Lord Henley had not been adverted to in recent determinations, and he refused to allow costs of this nature to be proved. (*b*)

Then came the great case of *Ex parte Charles*, where a trader, between verdict and judgment, had committed an act of bankruptcy; on which the debt so recovered was held not to be a good petitioning creditor's debt. (*c*) And this latter decision has received the sanction of Westminster Hall, and has been acted upon ever since. As, in an action for damages where judgment was signed after the act of bankruptcy and issuing of the commission. (*d*) So, where the plaintiff became bankrupt before the signing of final judgment. (*e*)

But the decision in *Ex parte Charles* left untouched the doctrine that costs shall bear relation to the original debt. (*f*) Therefore, where the plaintiff revived a judgment, originally recovered by *scire facias*, and the de-

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(*a*) By Lord Henley, *Ex parte Todd*, cited 2 Wils. 270. *Walter* v. *Sherlock*, ibid.

(*b*) 11 Ves. jun. 646. 2 B. & P. 191. n. (a.) S.C., and see Co. B. L. 211. *Ex parte Sneaps.*

(*c*) 14 East, 197.

(*d*) 2 M. & S. 70. *Buss* v. *Gilbert.*

(*e*) 1 Marsh, 346. *Walker* v. *Barnes.* 5 Taunt. 778. S.C., and see 2 B. & B. 8. *Dinsdale* v. *Eames.*

(*f*) 3 M. & S. 327. *per* Lord Ellenborough C. J.

fendant had become bankrupt, it was resolved, that the costs of *scire facias* related back to the original judgment, and that the bankrupt was delivered from the burthen of those costs by his certificate, there having been an ascertained debt in existence to which such costs might be referred. (*a*) So, costs incurred by a writ of error brought after a bankruptcy to recover a judgment against a bankrupt before, are equally barred. (*b*) So, where the plaintiff sued the defendant for a debt, soon after which a commission issued against the defendant, the plaintiffs went on to judgment, and then the defendant obtained his certificate, and brought a writ of error on the judgment, which was *nonprossed* for want of assignment of errors; it was held, that as there was a prior debt to which these costs could be attached, the bankrupt was discharged from them. (*c*) And again, where a second commission, the first being superseded, was sued out on the 7th of August, 1821, against a party who had been a plaintiff against the Commissioners of Bankrupts in an action for an alleged wrongful imprisonment, previous to which, in July, 1821, the defendants, the Commissioners, had entered up judgment, the Court held the debt clearly proveable, and made a rule absolute for the bankrupt's discharge from execution in respect of these costs. (*d*) But a bankrupt executor, who pleads a false plea after the commission issued, is liable to costs, and for this reason; he becomes a debtor

(*a*) 6 T. R. 282. *Philips* v. *Brown.*
(*b*) Ibid.
(*c*) 3 M. & S. 326. *Scott* v. *Ambrose.*
(*d*) 1 Bing. 189. *Holding* v. *Impey.* 7 Moore, 614. S. C.

by such plea, and is thus considered to have contracted a new debt under the commission. (*a*)

Bankrupt when discharged from debts paid for him by a surety.

By the law as it originally stood, if a surety paid the debt of his principal before bankruptcy he could come in under the commission, but if afterwards, his remedy still lay over against the bankrupt. (*b*) And it made no difference that the surety had been called upon for payment under such circumstances before the bankruptcy. (*c*) But it was enacted by 49 G. 3. c. 121. s. 8., that in all cases of commissions of bankrupt already issued, under which no dividend has yet been made, or under which the creditors who have not proved can receive a dividend equally in proportion to their respective debts, without disturbing any dividend already made; and in all cases of commissions of bankrupt hereafter to be issued, where at the time of issuing the commission any person shall be surety for, or be liable for any debt of the bankrupt, it shall be lawful for such surety or person liable, if they shall have paid the debt, or any part thereof in discharge of the whole debt, although he may have paid the same after the commission shall have issued, and the creditor shall have proved his debt under the commission, to stand in the place of the creditor as to the dividends upon such proof; and when the creditor shall not have proved under the commission, it shall be lawful for

(*a*) 3 Burr. 1368. *Howard* v. *Jemmet*. 1 Sir Wm. Bl. 400. S. C.

(*b*) Cro. Jac. 127. *Osborn* v. *Churchman*, and the authorities there cited. Cowp. 525. *Taylor* v. *Mills*. 2 T.R. 640. *Martin* v. *Court*, and see 2 T.R. 100. *Toussaint* v. *Martinnant*.

(*c*) 1 T.R. 599. *Paul* v. *Jones*.

such surety or person liable to prove his demand in respect of such payment, as a debt under the commission, not disturbing the former dividends, and to receive a dividend or dividends proportionably with the other creditors taking the benefit of such commission, notwithstanding such person may have become surety or liable for the debt of the bankrupt after an act of bankruptcy had been committed by such bankrupt, provided that person had not at the time when he became such surety, or when he so became liable for the debt of such bankrupt, notice of any act of bankruptcy by such bankrupt committed, or that he was insolvent, or had stopped payment; provided always, that the issuing of a commission of bankrupt, although such commission shall afterwards be superseded, shall be deemed such notice; and every person against whom any such commission of bankrupt has been or shall be awarded, and who has obtained or shall obtain his certificate, shall be discharged of all demands, at the suit of every such person having so paid, or being hereby enabled to prove as aforesaid, or to stand in the place of such creditor as aforesaid, with regard to his debt in respect of such suretyship or liability, in like manner, to all intents and purposes, as if such person had been a creditor before the bankruptcy of the bankrupt for the whole of the debt in respect of which he was surety, or was so liable as aforesaid.

This statute contemplated equitable as well as legal debts; and, therefore, solvent partners, who had paid a bill in quality of surety for their co-partner who became a bankrupt, were considered competent to prove under the commission, and his certificate was held to bar

their debt. (*a*) If the suretyship be continued by the plaintiff's accepting a second bill in regard of the same debt, although a commission be superseded previous to the second acceptance, yet if a second effectual commission ensue, the continuation of such suretyship will occasion an avoidance of the debt under this statute. (*b*)

It has been determined, that the value of an annuity is not a debt within the meaning of the eighth section of the act of parliament. Therefore, where a surety was compelled by the annuity-creditor to pay arrears due after the commission issued, it was holden, that he might sue the principal, and hold him to bail. (*c*)

So, where a surety had redeemed an annuity subsequently to the bankruptcy, the same position, that this was not a debt within the eighth section, was sustained in the Court of King's Bench, and afterwards, on error brought, in the Exchequer Chamber. (*d*) And this principle, that a debt must be due at the issuing of the commission, is entirely recognized. So that, where the plaintiff had been a surety for the payment of rent, but no arrears had become due when the commission was sued out, the Court held, that the eighth section distinctly referred to existing debts, and that the case of *Welsh* v.

(*a*) 2 M. & S. 195. *Wood* v. *Dodgson.*

(*b*) 13 East, 427. *Stedman* v. *Martinnant.*

(*c*) 4 M. & S. 333. *Welsh* v. *Welsh.*

(*d*) 3 B. & A. 186. *Flanagan* v. *Watkins.* 1 Bing, 413. S. C. in error. 1 G. & J. 199. S. C. & S. P. confirmed; and see the observations of Bayley J. 2 M. & S. 553. in *Page* v. *Bussell.*

Welsh was an authority to be relied on. (*a*) The payment of part alluded to in the statute, must be in discharge of the whole debt. And so, where the plaintiff paid 500*l.*, parcel of a much larger sum, as part of such sum, to relieve himself from his personal liability, the Court said, that the section applied only to cases in which a surety has paid the whole debt, or a part in discharge of the whole. (*b*) However, if any act of suretyship be completed when the commission issues, the certificate will operate. As where the plaintiff had accepted an accommodation-bill for the defendants, who afterwards became bankrupts, and there was no counter bill by way of security; the plaintiff paid the bill after the bankruptcy, and sued the defendants in assumpsit: the Court resolved, that here was a payment by a person after the commission, in respect of a debt for which he had rendered himself liable before; the damages were no longer unliquidated, but rendered certain by the payment; and as they were consequently proveable under the commission, judgment was given for the defendants. (*c*)

So, where a subdistributor of stamps became bankrupt, and his surety paid a sum of money to compromise a *scire facias* brought against him upon his bond, the Court held, on an action by such surety, that a debt had been created by the payment so made as much as in

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(*a*) 2 Moore, 644. *M'Dougal* v. *Paton*. 8 Taunt. 584. S. C.

(*b*) 5 B. & A. 852. *Soutten* v. *Soutten*.

(*c*) 2 Moore, 602. *Vansandau* v. *Corsbie*. 8 Taunt. 550. S. C. S. C. affirmed in error. 3 B. & A. 13.

a contract for goods sold, &c.; and that it might have been proved under the defendant's commission. (*a*)

A surety who pays a debt after proof by the creditor under the commission, has been allowed to stand in the place of the creditor for the debt paid, not only in respect of the dividends, but also of the certificate. (*b*)

Debts arising after bankruptcy.

Of course, debts which arise after a bankruptcy and commission, are not barred by a certificate, for they are not proveable. (*c*)

Debts not payable at the time of bankruptcy.

The 7 G. 1. c. 31. s. 1. provided, that persons taking bills, bonds, &c. payable at a future day, for goods to such as became bankrupt, should be admitted to prove their bills, &c. and be entitled to a proportionate share of the bankrupt's estate, on the condition of discounting *5 per cent.* on their receipts.

But, it being holden, that this statute was confined to written securities, in a case where school-money, not due till the end of the half-year, was sued for and recovered, the defendant, the parent, having become bankrupt just before the end of the half-year (*d*); the ninth section of 49 G. 3. c. 121. declared, that all debts whatever, not payable at the time of the bankruptcy, should be proved,

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(*a*) 5 B. & A. 12. *Westcott* v. *Hodges.*

(*b*) 1 G. & J. 330. *Ex parte Gee and another.*

(*c*) See 1 H. Bl. 640. *Brookes* v. *Rogers.* 7 T. R. 364. *Snaith* v. *Gale.* Id. 565. *Cowley* v. *Dunlop.* 2 B & P. 1. *Bamford* v. *Burrell.* 1 East, 20. *Wright* v. *Hunter.* 5 B. & A. 250. *Jameson* v. *Campbell.* S. C. affirmed in error. 1 Bing. 320. Id. 281. *Brix* v. *Braham.*

(*d*) 4 East, 438. *Parslowe* v. *Dearlove.* See 2 P. Wms. 396. *Ex parte of the East India Company.*

deducting 5 *per cent.* rebate of interest in England, and 6 *per cent.* in Ireland.

Debts due to the Crown.

The statutes of bankrupt not being binding on the crown, a bankrupt's certificate will not bar the King's debt. (*a*) But he may prove under the commission, and it is said to be the common practice for the officers of the crown to do so. (*b*)

Cognovit.

A cognovit is not discharged by this remedy, for it is mere acknowledgment of the amount of damages, and the plaintiff may in such a case sign judgment at any time, and the Court said, on a discussion of this kind, that it was not like a warrant of attorney. (*c*)

So it was where a party became bankrupt before a verdict in trespass for mesne profits. (*d*)

It was proposed to excommunicate a party for non-compliance with a monition to pay tithes, against which he urged, that he had become a bankrupt, and had obtained his certificate since the tithes were due; but Sir Wm. Scott inclined to think, that the debt might have been proved under the commission, especially as the clergyman had stated the number of acres, the estate depastured, and the grain sown, and as he might have had the answers of the debtor; and the learned Judge declined to decree the excommunication. (*e*)

(*a*) Bunb. 202. *Rex* v. *Pixley*. 1 Atk. 262. *Anon.*

(*b*) 1 Chr. B. L. 361.

(*c*) 2 Taunt. 68. *Wyborne* v. *Ross.*

(*d*) Wightw. 10. *Muggridge* v. *Davis.*

(*e*) 1 Hagg. Con. Rep. 470. *Braithwaite* v. *Hollingshead.* Whether it is a discharge from *a capias utlagatum* on mesne process? Q. And see 3 Taunt. 141. *Beauchamp* v. *Tomkins.*

Effect of the certificate on the bankrupt's person and effects.

The certificate has the effect of discharging the person and effects of the bankrupt against all creditors under the first commission; but if a second should be sued out, his future effects are made liable by 5 G. 2. c. 30. s. 9., unless his estate be capable of paying 15*s.* in the pound under such second commission. And by the same section, if a party compound with his creditors, and be released by them, and a commission of bankruptcy then issue against him, he is equally constrained as to his future effects, unless he pay 15*s.* in the pound, though free as to his person. But it must be a compounding with all the creditors. And, therefore, where an insolvent compounded with some joint-creditors, but not with his separate creditors, the Court thought, that the compositions contemplated by the act were not limited, but general; such as would admit of creditors of every description, and, consequently, that the certificate in such a case protected future effects. (*a*) And the distinction was decidedly acted upon in a subsequent case, where the party had, as far as was in his power, propounded a general and equal satisfaction to all his creditors; on that occasion, therefore, the certificate of course did not operate. (*b*)

And it makes no difference that the first commission had been superseded by consent; for supposing that the bankrupt has compounded, the act says, that he shall still be liable; a *supersedeas*, therefore, ought not to place him in a better condition. (*c*) So, if the creditor has

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(*a*) 15 East, 619. *Norton* v. *Shakespeare.*
(*b*) 1 M. & S. 182. *Slaughter* v *Cheyne.*
(*c*) Dougl. 46. *Thornton* v. *Dallas.*

signed the certificate, the bankrupt will, nevertheless, be still amenable. (*a*) The proof of such payment of 15*s.* has been held to lie on the defendant, and evidence that it will probably produce so much will not be sufficient. (*b*) But it is incumbent on the plaintiff to aver that 15*s.* in the pound have not been paid, and a writ of *scire facias* was quashed for this defect. (*c*)

However, by 49 G. 3. c. 149. s. 14. it was enacted, that the proving or claiming a debt under the commission, should be deemed an election on the part of the creditor not to proceed against the bankrupt in respect of such debt.

Therefore, the proving of a debt against a person who had compounded with his creditors, was considered an election, importing that the creditor had renounced his other rights. (*d*)

And, the plaintiff, in order to deprive a defendant of a benefit of a certificate, upon which defendant has not paid 15*s.* in the pound under a second commission, may produce the proceedings under the commission, and show the defendant's submission to them, without more. (*e*)

Relieving bail after the certificate.

The last enquiry incident to this section is the method of relieving bail, and the principle adhered to on this subject is, that if the bail are fixed before the certificate no assistance will be afforded them. And the distinc-

(*a*) 5 T. R. 287. *Philpott* v. *Corden.* See 7 East, 154. *Hovil* v. *Browning.*

(*b*) 1 B. & P. 467. *Jelfs* v. *Ballard.* 3 B. & P. 185. *Edmonson* v. *Parker.* 16 East, 225. *Coverley* v. *Morley.*

(*c*) 7 T. R. 27. *Gill* v. *Scrivens.*

(*d*) 3 M. & S. 78. *Read* v. *Sowerby.*

(*e*) 5 T. R. 655. *Haviland* v. *Cook.*

tion was adopted by Lord Mansfield and Mr. Just. Foster, in a case where the bail had been fixed in July, and the certificate obtained in August. (*a*)

In all cases where the defendant may be discharged out of custody, the bail are entitled to relief according to the practice of the Court of King's Bench. So that where a bankrupt obtained his certificate before the trial, but neglected to plead it *puis darrein continuance*, the Court made the rule for entering an exoneretur on the bail-piece absolute. (*b*)

In the Common Pleas, it seems, that the bankrupt's omissions will be visited upon the bail. So that, where the defendant obtained his certificate, but suffered the plaintiff to sign judgment as for want of a plea, a very strong expression was manifested by the Court against the bail, since it is their duty to watch the proceedings, and they were only let in upon terms to try the right in the original action in an issue. (*c*)

This case, however, has never been acted upon in the King's Bench. (*d*) It has been considered sufficient that the certificate was obtained before the rising of the Court on the day when the second *scire facias* against the bail was returnable, and an exoneretur was entered under these circumstances on payment of costs. (*e*)

(*a*) 1 Burr. 244. *Woolley* v. *Cobbe*. 2 Sir Wm. Bl. 812. *Walker* v. *Giblett*. 8 East, 433. *Shakespeare* v. *Phillips*, and see 1 B. & P. 450. n. *Beddome* v. *Holbrooke*. 6 Taunt. 329. *Howes* v. *Mott*. 2 Marsh, 37. S. C.

(*b*) 3 B. & C. 222. *Todd* v. *Maxfield*.

(*c*) 3 Taunt. 46. *Clarke* v. *Hoppe*.

(*d*) 3 B. & C. 224. *Per curiam*.

(*e*) 1 B. & C. 247. *Johnson* v. *Lindsay*, and see 14 East, 599. *Mannin* v. *Partridge*.

But if they become fixed between the time of the signature by the creditors and commissioners and the allowance of the certificate by the Lord Chancellor, no relief will be extended. (*a*)

Where the bail make a late application to the Court, they will be relieved only on payment of costs, as where the principal obtained his certificate between the return of the *ca. sa.* and the delivery of the first *scire facias* to the sheriff. (*b*) The Court, however, will not direct an issue to try the fact of the bankrupt being a trader, the certificate being made sufficient evidence of the trading by 5 G. 2. c. 30. (*c*)

If the bail are ignorant of any negociation between the plaintiff and their principal, the Court will not suffer them to be damnified. So that, where the bail signed an agreement to continue liable, the fact of their principal being ready to surrender being kept from them, after which the bankrupt obtained his certificate, and then the plaintiff commenced proceedings against the bail, it was held, that the latter were discharged. (*d*)

The bankruptcy of the principal has been held an improper plea on behalf of the bail in the Common Pleas, for the relief is by a more summary course, and the bankrupt is not to be compelled to avail himself of his own remedy. (*e*)

(*a*) 7 Taunt. 589. *Stapleton* v. *Mocbar.*

(*b*) 14 East, 599. *Mannin* v. *Partridge.* 1 B. & A. 332. *Harmer* v. *Hagger.* 8 Taunt. 28. *Thackeray* v. *Turner.*

(*c*) 1 B. & A. 332. *Harmer* v. *Hagger.*

(*d*) 1 Bing. 164. *West* v. *Ashdown.* 7 Moore, 566. S. C.

(*e*) 2 B. & P. 45. *Donnelly* v. *Dunn,* and see 1 B. & P. 450. *per* Buller J., and id. 450. n. *per* Buller J., in *Beddome* v. *Holbrooke.*

But bail in error are not discharged by any proceedings; and the reason is, because of their inability to surrender their principal. (*a*) And thus it is, that if the defendant in error take the plaintiff in error in execution for the debt and damages, he does not thereby discharge the bail in error. (*b*)

SECT. VI.

How the Bankrupt should avail himself of his Certificate.

1. By Motion. 2. By Plea.

BY the seventh section of 5 G. 2. c. 30. it was provided, that any bankrupt who should be arrested after the allowance of his certificate for a debt due before he became bankrupt, should be discharged upon common bail. And by s. 13., if any bankrupt be taken in execution or detained in prison after the allowance and confirmation of his certificate, for any such debt so due, by reason that judgment has been obtained before the allowance and confirmation of his certificate, he shall be discharged by one or more Judges of the Court wherein such judgment has been obtained, on production of his certificate. And by 49 G. 3. c. 121, any debt previous to the issuing of the commission comes within the provisions of 5 G. 2.

(*a*) 1 T. R. 624. *Southcote* v. *Braithwaite.*
(*b*) 2 B. & P. 440. *Perkins* v. *Pettit.*

There is no difficulty for an honest insolvent to avail himself of these enactments in his favour (*a*); but if there be affidavits positively stating that the certificate has been obtained by fraud, as by allowing the proof of fictitious debts under the commission, the Court will not discharge the party, but will leave him to plead his certificate. (*b*) So, where upon a summary application for cancelling the bail-bond, and entering an exoneretur, an affidavit was produced, affirming that the validity of the certificate was the point intended to be contested on the trial, the Court discharged the rule, observing, that where the certificate was disputed, they could not interfere in a summary way. (*c*) Again, where the bankrupt had described himself as of a place where he had never lived, and the plaintiff had never heard of the commission until after the commencement of his action, the Court refused to relieve the defendant. (*d*) And there must be time given occasionally in order to see whether the certificate has been fairly obtained. (*e*) No application of this kind by an uncertificated bankrupt under a second commission will be successful, because such commission is not valid: and for the same reason, an exoneretur on the bail-piece was refused under like circumstances, for

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(*a*) See 1 Wils. 41. *Graham* v. *Benton.* Barnes, 368. *Palmby* v. *Masters.*

(*b*) 2 H. Bl. 1. *Vincent* v. *Brady.*

(*c*) 1 B. & P. 427. *Lister* v. *Mundell.* 2 B. & P. 390. *Stacey* v. *Federici.*

(*d*) 2 Sir Wm. Bl. 725. *Sowley* v. *Jones.*

(*e*) 1 Buck. 5. *Newers* v. *Colman.*

the bail ought not to be in a better situation than their principal. (*a*)

Formerly, if the bankrupt obtained his certificate pending an action to which he had given bail, the course was, for the bail to surrender him, and that he should then apply for his discharge; but the recent practice has been, to enter an exoneretur on the bail-piece, in the first instance, for the purpose of avoiding circuity. (*b*)

It was also holden on former occasions, that the clause of this statute extended to the protection of the bankrupt's person only, and that a Judge could not, upon motion, relieve him in case of an execution against his goods, taken out before, but executed after the allowance of his certificate, and that he must be left to his *audita querela*. (*c*) But in a later case, Eyre C. J. expressed his unwillingness to compel a bankrupt to incur the expence of an *audita querela*, and said, that if the matter in his favour were clear, they would relieve him from the operation of a *scire facias* against his goods, which had been executed after his certificate allowed. (*d*)

Where a defendant applied to be discharged from a debt contracted in this country, on the ground of his bankruptcy and certificate in Ireland, the Court put him to plead (*e*), and we have seen that such a plea would not be available. (*f*)

(*a*) Cowp. 825. *Martin* v. *O'Hara*. (*b*) Ibid.

(*c*) Barnes, 204. *Calcraft* v. *Swan*. Id. 206. *Ashdown* v. *Fisher*. 1 T. R. 361. *Callen* v. *Meyrick*.

(*d*) 1 B. & P. 427. *Lister* v. *Mundell*.

(*e*) 2 H. Bl. 553. *Quin* v. *Keefe*. 5 Moore, 331. *Bamfield* v. *Anderson*. 2 Ch. Rep. 55. *Earlier* v. *Languishe*, where the debt was contracted, and the bankruptcy and discharge happened in Bremen. (*f*) Ante, sect. 5.

And so, where a like application was made on behalf of an insolvent trader in Newfoundland, who had obtained his certificate under 49 G. 3. c. 121. s. 8., it was refused on the ground, that the certificate should have been pleaded. (*a*)

By plea.

The second mode by which a bankrupt is enabled to disclose to the Court a matter of this kind, is by pleading the certificate. And he can only avail himself of such a defence by plea, for where it was proposed to give evidence of bankruptcy under the general issue, Lord Ellenborough pointed out the unfairness of suddenly starting a bankruptcy upon a plaintiff, and said, that here was moreover a matter of special discharge, which ought certainly to have been put on the record. (*b*)

The statute of 5 G. 2. c. 30. s. 7., enables the bankrupt to plead in general that the cause of action accrued before he became bankrupt, and to give the act and special matter in evidence. It is, therefore, sufficient to follow the provision of the act without alleging that the defendant had conformed himself to the bankrupt acts, and it was so held, in a plea stating the certificate, and that the cause of action arose before the party became bankrupt. (*c*)

This case overturned *Paris* v. *Salkeld* (*d*), where a plea of bankruptcy *puis darrein continuance* was resolved by the Chief Justice Pratt, and Bathurst Justice, to be bad for want of the allegation of conformity. But where

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(*a*) 1 B. & B. 13. *Philpotts* v. *Reed.*

(*b*) 1 Campb. 363. *Gowland* v. *Warren.*

(*c*) Co. B. L. 480. *Willan* v. *Geordini*, and see 1 P. Wms. 249. *Miles* v. *Williams.*

(*d*) 2 Wils. 139. *Paris* v. *Salkeld.*

it was pleaded to an action of covenant that the said indenture in the said declaration was made before such time as the said defendant so became a bankrupt without alleging, that the cause of action arose before the bankruptcy, the Court said, that such a plea was bad at common law, and not warranted by the statute, which prescribes a particular form of plea. As, however, there was a plea, averring generally that the cause of action arose before the bankruptcy, they were of opinion, that under such a plea the defendant might make out his defence at the trial. The special demurrer on the other plea was allowed. (*a*)

And the plea must be according to the truth; so that, if it state a debt upon a promissory note made before, but not due until after the bankruptcy, to have been due at the time of the act of bankruptcy, it cannot be supported. (*b*) It is not necessary to assert, that the bankruptcy happened before the commencement of the suit; it is sufficient to pursue the words of the statute, and all the rest will be matter of evidence. If, indeed, it should appear at Nisi Prius, by looking at the memorandum of the record, and the certificate given in evidence, that the defence did not arise till after the action brought, it would be holden, that the certificate would not be applicable to such a plea, but this investigation must take place at Nisi Prius. A demurrer, therefore, alleging this omission for cause, was disallowed. (*c*)

But where the defendant became a bankrupt on the 12th of June, and on the 5th of September the plaintiff

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(*a*) 4 T. R. 156. *Charlton* v. *King*.
(*b*) Cowp. 544. *Trueman* v. *Fenton*.
(*c*) 6 East, 413. *Tower* v. *Cameron*.

exhibited his bill, upon which, on the 7th of the following October the defendant obtained his certificate, and pleaded his bankruptcy on the 21st of November; to wit, that before the exhibiting of the plaintiff's bill, the defendant became a bankrupt, and that the cause of action accrued before his bankruptcy; it was holden, that the certificate was evidence to support this general plea in bar. (*a*)

The necessity of pleading this discharge is not confined to the 5 G. 2.; for under 49 G. 3. c. 121. s. 8. which extends the relief to *bona fide* debts contracted before the commission, it has been holden first in the Common Pleas, and in the King's Bench subsequently, that the defendant could not avail himself of his certificate under the general issue. (*b*) But the usual form of pleading under 5 G. 2. will meet the enactments of 49 G. 3. c. 121. So that where the defendant pleaded in the ordinary way, that the cause of action accrued before his bankruptcy; but the costs of defending actions, for which the defendant was sued, were not incurred until afterwards, it was objected, that as the defendant meant to rely on a particular statute applicable to cases arising after the bankruptcy, it would be incongruous for him to plead a cause of action arising before; but the Court were of opinion, that as the 49 G. 3. c. 121. placed persons who proved before the commission issued in the same situation as though they had been creditors before the bankruptcy, it was obvious, that the bankrupt ought to have the same benefit of a precise form of pleading. (*c*)

(*a*) 9 East, 82. *Harris* v. *James*.
(*b*) 12 East, 664. *Stedman* v. *Martinnant*.
(*c*) 5 B. & A. 12. *Westcott* v. *Hodges*.

Time.

The Court will give every facility to the operation of a certificate. Where, therefore, a regular judgment had been signed, a rule for setting it aside, founded on an affidavit of merits, which stated, that the defendant meant to plead his bankruptcy, was made absolute on payment of costs; and the Court declared, that in cases of fair bankruptcy they would always help the insolvent. (*a*) So the bankrupt will be permitted to avail himself of this defence by a plea *puis darrein continuance* (*b*); but the Court will always satisfy themselves upon these occasions, that the certificate, if so pleaded, would be a bar to the action, for, otherwise, leave will not be given. (*c*)

But where a verdict was found against a bankrupt through a neglect on his part to produce the certificate, the creditors could not be restrained by injunction from proceeding on the verdict. (*d*)

And care will be taken that a plaintiff is not unduly prejudiced. As where a declaration was delivered in Michaelmas Term, 1818, in Hilary following the defendant pleaded the general issue, and in February filed a bill in the Exchequer for a discovery, notice of trial having been previously given; whereupon an injunction issued. In April a commission was issued against him, and in July he obtained his certificate; upon which he instructed his attorney to put in his plea of certificate *puis darrein continuance*, which, nevertheless, was not

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(*a*) 1 B. & P. 52. *Evans* v. *Gill*, *Stafford* v. *Roundtree*. 24 G. 3. *contra*. Montagu, B. L. 348.

(*b*) Tidd. 878. *Capper* v. *Stewart*.

(*c*) 5 B. & A. 852. *Soutten* v. *Soutten*.

(*d*) 1 Rose, 460. *Lingard* v. *Mather*.

done in consequence of his counsel advising that it would have the effect of dissolving the injunction, or amount to a waiver. In Easter Term 1820, a rule *nisi* was obtained for pleading this certificate *nunc pro tunc*, as of Michaelmas Term 1819. But the Court, while they assented to make the rule absolute, would not allow the plaintiff to be injured, who, but for the bill in equity, would have obtained judgment in Easter Term 1819. They, therefore, imposed the terms of the defendant's dismissing his bill in equity, and paying all costs at law and in equity, as between attorney and client. (*a*) A distinction is observable with respect to pleading between the bail and their principal; the former can only be relieved on motion, the latter, in most cases, should have recourse to a plea. And, thus, it has been holden, that the general plea applies only to the bankrupt himself, and, that, however probable it may be that the Court will relieve the bail on motion, the certificate of their principal cannot, on their behalf, be made a legal defence. (*b*)

The plea of certificate is available, although used much more rarely, in the Court of Chancery. Thus, where a party had his election of two remedies at law, assumpsit or tort, and chose to come into equity, upon which the defendants pleaded their certificate, it was contended that the plaintiff had waived his remedy as for a tort; and the Vice Chancellor said, that the bill which prayed for an account was analogous to the remedy at law for money had and received, and that it must be considered

(*a*) 3 B. & A. 577. *Duff* v. *Campbell.*

(*b*) 2 Sir Wm. Bl. 812. *Walker* v. *Giblet.* 1 B. & P. 450. n. *Beddome* v. *Holbrook.* 2 B. & P. 45. *Donnelly* v. *Dunn.*

to have been brought in lieu of that action, consequently that the certificate was a bar. (*a*)

There is a difference between the practice of the King's Bench and Common Pleas regarding the signature of this plea by counsel. In the King's Bench it was urged, that it had always been considered as a special plea, and, as such, was filed with the clerk of the papers; but the rule for setting aside a judgment which had been signed in such a case for want of the signature of counsel, was made absolute. (*b*) In the Common Pleas, the Court referred to the officers, and decided, that a plea not signed by a serjeant might be treated as a nullity. (*c*)

SECT. VII.

Of the Evidence requisite to support a Certificate, and herein of the Bankrupt's Competency to become a Witness.

By analogy to the rules of evidence in general, the production of the certificate itself, being the best possible proof, is advisable in all cases where it can be so brought forward. If this cannot be done, as, for example, where the certificate is in the possession of an adverse party, secondary evidence will of necessity be admitted. (*d*)

(*a*) 3 Maddock, 51. *De Tastet* v. *Sharpe and others.*

(*b*) 6 T. R. 496. *Leigh* q. t. v. *Monteiro.* 1 Chit. Rep. 225.

(*c*) 3 B. & P. 171. *Pitcher* v. *Martin.*

(*d*) Phil. on Ev. 4th ed., vol. i. p. 233. and see 1 Esp. 165.

As, where the plaintiff's case was, that the defendant, after having been discharged under 5 G. 2. c. 30., had not paid 15*s.* in the pound under the second commission, and he showed by the solicitor to the former commission and his agent in town, that the defendant had employed them to solicit his certificate, which they had no doubt was allowed by the Lord Chancellor. Notice having been given to the defendant to produce the document, Lord Ellenborough said, he would presume that it came to the defendant's possession, and he thought, that abundant secondary evidence of the allowance of such certificate had been then adduced, on which the plaintiff had a verdict. (*a*) But a book kept in the office of the secretary of bankrupts, containing an account of the allowance of certificates, which might be consulted by the public, but was never seen or referred to by the Lord Chancellor, was rejected as inadmissible, although had the Lord Chancellor referred to, and acted upon it, it would have been adjudged otherwise. (*b*) So, where it was proposed, on a similar occasion, to show that the defendant had submitted to the former commission, and to put in as evidence his affidavit of conformity, Lord Ellenborough said, that here might be good secondary evidence, if a sufficient foundation were laid for admitting it, but notwithstanding the affidavit of conformity *non constat* that the certificate was allowed, and the plaintiff was nonsuited. (*c*)

It is no objection to an instrument of this kind at Nisi Prius, that the party has obtained his discharge under a

(*a*) 3 Campb. 499. *Henry* v. *Leigh.* (*b*) Ibid.
(*c*) 4 Campb. 282. *Graham* v. *Grill.*

wrong name; for, where a bankrupt sued under the name of Elizee, put in a certificate granted to one V. T., the Chief Justice (*a*) said, that such a matter might be sufficient to procure a supersedeas of the commission before the Lord Chancellor, but that he was bound to give it effect whilst it remained in force. Some proof, however, was required by the learned Judge of the identity of this bankrupt, which he was unable to prove, and so the plaintiff had a verdict. (*b*)

It has been established as a rule of law, that where an objection to the competency of a witness arises from his answer to a question on the *voir dire*, he may do away such objection in the same way, and show himself a competent witness by parol. So that, where a witness called to prove the petitioning creditor's debt, was asked whether he were not a creditor under the commission, to which he answered in the affirmative, but said, that he had since that time become a bankrupt, and obtained his certificate, Lord Kenyon considered his testimony admissible; but added, that had the fact appeared in evidence in any other manner, the objection must have been answered by the best evidence, namely, by producing the certificate. (*c*)

Certificated bankrupt when a witness.

A party who has obtained his certificate, although discharged from his debts, is yet mainly interested in the surplus; he may, indeed, come forward for the purpose of diminishing his own fund, but if his testimony will in any way conduce to an increase of the residue,

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(*a*) Lord Ellenborough.
(*b*) 3 Campb. 256. *Stevens* v. *Elizee.*
(*c*) 1 Esp. 164. *Botham* v. *Swingler.*

he will not be a competent witness unless he release such surplus. Therefore a bankrupt cannot be called as a witness to support the commission, either with regard to the petitioning creditor's debt, the trading, or his own act of bankruptcy; and no release can make the bankrupt a witness to prove his own act of bankruptcy. (*a*) To allow testimony of this kind in support of the petitioning creditor's debt, would, in effect, be supporting the commission, and as it is for the benefit of the bankrupt that it should be in force, he is deeply interested; and, therefore, by no means a competent witness, although he may prove matters incidental to the commission. (*b*) But a certificated bankrupt, who has released the surplus of his estate, may prove the hand-writing of the Commissioners for the purpose of identifying the proceedings under the commission; for the 49 G. 3. c. 121. s. 10. has provided that the proceedings of the Commissioners shall be received as evidence of the petitioning creditor's debt, the trading, and bankruptcy, unless notice to dispute such matters be given; and the validity of the commission does not depend upon this signature, but upon the facts contained in the depositions to which the signature is subscribed; and the principle to be gathered from the cases in Henry Blackstone is, that the bankrupt was considered interested lest proceedings should be had to supersede the commission; in which case the certificate would become inoperative,

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(*a*) 2 Str. 829. *Field* v. *Curtis.*

(*b*) 2 H. Bl. 279. n. *Cross* v. *Fox.* Ibid. n. *Flower* v. *Herbert.* Ibid. *Chapman* v. *Gardner.*

and the old debts revive against the bankrupt. (*a*) However, if the defendant calls the bankrupt, all objection to his competency is removed, and the plaintiff may cross-examine him as to any of the facts above-mentioned as excluded. (*b*) It was, indeed, once allowed by Lord Kenyon at Nisi Prius, to call a bankrupt for the purpose of explaining a doubtful act of bankruptcy, and the learned Judge there said, that however true it might be that a bankrupt could not prove his own act of bankruptcy, the converse had never been established, that he might not disprove it, by explaining an equivocal act. (*c*) But in a subsequent case, Lord Ellenborough refused to allow an explanation under such circumstances; saying, that to permit such evidence would be to take the sting out of the transaction which is to constitute the act of bankruptcy, and that he could not suffer that to be defeated. (*d*)

The bankrupt's evidence may, however, be received in collateral matters, if he execute a proper release, and he may certainly be examined where his testimony will have a tendency to diminish his resources. For, in this latter case he may not only defeat his title to the benefit which the law allows him, if the fund be of a certain amount, but he hazards, being uncertificated, the displeasure of all his other creditors. (*e*) Where a bank-

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(*a*) 2 B. & C. 14. *Morgan* v. *Pryor.*

(*b*) Bull, N. P. 38. *Assignees of Gill* v. *Woodmess.*

(*c*) 1 Esp. 287. *Oxlade* v. *Perchard.*

(*d*) 5 Esp. 22. *Hoffman* v. *Pitt.*

(*e*) Cowp. 70. *Langden* v. *Walker*, cited. Ib. *Butler* v. *Cooke*, and see Bull, N. P. 43. *Evans* v. *Gold.*

rupt was lately called to prove that certain proceedings were proceedings under the commission against him, and it was objected, although he was certificated, and had released the surplus, that he would be thus establishing his own bankruptcy, Abbott C. J. admitted the proof tendered. (*a*) But if a second commission issue against a man, and he do not pay 15*s.* in the pound, he is an incompetent witness for his assignees; for though under a prior commission his interest ceases after he has released his allowance and surplus, yet, here there is a further bias, for he is swearing to increase his estate, and so to discharge his future effects, which remain liable under the second commission in default of his paying 15*s.* in the pound. (*b*)

So, an uncertificated bankrupt was held incompetent to prove an usurious contract with one of his creditors in an action for penalties against the defendant, his assignee, who had proved the debt under the commission; for, notwithstanding a proffered release of the allowance and surplus, the defendant might still, before the certificate, arrest his debtor, and sue him at law. (*c*) Nevertheless, if a bankrupt have received his allowance he may be called, and his testimony will be admissible, because he is not bound to refund. (*d*)

Debt was brought upon 9 Ann. c. 14. by the bankrupt's assignee to recover money lost at play, and the bankrupt himself was tendered as a witness under the shelter of three releases, one from the bankrupt to the assignee of

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(*a*) 3 Stark. 58. *Morgan* v. *Price.*
(*b*) Peake, N. P. 3. *Kennet* v. *Greenhollers.*
(*c*) 2 T. R. 496. *Masters* q. t. v. *Drayton.*
(*d*) 1 Brown, 269. *Russel* v *Russel.*

all surplus and allowance; the next from the creditors, including the petitioning creditor, to the bankrupt; and a third from the assignee to the bankrupt, the said assignee not being a creditor. The bankrupt had obtained his certificate. It was objected, that the witness could not be examined, for that it did not appear whether all the creditors had signed the release, and moreover, that these instruments destroyed the plaintiff's right of action; but Abbott C. J. received the evidence, and on a case stated for the opinion of the Court above, the ruling of the Lord Chief Justice was confirmed; for, first, as a year had elapsed between the issuing of the commission and the date of the creditor's release, it must have been presumed, as no creditor applied during that time to be let in to prove, that all had signed; and, secondly, the fair and true construction of the release was, that it did not relate to things before effectually assigned, but to such things as might thereafter come to the bankrupt; and the postea was delivered to the plaintiff. (*a*)

Assumpsit was brought for money lent, &c. against two defendants; the one pleaded, that he did not undertake, &c., the other, his bankruptcy and certificate, on which there was a *nol. pros.* as to him. It appeared, that these persons had been in partnership, which was dissolved on the 14th July, 1821, and that an accommodation bill, the subject of the action, and drawn in the names of both defendants, had been accepted by the plaintiff on the 16th of that month. It was proposed to call the bankrupt defendant as a witness, to show that the bill had been accepted on his behalf only; against

(*a*) 1 B. & C. 444. *Carter* v. *Abbott.*

which it was objected, that here were joint debtors, and, consequently, that the debt was not barred by the certificate; but the Chief Justice (*a*) considered the bankrupt as a surety within 49 G. 3. c. 121. s. 8., for the partnership had been dissolved, and so, that the suretyship-debt might have been proved under the commission, and the defendant obtained a verdict on the admission of the disputed testimony, which was sustained on application to the Court above. (*b*)

SECT. VIII.

When the Certificate is rendered of no Avail by a new Promise on the Part of the Bankrupt.

THE emancipation of a bankrupt from his debts by virtue of a certificate, however consonant to the feelings of humanity, is yet a measure of great public policy, as it compels an equal distribution of an insolvent's effects amongst his creditors, and while it exonerates the unfortunate person, the burthen of loss is sustained alike by each suffering creditor. The benefit thus imparted is to be considered, therefore, in a general and enlarged sense; so, that while the legal responsibility of the bankrupt is removed, the conscientious obligation which he lies under of discharging his debts remains, and thus the

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(*a*) Sir Charles Abbott.

(*b*) 2 B. & C. 558. *Moody* v. *King and Porter.*

principle is introduced which recognises a subsequent promise by such a person to pay an ancient debt as valid and effectual, notwithstanding his certificate. (*a*) Thus, where the defendant incurred a debt just before his bankruptcy, and gave acceptances for the amount, which were cancelled on condition of his giving a security for 67*l.* in satisfaction of the whole debt, it was holden, on an action brought upon the promissory note given as such security, that the old debt had been revived, and that it thus formed a sufficient consideration for an assumpsit. (*b*)

It has been said by Lord Hardwicke, that if a bankrupt applies to an old creditor, after a discharge by certificate, to lend him a new sum of money to carry on his trade, or to become a security for any office, it might be a good consideration for a bond to secure the remainder of the old debt, and that such old creditor ought to be admitted a creditor for the whole debt under the second commission; though, added the learned Lord, "I will not be bound down by this opinion." (*c*) With these expressions Professor Christian has declared himself dissatisfied, observing, that the statute of James (*d*) intended that no specialty, judgment, &c. should be admitted for more than a rateable part of the just debt, without respect to the greater sum contained in it, and

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(*a*) This promise by the 131st section of 6 G. 4. c. 16., the new act, must be in writing, many cases having occurred in which very equivocal promises had been brought forward for the consideration of juries.

(*b*) Cowp. 544. *Trueman* v. *Fenton.*

(*c*) 1 Atk. 255. *Ex parte Burton.*

(*d*) 21 Jac. 1. c. 19. s. 9.

that it can neither be honest nor conscientious for a bankrupt to deprive a second class of creditors of their debts in favour of the first, who would probably be his relations or particular friends. (*a*) And the common form of declaring will be sufficient. As where an objection was taken on account for goods sold and delivered, that the new promise should have been specially stated, Lord Kenyon assimilated the case to a replication on the statute of limitations of a new promise generally, which had been always held sufficient; and the plaintiff had a verdict. (*b*)

Again, in an action on bond, it seems, that payment of interest by the bankrupt after his bankruptcy, and now, at this day, after the issuing of the commission, will revive the debt. Lord Mansfield said, in a case of this kind, that if the interest had not been paid by the bankrupt, for there was a doubt whether one of his sureties had not made the payment, there was no question, but that if he had so acted, it would be an admission on his part that the principal was then due, and he might be liable as on a new contract. Affidavits were directed by the Court, stating by whom the interest was paid, but the case was not mentioned again. (*c*)

It is essential that the promise should be unequivocal

(*a*) 1 Chr. B.L. 365.

(*b*) Peake, N. P. C. 3d ed. 99. *Williams* v. *Dyde.* Acc. *Russell* v. *Hardman.* Ibid. cited.

(*c*) Dougl. 192. *Alsop* v. *Brown.* See 1 T. R. 715. *Birch* v. *Sharland.* 4 Burr. 2482. *Vigers* v. *Aldrich.* 1 T. R. 557. *Jaques* v. *Withy.* Montagu, B. L. 363., and the authorities there cited.

and positive in its terms (*a*); for where the plaintiff was giving general declarations in evidence by the defendant that he would pay every body, and that his effects would pay 20*s.* in the pound, but omitted to show any specific promise, Lord Ellenborough expressed himself in decided terms against the plaintiff, and a juror was withdrawn. (*b*)

Again, the defendant promised to pay an antecedent debt by two instalments, but this proposal was not acceded to, and upon application he said, that he had indeed agreed to pay 15*l.* in satisfaction of the debt, but that as he had obtained his certificate, he would not pay that sum unless compelled by law. Lord Ellenborough left it to the jury to determine whether there had been a distinct unequivocal promise to pay, for if there had been a conditional promise only, the defendant could not become liable until the condition had been performed. The jury found for the defendant. (*c*)

Where the bankrupt promised to pay when he should be able, Lord Loughborough held the promise absolute, and the benefit of the certificate waived, although it was objected, that the defendant's ability to pay ought to have been proved; but on a rule nisi for a new trial, Gould, and Heath Justices, thought that the objection should have prevailed, though Lord Loughborough retained his former opinion, and the rule was made absolute. (*d*)

Where a party declared that he could not pay at the time of the demand, but that his friends were about to

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(*a*) It must now be in writing.
(*b*) 5 Esp. 198. *Lynbury* v. *Weightman.*
(*c*) 1 Stark. 370. *Fleming* v. *Hayne.*
(*d*) 2 H. Bl. 116. *Besford* v. *Saunders.*

do something for him, and that he would pay by instalments, it was holden, that sufficient evidence of a new promise had not been shown. (*a*)

If the plaintiff venture upon any act so inconsistent with the new promise on which he brings his action, as to show that he has proposed another remedy for himself, a waiver of the agreement will be presumed. For instance, it was agreed, that in consideration of the plaintiff not proving his debt under the commission, the defendant should pay him 18*s.* in the pound, &c.; but the witness who came forward to prove the treaty, admitted on his cross-examination, that the plaintiff had petitioned the Great Seal against the allowance of the defendant's certificate. Lord Kenyon held, that the agreement had been vacated by this act of the plaintiff, who had defeated his remedy by an act totally inconsistent with it, and that he should be construed to have abandoned it. (*b*)

On the question of a bankrupt's arrest upon a new promise after his certificate, there have certainly been conflicting authorities; the better opinion, however, seems to be, that a party is entitled to be discharged under such circumstances. Thus, where the defendant had promised to pay the plaintiff his debt when he should be able, he was discharged on common bail. (*c*) So,

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(*a*) 4 Taunt. 613. *Markland* v. *St. George.*

(*b*) 1 Esp. 282. *Colls* v. *Lovell.*

(*c*) 2 Burr. 736. *Bailey* v. *Dillon*, and see 2 Str. 1234. *Turner* v. *Schomberg.* But the clear distinction in this last case is, that the Court considered the debt sued for as an old debt, and not founded on any new consideration; whereas,

where the defendant had been discharged under an insolvent act, and then made a positive promise to pay the debt from which he had been discharged, the rule for liberating him upon common bail was made absolute (*a*); and a case of *Best* and *Barber* was cited by the Court, in which the distinction between applications to discharge the person, and the goods of the bankrupt, was strongly adverted to and established. (*b*) And, on a recent occasion, a certificated bankrupt was delivered from custody on filing common bail, although he had made a promise to pay a pre-existing debt, the Court saying, that the case of *Wilson* v. *Kemp* was rightly decided, and that the words of the statute (*c*) were very strong. (*d*) Nevertheless, where, in the Common Pleas, the defendant applied for his discharge from arrest on the ground of his having been emancipated under an insolvent act, Gibbs C. J. thought that the plaintiff had taken the case out of the operation of the act, by showing that his cause of action arose on a promise made by the defendant since his discharge under that act, and the rule was discharged. (*e*) And, in the Exchequer, the decision of the Court of Common Pleas was sanctioned shortly

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in the first, the promise came after the bankruptcy, though the debt was prior to it.

(*a*) 3 M. & S. 595. *Wilson* v. *Kemp*. (*b*) Id. 597.

(*c*) 5 G. 2. c. 30. s. 7. "and in case any such bankrupt shall afterwards be arrested, prosecuted, or impleaded, for any debt due before such time as he, she, or they became bankrupt, such bankrupt shall be discharged upon common bail." (*d*) 1 B. & C. 116. *Peers* v. *Godderer*.

(*e*) 6 Taunt. 563. *Horton* v. *Moggridge*.

afterwards, when it was decided, that a bankrupt might be holden to bail on a subsequent promise.

And this resolution took place in consequence of two MSS. cases in the King's Bench, furnished by Mr. Justice Burrough, in one of which it had been holden justifiable to arrest a bankrupt under such circumstances; and in the other, a motion to set aside an execution against the goods of an insolvent debtor after the delivery of a note by the debtor for payment of part, had been refused. (*a*) The Court of Exchequer, in the case before them, had taken time to consider, being at first much inclined to make the rule for cancelling the defendant's bail-bond absolute on the authorities of *Bailey* v. *Dillon* and *Wilson* v. *Kemp*. (*b*)

(*a*) 8 Price, 531. *Drew* v. *Jefferies*. Id. 533. *Best* v. *Barber*.

(*b*) 8 Price, 526. *Blackburn* v. *Ogle*. True it is, that the applications in *Wilson* v. *Kemp*, and *Horton* v. *Muggridge*, were under insolvent debtor's acts; but as the words of discharge are the same, "from all debts," &c. the statutes must be taken to be *in pari materiâ*, and the respective decisions of the Courts to be therefore irreconcileable.

SECT. IX.

Of the new Bankrupt Act as it respects Certificates.

By 6 G. 4. c. 16. s. 122. it is enacted, that the certificate shall be signed by four fifths in number and value of the creditors of the bankrupt, who shall have proved debts under the commission to the amount of 20*l.* or upwards; or after six calendar months from the last examination of the bankrupt, then either by three fifths in number and value of such creditors, or by nine tenths in number of such creditors, who shall thereby testify their consent to the said bankrupt's discharge as aforesaid. The section goes on to prescribe, that the Commissioners should certify the conformity of the bankrupt, and the full discovery of his estate and effects, and that there appears no doubt of the truth or fulness of such discovery, and also the signature of the creditors. The bankrupt's oath that the certificate has been obtained without fraud is next ordained; and, finally, the allowance by the Lord Chancellor, and licence for the creditors to be heard before him against the allowance.

Here the 49 G. 3. is altered from the number of three fifths to the original measure of creditors; but the most material change is the return to three fifths after six months, and the reference to nine tenths, without regard to the value of their debts. The remainder of the clauses are in accordance with the old provisions.

By s. 123. in all cases where any petition for the allowance of a certificate shall have been presented to the Lord Chancellor previous to the passing this act, by virtue of

the 5 G. 4. c. 98. by any bankrupt whose certificate shall have been signed by the requisite number of creditors, with the exception of one, whose signature is thereto necessary, and by the Commissioners, the Lord Chancellor may allow such a certificate, which shall be a valid discharge, provided the petition be duly served as required by the said act of 5 G. 4.

By s. 124., before the Commissioners shall sign any certificate, they must have proof, by affidavit in writing, of the creditor's signature, or of the person authorized to sign, and of the authority so given; which authority, if the creditor reside abroad, must be attested by a notary public, British minister, or consul, and every such affidavit, authority, and attestation shall be laid before the Lord Chancellor with the certificate, previous to its allowance. These arrangements are derived from acts which were already in force, and are to be found in 5 G. 2. c. 30. s. 10., and 24 G. 2. c. 57. s. 10.

The 125th section declares, that all contracts entered into as considerations for the signature of certificates shall be void, and that the parties sued thereon may plead the general issue, and give the special matter in evidence. This enactment had also been existing since 5 G. 2.

The effect of the remedy is next stated in s. 126. The bankrupt who has obtained his certificate is emancipated from arrest, and ordered to be discharged on common bail, in respect of any action against him for a debt proveable under the commission: he may plead the general issue, and give this certificate in evidence as special matter for his discharge; and if taken in execution where judgment has been obtained before the allowance of his certificate, he shall be discharged on the produc-

tion of such certificate. This section is composed from the 5 G. 2. c. 30. s. 13., and 46 G. 3. c. 135. s. 2. The punishment of insolvents for various indiscretions follows in the 130th section.

This differs in many respects from the ancient exceptions to the benefit of which we are speaking. The fact of giving 100*l.* in marriage with a daughter is now no longer criminal, and the sums to be lost in gambling to exclude the bankrupt are much increased. Thus it is enacted, that a party shall have neither his certificate nor allowance who has lost 20*l.* in one day, or 200*l.* by gaming and wagering within the year next preceding his bankruptcy, or 200*l.* by stock-jobbing within the same time; or who shall, after an act of bankruptcy committed, or in contemplation of bankruptcy, have destroyed, altered, mutilated, or falsified, or caused to be destroyed, &c. any of his books, papers, writings, or securities; or made or been privy to the making of any false or fraudulent entries of any book of account or other document, with intent to defraud his creditors; or shall have concealed property to the value of 10*l.* or upwards; or who being privy to the proving of any false debt under the commission shall not disclose the same to his assignees within one month after such knowledge.

The same provisions enacted in the old statutes, with respect to commissions after a compounding with creditors on a second commission, are preserved in the 127th section, which declares, that, if any one has become a bankrupt, has compounded, or taken the benefit of the insolvent act, his future effects shall vest in the assignees, unless he have paid 15*s.* in the pound, although he be certificated.

By s. 131. (adverting to the much canvassed subject of

reviving debts) a bankrupt is relieved entirely from every debt under a present or future commission, unless he make his promise in writing to pay such debt after the suing forth of the commission.

Lastly, the 105th section has a reference to cases where the assignee of a bankrupt becomes a bankrupt, retaining effects of the bankrupt to whom he is assignee. The new enactment has this difference from 49 G. 3. c. 121. s. 6., that he becomes liable to the extent of such debts, as assignee, which are not paid by dividends under his commission, let his debt to the original bankrupt be what it may, instead of the limitation to 100*l.* prescribed by the latter statute. Thus, if any assignee, indebted to the estate of which he is such assignee, in respect of money so retained or employed by him, become bankrupt, if he shall obtain his certificate, it shall only have the effect of freeing his person from arrest and imprisonment; but his future effects (his tools of trade, necessary household goods, and the necessary wearing apparel of himself, his wife and children, excepted,) shall remain liable for so much of his debts to the estate of which he was assignee as shall not be paid by dividends under his commission, together with lawful interest for the whole debt. (*a*)

(*a*) The 5 G. 4. being repealed has not been particularly referred to in this chapter, although many of its provisions were new, and were incorporated in 6 G. 4. c. 16.

CHAP. III.

OF JUDICIAL CERTIFICATES.

THE principal certificates which form the subject of our present inquiry are those relative to costs, which are granted by Judges in pursuance of various acts of parliament. Many others, however, are occasionally employed; such, for instance, as protect persons who have prosecuted a burglar to conviction from the burthens of parish and ward offices, reports of matters which have happened at the trial of causes, certified opinions on tax appeals, &c. It is proposed to treat in the following sections of those which have been, or are likely to be, open to legal discussion.

SECT. I.

Of Certificates touching Costs.

Origin of these certificates.

IT is a fact well established in our legal history, that no costs were allowed as a matter of right at common law either to a plaintiff or defendant; and it is equally well known, that to prevent the inconveniencies which resulted from the incompetency of juries to calculate the

amount of costs which they were wont to give as parcel of the damages, and from the change which took place in the reign of Edw. I. respecting the assessment of costs, the statute of Gloucester was framed. (*a*) The plaintiff, by this act of the legislature, became entitled to costs in all cases where damages were recoverable by the common law; and as the statute was very liberally expounded in his favour, a multitude of trifling suits were prosecuted at Westminster, which were properly the subjects of an inferior jurisdiction, either for the sake of better counsel, or through a spirit of vexatious litigation. (*b*) And as the smallest damages conferred this benefit on the party suing, it was judged expedient to restrain this abundance of petty actions, and to confine them, if possible, to county courts, whose jurisdiction would be thus upheld, while the expence of suitors might at the same time be much diminished. It was therefore provided by 43 El. c. 6. that, except in actions for the recovery of real property or interests which might be acquired therein, and for batteries, there should be no more costs than damages, if the Judge certified that the damages were under 40*s*. There seems, however, to have been a judicial reluctance to act upon this statute; and the exception in favour of batteries operated, it should seem, to produce an increase of such suits, so that it became necessary in the reign of Charles II. to pass another act (*c*), which, according

43 El. c. 6.

(*a*) See Gilb. C. P. p. 266. Hullock on Costs, vol. i. p. 2.

(*b*) See Gilb. C.P. p. 262. 265. Gilb. Eq. Rep. 196. Sayer on Costs, p. 18.

(*c*) 22 & 23 Car. 2. c. 9.

22 & 23 Car. 2. c. 9.

to its present construction, deprives a plaintiff of costs in all actions of assault, battery, and local trespasses, where the freehold or title to land is not in question, unless the Judge certifies that an assault and battery has been proved, or that such title to land was principally a subject of discussion at the trial.

A serious evil of a contrary nature now arose. Disorderly persons, rightly presuming that a jury would give 40*s.* damages for trifling acts of trespass, were accustomed wilfully to invade the lands and property of their neighbours, and sheltered themselves under the severity of this act of Charles. In consequence of this,

8 & 9 W. 3. c. 11.

another certificate was introduced by 8 & 9 W. 3. c. 11. s. 4. Under this act, if the Judge certifies on the back of the record that the trespass was wilful and malicious, full costs of suit are awarded to the plaintiff.

4 Ann. c. 16. s. 4.

A fourth certificate was given by the act of Queen Anne (*a*), which enables a defendant to plead several matters; by virtue of that, where a defendant succeeds on one of his special pleas, it is in the power of the Judge to say whether he had a probable cause for his pleadings, and thus give him the costs of them, which are otherwise in the discretion of the Court. (*b*)

Other certificates.

There are a few other judicial certificates relating to costs; such, for example, as relieve the officers of the revenue, &c. from costs under particular circumstances, defendants from the expence of special juries, unless the Judge certifies that the cause was of sufficient importance to require such a trial; of these, and of the rest, we shall treat in their order.

(*a*) 4 Ann. c. 16. s. 4.

(*b*) Hullock's Costs, vol. i. pp. 105, 106.

Before, however, we enter upon this enquiry, it may not be amiss to notice shortly some general matters respecting these instruments.

Certificate paramount to arbitrator's award.

It may be observed, that they are of pre-eminent authority, and that no other analogous writing can have the same effect. Therefore, where under an arbitration damages to the amount of 5*s.* were awarded to the plaintiff for an assault, and there had been a previous direction that the costs should abide the event, the Court held, that the event of a suit meant the legal event, and that the arbitrator was justified in his silence as to the costs, his finding not being tantamount to a Judge's certificate under 22 & 23 Car. 2. c. 9. (*a*) In a subsequent case, where there was an award in an action of trespass of 10*s.* damages, and costs against the defendant, it was attempted to distinguish the last decision, as the arbitrator had declared the trespass wilful, and had directed the payment of costs. But the Court determined, that the order in this case was not a sufficient substitute for a certificate under 8 & 9 W. 3., and they refused a rule to tax full costs for the plaintiff. (*b*)

Amendment of record by the insertion of Judge's certificate.

A case occurred under the mutiny act, in which an amendment was allowed on the record by the insertion of the Judge's certificate for treble costs, the defendant having obtained a verdict. Application was made to the Court of Common Pleas, in the first instance; but as no notice had been taken of the special matter or certificate, and the motion was for leave to strike out from "treble

(*a*) 3 T. R. 138. *Swinglehurst* v. *Altham*.

(*b*) 5 East, 489. *Ward* v. *Mallinder*. 2 Smith, 63. S. C. Hullock on Costs, vol. ii. p. 427. and see 5 Taunt. 595.

costs" the word "treble," Gibbs C. J. observed, that all the allegation which should appear on the record was omitted; that the error was not merely a superfluity by the insertion of the word "treble," but a substantial defect which could not be supplied. (*a*) But, pending a writ of error in Parliament, in which, amongst other matters, this omission was assigned for error, the Court of King's Bench was moved to allow the amendment of the record by the insertion of the Chief Justice's certificate; and Scarlett, in support of the rule, said, that the application would not probably have been resisted in the Common Pleas had it been made in its present form. The rule was made absolute. (*b*)

If a statute contains no mention of a certificate, the Judge is not empowered to make such an instrument; and, therefore, where double costs had been taxed under 11 G. 2. c. 19. s. 21. in favour of a party distraining, it was moved, that the prothonotary should review his taxation, there being no certificate; but the Court, without hearing counsel against the rule, discharged it, observing, that neither a certificate, nor a suggestion on the record, was necessary in this case. (*c*)

It may be convenient to consider the effect of these certificates, and the time for requiring them, under the head which is appropriated to each.

(*a*) 5 Taunt. 820. *Dunbar* v. *Hitchcock.* 1 Marsh, 382. S. C.

(*b*) 3 M. & S. 591. *Dunbar* v. *Hitchcock.*

(*c*) 1 Taunt. 210. *Finlay* v. *Seaton.*

Of the Certificate under 43 El. c. 6. s. 2.

By 43 El. c. 6. s. 2. it is enacted, that "if upon any action personal to be brought in any of Her Majesty's Courts at Westminster, not being for any title or interest of lands, nor concerning the freehold or inheritance of any lands, nor for any battery, it shall appear to the Judges for the same Court, and be so signified or set down by the Justices before whom the same shall be tried, that the debt or damages to be recovered therein in the same Court shall not amount to the sum of 40*s.* or above; that in every such case, the Judge and Justices, before whom any such action shall be pursued, shall not award for costs to the party plaintiff any greater or more costs than the sum of the debt or damages so recovered shall amount unto, but less at their discretions."

This act was made to endure to the end of the first session of the next parliament, continued by 3 Car. 1. c. 4. and 16 Car. 1. c. 4. The second clause was extended to the principality of Wales and the counties palatine by 11 & 12 W. 3. c. 9. 43 El. c. 6.

It is said, that no certificate was granted for upwards of a hundred years after the passing of this statute; and as a reason for this forbearance, Mr. Justice Burnett has alleged the incapacity of inferior jurisdictions, and the unwillingness of Judges to deprive a plaintiff of his costs, who, by coming into Westminster Hall, showed a desire to avail himself of superior information. (*a*)

(*a*) 3 Wils. 329., and see Gilb. Eq. Rep. 195. Hullock's Costs, vol. i. p. 20.

Nevertheless, a different feeling was entertained in the reign of George II. and since that time there have been many certificates, and many legal discussions on the operation of the act. It may be observed here, that the 22 & 23 Car. 2. c. 9. had come into play much before that of 43 El., and that one probable occasion for the revival of the old statute might be the alteration which the construction of the statute of Charles underwent, being confined to actions of assault and battery, and local trespasses in which the freehold might by possibility come in question. And as a confirmation of this, we find, that the old act, although not brought into operation, was noticed soon after the new restrictions were imposed. (*a*)

At length, in an action for taking sand upon Hounslow Heath, the damages being under 40*s.*, Willes C. J. certified on the 43d of Eliz., and the Court held, that the plaintiff was not entitled to more costs than damages. (*b*) After the lapse of a year the opinion of the Court of King's Bench was required upon the validity of the act; for it was there said in argument, that the subsequent statute of Charles had effected a repeal of the other. The action was trespass for taking a cart-rope, and the question at issue related to the right of taking certain tolls. The damages for the plaintiff were assessed at 1*s.* 6*d.*, and the Judge certified. On a motion for full costs on the plaintiff's behalf, it was said by a very able Judge (*c*), that although he thought the case before the

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(*a*) 2 Mod. 141. 1 Freem. 214.

(*b*) In C. B. Pasch. 17 G. 2. *White* v. *Smith*, cited 2 Str. 1232. 1 Wils. 94. Hullock on Costs, vol. i. p. 21. Tidd, vol. ii. p. 965. 7th ed.

(*c*) Sir Thomas Denison.

Court very proper for the jurisdiction of a superior Court, being for prescription and right to tolls, yet that the 43 El. was certainly in force, and that, as there was a certificate, he could not see how they could adjudge against an act of parliament, and the rule was discharged. (*a*)

An ingenious argument was presented to the Court some time afterwards, whether the cases of certificate on this statute were not necessarily confined to suits which an inferior Court could entertain, and a refusal by Mr. J. Buller to grant a certificate was urged in support of this doctrine (*b*); but the Court were very clear, that the 43 El. extended to trespass *vi et armis*, which was the matter before them; and Lord Kenyon had previously suggested, that although an action *vi et armis* could not be brought in a county court, yet that there were other inferior courts which had a power of trying such issues by their charter. (*c*) But it seems to be a rule, that if a defendant remove his cause from an inferior court, and fail, the plaintiff shall have full costs, for that would not be an action brought in the Courts at Westminster. (*d*)

It is obvious, that two cases are provided for by the act, an interest or inheritance in lands, and a battery: questions have arisen on both these exceptions. Trespass was brought for taking a distress: the defendant

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(*a*) 1 Wils. 93. *Walker* v. *Robinson*. 2 Str. 1232. S. C.

(*b*) In *Delamotte* v. *Dixon*, sittings after Mich. 27 G. 3. B. R., cited 3 T. R. 37.

(*c*) 3 T. R. 37. *Dand* v. *Sexton*.

(*d*) See Sayer on Costs, p. 18. Hullock on Costs, vol. i. p. 27.

Title or interest in lands.

justified as agent to General C. by virtue of a reservation in a lease of land from the General to the plaintiff: on this the plaintiff traversed the agency, and had a verdict with 1*d.* damages, but the Judge certified. The Court held, that the issue joined was merely collateral to the plaintiff's interest in the land demised, and, consequently, did not come within the exception. (*a*) So, where there was an action upon the case for digging the plaintiff's turves upon his common, the jury gave 1*d.* damages, and there was a certificate, the Court were of opinion, that this was not necessarily an action for any title or interest in lands: it might be brought to assert such a title, or it might be employed against a wrong doer, or another commoner, as in the case before them, and they discharged the rule for costs. (*b*)

But where the action was trespass, and the material question on the trial was, whether a tree grew on the plaintiff's or on the defendant's ground, and a verdict passed for the plaintiff, damages 37*s.*, the value of the tree, upon which a certificate under 43 El. was granted by the Judge, it was contended, that this case could not be within the statute, since it was an action concerning the freehold of lands; and the Court of Exchequer agreed to this doctrine, and made a rule absolute for the Master to tax costs. (*c*)

With respect to the second exception, batteries, it is clearly holden, that the Judge may certify as to any other tort or trespass included in the action for assault and

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(*a*) Say. Rep. 250. *Howard* v. *Cheshire.*
(*b*) 8 East, 294. *Edmonson* v. *Edmonson.*
(*c*) 9 Price, 314. *Littlewood* v. *Wilkinson.*

battery, and so deprive the plaintiff of his costs. Thus, where the Judge had certified as to the imprisonment in an action for assault, battery, and false imprisonment, the Court sustained the certificate, and said, that every imprisonment, though it might be a corporal damage, certainly did not include a battery. (*a*) So, in a similar action, where a battery was proved at the trial, the Judge's certificate was held equally available; for, under the act of Charles, there could be no costs for the assault and battery unless there was a certificate expressly for the purpose; and here the costs for the imprisonment were barred by the certificate under 43 El. c. 6. (*b*) And the same doctrine was held applicable, although the imprisonment was stated in a separate count. (*c*) However, setting aside these exceptions, a certificate will bar costs as a matter of course. Therefore, although the defendant had in one case pleaded a tender, and so increased the costs, the Court held, that the frivolousness of the action was the very spring of the certificate, and they discharged the rule for full costs. (*d*)

Assault and battery.

And if the parties have been reciprocally guilty of vexatious acts, probably the Judge will not certify; and Lord Ellenborough acted upon this principle where the trespass was very trivial, and the damages only 1*s*. (*e*)

Where damages and costs have been given by various acts of parliament questions have arisen whether a certificate would bar the recovery of expences under such

Certificate under 43 El. controls the ef-

(*a*) 1 New Rep. 255. *Emmet* v. *Lyne*.
(*b*) 2 New Rep. 471. *Wiffin* v. *Kincard*.
(*c*) 2 Bing. 333. *Briggs* v. *Bowden*.
(*d*) 2 Wils. 258. *Bartlet* v. *Robins*.
(*e*) 1 Stark. 55. *Gosson* v. *Graham*.

fect of other acts of parliament which give costs.

circumstances. And it has been uniformly holden, that this stat. of Eliz. is paramount, and that no resistance can be made to a certificate granted under it. Thus, where in an action of trespass the defendant pleaded not guilty, with a justification which, with the general issue, was found against him with 1*d.* damages, and the Judge had not certified under 4 Anne. c. 16., but had given a certificate under 43 El., it was determined, that by the statute of Anne, where no issue is found for the defendant, the costs are in the discretion of the Court, and that in this case the plaintiff was properly barred by the certificate. (*a*) In a subsequent case this decision was expressly recognized, and Lord Ellenborough mentioned the stat. of Anne as extending only to instances where one bar is found for the defendant, which would, but for this provision, give him the general costs of the cause. (*b*)

Again, the stat. 27 G. 3. c. 38. s. 1. gives the plaintiff such damages as a jury shall assess, with costs of suit. An action was brought to recover damages for copying and selling the pattern of a calico of which the plaintiff was the proprietor, and which was protected by that and a subsequent act. The damages were under 40*s.*; and the prothonotary refused to tax more costs than damages, there being a certificate under 43 El. But the Court discharged a rule for compelling the officer to review his taxation; observing, that the statute contained no words which could curtail the Judge's power of certifying. (*c*) An attempt was made recently in the King's Bench to

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(*a*) Say. Rep. 260. *Howard* v. *Cheshire.*
(*b*) 7 East, 583. *Richmond* v. *Johnson.*
(*c*) 1 Taunt. 400. *Williams* v. *Miller.*

distinguish this decision, on the ground that the words "full costs" created a direction so express as to destroy the effect of a certificate. The action proceeded on 11G.2. c.19. s.19., which gives full costs to the plaintiff for irregular distresses; and the damages being 1*s.* the Judge certified. But the Court cited the case of *Williams* v. *Miller* as an existing authority on the subject, and declared, that no distinction was known to the law between costs and full costs. (*a*)

When this certificate may be granted.

A certificate upon this statute may be granted at any time after the trial of the cause; and it has been said by Ch. Just. Willes, that he remembered such a writing to have been given six months afterwards. (*b*) And it makes no difference that the costs have been taxed, and that no objection was made to such taxation by the defendant's attorney; for where the Judge determined, after some consideration, to grant a certificate and thereby deprive the plaintiff of his costs, and the plaintiff's attorney refused to produce the *postea* for that purpose, the Court made a rule to that effect absolute with costs; observing, at the same time, that a certificate might at any time be indorsed on the record. (*c*)

Of the Certificate under 22&23 Car.2. c.9.

The Judges having been reluctant to certify under the statute of Eliz., trifling and vexatious suits still continued, and to such an extent, that, as the preamble of the new statute informs us, many persons were undone by litiga-

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(*a*) 5 B. & A. 796. *Irwine* v. *Reddish.*
(*b*) *Holland* v. *Gore.* Trin. 32 G. 2. Sayer on Costs, p. 18.
(*c*) 5 B. & A. 536. *Foxall* v. *Banks.*

tion. The legislature determined upon this, that instead of leaving the Judge to arrest the plaintiff's costs at his pleasure, there should not be any costs in personal actions without a certificate. This intention was, however, in part frustrated, as we shall see hereafter, and after some time, the statute of Eliz. was put in force, to obviate the disappointment which had thus occurred for the second time.

By 22 & 23 Car. 2. c. 9. it is enacted, that "in all actions of trespass, assault, and battery, and other personal actions, wherein the Judge at the trial of the cause shall not find and certify under his hand upon the back of the record, that an assault and battery was sufficiently proved by the plaintiff against the defendant, or that the freehold or title of the land mentioned in the plaintiff's declaration was chiefly in question, the plaintiff in such action, in case the jury shall find the damages to be under the value of 40*s*., shall not recover or obtain more costs of suit than the damages so found shall amount unto."

And it is provided, that all judgments shall be void where more costs are awarded than the Judge's certificate will warrant. The latter provision, however, does not extend, as we shall see presently, to cases where the jury give costs, but only to costs *de incremento* which the Court award. (*a*) And after execution, supposing the entry of costs to be erroneous, it is too late to make an application to the Court, although the remedy by action is still open to the injured party. (*b*)

(*a*) 2 Ventr. 36. and see *post*, in this chapter.

(*b*) Comb. 222. *Phelps* v. *Rainer*, by Holt C. J.

This act is extended to the counties palatine and the Courts of Great Session in Wales by 11 & 12 W. 3. c. 9. s. 1. There is little doubt but that the legislature expected all personal actions to have been included within their provisions, yet a more narrow, and, it is to be presumed, a more correct construction was soon adopted by the Courts. The act points at actions of assault and battery, and those in which the Judge can certify as to the freehold. Now, as this could not be done in assumpsit, trover, and many other suits, they were held not to be within its remedy. However, where the defendant pleaded *son assault demesne* to trespass, and there was a verdict with damages under 40*s.*, the Court would not allow full costs, but left the plaintiff to take them at his peril. (*a*) The next case was an action for a disturbance of common in which the damages were 1*d.*, and there, the Court declared, that a majority of the Judges had resolved on restricting the act to trespass, and assault and battery. (*b*) Nevertheless, shortly afterwards, trespass was brought for taking a net, and there was evidence of a piscary, but the issue being not guilty, and there being no title in the declaration, costs were refused. (*c*) And the same rule again prevailed in trespass for taking a bull. (*d*) So that actions on the case seem first to have been excluded, and then trespasses, which could not by possibility involve a title to the freehold. (*e*)

The first cases on 22 & 23 Car. 2. c. 9.

(*a*) 2 Keb. 849. *Mott* v. *Hamand.*

(*b*) 3 Keb. 31. *Brown* v. *Taylor.* 2 Mod. 141. *Styleman* v. *Patrick.* S. P. 1 Freem. 214. S. C.

(*c*) 3 Keb. 121. *Earl of Pembroke* v. *Westall.*

(*d*) Id. 247. *Claxton* v. *Laws.*

(*e*) See 1 Merr. 365. *Hamond* v. *Rockwood.*

The present readiness of the Judges to certify under 43 El. has obviated any mischief which might have arisen from this alteration.

Actions not within the statute,

This statute, then, does not extend to actions of assumpsit, debt, covenant, or false imprisonment (*a*); nor to cases where special damage is laid as matter of aggravation (*b*), as in proceedings for criminal conversation, battery of the plaintiff's servant, &c. Neither does it embrace writs of enquiry (*c*), for the enacting words speak of the Judge's certificate at the trial of the cause, and the defendant abandons his chance by letting judgment go by default. And the same rule prevails respecting causes which the defendant has removed from an inferior court, which we have mentioned when speaking of the 43 El. As, where proceedings for taking sheep were removed by habeas corpus, the Court of Common Pleas held, that the statute did not apply; but the Court of King's Bench were disposed to differ from that decision. (*d*) Nevertheless, they soon expressed a wish that the practice of both Courts should be the same; and in a case which came shortly afterwards from the Palace Court, they allowed full costs, and a clear distinction was taken between the removal of suit by the plaintiff and the defendant. (*e*) And the same doctrine was sustained regarding actions from the Marshalsea, when

Writs of enquiry.

Actions removed from inferior Courts.

(*a*) Tidd, 7th ed. 976. (*b*) 3 Wils. 331. 3 Keb. 184.
(*c*) Bull. N. P. 329. (a.) *Sheldon* v. *Ludgate.*
(*d*) 3 Keb. 389. *Orpwood* v. *Holden.*
(*e*) Id. 357. 423. *Dunel* v. *Skidmore.* Freem. Rep. 365. *Hamond* v. *Rockwood.* 4 Mod. 378. *Roop* v. *Scritch.* S. P. Gilb. Hist. C. P. p. 270. 3 Salk. 115. *Cooke* v. *Beale.*

the practice was certified by the officers as to all other inferior courts. (*a*)

Again, the statute will not operate, if the jury think proper to give more or less costs than damages, even if their verdict be under 40*s.*; but it is seldom if ever that this power is exercised, at least in the present day, in cases where a certificate is requisite to ensure costs. The jury may give more than 40*s.* costs.

Thus, where debt was brought upon a judgment for 10*s.* damages, and 40*s.* costs, the stat. 22&23 Car. 2. was pleaded specially; and it was set out, that as more costs than damages had been awarded without a Judge's certificate, the judgment was void. But the plea was held insufficient on demurrer, for the verdict was for 40*s.* costs, and not costs increased by an award of the Court, and had the judgment been erroneous, it was said, that it would be a hardship to make it avoidable by plea. (*b*)

So, on a judgment upon *nul tiel* record, the jury gave 3*s.* 4*d.* damages, and 40*s.* costs, on which it was urged, that the judgment was erroneous, since more costs than damages had been given; but the Court were clear that the jury were not bound by the statute, and that the prothonotary ought to sign judgment according to the verdict. (*c*)

Again, where it was moved, that the associate should correct his minutes by substituting 5*s.* for 40*s.*, the jury having given 5*s.* damages, and 40*s.* costs in a case at York, the Court recognized the power of the jury to do

(*a*) 1 Ld. Raym. 395. *Archbishop of Canterbury* v. *Fuller.*
(*b*) 2 Ventr. 36. *Page* v. *Kirke.*
(*c*) Ca. Pract. 44. *Watkinson* v. *Swyer.*

this as well established, and said that the statute only restrained *the Court* from giving costs *de incremento.* (*a*)

Cases of assault and battery where a certificate is required.

We have seen that the 22&23 Car. 2. c.9. s.149. is confined to actions of assault and battery, and local trespasses not regarding the freehold. It is proposed to show under these two heads, the cases which demand a certificate, and the particular instances in which no such writing need be obtained. First, as to assault and battery. Where the defendant was acquitted of the battery, but found guilty of the assault, and the damages were under 40*s.*, the Judge certified as to the assault only, and the Court were fully of opinion, that under the then new act, both an assault and a battery should be proved in order to give costs to the plaintiff. (*b*) The Judge might now certify under 8&9. W. 3. that the trespass was wilful and malicious.

Where the defendant's pleading waives the need of a certificate.

If, however, the defendant ventures to plead a justification to a charge of assault and battery, and it be found against him, no certificate will be necessary on the plaintiff's behalf, since that which otherwise ought to be in proof is admitted by the defendant's own showing. (*c*) It is now agreed, notwithstanding an old decision to the contrary, that where *son assault demesne* is pleaded, which admits a battery, a plaintiff shall have full costs without a certificate. As, where in an action of assault and battery, the defendant pleaded *molliter manus imposuit*

(*a*) Ca. Pract. in C. B. 149. *Ibbotson* v. *Brown*, and see Hullock's Costs, vol. i. p. 38.

(*b*) 3 Lev. 102. *Smith* v. *Neesam.* 3 Keb. 335. *Smith* v. *Hadome.* Q. S. C. 1 Ventr. 256. *Anon.* Q. S. C.

(*c*) 2 Keb. 849. *Mott* v. *Hamand*

to turn the plaintiff out of the defendant's garden. A verdict having been obtained with damages under 40*s.*, the question was, whether the pleadings admitted the battery; and some doubt was entertained upon the bench, Lee J. thinking, that the assault was alone included, the C. J. (Lord Raymond,) and Page J., that the battery came within the justification; and it was said by Mr. Just. Page, that in his remembrance Lord Holt would allow a smart beating under the plea of *molliter manus*. The case was adjourned: but when it came to a re-hearing, the Court were clear, that the plaintiff should have his full costs where *son assault demesne* was pleaded. (*a*) Yet, if under such circumstances the plaintiff make a new assignment, and the defendant plead not guilty, there will not be more costs than damages, on a verdict for the plaintiff, without a certificate. (*b*)

Although every *molliter manus* need not include a battery (*c*), a gentle arrest, for example, the Court will look at the plea for the purpose of ascertaining the nature of the injuries justified. As, where violence had been used against the plaintiff, and the defendant pleaded *molliter manus* to trespass for assaulting him in a church, and justified the assault and battery *in toto*, on which a verdict passed for the plaintiff with one farthing damages, and it was contended, that the pleadings did not admit the bat-

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(*a*) 2 Barnard, 180 277. *Washer* v. *Smith*. 6 Vin. Ab. 332. pl. 38.

(*b*) Bull, H. P. 330. (a.) *Richards* v. *Turner*.

(*c*) 2 Barnard, 180. 277. *Washer* v. *Smith*. Wm. Kel. 93. S. C.

tery, and that the stat. 4 Ann. c. 16., which permitted the use of double pleas, materially altered the case. But the Court rejected the argument on the statute of Anne as irrelevant, and held, that as the justification went to the battery, the plaintiff must of necessity have his costs. (*a*)

So, where there was an action for an assault and battery, and the defendant justified the ill-treating charged in the declaration, and less than 40*s*. damages were given by the jury, the Court, on being moved for a rule to substitute 1*s*. instead of 40*s*. on the postea, made it absolute after consideration; and Mr. Justice Dallas said, that the only difference between the case before them and that of *Smith* v. *Edge* was, that in the latter nothing was said about the ill-treating, but the plea spoke of the battery; whereas, in the first, the plea notices the ill-treating, but does not expressly mention the battery. (*b*) If, however, the defendant only justify the assault, the plaintiff will be in the same situation on obtaining a verdict under 40*s*. as though the Judge certified the assault only, and will lose his costs. (*c*) A case occurred recently, in which the defendant justified the assault, and pleaded not guilty to the battery; a verdict passed for the defendant on the justification, and for the plaintiff on not guilty. Damages one farthing. The Court were very clear that a Judge's certificate was necessary to give the plaintiff his costs on this finding. (*d*)

Two classes of cases on this head of the subject are

(*a*) 6 T. R. 562. *Smith* v. *Edge*.
(*b*) 7 Taunt. 689. *Johnson* v. *Northwood*.
(*c*) 3 T. R. 391. *Page* v. *Creed*.
(*d*) 1 Taunt. 16. *Brennan* v. *Redmond*.

excepted out of the statute of Charles 2d. The first class applies, where the action of assault and battery is maintainable only by reason of some special damage resulting from the offence; the second, where another trespass, not within the statute, but being in itself a substantive and independent injury, is included in the declaration, with the charge for assault and battery.

Consequential damage laid as independent injury.

A battery of the plaintiff's servant was proved *per quod servitium amisit*, and the Judges allowed full costs without the signing of the postea. (*a*) Again, the declaration charged criminal conversation with the plaintiff's wife; and, on a verdict with 20*s*. damages, the case was solemnly debated, and full costs were adjudged to the plaintiff, on the principle, that the gist of the complaint was the criminal conversation, and not the assault. (*b*) And, in speaking of local trespasses, we shall find that the same rule is preserved.

The second class of cases relates to the spoliation of personal chattels, and the decisions proceed upon these principles, either that, as the statute only contemplates assault and battery, and local trespasses, all other injuries are of course exempted from its operation (*c*); or that, where there are substantive injuries besides the assault and battery, it is a kindness on the plaintiff's part to include all the grievances in the same declaration, since he thereby preserves the defendant from the payment of

(*a*) 3 Keb. 184. *Peak* v. ——, and see 1 Salk. 206. *Browne* v. *Gibbons*. 7 Mod. 129. S. C. 2 Ld. Raym. 831. S. C.

(*b*) 3 Wils. 319. *Batchelor* v. *Bigg*. 2 Sir Wm. Bl. 854. S. C., and see 5 T. R. 361.

(*c*) 3 Wils. 328. *per* Willes C. J.

double costs. (*a*) With regard, however, to one species of injury, which very commonly accompanies an assault, the tearing clothes, &c., it has been determined progressively; first, that an injury laid as a consequence of the assault and battery would not entitle the plaintiff to full costs; next, that the consequential mischief must have happened at a time different from that of the assault and battery; and now, it is considered most prudent amongst pleaders, where there really has been a distinct damage, to devote a separate count of the declaration to the statement of such personal wrong, whether it be tearing the clothes, breaking furniture, &c. And if the action be for assault and battery, and do not expressly contain a charge for spoliation, distinct from the title of the freehold, the plaintiff will still be deprived of his costs, unless he avails himself of a separate count. Thus, where the injuries complained of were assault, battery, wounding, and disturbance of the plaintiff's possession, a motion for full costs was denied. (*b*) So, where trespass was brought for assault, wounding, battery, and imprisonment, and also for breaking and entering the plaintiff's house, opening the doors, and breaking the locks and bars belonging to the doors; the defendant justified the imprisonment, which was found for him, and pleaded not guilty to the rest, on which a verdict passed for the plaintiff with 2*s.* 6*d.* damages; it was holden, that there could not be full costs for the battery, because the Judge had not certified as to the proof of that, nor for the trespass to the house, for a certificate was wanting

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(*a*) 3 Wils. 331. *per* Burnet J.
(*b*) 1 Ld. Raym. 566. *Boiture* v. *Woolrick*.

alike in that view of the case, as the title might certainly have come in question. (*a*) The aggravated mischief complained of must be direct and substantial; for where the plaintiff was beaten when riding upon his horse, and there did not appear any independent assault upon the horse, the damages being *5s.*, the Court refused the increased costs. Neither, in a recent case of this kind, would they permit the plaintiff to apply for the Judge's report, but held, that they could only look to the declaration. (*b*)

In the great case of *Milbourn* v. *Reade*, the declaration was for assaulting, beating, and wounding the plaintiff, carrying off his coals, and breaking a standard and roller belonging to him. Plea, not guilty. The defendant was found guilty of all the premises except the asportation; damages *5s.*; and there was no certificate. On the taxation of full costs, the Court were moved to set it aside; but after much discussion, they discharged the rule. In this case, Willes C. J., and Abney J., paid no attention to the asportation or spoliation of chattels; they thought, that as the breaking of the roller was distinct from the assault and battery, and from the consideration of freehold, the statute could not apply; but Mr. Just. Burnett apprehended that part of the verdict was within, and part without the act; it was less vexatious to the defendant that the plaintiff had included all his grievances in one charge, and so he conceived him entitled to full costs. (*c*)

(*a*) 1 Str. 577. *Beck* v. *Nicholls*.

(*b*) Id. 624. *Clarke* v. *Othery*. 1 Taunt. 357. *Bannister* v. *Fisher*. S. P.

(*c*) Barnes, 134. *Milbourn* v. *Reade*. 3 Wils. 324. S. C. cited.

Laceravit.

We come now to the tearing or rending of the plaintiff's clothes. It has always been considered, that if the injury to the plaintiff's clothing be laid in the same count, as a consequence of the assault and battery, the whole must be taken as an entire act, and that a certificate is indispensable. (*a*) In a case subsequent to those just mentioned, the Court of King's Bench, although they refused costs because the beating was consequential, intimated, nevertheless, that if the plaintiff had proved the beating as a substantive mischief, he would have been entitled to his motion. (*b*) But the Court of Common Pleas seem to have decided, that to make even the independent allegation available, the proof of it should be, that it happened at a different time from that of the assault and battery. So that where the plaintiff complained of the throwing a large quantity of water over him, which then and there wetted him, &c. the Court thought the whole count and complaint tied together, and refused costs. (*c*) So, after a general verdict in a similar case, Lord Loughborough said, he could conceive one case only, in which, by any reasonable probability, the acts can be considered as wholly distinct; and that would be by supposing that the defendant had first beat the plaintiff, then stripped him naked, and spoiled his clothes. Here, added the learned Judge, it is evident, that one act was in consequence of the other, and the law is not to be evaded by a device of pleading. And

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(*a*) Sayer on Costs, 47. *Caruthers* v. *Lamb* in C. B. Barnes, 120. S. C. Sayer, Rep. 91. *Thompson* v. *Adshead* in K. B. (*b*) 1 T. R. 655. *Cotterill* v. *Tolly*.

(*c*) 1 H. Bl. 295. *Atkinson* v. *Jackson* cited.

the words of Mr. Justice Wilson are material. If in an action of this kind the party chooses to forego the tort to his person, and goes only for the injury to his clothes, he would have his full costs. But, if he will combine both together in one count, the case is within the statute of Charles 2d., because the principal injury is the battery, and the Judge may certify. (*a*) This doctrine was adopted soon afterwards by the Court of King's Bench (*b*); and therefore it is, that a distinct count is now employed in stating a *laceravit*, by which means these subtleties are avoided.

Local trespasses.

The second division of the subject relating to certificates on this statute, applies to local trespasses. And whatever perplexity may have appeared in cases reported on this head, it is clear, that where the freehold cannot by possibility come in question, no certificate will be required; or, where a substantive and distinct injury is proved, the taking away of goods, &c. for instance, whether the reason be, that such asportation is the gist of the action, or that it is a personal matter within the statute, or that it is a measure of mercy on the plaintiff's part thus to consolidate his statement against the defendant, there is no need of a certificate; but that, if the freehold should come in question, or might, in any view of the case, be debated, the Judge must certify, if the damages are under 40*s*., else the plaintiff cannot have his costs. And although the count *de bonis asportatis*, analogous to the *laceravit*, is now adopted, yet care must be taken not to state the asportation of any property

(*a*) 1 H. Bl. 291. *Mears* v. *Greenaway*.
(*b*) 5 T. R. 482. *Lockwood* v. *Stannard*.

which may be attached to the freehold, as the authorities sufficiently warn us.

Things attached to the freehold within the statute.

Thus, where actions were brought for putting stakes upon the ground (*a*); for breaking a close, and cutting rails (*b*); for breaking the soil with ploughs, or otherwise (*c*); obstructing a watercourse (*d*); breaking hedges and fences (*e*); lopping and spoiling trees (*f*); damaging window-shutters, and the bolts thereto attached (*g*); erecting a wall (*h*); prostrating and destroying pales, rails, and gates (*i*); or breaking a cellar-door (*k*); in all which cases the damages were under 40*s*., no more costs than damages were allowed, because all these matters of property were affixed to the freehold, which might certainly have come in question.

So, in a more recent case, where the declaration stated that the plaintiff's windows, belonging to his dwelling-house, had been broken by the defendant, and the damages were under 40*s*., it was said by Lawrence J., that

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(*a*) 2 Ventr. 48. *Anon.* (*b*) Comb. 324. *per* Holt C.J.

(*c*) Ca. Pract. C. P. 2. *Smithsend* v. *Long.* Id. 3. *Haseltine* v. *Kirkhouse.* 5 Mod. 74. *Reynolds* v. *Osborn.*

(*d*) Carth. 224. *Laver* v. *Hobbs.*

(*e*) Bunb. 167. *Mitchel* v. *Soaper,* and see Id. 207. *Reeves* v. *Butler.* S. P.

(*f*) Bull. N. P. 330. *Hill* v. *Reeves.* 3 Com. Dig. 244. *Shepherd* v. *Yard.*

(*g*) Bull. N. P. 330. *Birch* v. *Daffey.* Pract. Reg. 107. S. C. 11 Mod. 198. *Butler* v. *Cozens.* S. P. 6 Vin. Ab. 357. S. C. (*h*) 2 Ld. Raym. 1444. *Higgins* v. *Jennings.*

(*i*) Cas. Pract. 86. *Dixie* v. *Somerfield.* Barnes, 121. *Tomlinson* v. *White, Ullithorne* v. *Kirkhouse,* cited in Barnes.

(*k*) Ca. Pr. 117. S. C.

the defendant might have given *liberum tenementum* in evidence, and so have shown property in the house; and the Court held the case within the statute. (*a*) And in an action for destroying the plaintiff's hedge on a certain common, to which there was a plea of not guilty, and a special plea, which was found for the defendant, who was, notwithstanding, found guilty on the general issue, and 20*s.* damages awarded, the Court fully sustained the doctrine which we have mentioned. (*b*)

Things growing on the freehold.

Again, the statute extends to trespasses committed on any thing which grows upon the freehold. As, where there was a charge for breaking a close with cattle, and bruising, pressing, and spoiling certain apples there found, the Court, looking to the declaration, said, that the apples, though stated to have been found, might have been growing, and they refused the costs. (*c*) And in a previous case, where the trespass was cutting corn growing on the plaintiff's close, the Court inclined against the costs, but they adjourned the question. (*d*)

Matter alleged in aggravation.

No difference will be occasioned if the statement of trespasses be accompanied with matter of aggravation. As, where the plaintiff complained that his house had been broken and entered, and that he had been kept and continued out of possession for a month; for the freehold might have come in question, and the *per quod* was merely to enhance the damages. (*e*) Again, where the

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(*a*) 6 T. R. 281. *Adlem* v. *Grinaway.*

(*b*) 7 East, 325. *Stead* v. *Gamble.*

(*c*) Barnes, 144. *Gregory* v. *Dormer.*

(*d*) 1 Salk. 193. *Blachly* v. *Fry.* Skin. 666. S. C. 5 Mod. 315. S. C. Comb. 399. S. C. 1 Com. Rep. 19. *Lately* v. *Fry, semb.* S. C.

(*e*) 1 Str. 645. *Blunt* v. *Mither.*

pleading charged an affray and disturbance in the plaintiff's house, and until he, in conjunction with two others, gave the defendant their promissory note for 6*l.* 17*s.*, (there was a guinea by way of damages,) the Court held, that this damage was consequential, and directed the Master to tax the costs at one guinea. (*a*)

Mesne profits.

It has been resolved, that an action for mesne profits is within the act which we are discussing; and, therefore, where there was a verdict in such a case with 1*s.* damages, the Court said, that although the Judge might have certified, yet that, as he had not done so, they could not grant the application for costs. (*b*)

Title to freehold not in question.

If, however, it appear from the nature of the case, or from the pleading, that the title to freehold could not be involved on the trial, or, if a distinct grievance be alleged, the asportation of chattels, for instance, there will be no need of a certificate. Thus, where an action on the case was brought for disturbance of common, it was holden, that, as the title could not be in question, there was no need of a certificate. (*c*) Again, where the defendant was found guilty of breaking and entering the free-warren of the plaintiff, and chasing and hunting a hare, with 6*d.* damages, the Court were unanimous that the full taxation of costs should be allowed; for the title to the soil could not come into question in mere actions for breaking free-warrens, and a man might have free warren in *alieno solo*; besides which, the hunting of the hare was a damage to personal property. (*d*)

(*a*) 3 Burr. 1282. *Appleton* v. *Smith.*
(*b*) 6 T. R. 593. *Doe* v. *Davies.* 1 Esp. 358. S. C.
(*c*) 2 Mod. 141. *Styleman* v. *Patrick.* Freem. 214. S. C.
(*d*) 2 Sir Wm. Bl. 1151. *Lord Dacre* v. *Tebb.*

Where title appears on the pleadings.

Perhaps it may be evident on the face of the pleadings that the freehold is in dispute; on such an occasion it has always been clear that no certificate need be granted. (*a*)

But the principal matter in dispute upon this subject is, whether a plaintiff can recover his costs after the defendant has justified, by a new assignment of some trifling trespass *extra viam*, without traversing the defendant's justification. It has been now determined, that if a way be pleaded specially, and be not traversed, the plaintiff shall not, by such new assignment, have his costs. And in a recent decision, the authority of those cases which have been indulgent to the plaintiff, where the defendant has pleaded a right of way generally, seems to have been much shaken. In the old case of *Asser* v. *Finch*, which has been much acted and relied upon, the defendant justified for a way, the plaintiff replied *extra viam*, and issue being taken, a verdict passed for the plaintiff; and the Court held that he should have full costs, because a title to the way was upon the record. (*b*) In a subsequent case, these decisions were again sustained; but in the authority to which we now refer, the plaintiff traversed the defendant's plea of right of way. A way was pleaded, and there was a replication traversing that right, and also by assigning *extra viam*; the justification was found for the defendant, and there was a verdict for the plaintiff on the new assignment, with 1*s*. damages. And although

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(*a*) Gilb. H. C. P. p. 263. 2 Mod. 142. Freem. 215.

(*b*) 3 Lev. 234. *Asser* v. *Finch*. 2 Str. 726. *Higgins* v. *Jennings*. S. P. 2 Ld. Raym. 1444. S. C. 2 Str. 1168. *Beale* v. *Moor*. S. P.

this case was assimilated by the defendant's counsel to a new action of trespass, who pressed the case of *Ibbotson* v. *Browne* (*a*), as an authority to show that the plaintiff should not have costs where he obtains a verdict on the general issue, but has at the same time a plea of justification found the other way, the Court declared their resolution to abide by *Asser* v. *Finch* as an established case of practice. (*b*)

The first blow which this class of determinations received was, where the defendant pleaded not guilty generally to several trespasses, and a special justification under an enclosure act, in which he set out a right of way by mete and bounds particularly. The replication was an assignment *extra viam*, and on the two general issues, a verdict, with 30*s*. damages, passed for the plaintiff. The Master taxed full costs, but it being insisted that a certificate was necessary, the Court made the rule absolute for the officer to review his taxation; and Lord Mansfield said, that as there was no question on the record as to the limits of the way, and no certificate to show that the way did actually come in question, the plaintiff could not have his costs. (*c*) It seems, that Mr. Justice Buller was not satisfied with the case of *Asser* v. *Finch*, and in his law of Nisi Prius, adverting to the case of *Cockerill* v. *Allanson*, he observes, that on such occasions the title may or may not be in question, and that if it be so, the Judge ought to certify. (*d*) And in a determination of recent date, Mansfield C. J. intimated

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(*a*) Barnes, 129. (*b*) 1 East, 350. *Martin* v. *Vallance*.
(*c*) Hullock on Costs, vol. i. p. 78. *Cockerill* v. *Allanson*. Bull. N. P. 330. S. C. (*d*) Ibid.

a strong opinion against the old doctrine. Trespass was brought for entering the plaintiff's dwelling-house, and seizing his goods. Two special justifications were pleaded, under a warrant from the sheriff; on which the plaintiff made a new assignment of other and different trespasses, and on this he obtained a verdict, damages 1*s*. The Master having allowed full costs, he was directed to review his taxation; and the Chief Justice, after observing, that in the case before the Court there had been a justification under a warrant not traversed, and that he could distinguish it from *Cockerill* v. *Allanson*, declared with reference to *Martin* v. *Vallance*, *Asser* v. *Finch*, &c., that it would be monstrous for a plaintiff, who has been wholly wrong in bringing an action for a trespass, which is fully justified under a right of way, to have full costs because he brings another action for another little trifling trespass which he may happen to prove. (*a*) Formerly, where there had been a view in trespass, and it appeared that the title was in question, the view was put upon the record, and the granting it was equivalent to a certificate. (*b*) But now, that by statute the view may be before the trial, as a matter of course, in which case it does not appear upon the record, costs cannot be allowed without a certificate; for, according to Lord Ellenborough, there seems to be no reason for allowing costs of increase because a view was had, for that may be granted when the title is not in question. (*c*)

(*a*) 4 Taunt. 98. *Gregory* v. *Ormerod*. See 13 East, 191. *Thornton* v. *Williamson*.

(*b*) 1 Ld. Raym. 76. *Kempster* v. *Deacon*.

(*c*) 11 East, 184. *Flint* v. *Hill*.

A case occurred, in which the declaration consisted only of one count, part of which was justified; the plaintiff, without taking issue on the special plea, newly assigned, and had a verdict with 1*s.* damages, upon which he was allowed full costs. (*a*) But it may be suggested, that according to the observations in *Gregory* v. *Ormerod*, this course of proceeding would undergo a change on some future occasion; or this case might be considered as one, in which the freehold could not by possibility come in question. Nevertheless, where the freehold does not appear on the record, a certificate is indispensable on a single charge. As, on a charge of several trespasses, and a plea of not guilty to part, and as to the residue, a justification which was found for the defendant, it was holden, that under those circumstances the case was the same as though the general issue had been pleaded alone, and no more costs than damages were allowed. (*b*) So, in the common case, where trespass was brought *quare clausum fregit*, the defendant pleaded a justification; on which the plaintiff made a new assignment, to which there was a plea of not guilty. The damages being under 40*s.*, it was holden, that as there was no special pleading, that is, as there was no title on the record, there should not be full costs. (*c*)

Where the issue is collateral to the ques-

We come now to the point, whether a certificate be necessary where the issue joined is collateral to the question of freehold or title to the land, the damages being

(*a*) 1 T. R. 636. *Gundry* v. *Sturt.*

(*b*) 2 Ventr. 180. 195. *Anon.*

(*c*) Barnes, 124. 129. *Ibbotson* v. *Browne.* Ca. Pract. C.B. 149. S. C. S. P. *Lloyd* v. *Day.* Id. 149.

under 40*s.*; and although it was resolved formerly, that on such a contingency there should be a certificate, the practice at this day is, that if the plaintiff have one special plea found in his favour, he shall be entitled to the full costs of the trial. Thus, where trespass was brought for breaking the plaintiff's house, the defendant justified as bailiff under process: the replication was, that the plaintiff's doors were shut; on which issue was joined, and a verdict found, damages 2*d.*, the Court refused to allow full costs. (*a*) But of late a contrary doctrine has obtained, on the principle, that the Judge who has tried the cause cannot, in any view of it, grant a certificate, since the freehold cannot come into question on a collateral issue. So, trespass for breaking the plaintiff's close, and carrying away some of his personal chattels, the defendant pleaded the general issue, and a licence. A verdict on both these issues passed for the plaintiff, damages 1*s.*; but there was no certificate: on which it was urged, that the plaintiff ought not to have more costs than damages. But the Court held, first, that here had been an asportation of personal goods; and, secondly, that the established rule of law was, that where a special plea of justification is found against the defendant, the plaintiff shall be entitled to full costs. (*b*) The defendant's pleas to an action of trespass were, first, the general issue; secondly, disclaimer of title, that the trespasses were involuntary, and tender of amends; thirdly, a distress taken damage-feasant for the same trespass; fourthly, defect of fences; fifthly, a licence. There were new as-

tion of freehold.

(*a*) 6 Vin. Ab. 359. *Philpot* v. *Jones.* 2 Barnard. 277. S. C. cited.

(*b*) 2 H. Bl. 2. *Redridge* v. *Palmer.*

signments to all the special pleas except that of licence, and similar pleas to the new assignments, on which issues were taken, and a general verdict found for the plaintiff, damages 5*s*., and the Judge did not certify. It was insisted for the defendant, that the freehold could not come into question in the case before the Court on the pleas pleaded, and that there ought to have been a plea on the record tantamount to a certificate, before the plaintiff could recover costs. The Court said, that they might have adopted the construction contended for by the defendant if this had been a new case; but as *Redridge* v. *Palmer* had been decided upon great consideration, they declined to depart from that authority. (*a*)

To trespass for breaking and entering the plaintiff's close, the defendant pleaded the general issue, and a licence; the plaintiff traversed the licence, and made a new assignment; the defendant took issue on the traverse, and pleaded not guilty to the other. There was a general verdict for the plaintiff, damages 1*s*. The Master having allowed only 1*s*. costs, it was moved that he should review his taxation. And the decisions of the Court of Common Pleas were fully sustained by Lord Kenyon, who said, "The principle is, that where the case is such, that the Judge who tries it cannot, in any

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(*a*) 2 H. Bl. 341. *Comer* v. *Baker*. It is worthy of observation, that in this case there was a disclaimer of title by the defendant, that issue was joined on the same plea to a new assignment, and found for the plaintiff: the Judge, it is suggested, could not, therefore, in any view of the case, grant a certificate that the title had come into question, and, consequently, the plaintiff was entitled to his costs.

view of it, grant a certificate within the act, it is considered to be out of the statute: the question was collateral, not whether the defendant had a title to the land, but whether he had liberty to go over it. (*a*)

In order to ascertain if the freehold could have been involved, the Courts always advert to the declaration, because it is the plaintiff's action: they will not, therefore, be induced to look into the facts of a special plea in order to be satisfied that the title could not have come into question, for the statute was enacted to prevent frivolous and vexatious suits. So that, where the plaintiff complained of the destruction of his hedge erected on a common, and the defendant prescribed for a right of common, wherefore, &c. the Court declared, that they could not inspect the plea for the purpose of ascertaining the impossibility that the title had been in dispute, they could look only to the declaration; and as, upon the face of that, the freehold might have been questioned, they refused the allowance of full costs. (*b*)

Asportavit.

If any property be taken from the plaintiff, it is an independent injury, and of course not within the statute. If a grievance of this kind be united with one touching the freehold, provided it be not a mere description of the mode by which the mischief was effected, no difference will be made; and it matters not whether the distinct allegation be comprehended within the same count with the real trespass, or be reserved for another; which latter method is, however, always employed at present. But, where there is a count for trespass to the reality,

(*a*) 7 T. R. 659. *Peddell* v. *Kiddle*.
(*b*) 7 East, 325. *Stead* v. *Gamble*.

care must be taken to show, not only that the property has been removed from the place where it was originally placed, but also from the land of the owner.

There is a variety of cases to prove our first proposition, respecting the mere removal of goods. As where the plaintiff's stalls were overthrown in the market-place (*a*); where his sheep were taken (*b*), chased, driven, and wounded (*c*); his goose killed (*d*); his water pail broken (*e*); his horse sent from one place to another (*f*), &c.; in all which cases he was entitled to full costs. Many other authorities are mentioned, underneath, to the same effect. (*g*)

Where the asportavit has been charged in the same count with a trespass to real property, if the injury complained of be independent, and there be a general verdict, the plaintiff shall have costs, for it should be presumed, that some damages had been apportioned to each wrong. As where the plaintiff stated that his close had been entered and his cable cut, he was allowed full costs on a ver-

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(*a*) Sir Thomas Jones, 232. *Smith* v. *Betterton*. Skin. 100. S. C. 2 Show. 258. S. C. Tho. Raym. 487. S. C.

(*b*) 3 Keb. 389. *Orpwood* v. *Holden*, and see 3 Keb. 469. *Dicer* v. *Stanton*. (*c*) 1 Salk. 208. *Ven* v. *Philips*.

(*d*) Ca. Pract. C. P. 49. *Blackboyne* v. *Parker* cited.

(*e*) Ibid. *Parke* v. *Davies*.

(*f*) Hullock on Costs, vol. i. p. 65. *Harper* v. *Jiffer*.

(*g*) 1 Str. 534. *Keen* v. *Whistler*. Gilb. Eq. Rep. 197. S. C. cited. Comb. 75. *Benton* v. *Carpenter*. Carth. 225. *Colethurst* v. *Hayes* cited. Ca. Pract. C. P. 24. *Rossiter* v. *Bolting*, and see Hullock's Costs, vol. i. p. 65. where all these authorities are collected. 1 Stark. 55. *Gosson* v. *Graham*.

dict with only 2*d.* damages. (*a*) And the same doctrine prevailed, where the plaintiff's close was entered, and his sheep driven (*b*); where his bull was chased (*c*); where his house was broken, and his provisions carried away. (*d*) So, if the damage be consequential, provided the plaintiff may have a distinct satisfaction for it, the same result will ensue. Trespass was brought for the entry of diseased cattle into the plaintiff's close, by which his cattle were infected. The damages were 20*s.*, and full costs were adjudged to the plaintiff; for here was a distinct wrong, joined as matter of aggravation. (*e*) But one of the Judges (*f*) thought that the recovery in this action would not be pleadable to a special action on the case for the special injury, which was denied by the rest.

Yet, in another case, where the plaintiff declared for breaking his house and barn, locking the doors of the barn, and seizing and detaining his goods and chattels for a long space of time, and depriving him of the use of his barn, &c.; on a verdict with 2*d.* damages, it was finally holden that he should not have full costs. Lord Chief Baron Eyre was in the plaintiff's favour when the case was first considered; but Sir Jeffrey Gilbert,

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(*a*) Comb. 324. *Hains* v. *Hughes.*

(*b*) Barnes, 119. *Arnold* v. *Thomson.* Ca. Pract. 99. S. C.

(*c*) 1 Str. 551. *Thompson* v. *Berry.* Gilb. Eq. Rep. 197. S. C. cited.

(*d*) 2 Str. 1130. *Smith* v. *Clarke.*

(*e*) 1 Str. 192. *Anderson* v. *Buckton, per* Pratt C. J. Powys and F. Aland Justices. 11 Mod. 303. S. C. S. P. Fitzg. 42. *Granvile* v. *Vincent.* 1 Barnard. 117. 127. 134. *Grandey* v. *Wiltshire,* semb. S. C.

(*f*) Sir Robert Eyre.

succeeding him as Chief Baron, thought the taking of the goods too strongly connected with the breaking of the barn, and that the title might have been in question; for there was no distinct allegation that the property of the goods had been in dispute, and so the costs were disallowed. (*a*) But it was agreed, that if the asportation had been laid in another count, the plaintiff would have succeeded, and this has always been the rule. There was one count for breaking a close, and another for impounding cattle; the damages were under 40*s.*, and the Court were of opinion, that the case was not within the statute, since the title could not come in question upon the destruction of a chattel. (*b*) The same rule was adopted by Lee C. J., where trespass was laid in one count for carrying away a hog, and in another respecting lands. (*c*)

What a sufficient asportation.

Questions have arisen as to what should be considered a sufficient removal of goods from the freehold; at first, as where roots had been dug up and removed to a place on the same ground, it was conceived sufficient to prove such an asportation only as would constitute a felony; and, consequently, that this removal had been ample to entitle the plaintiff to his costs. But even there Mr. Just. Ventris differed, saying, that the felonious intent was manifest by the taking of goods, not by the carrying them away. (*d*) In another case, where trespass was brought for breaking a close, and cutting and carrying

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(*a*) Bunb. 207. *Reeves* v. *Butler*. Gilb. Eq. Rep. 195. S. C.

(*b*) 3 Mod. 39. *Barnes* v. *Edgard*.

(*c*) Sayer on Costs, 39. *Knightly* v. *Buxton*.

(*d*) 2 Ventr. 215. *Anon*.

away corn, the defendant was found guilty of all except the carrying off the corn; and the Court, it seems, intimated an opinion, that if the defendant had been convicted of moving the corn, although not from off the premises, the plaintiff would have had costs. (*a*) However, this doctrine did not give entire satisfaction; for, when shortly afterwards an action was brought for pulling up and throwing down a hedge, and a verdict passed for the plaintiff with 5*s.* damages, the Court expressed an opinion, that asportation did not mean such a removal as this, but an entire carrying away. (*b*) So, where the case was for tearing and pulling up poles, the Court repudiated the case in Ventris, and said they should rely on *Franklin* v. *Jolland* as their authority for denying costs. (*c*)

Where materials had been taken from a saw-pit, but had been brought back and restored by order of the defendant, and the plaintiff had paid 7*s.* 6*d* for restoring the saw-pit to its former condition, which sum was awarded him for damages by the jury, Eyre C. J. thought the plaintiff entitled to costs, as an asportavit had been proved; but, on a rule that the Master should review his taxation for the plaintiff, Mr. Justice Buller, who was sitting alone in banco, was of a different opinion, and thought that there should not be more costs than damages, there being no certificate. (*d*)

It is very necessary that the asportavit should not be so connected with the trespass as to seem a part of it.

(*a*) Skin. 666. *Blackly* v. *Fry.*
(*b*) 1 Str. 634. *Franklin* v. *Jolland* cited.
(*c*) Id. 633. *Anon.* Gilb. Eq. Rep. 198. S. C.
(*d*) 1 Esp. 255. *Richardson* v. *Tomlin.*

For where the plaintiff declared for digging turf, peat, sods, &c., and taking and carrying away the same, on a verdict with 1*s.* damages, the Court could not help considering the asportavit as matter of description, and part of the trespass; and that as the freehold might have come in question, a certificate was necessary to entitle the plaintiff to his costs. (*a*)

It has been resolved, that if a defendant be acquitted of breaking a close, and be found guilty as to taking away goods, however small the damages, the plaintiff will have costs, for it occurs as a mere question relative to personal property (*b*); whereas, if the asportavit, whether alleged as a substantive fact in the same count with the trespass to real property, or in one separate, be found for the defendant, the case assuming the aspect of trespass *quare clausum fregit*, will be entirely within the statute of Charles, and no costs will be recoverable by the plaintiff. (*c*)

Within what time this certificate may be allowed.

Although the learned Judge, who has so ably enriched the profession with a treatise on Costs, expressed an opinion at the time of its publication that a certificate on this statute should be granted at the trial of the cause (*d*), he, nevertheless, at the summer assizes for Shrewsbury in the year 1823, before he left the assize town, certified as to the proof of a battery; and an objection being taken, that the Judge should have certified

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(*a*) Dougl. 780. *Clegg* v. *Molyneux.*

(*b*) Freem. 394. *Anon.*

(*c*) 2 Ventr. 180. 195. Ca. Pract. C. P. 118. Bunb. 208. in *Reeves* v. *Butler.*

(*d*) Hullock on Costs, vol. i. p. 38.

at the trial, the Court of King's Bench expounded the words, "the Judge at the trial of the cause," to mean, the Judge who tried the cause; observing, that the certificate could never be granted at the trial, but only when the verdict has passed. And they held this construction the most convenient, as the Judge would rather have time to consider of the matter, than decide on granting the certificate at the instant. (*a*)

Whether a Judge be bound to certify.

Lord C. J. Willes has declared, that a Judge is not bound or concluded by the verdict; for that if he were, there would be no room for a certificate (*b*); and Mr. Justice Buller, in his Law of Nisi Prius, tells us, that some Judges have held themselves bound by the verdict; but he gives it as his firm opinion, that the statute intended to leave the matter to their discretion under all the circumstances of the case (*c*), which is now clearly the prevailing opinion; and it should be added, that in matters of consequence, either the damages are beyond 40*s.*, or the Judge, adverting to the magnitude of the case, will of course grant his certificate.

4 & 5 W & M. c. 23. respecting inferior tradesmen.

It remains, that we mention the stat. 4 & 5 W. & M. c. 23. s. 10., as repealing partially the act of Charles regarding certificates in cases where inferior tradesmen, apprentices, and other dissolute persons, are found guilty of wilful trespasses by hunting upon the land of another person. It enacts, that if any such person as aforesaid shall presume to hunt, hawk, fish, or fowl, (unless in company with the master of such apprentice, duly qualified by law,) such person or persons shall be subject to the

(*a*) 2 B. & C. 621. *Johnson* v. *Stanton.*
(*b*) 3 Wils. 328. (*c*) Bull. N. P. 330.

penalties of this act, and shall and may be sued and prosecuted for their wilful trespass in such their coming on any person's land; and if found guilty thereof, the plaintiff shall not only recover his damages thereby sustained, but his full costs of suit; any former law to the contrary notwithstanding.

Of the Certificate under 8 & 9 W. 3. c. 11. s. 4.

The third certificate which we have occasion to mention is that given by 8 & 9 W. 3. c. 11. s. 4., which declares, that in all actions of trespass to be commenced or prosecuted in any of His Majesty's courts of record at Westminster, wherein at the trial of the cause it shall appear, and be certified by the Judge, under his hand, upon the back of the record, that the trespass upon which the defendant shall be found guilty was wilful and malicious, the plaintiff shall recover not only his damages, but his full costs of suit; any former law to the contrary notwithstanding.

This statute was passed for the prevention of petty acts of trespass for which a jury could not give 40*s.* damages when singly considered, but which, nevertheless, when repeated constantly, became serious annoyances.

The plaintiff could not sue in the County Court, for there no actions *vi et armis* will lie: he dared not seek redress in the superior courts, for, by so doing, he was almost certain of losing his costs.

No certificate, it seems, has been granted upon this act for other trespasses than those which are brought *quare clausum fregit;* but Chief Justice Willes was firmly of opinion, that the legislature intended that it should reach all trespasses by the same construction

which they proposed for the statute of Charles, and which was at first entertained; and he said, that if an outrageous assault were attempted upon a man, but failed, and so left the battery undone, he would doubtless certify under 8&9 W. 3. (*a*) But this opinion has not been acted upon; and the remedies given by the act are principally enforced at this day, against persons who commit trespasses upon land after notice, which has been deemed the test of a wilful and malicious trespass. (*b*) Therefore, no malice need be proved (*c*), for it will be presumed under these circumstances; and there is no doubt but that a Judge would certify in the case of a voluntary malicious trespass committed without notice. (*d*)

Where it appeared in evidence that the plaintiff had a close adjoining the defendant's public house; that the defendant sometimes used to set a table for his guests in the said close, and serve them there; that he often used to walk there for his pleasure, and with others who shot with bows and arrows there; though Chief Justice Holt said, that this was a case in which, if a verdict passed for the plaintiff with damages under 40*s*., he would certify as for a voluntary malicious trespass. (*e*)

Yet, with respect to the trespasses charged in the authority which has just been cited, we may reasonably suppose, that a notice would be necessary, and that it would not come within the class of aggravated acts, in which malice is obviously prominent in the first instance. The

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(*a*) 3 Wils. 325, 326. *per* Willes C. J. (*b*) 1 T. R. 636.
(*c*) 6 Vin. Ab. 332. *per* Eyre J.
(*d*) See 6 Mod. 153. *per* Holt C. J.
(*e*) 6 Mod. 153. *Dove* v. *Smith.*

inference naturally deducible from this, and which has ever been an established rule, is, that accidental trespasses will not draw down the penalties of this certificate.

A point was recently agitated, whether the certificate under this statute would extend to a judgment by default. And the Judge having certified in an action of trespass, where, as to the new assignment, there was a judgment by default, it was argued for the defendant, that the act only contemplated matters of which the defendant is found guilty at the trial, and here no damages had been assessed under the general issue, but only under the new assignment. The Court, however, gave no opinion upon this question; for, as the defendant had denied the plaintiff's demand altogether, and the plaintiff had obtained a partial verdict in his favour, the plaintiff was entitled to the general costs of the trial, independently of the certificate. (*a*)

Time of granting this certificate.

There is no doubt at this day but that the Judge may grant this certificate at any reasonable time after the trial of the cause, as we shall find from the subjoined authorities. Yet there was a case in 28 G. 2. before Sir Michael Foster, where application was made out of Court for a certificate, and the Judges were clear that the certificate so granted was void, and contrary to the statute, which enacts that it shall be made in open court at the trial. (*b*) Nevertheless, a case was cited collaterally some years afterwards, to the effect, that such an instrument

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(*a*) 3 Brod. & Bing. 117. *House* v. *The Treasurer to the Commissioners of the Navigation of the Rivers Thames and Isis.* 6 Moore, 324. S. C.

(*b*) 2 Wils. 21. *Ford* v. *Parr.*

need not be given at the trial. (*a*) And in a previous case, a learned Judge had intimated his willingness to certify after the trial. (*b*) But a very recent decision has finally disposed of this matter. There was a wilful trespass after notice, and the damages being 5*s*., the Judge certified: the costs were taxed and levied under an execution; and a rule was obtained to set aside the certificate, judgment, and execution, and to have the money levied returned to the defendant. Lord Chief Justice Abbott delivered judgment against the rule, and observed, that the first section, respecting a reasonable cause for making defendants indeed, required that the certificate should be made in open court at the trial; and that the attention of the Judges in *Ford* v. *Parr* had not been called to the fourth section, which makes no mention of any particular time. He added, that the two sections did not appear to him to be in *pari materiâ*, but, on the contrary, that the application of different words to similar matters showed that they were intended to have a different construction. (*c*)

Whether the Judge be bound to certify.

The discretion of the Judge in granting these certificates was established by the latest decision of the Court of King's Bench upon this subject, notwithstanding an authority to the contrary; and the concluding words of the Lord Chief Justice in *Woolley* v. *Whitby*, which we have so lately mentioned, and which speak of the discretion exercised by the Judge, would seem to import that the later doctrine is the most stable at this day.

(*a*) 7 T. R. 449. *Swinnerton* v. *Jervis* cited.
(*b*) 1 T. R. 636. *Gundry* v. *Sturt*.
(*c*) 2 B. & C. 580. *Woolley* v. *Whitby*.

However, Mr. Justice Buller, at the Stafford summer assizes for 1794, certified in an action for coursing over the plaintiff's ground, conceiving himself bound to do so, and at the same time reserving leave to the defendant to set that certificate aside; but the Court refused a rule for that purpose, holding the statute compulsory on the Judge. (*a*) The same learned Judge certified afterwards in other cases, and De Grey C. J. and Wilmot J. are said to have acted under the same impression. (*b*) The resolution to which we have alluded as finally settling this point arose on a rule which was obtained calling upon the defendant to show cause why "Mr. Justice Le Blanc should not certify on the record that a certain trespass therein mentioned was wilful and malicious." The Court were perfectly satisfied that this was not a case for a certificate, but that at all events the act reposed a discretion in the Judge to certify or not at his convenience; and Lord Ellenborough, in the course of his judgment, used the following decided observations: "The act of granting a certificate in any case is to be done by the Judge alone before whom the trial is had: a rule, therefore, calling upon a party to show cause why the Judge should not be compelled to certify, is not only disrespectful and improper in the terms of it, but inefficacious in itself; and I must object to making any rule which we have no means of compelling the

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(*a*) 6 T. R. 11. *Reynold* v. *Edwards.*

(*b*) *Rudge* v. *Bond.* Cor. Buller J. cited, 3 East, 496. *Davenport* v. *Humphreys*, cor. Buller J. Ibid. *Davenport* v. *Merchant*, cor. De Grey C. J. 6 T. R. 12. cited in the note. *Perrot* v. *Townsend*, cor. Wilmot J. Ibid.

execution of. If there be any method of compelling the Judge to grant a certificate, it can only be by mandamus, though I do not mean to say that it can be done at all." Mr. Justice Grose mentioned, with regard to the mode of drawing up the rule, that it had been so arranged in the case of *Swinnerton* v. *Jervis*, at the express desire of Mr. Justice Nares, who tried that cause. (*a*)

Of the Certificate under 4 & 5 Anne. c. 16. s. 5.

It is fully known, that by the fourth section of this statute of Anne, a defendant is permitted, with the leave of the Court, to plead several matters. The fifth section relating to the certificate runs thus: "Provided, nevertheless, that if such matter shall, upon a demurrer joined, be judged insufficient, costs shall be given at the discretion of the Court; or if a verdict shall be found upon any issue in the said cause for the plaintiff or demandant, costs shall be also given in like manner, unless the Judge who tried the said issue shall certify, that the said defendant, or tenant, or plaintiff in replevin, had a probable cause to plead such matter, which upon the said issue shall be found against him."

The intention of the legislature in passing this act, was, that the defendant should not so avail himself of his newly-granted indulgence as to burthen the record with frivolous or ill-advised pleas, and thus, by succeeding on a part of his defence, oppress the plaintiff with the costs of them. Hence it is clear, that the statute applies only where one of several special pleas is found for the de-

(*a*) 3 East, 495. *Good* v. *Watkins*. See 5 T. R. 273.

fendant, which, but for this provision, would give him all the costs of the cause. (*a*) And we shall find, that if a plaintiff be nonsuited on the general issue, he shall still have the costs of a demurrer adjudged in his favour in the absence of a certificate, and this will be the case even should it appear on the record that he has had no cause of action, for the very gist of this enactment is to correct defendants for pleading insufficient matter. The discretion vested in the Court is explained to mean, not a power of refusing costs altogether, but merely an authority as to the quantum of allowance, which is exercised by giving the plaintiff the costs of the issues found for him, always excepting that there be not a certificate. Thus, in trespass against a man and his wife for an assault, there were four pleas: accord and satisfaction by the husband, that the wife's act was in aid of her husband, not guilty, and *son assault demesne*. The two first pleas were found for the defendants, the two last for the plaintiff; and it was holden, that, as there was no certificate, the plaintiff should have the costs of the last pleas. (*b*) So, where in trespass the defendant pleaded not guilty, with several justifications, there was a verdict for him, but it was entered upon the general issue only; on which a *venire de novo* was moved for by the plaintiff, but the Court refused the application, observing at the same time, that the plaintiff might have insisted upon having a verdict entered for him upon the other issues, which, unless a certificate intervened,

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(*a*) Hullock on Costs, vol. i. p. 105.

(*b*) Barnes, 140. *Jones* v. *Davies and Wife*.

would have given him the costs of those issues. (*a*) In the following case, the costs of a special plea were given to the plaintiff on demurrer, although he became nonsuit at the trial upon the general issue. It was an action on the case by a commoner for digging turves. The general issue and two special pleas were pleaded, on which there were new assignments, and a special plea to the new assignments, to which the plaintiff demurred. The plaintiff was nonsuited on the general issue, but had judgment on the demurrer; and, although there were some diversity of opinion among the Judges, all of whom were consulted, the prothonotary was finally ordered to tax the plaintiff's costs of the demurrer, and that such sum should be deducted from the defendant's costs upon the nonsuit. (*b*) Even if it turn out that there is no cause of action, the plaintiff will have his costs on demurrer. Trespass was brought for breaking and entering a close. The defendants pleaded not guilty, and justified under a right of common. The plaintiff to this replied a right of approval in the lord, leaving a sufficiency of common. The defendants again pleaded a right to dig sand or gravel on the l. i. q.; which the plaintiff traversed; they then alleged a custom to enclose with the licence of the lord, and leave of the homage, and averred, that the homage had not presented the plaintiff. To this the plaintiff replied a right on the lord's part to enclose under the statute of Merton, and

(*a*) Bull. N. P. 335. *Bartlett* v. *Spooner*. Barnes 461. S. C. S. P. Bull. N. P. 335. *Dayrel* v. *Briggs*.

(*b*) Barnes, 136. *Greenhow* v. *Ilsley*, and see Willes, 621. note.

that the lord of the manor had approved the l. i. q. The defendants demurred, and judgment went against them upon the demurrers. The issues on the right of the defendants to dig sand and gravel were found for them, and the jury were discharged from giving a verdict on the rest. The question was, if the plaintiff should have the costs of the demurrers. The Court held, first, that their power was discretionary as to the quantum of costs, and not as to the point of refusing them; and, secondly, that as the demurrer had been occasioned by the bad pleading of the defendants, they ought to abide the costs of their errors. (*a*)

What costs are meant.

The nature of these costs has been open to much discussion; and although in replevin, as we shall find, they are intended to mean the costs of the trial as far as they are involved in those issues, because both parties are actors in such a case, in other actions the costs of the pleadings only are allowed. And this point has been solemnly determined in a very recent decision, where Mr. Justice Park said, that he had consulted several of the Judges, and that their opinion was, that the costs of the issues meant the costs of pleadings only. (*b*)

Replevin.

Mr. Baron Hullock, in his book on Costs, makes it very clear that an avowant is within the fifth section of this statute, although he is not particularly named. For, as a Judge may certify that a plaintiff in replevin had a probable cause to plead several matters, he says a certificate would hardly be given to excuse the plaintiff from paying costs, unless the defendant, without a certificate,

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(*a*) 2 T. R. 391. *Duberley* v. *Page.*
(*b*) 1 Bing. 275. *Othir* v. *Calvert.*

would be entitled to receive them. (*a*) His opinion has been sustained by adjudged cases, and by a recent authority.

A plaintiff in replevin prescribing for a right of common, pleaded two several matters to an avowry, one of which was found for him, the other for the defendant, and there was no certificate. It was urged, that an avowant was not within the words of the statute of Anne; but it was held, that an avowant was in the nature of a defendant, and plainly within the intent and meaning of the act; and so the defendant had the costs of the plea found in his favour. (*b*)

Again, in an action of replevin, the defendant pleaded *non cepit*, and made cognizance as bailiff of J. H. The plaintiff took issue on *non cepit*, and traversed the defendant's being bailiff; and then he pleaded in bar, first, a licence from J. H. to put his cattle on the l. i. q.; and, secondly, made prescription for common. The replication traversed the licence, and protesting against the right of common, traversed the place as parcel, &c. The first and last issues were found for the plaintiff, the second and third for the defendant, and there was no certificate. The Court were decidedly of opinion that the defendant was entitled to have the costs of the issues found for him deducted from the general costs of the verdict in favour of the plaintiff. (*c*)

(*a*) Hullock on Costs, vol. i. p. 109.

(*b*) Barnes, 144. 146. *Bright* v. *Jackson*, and see Barnes, 141. *Cremer* v. *Dent*.

(*c*) 2 T. R. 235. *Dodd* v. *Joddrell*. S. P. 2 B. & P. 368. *Vollum* v. *Simpson*.

So, where under an arbitration, two issues in replevin were found for the defendant, and one for the plaintiff as to the fraudulent removal of goods, with the general costs of the cause, the Court did not think it necessary to hear counsel in support of the rule; but adverting to *Dodd* v. *Joddrell* and *Vollum* v. *Simpson*, declared that the point had been decided, and that they approved of the opinion of Heath J., who had said in the latter case, that the statute of Anne being remedial, ought to be so construed as to advance the remedy. (*a*)

It may be easily conceived, that an avowant is considered a defendant within this act for the purpose of paying costs on avowries found against him, so that where the jury found for the plaintiff in replevin on every issue excepting one, which entitled the defendant to the *postea*, the Court of King's Bench were perfectly clear that the issues for the plaintiff should be deducted from the general costs, and that the avowant was a defendant within the act.(*b*)

As in replevin both parties are actors, it has always been resolved that the costs intended in this species of action are not only the costs of the pleadings, but those also of the trial. As, where the pleas in bar were, first, a prescription to have common on the l. i. q., on which issue was joined, and found for the plaintiff; secondly, common because of vicinage, which was found for the defendant; and there was no certificate. The Court

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(*a*) 5 Taunt. 594. *Cook* v. *Green*. 1 Marsh, 294. S. C. The decisions in Ireland on 6 Ann. c. 10., which is similar to the English statute, proceed on the same principles. See Wilkinson on Replevin, p. 107.

(*b*) Dougl. 709. *Stone* v. *Forsyth*, in the note.

determined, that the defendant should have the costs of the trial allowed him in this case, and not merely the costs of the pleadings. (*a*) So, where the prothonotary allowed the plaintiff in replevin the costs of his pleadings, briefs, and witnesses relating to the issues on which he had succeeded, the Court recognized the authority of *Brooke* v. *Willet*, and confirmed the officer's report. (*b*)

We have already seen, that a certificate under 43 El. will deprive the plaintiff of costs, although other statutes should award them to him; if, therefore, all the issues be found for the plaintiff and there be a certificate under 43 El. he cannot successfully claim the costs of the defendant's special pleas, for the statute of Anne applies only where one bar is found for the defendant which entitles him to the general costs of the trial. (*c*)

Time for granting this certificate.

It seems that this certificate, in common with those which we have already discussed, need not be granted at the trial: and it may be added, that instances of granting these instruments (*d*) are rare, since it is just that the party who has created the expence should sustain the inconvenience. (*e*)

Of the Certificate under 8 & 9 *W.* 3. *c.* 11. *s.* 1.

The acts of parliament which entitled defendants to their costs before the stat. 8 & 9 W. 3. c. 11. were

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(*a*) 2 H. Bl. 435. *Brooke* v. *Willet.*

(*b*) 2 B. & P. 368. *Vollum* v. *Simpson*, and see id. 257. *Da Costa* v. *Clarke.* 3 T. R. 391.

(*c*) 7 East, 583. *Rickmond* v. *Johnson*, and see *Howard* v. *Cheshire*, Say. Rep. 260. *ante.*

(*d*) Barnes, 141. *Cremer* v. *Dent.*

(*e*) 2 T. R. 394. *per* Buller J.

held to extend only to cases where all the parties were acquitted; it therefore, happened, not unfrequently, that innocent persons were made defendants for sinister purposes; as, for instance, to deprive co-defendants of their testimony; and this hardship ensued, that when these individuals were acquitted, they were obliged to sustain their own expences thus unjustly entailed upon them.

To remedy this, the first section of the above act provides, that, for relief of his Majesty's good subjects against causeless and unjust suits, where several persons shall be made defendants to any action or plaint of trespass, assault, false imprisonment, or *ejectione firmæ*, and any one or more of them shall be upon the trial thereof acquitted by verdict, every person or persons so acquitted shall have and recover his costs of suit, in like manner as if a verdict had been given against the plaintiff or plaintiffs and acquitted all the defendants; unless the Judge before whom such cause shall be tried, shall immediately after the trial thereof, in open court, certify upon the record, under his hand, that there was a reasonable cause for the making such person or persons a defendant or defendants to such action or plaint.

This provision is available only in the particular actions mentioned; and consequently it does not apply to trespass on the case (*a*), trover (*b*), replevin (*c*), or debt; as where one executor defendant was acquitted on the plea

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(*a*) 2 Str. 1005. *Dibben* v. *Cooke.*

(*b*) Barnes, 139. *Poole* v. *Boulton.* *Marriner* v. *Barret*, cited 3 Burr. 1285.

(*c*) 3 Burr. 1284. *Ingle* v. *Wordsworth.* 1 Sir Wm. B. 355. S. C. Sayer on Costs, 215. S. C.

of *plene administravit præter.* (*a*) Neither does the statute affect prosecutors, for on an information against several, one was acquitted, but, on application, he was refused costs, for the act of 4 & 5 W. & M. c. 18. cannot be intended to make prosecutors otherwise liable than as plaintiffs were before in other actions. (*b*)

It should be remarked here, that the act seems applicable only to cases where one defendant is found guilty; for it expressly declares that the defendant or defendants acquitted shall stand in the same situation as though all had been found not guilty, unless there should be a certificate of probable cause; and it need hardly be added, that a judgment by default by one, where the other party is acquitted, is not within its operation.

The Master the proper judge of these costs.

Of the amount of costs the Master is the proper judge, and he is subject to the correction of the Court, who, nevertheless, will not help a defendant if any collusion appear in his conduct. As, where an ejectment was brought against four, and one was acquitted, the Master taxed the defendant's costs at 3*l.*, but he was dissatisfied, and moved the Court for all his extraordinary costs, on which it appeared, that these expences had been incurred on account of the other defendants as well as on his own, and so a contrivance was detected to charge the plaintiff with these disbursements. The Court discharged the rule with costs. (*c*)

(*a*) Tidd. 1001. 7th ed. *Duke of Norfolk* v. *Anthony.*

(*b*) 1 Salk. 194. *The Queen* v. *Danvers.*

(*c*) Barnes, 131. *Thrustout and Jenkinson* v. *Woodyear and others.*

So, where to trespass and assault two defendants had pleaded jointly; one was found guilty, the other acquitted; and the master allowed him 40s. costs, on which he applied to the Court with an affidavit that his costs had been considerable; but the Court said, that if these defendants had pleaded separately the case might have been different; as it stood before them, they said, the plaintiff would pay the costs of the defendant who had been convicted, if the rule were granted, it being a joint defence. (*a*) Again, where both defendants had appeared by the same attorney, and one was acquitted, the Master only allowed him half costs, and it was admitted by the defendant's counsel that this was a matter wholly in the discretion of the Court. (*b*)

Setting off costs.

It seems also to be a point for the consideration of the Judges, whether they will allow the costs of one party to be set off against those of another: Although where four persons were sued in the Common Pleas, of whom one only was found guilty; the three defendants who were acquitted, made an affidavit that the plaintiff was a poor itinerant Jew, and urged, that their costs should be deducted out of such as the prothonotary should allow the plaintiff against him who was convicted; but the Court rejected the application as unprecedented. (*c*)

On the general principle, the practice of the Courts of King's Bench and Common Pleas differs: the first, regarding the lien of the attorney upon the costs as of

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(*a*) 2 M. & S. 172. *Hughes* v. *Chitty and Pontland.*

(*b*) 4 Barne. & Ald. 43. 700. *Holroyd* v. *Breare and Holmes.*

(*c*) Barnes, 145. *Mordecai* v. *Nutting.*

primary importance; the second considering that as subject to the equitable claims between the parties. (*a*) In a very late case, which is more adapted to the point on which we are treating, one defendant was found guilty on the general issue, and had a verdict on his justification; the other was acquitted generally; on which the Master taxed full costs for the plaintiff against the party who had been found guilty, and half costs to the other; and it was insisted, that the costs allowed to the one defendant ought to be set off against such as were to be paid by the other, both having appeared by the same attorney; but Mr. Justice Bayley observed, that the liberty of setting off the costs could not be allowed, since the lien of the plaintiff's attorney would thereby be destroyed. (*b*)

Where the certificate has been granted.

Sometimes this certificate is granted by the Judge, who will look to the probable reason for joining a party as defendant. The plaintiff had been apprehended and taken to the watch-house, for which he brought his action: two of the defendants were the parties who had taken him, the third was the constable and watch-house-keeper, who detained him the whole night. A verdict passed for the latter, and a certificate was applied for, which, on reference to the statute, was given by Lord Ellenborough. (*c*)

Trespass was brought for a distress. The defence was the clandestine removal of goods to avoid the payment

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(*a*) See the cases on the subject in Hullock on Costs, vol. ii. pp. 472. 476.

(*b*) 4 B. & A. 43. 700. *Holroyd* v. *Breare and Holmes.*

(*c*) 3 Campb. 35. *Aaron* v. *Alexander and others.*

of rent; the broker was found guilty, but there was no evidence against the landlord, and he was acquitted. Lord Ellenborough certified. (*a*)

Time. The express words of the act, that this certificate shall be made upon the record, in open court, immediately after the trial, sufficiently preclude all doubt as to the time within which it is to be applied for.

Of Certificates in Actions against Justices, Constables, Officers, &c.

Under 7 Jac. 1. c. 5. By 7 Jac. 1. c. 5. justices of peace, mayors, or bailiffs of cities and towns corporate, headboroughs, port-reves, constables, tithing-men, and collectors of subrieties and fifteens, on being sued for any thing done touching their offices, and all others which, in their aid or assistance, or by their commandment, have done any thing touching such offices, may plead the general issue, and give the special matter in evidence; and if any verdict be given in their favour, or the plaintiff be nonsuit, or discontinue, the Judge is to allow them double costs, which has been understood to mean that in such cases a certificate shall be granted for the purpose. This act is made perpetual by 21 Jac. 1. c. 12., which extends its provisions to churchwardens and overseers of the poor, since these officers were not considered within the equity of the word constables. (*b*) And it is further provided by 42 G. 3. c. 85. s. 6., that the stat. 21 Jac. 1. c. 12. being found expedient, shall be extended to all persons in any

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(*a*) 4 Campb. 136. *Furneaux* v. *Fotherby and Clarke.*
(*b*) 11 State Trials, 320.

public employment, civil or military, either in or out of the kingdom, who may have power and authority to commit persons to safe custody.

Who within 7 Jac. 1. & 21 Jac. 1.

It was decided very early, that a deputy-constable was protected by 7 Jac. 1. c. 5., being in the place of a constable, although the opinion of Mr. Just. Doderidge was adverse at first. (*a*) And it has been ruled at Nisi Prius, that one who acted under the warrant of a justice of the peace, though no officer, came within the words which protect persons who follow the commandment of such justices, &c. in matters concerning their respective offices. (*b*) But neither a secretary of state, nor a King's messenger, are within these statutes. And so it was held, after the most earnest argument and deliberation, in the great case of *Entick* v. *Carrington*; and it was determined there, that the former was not, *ex officio*, a justice of the peace, and so, consequently, excluded from the benefits of all the acts respecting such justices. (*c*) However, the late statute of G. 3., it should seem, is sufficiently extensive to extend these remedies both to the minister and the person who acts under his authority.

Certificate must be granted by the Judge who tries the cause.

The Judge at the trial will order the postea to be marked with double costs. And the Court have held, that, on a general verdict, he alone can do this with propriety. So that, in a case where no memorandum

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(*a*) 3 Bulst. 77. *Phelps* v. *Winchcomb*. Mo. 845. S. C. 1 Ro. Rep. 274. S. C.

(*b*) Clayt. 54. *Wenpeny's* case. 6 Vin. Ab. 348, cites S. C.

(*c*) 11 State Trials, 313. 2 Wils. 275. S. C.

appeared, they refused to give double costs, although the defendant was a constable, and had a verdict for something done in the execution of his office. (*a*)

If the plaintiff be nonsuited, the proper method still is to apply for a certificate. And thus, where an action of trespass was brought against the defendant for taking an anchor as a distress for non-payment of the poor-rate, and there was a nonsuit, it was moved, that a suggestion of the defendant being a churchwarden, and acting in the execution of his office, should be put upon the record; but cause was shown against this rule, on the ground that no certificate had been granted, and the Court thought such an instrument indispensable; intimating, at the same time, that an application should be made to the Judge for such certificate, and that he was bound to grant it. (*b*) The same point had been previously ruled soon after the passing 7 Jac. 1. (*c*); but the case was not mentioned in the authority just referred to.

Act done must be in the execution of office.

It is necessary, for the perfection of this certificate, that the act done and certified should be while the party was in the execution of his office. Therefore, where trespass was brought against a constable, and on not guilty a verdict passed for the defendant, there was a rule to show cause why it should not be entered on the roll that the defendant was a constable, and that the action was brought for what he had done in the execution of his office. But the plaintiff's counsel produced an affidavit

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(*a*) 2 Ventr. 45. *Anon.*
(*b*) 7 T. R. 448. *Harper* v. *Carr.*
(*c*) Winch. Rep. 16. *Maior* v. *Two Bayliffs.*

to prove that the party had not been so officially acting, on which the rule was discharged. (*a*)

Where no certificate is necessary.

Sometimes, however, no certificate is required. As, where a plaintiff discontinues, where there is a special verdict, or where it appears admitted on the record that the party defendant has been an acting officer.

Trespass was brought for taking a gun, and the plaintiff moved to discontinue with leave of the Court. The defendant, a justice of the peace, made an affidavit to that effect, and that he was acting in his office, and so moved for double costs; and his application was granted, for it was said, that where there is a discontinuance with leave of the Court, it is always upon payment of costs, and that in the case before them it must be upon payment of double costs. (*b*)

Again, where on a special verdict, it appears that the act complained was done by the party by virtue of his office, double costs must be taxed, although there be not a certificate; and it has been so adjudged, the opinion of the Master being decidedly that he ought to tax double costs. (*c*)

It has been resolved, that a fault in the plaintiff's declaration should not exempt him, in these cases, from paying double costs. Trespass was brought by husband and wife for battery done to them both to their wrong.

(*a*) Dougl. 307. *Grindley* v. *Holloway*. See Ca. temp. Hardw. 138. *Valentine* v. *Fawcett*. Vaugh. 111. *Styles* v. *Coxe* Bart.

(*b*) Bull. N. P. 332. *Devenish* v. *Martin*. 2 Str. 974. S.C. 2 Barnard. 171. to the same effect.

(*c*) Dougl. 308. n. *Rann*. v. *Piekins*.

Plea, not guilty. The defendant, a constable, was acquitted, and the Judge certified that he had acted in the execution of his office, on which double costs were prayed. The plaintiff, by his counsel, urged the insufficiency of his own declaration; but the Court said, that double costs were allowed for the vexation of defendants, and that vexation fully appeared in the case before them. So the costs were allowed. (*a*)

Statutes do not extend to actions for non-feasance.

A series of decisions prove, that these statutes do not extend to actions of non-feasance; and of course, if the case be such that the defendant cannot plead the general issue, and give the special matter in evidence, he cannot advantage himself of the enactments which, on so doing, give the double costs.

Assumpsit was brought by the officers of one parish against those of another, to recover money laid out by the former for maintenance and medical assistance afforded to a pauper belonging to the latter parish, on which there was a nonsuit; and the Court held, that this was a mere non-feasance, to which this statute did not extend. (*b*) In a subsequent case the above authority was distinctly recognized, where the action was to recover the price of certain bread which had been furnished for the use of the poor of the parish by the defendant's order, who was acting on behalf of the churchwarden and overseer. (*c*)

Again, on the other point, where the plaintiff, a freeman, who had a voice in the election of mayor, sued

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(*a*) Cro. Car. 174. ——— v. *Heylers.*
(*b*) 3 East, 92. *Atkins* v. *Banwell.*
(*c*) 3 M. & S. 131. *Blanchard* v. *Bramble.*

the defendant, then being mayor, for refusing to receive his suffrage, and became nonsuit, the Court were of opinion, that this was not a case for double costs under 7 Jac. 1.; for the scope of that act was to protect mayors, &c. in actions for false imprisonment, and such matters, when they might substantiate their defence under the general issue. (*a*) And the same doctrine was sustained, where a constable was acquitted in an action for a false presentment of inhabitants as chargeable to duties (*b*); and where churchwardens were in like manner found not guilty on a charge of presenting to the plaintiff falsely and maliciously upon a pretended fame of incontinency. It was declared, in the last case, that the matter was purely ecclesiastical, and that the makers of 7 Jac. 1. only contemplated grievances inflicted upon men in temporal matters concerning their offices. (*c*)

Under these acts not only the costs assessed by the jury but those also *de incremento*, shall be doubly taxed (*d*); and it was soon adjudged, that all defendants acquitted under these circumstances are entitled to the double taxation. (*e*)

With regard to the time of granting this certificate, the Court expressed their opinion in a case which has been already mentioned, that it need not be granted at the trial, and that they thought the Judge bound to allow it. (*f*) Time.

(*a*) 2 Lev. 250. *Herring* v. *Finch*.
(*b*) Cro. Car. 467. *Stone* v. *Lingar*.
(*c*) Id. 285. *Kercheval* v. *Smith*. Sir Wm. Jones, 305. S. C.
(*d*) Skin. 556. *per* Holt C. J.
(*e*) Vaugh. 117. (*f*) 7 T. R. 448. *Harper* v. *Carr*,

1 W. & M. respecting land-tax collectors.

It should seem to be the custom for Judges to certify on the postea where double or treble costs are given to officers, or in default of such certificate, for the parties to apply to have a suggestion entered on the roll. The defendant, a collector of the land-tax, was sued in assumpsit and case for seizing goods, and on a verdict in his favour, the Judge certified, that the defendant had justified by virtue of 1 W. & M. for the tax. On a motion for treble costs under s. 10., the defendant's counsel distinguished this application from such as had been made under the statute of James, observing, that the act of William gave the remedy upon any issue joined, and that there was a disaffirmance of the power by which the defendant was collector; after some doubt on the part of Holt C.J. (*a*), the Court gave the costs prayed. (*b*)

With reference to suggestions, a case occurred, in which the defendants, collectors of the tax for window lights, were impleaded in trover for taking goods, and on the plaintiff being nonsuited for want of showing a title to the goods, their counsel produced an affidavit, which stated that their clients were officers, and had been acting in the execution of their duty on the occasion complained of. It was admitted, that the usual mode of

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(*a*) 12 Mod. 6. *Willet* v. *Tidey*.

(*b*) 1 Show. 214. *Willet* v. *Tidey*. 12 Mod. 6. S. C. Carth. 188. S. C. It may be suggested, that the statutes of James I. seemed, according to the report in 12 Mod., to have been fully in the mind of the learned Judge, and that it was not until Sir B. Shower, for the defendant, had distinctly mentioned the certificate under 1 W. & M. that the costs were granted.

obtaining the double costs, which were asked for, was by a certificate from the Judge; but it was submitted, that a suggestion on the roll might be entered to the same effect, on which Lord Hardwicke said, that there appeared to him no other way for the defendants to obtain their costs, and so the rule was made absolute. (*a*)

24 G. 2. c. 44. s. 8.

It is provided by 24 G. 2. c. 44. s. 8. that where the plaintiff in any such action, (meaning actions against justices for any thing done in the execution of their office,) against any justice of the peace, shall obtain a verdict, in case the Judge before whom the cause shall be tried shall in open court certify, on the back of the record, that the injury for which such action was brought, was wilfully and maliciously committed, the plaintiff shall be entitled to have and receive double costs of suit.

Certificates to protect revenue officers.

By 19 G. 2. c. 34. s. 16. it is enacted, that in case any information shall be commenced and brought to trial, on account of the seizure of any ship as forfeited for illegally carrying goods, &c., as prohibited or uncustomed, or illegally carried or exported, or intended or attempted to be exported, or as illegally relanded after having been shipped or exported upon debenture or certificate, wherein a verdict shall be found for the claimer thereof, and it shall appear to the Judge or Court, before whom the same shall be tried, that there was a probable cause of seizure, the Judge or Court before whom the said information shall be tried shall certify on the record that there was a probable cause for the prosecutor's seizing the said ship or goods, the defendant shall not be entitled to any costs of suit whatsoever, nor shall the per-

(*a*) Ca. temp. Hardw. 125. *Barton* v. *Miles*.

sons who seized the said ship, &c. be subject to any action, &c. The clause further provides, that if any action, indictment, or prosecution be brought against the persons so seizing, &c., and a verdict pass against the defendants, if the Judge before whom such action or prosecution shall be tried shall certify, on the said record, that there was a probable cause for such seizure, then the plaintiff, besides his ship or goods so seized, or the value thereof, shall not be entitled to above 2*d.* damages, nor to any costs of suit; nor shall the defendant in such prosecution be fined above 1*s.*

There is a provision to the same effect in 4 G. 3. c. 15. s. 46. respecting seizures made in America.

In 1779, two points were determined by the Court of King's Bench with regard to the certificate in the latter statute. First, that it might be granted by the Judge after the trial, and out of court; secondly, that a Court of Appeal was competent to give such a document. The plaintiff owned a trading vessel, of which he was also the master; the defendant seized this ship for a smuggler. An information was brought in the Vice-Admiralty Court at Halifax, and sentence was pronounced against the master, Sullivan, who appealed to the superior Court of Admiralty at Halifax, and obtained a reversal of the sentence; but the Judge, some time afterwards, certified that there had been a probable cause of seizure.

Sullivan, however, sued the defendant on his return to England, in trespass, and the record, with the indorsed certificate, being produced, it was contended for the defendant, that the instrument was a bar to the action, and that the plaintiff must be nonsuited. The plaintiff replied, that the certificate should have been given at the trial, on which he had a verdict, subject to

the opinion of the Court. A new point was raised on the argument, that an appellate jurisdiction had no power to interfere in this manner; but the Court said, adopting the observation of the Solicitor-General, that there could be no certificate in the original court, since the sentence was in favour of the defendant; and that it would indeed be strange, if he were to be in a worse situation than if that sentence had been against him. On the second point, the case of *Cremer* v. *Dent*, decided on the statute 4 Anne, c. 16., was mentioned as an authority for granting the certificate after the trial; and Lord Mansfield added, that sentences in the Admiralty Court were often not drawn up for months after they were pronounced. On this the rule for entering a nonsuit was about to be made absolute, when Dunning urged that, as the certificate did not exist at the commencement of the action, it should have been pleaded; but the Court noticed the plaintiff's inconsistency in allowing a copy of it to be read at the last trial, and in making up the record in which the plea was entered of Hilary Term, 1778, whereas the certificate had been granted in June, 1777, and so tacitly admitting that the defendant might give his special matter in evidence. Independently of this, the Judges were clear that if they granted a new trial on this ground, the defendant might avail himself of the certificate, since it had been pronounced valid. (*a*)

At the trial of the cause just mentioned, Lord Mansfield was applied to for a certificate under the second branch of the clause in 19 G. 2.; but he refused, thinking

(*a*) Dougl. 106. *Sullivan* v. *Montague*.

that it related only to cases where there had not been a condemnation. (*a*)

There is a note in Mr. Serjeant Frere's edition of Douglas, which cites an authority where a Judge was held to be warranted in certifying under the second branch of the clause, though no information had been brought in the Exchequer for the condemnation of the ship. (*b*) However, the stat. 26 G. 3. c. 40. s. 31. expressly enacts these provisions in cases where "no information shall be commenced or brought to trial to condemn the same," meaning goods, ships, &c.

By 23 G. 3. c. 70. s. 29., the protection above alluded to is extended to the officers of the excise or inland duties; and by 24 G. 3. c. 47. s. 35., the like provision is enacted for the officers of the customs; and the act of 28 G. 3. c. 37. s. 24. follows that of 26 G. 3. c. 40. respecting all actions brought for the seizure of any goods, wares, and merchandizes, forfeited by virtue of the revenue acts. Yet, if injuries be committed by revenue officers, independently of the seizure, they are certainly amenable, and it has been so resolved. Trespass was brought against custom-house officers for forcibly entering the plaintiff's house, breaking locks, doors, &c., making a disturbance, and seizing one piece of printed calico. There was a general verdict for the plaintiff, with damages above 40*s.*; but the Judge certified that there had been a probable cause of seizure. Nevertheless, as the jury had not distinguished the trespasses accompanying the seizure by their verdict, it was holden, that the

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(*a*) Dougl. 108.

(*b*) Id. 108. n. 45. *Renalls* v. *Cooper.*

plaintiff should have both damages and costs. (*a*) Those words, common to the revenue acts, which prevent the plaintiff recovering any thing besides the property seized, or the value thereof, mean the value of the goods at the time of the seizure, together with any loss occasioned by the seizure and detention.

Custom-house officers were sued for taking verdigris; and on a verdict in the plaintiff's favour, damages 73*l.* and upwards, the Judge certified under 28 G. 3. c. 37. The principal mischief complained of was, that the verdigris had been damaged before it was returned to the plaintiff. And a rule was obtained to show cause why judgment should not be entered up for 2*d.* damages; but it was discharged with costs: for the Court referred to the act, where it is expressly declared, that the plaintiff shall recover either the thing seized, or the value thereof; and they were of opinion, that the value at the time of seizure was the true measure for damages. (*b*)

Of the Certificate regarding Special Juries.

It was intended by the stat. 3 G. 2. c. 25. s. 16., that the party who applied for the special jury should pay the costs attending such a proceeding; but as the word "fees" was inserted alone, it was soon holden, that the bare fees of striking the jury were the only costs which the applicant was bound to satisfy. And thus, many frivolous suits were commenced with a view to harass the opposite party with the expences of a special jury. (*c*)

(*a*) 1 H. Bl. 28. *Baldwin* v. *Tankard, &c.*

(*b*) 5 B. & A. 762. *Laugher* v. *Brefitt.*

(*c*) Sayer on Costs, 181. Hullock on Costs, vol. ii. p. 436.

This produced another act, in which a certificate is introduced. By 24 G. 2. c. 18. s. 1., the party asking for this jury is ordered to pay not only the fees attendant upon the practice, but all the expences also occasioned by the trial of the cause by such special jury, unless the Judge before whom the cause is tried shall, immediately after the trial, certify in open court, under his hand, that the same was a cause proper to be tried by a special jury.

The word "immediately" distinguishes the time of granting this certificate; and, therefore, where Lord Ellenborough was applied to on the day after a trial by special jury to certify, he said, that he conceived he had no authority for that purpose, and that he had been in the habit of refusing all such applications. By the constant practice the sums actually paid to the special jury attending are only allowed; and the Court of King's Bench has decided in conformity with this practice, although they thought that the statute would bear another construction. (*a*)

This certificate cannot, it seems, be given in criminal cases. (*b*) For, where an information was filed against a defendant for a libel, who was found guilty, and the prosecutor, at whose instance the special jury had been struck, applied to Lord Kenyon for a certificate, he replied, that in a criminal case of that nature he could not certify so as to give the costs. (*c*)

(*a*) 2 Ch. Rep. 154. *Cursum* v. *Durham.*

(*b*) Tidd, 7th ed. 827.

(*c*) 1 Esp. 229. *In the case of the King, on the prosecution of Sermon*, v. *Lord Abingdon.*

Of the Certificate regarding frivolous Defences on Indictments for the Non-repair of Highways.

By 13 G. 3. c. 78. s. 65. it is declared, that it shall and may be lawful for the Court before whom any indictment or presentment shall be tried for not repairing highways, to award costs to the prosecutor, to be paid by the person or persons so indicted or presented, if it shall appear to the said Court that the defence made to such indictment or presentment was frivolous; or to award costs to the person indicted or presented, if it shall appear to the said Court that such prosecution was vexatious.

Under this statute it is the practice for Courts of Quarter Session to award costs by their order, whereas at Nisi Prius the Judge marks the record by certificate.

A certificate of this kind, given by Mr. Justice Buller after trial, which merely stated that the defence was frivolous, without expressly awarding costs, was holden sufficient, no precise form of words being necessary. (*a*)

The Judge before whom the matter is tried is the only competent authority at whose hands this document is to be asked; and therefore where certain inhabitants had been acquitted on an indictment for not repairing a road for want of prosecution, the Court, on being urged to award costs as for a vexatious prosecution under the second sentence of s. 65., distinctly affirmed that they had not power to do so, and that the application should have been made to the Judge at Nisi Prius. (*b*)

(*a*) 6 T. R. 344. *Rex* v. *Inhabitants of Clifton.*

(*b*) 5 T. R. 272. *Rex* v. *Inhabitants of Chadderton.*

Time. No particular time is mentioned for the granting this certificate, it may therefore be presumed, that the Judge may certify at any reasonable time after the trial.

Of the Certificate under 13 *G.* 3. *c.* 51. *s.* 1. *respecting Trials in Wales.*

The Welch judicature act was one of those various efforts which the legislature has from time to time employed for the suppression of vexatious suits at Westminster.

The first section enacts, that in case the plaintiff in any action upon the case for words, action of debt, trespass on the case, assault and battery, or other personal action, where the cause of such action shall arise within the dominion of Wales, and which shall be tried at the assizes, at the nearest English county to that part of the said dominion of Wales in which the cause of action shall be laid to arise, shall not recover, by verdict, a debt or damages to the amount of 10*l.*: in such case, if the Judge who tried the cause, on evidence appearing before him, shall certify, on the back of the record of Nisi Prius, that the defendant or defendants was or were resident in the dominion of Wales at the time of the service of the writ, or other mesne process served on him, her, or them, in such action; on such fact being suggested on the record or judgment roll, a judgment of nonsuit shall be entered against the plaintiff, and such defendant or defendants shall be entitled to and have like judgment and remedy therein, to recover such and the like costs against the plaintiff or plaintiffs in every such action, as if a verdict had been given by the jury for the defendant or defendants, unless the Judge

before whom such cause shall be tried shall certify, on the back of the record, that the freehold or title of the land mentioned in the plaintiff's declaration, was chiefly in question, or that such cause was proper to be tried in such English county.

Section 2. provides, that in all transitory actions brought in like manner, where the verdict is under 10*l.*, and the Judge certifies the defendant's residence in Wales as above, the plaintiff shall be nonsuited, and shall pay to the defendant his costs of suit, but the plaintiff shall be allowed out of the defendant's costs the full sum he has obtained by the verdict; and such verdict, although no judgment be entered by the plaintiff, shall be an effectual bar to any future action brought by the plaintiff for the same cause.

An attorney sued a defendant resident in Wales, by attachment of privilege for words spoken there, and laid his venue in the Welch county, whereby the cause came on for trial at Hereford, and there was a verdict with 5*s.* damages, and the Judge certified. On a motion to enter this fact on the record, which was opposed, Lord Kenyon observed, that the plaintiff might have exercised his privilege by laying the venue in Middlesex, but as he had laid it where the cause of action arose, and where the defendant resided, the suggestion ought to stand upon the record. (*a*)

The words "other personal action" have not been idly introduced in the statute; and thus an action of covenant against a husband, because his wife had not

(*a*) 6 T. R. 500. *Evans*, Gent. v. *Jones*.

levied a fine according to the husband's agreement with the plaintiff, was held to be within its provisions. (*a*)

It seems, that the Judge is bound to certify in this case; for in a case for the plaintiff, indorsee of a promissory note recovered 5*l.* damages against the drawer, Lord Kenyon expressed some reluctance to certify, but on considering the subject, he declared himself bound to do so, and that he had no discretion on the point. (*b*)

SECT. II.

Of Judicial Certificates which entitled Persons to certain Rewards before the passing of 58 *G.* 3. *c.* 70.

THERE are well known periods in the history of this country, when offences against the persons and properties of individuals were of such frequency as to excite the most alarming dismay. To so great a height had this mischief arisen, that it was deemed necessary to stimulate the parties injured, by the hope of pecuniary rewards, to become active in the apprehension and prosecution of mischievous felons. The method employed was to empower the sheriff of the county or city where the conviction took place to pay a sum of money, (in many of the acts 40*l.* is the stated sum,) on the production of a certificate from the Judge who tried the

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(*a*) 1 New Rep. 267. *Davis* v. *Jones.*

(*b*) 1 Esp. 463. *Cooper* v. *Davies.*

prisoner certifying such conviction, to the party claiming under the instrument, as having apprehended and prosecuted the offender to conviction. The distribution of such money in shares was, in cases of dispute, entrusted to the discretion of the Judge. By these means highwaymen (*a*), counterfeiters and clippers of the coin of the realm (*b*), burglars (*c*), housebreakers (*d*), horse-stealers (*e*), sheepstealers (*f*), and coiners and utterers of false money (*g*), were exposed to the influence of a personal interest, which very much urged and awakened the police of the country. Of late years, however, the vigilance of the magistracy and officers acting under that authortiy has been sufficiently spirited and successful to repress the frequent occurrence of outrage and robbery which had once been so much the object and dread, and it has happened, infinitely to the disgrace of persons who have lent themselves to such practices, that false charges have been made, and enforced with effect, for the sole purpose of gaining these pecuniary payments. Instances of this nature being notorious, and there being also satisfactory evidence that the first thefts of youthful depredators had been often winked at in order that the rising thief might entangle himself in some crime which was comprehended in these statutes, and thus, that the reward might be obtained, the legislature resolved to repeal every provision in the acts we have referred to respecting the sheriff's payments of these bounties; and

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(*a*) 4 W. & M. c. 8. (*b*) 6 & 7 W. 3. c. 17.
(*c*) 5 Ann. c. 1. (*d*) Ibid. (*e*) Ibid.
(*f*) 14 G. 2. c. 6. (*g*) 15 G. 2. c. 28.

this has been done accordingly by 58 G. 3. c. 70., which allows the expences of the prosecutor and his witnesses in all grand and petit larcenies.

SECT. III.

Of the Judicial Certificate, exempting Persons who have prosecuted certain Felons to conviction from Parish and Ward Offices.

FOR the better apprehending, prosecuting, and punishing burglars, housebreakers, robbers in shops, warehouses, coach-houses and stables, and horse-stealers, it was enacted by 10&11 W. 3. c. 23. s. 2., that any person apprehending and prosecuting to conviction a felon guilty of any one of the crimes above mentioned shall be entitled to a certificate, without fee or reward, under the hands of the Judge or Justice before whom the conviction may take place, certifying such conviction, and within what parish or place the felony may have been committed, and that the party obtaining the certificate has been instrumental in discovering or taking the offender; and it provides further, that in case of any dispute between two or more as to the property of such certificate, it shall be distributed into shares at the discretion of the Judge or Justice, upon which the person who shall possess the temporary interest in the certificate shall be discharged from all manner of parish and ward offices within the parish or ward wherein the felony shall be committed. It is also declared, that the

certificate might be once assigned over, which is now, however, forbidden by a late statute, noticed at the end of this section, and that the assignee should be entitled to its benefits, and that it should be inrolled with the clerk of the peace. But by s. 2., if the party holding the certificate have occasion to avail himself of its advantages, neither he nor any one claiming an interest in it shall be enabled to assign it over. Sect. 3. gives the certificate to the executors or administrators of any party slain in the attempt to apprehend, or pursuit of felons of the description mentioned in the act.

There have been two discussions on the act of William regarding the boundaries within which this certificate is available, the result of which has been, that the words "parish or place" in the statute are construed to mean, if possible, a smaller within a larger district, as a township within a parish, a parish within a manor, &c. So that a party is not protected by the certificate from serving an office in a larger tract, which is more comprehensive than that in which the felony took place.

Thus, the defendant was indicted for not taking upon himself the office of constable for the manor of Birmingham; he removed the indictment into the King's Bench by *certiorari*, and pleaded not guilty; upon which it appeared, that he had an assignment of a certificate under 10 & 11 W. 3. c. 23., which discharged one P. J. from all parish offices within the parish of Birmingham, and that the limits of the office in question extended beyond the parish of Birmingham.

The Court, after argument, seemed very clear that the postea should be delivered to the prosecutor; and Lord Mansfield said, "The only question in this case is, whether the constable of the manor of B. is a parish

officer of the parish of B. Now, as a parish officer is relative to, and confined to the parish, the certificate cannot be a discharge from an office, whereof the functions are to be exercised out of the limits of the parish. (*a*) But if the exemption be claimed from the duty required in the smaller place, the case will be different; and it is to be observed further, that a liberal interpretation has ever been given to the act; and thus a constable, although he may not derive his office from parochial authority, has been held to be a parish officer for the purposes of this certificate. Debt was brought for the penalty of 20*l.*, because the defendant had not taken upon himself the office of petty constable for the township of Manchester. Pleas, nil debet, and a certificate by which one S. H., in consideration of his having apprehended and prosecuted a burglar to conviction, was discharged from all manner of parish offices within the parish of Manchester; the plea then stated an assignment by S. H. to the defendant before the election of constable, and that S. H. named in the certificate, and S. H. mentioned in the assignment, were the same. The plea went on to affirm that the township of Manchester, within which this felony was committed, was within the parish of M. Replication to the second plea, that the defendant was elected to serve for the township of M., and could not act for the parish of M. at large; without this, that the said office of constable to which the defendant was so elected, was a parish office within the said parish of M. General demurrer and joinder.

The Court held, first, that as the popular sense of the words "parish officers," was officers whose functions

(*a*) 2 Burr. 1182. *Rex* v. *Darbyshire.*

were exercised within the parish, to exclude this office would be to narrow the intentions of the legislature, and to depart from the opinion generally entertained upon that subject; and secondly, that as the exemption claimed was to be exercised within a less extent than the legislature had proposed as the reward of the party's public service, the defendant was certainly discharged, as the township of M. was wholly within the parish of that name. (*a*)

Even if a new office were created within a parish, the better opinion seems to be, that the party certificated would be exempt.

The defendant, assignee of a certificate under this act, was appointed by the trustees under an act of 22 G. 2., to be collector of the parish rates within Saint Leonard's Shoreditch. On his refusal to perform this duty, he was convicted before a Justice, and upon appeal to the sessions, and argument in the King's Bench, it was held, first, that although this office was not co-extensive with that of surveyor, yet, that it was part of the old office, and consequently, that the defendant was exempt: and secondly, by Foster and Wilmot, Justices, that had this been a new office, it would have been within the exemption, the words of 10 & 11 W. 3. being as general as can be. Ryder C. J. thought it a question of nicety; and Denison J. gave no direct opinion, though he said, that the act of William ought to have a liberal construction. (*b*)

(*a*) 7 East, 174. *Moseley*, Bart. v. *Stonehouse*. 3 Smith, 181. S. C.

(*b*) Burn's Just. by Chetwynd, vol. ii. p. 376. *Rex* v. *Davies*.

Pleading this certificate.

It will be observed, that this question was raised upon demurrer, probably with the intention of settling the law of the subject; nevertheless, it should seem, that such a certificate being a full bar to the action if substantiated, may be given in evidence under the general issue, and perhaps, it might be more safe not to plead it.

Certificate not now transferrible.

By 58 G. 3. c. 70. s. 2. it is declared, that certificates under 10 & 11 W. 3. c. 23. shall not be transferred as heretofore by the original grantee or grantees to any persons whatsoever; but by s. 3., the rights of executors under that statute are particularly mentioned as still in force, as we have described them. (*a*)

SECT. IV.

Of other Judicial Certificates.

With respect to facts upon a trial.

GREAT attention and respect are invariably paid to the certifications of the learned Judges; were it otherwise, the most abundant confusion would arise, and the matter at issue would undergo a second investigation upon affidavit; the least legitimate mode of ascertaining the truth of controverted facts.

The report, therefore, made to the Court by a Judge, of the evidence of Nisi Prius, is to be received with implicit fidelity, and an affidavit offered to contradict a fact stated in such report has been refused. (*b*)

(*a*) Ante. (*b*) Ca. Temp. Hardw. 25. *Rex* v. *Poole.*

So it is, where the Judges of a principality certify a particular custom used within their jurisdiction. As, in in Wales, upon a *quod ei deforceat*, where the common course in such an action was to give final judgment (*a*); if such an usage be certified, credit will be given to the Judge who avouches it, and this mode of trying a particular custom has been frequently recognized. (*b*)

So, in an old case, although the certificate of the Judge, that the verdict on a prosecution for perjury, had been, in his opinion, against evidence, could not influence the Court to grant a new trial; it was allowed to operate in mitigation of the fine. (*c*) At this day, however, a new trial will be granted in cases of misdemeanor, the defendant or defendants being respectively present in Court. (*d*)

Certificate of records.

Lord Coke enumerates among the legal certificates such as are used on the trial of a record, which, he says, are given by the Judges in whose custody records are by law. (*e*) And so, at this day, records are thus certified from one Court into another, when the purposes of justice require such a proceeding.

Certificate of Judge's opinion under the tax acts.

One more notification, which is in the nature of a certificate, may be mentioned in this place. Under the assessed tax acts, assessors, inspectors, surveyors, and appellants being dissatisfied with the determination of the Commissioners, may transmit a case for the opinion

(*a*) 5 Rep. 86. *Penryn*'s case.
(*b*) Cro. El. 503. 1 Saund. 74. 6 T. R. 638.
(*c*) 2 Keb. 403. *Rex* v. *Marchant*.
(*d*) Tidd's Practice, 918. 7th ed.
(*e*) Co. Litt. 74. See Cro. Jac. 542. *Draycott* v. *Heaton*.

of a Judge, and if his opinion be in favour of the surcharge, the assessment shall be in the double duty, or mitigated as determined on the appeal, if otherwise.

If, however, the charge be confirmed, the person so charged or surcharged shall pay 40*s.* to the King, as costs attending the same. (*a*)

The Commissioners of the land tax, are also in the habit of applying, in cases of difficulty, for the opinion of the Judges. Thus, where the Masters in Chancery were rated for their apartments in Symond's Inn, and afterwards for their offices in Southampton Buildings, application was made to the Judges, who certified their opinions briefly, that in one case the determination of the Commissioners had been right, in the other wrong. (*b*)

(*a*) See Burn's Justice, 23d ed. vol. v p. 360.
(*b*) See 3 Bos. & Pul. 134. n. (*a*.)

CHAP. IV.

OF CERTIFICATES BY JUSTICES OF THE PEACE.

ALTHOUGH various certificates are occasionally employed by magistrates in the execution of their office, and many amongst these are so far matters of course as not to require a separate notice in this place, yet there are a few upon which litigation has arisen, and it will be our province to lay such before the reader.

Certificate of having taken the sacrament.

It is required by 25 Car. 2. c. 2. s. 1., that every person that shall be admitted into any office, civil or military, shall receive the sacrament of the Lord's Supper, according to the usage of the church of England, within three months after his admittance, in some public church, upon some Sunday immediately after divine service and sermon. And by s. 3., that such person shall first deliver, in the court where he takes the oaths, a certificate of such his receiving the sacrament as aforesaid, under the hands of the minister and churchwarden, and shall then make proof of the truth thereof by two credible witnesses, at the least, upon oath; all which shall be enquired of, and put upon record in the respective courts.

A discussion lately arose upon the validity of a magistrate's warrant of distress, who had neglected to deliver in this certificate, or to take the oaths prescribed by the

statutes upon that subject. The proprietors of the Margate Pier Company denied their liability to be rated to the relief of the poor; but being defeated on that ground, they relied upon the invalidity of the distress, for want of qualification on the part of the magistrates who had enforced it. The defendants, who were sued in trespass for taking goods, &c. were justices of the Cinque Ports, and by 51 G. 3. c. 36. s. 3., the same qualification necessary for the justices of a county, is required for the magistrates of those ports, the delivery of the certificate in some general sessions, the oaths, &c.

It was the decided opinion of the Court, that the 18 G. 2., which speaks of a justice's incapacity without the due qualification; and the 51 G. 3. were *in pari materiâ*; that the restraining clauses of the former act were only prohibitory upon the party, and did not make his acts invalid; that if such were the case, a constable who arrested, or a gaoler who imprisoned under such a warrant, would each be a trespasser, and that the distinction known and established between the invalidity which sometimes accompanied the election of a corporate justice, and the annulling of his acts while in that situation, was solid and conducive to the public interest. It was added, that although no pecuniary penalty was inflicted by the 51 G. 3., the offending justice was still liable to a prosecution by indictment. (*a*)

Certificates of Justices relating to highways.

Certificates signed by magistrates respecting highways have been recognized as very general, and of ancient date. (*b*) Many of them are known to the common law,

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(*a*) 3 B. & A. 266. *Margate Pier Company* v. *Hannam, Dyson, and others.* (*b*) 6 T. R. 635. *per* Ashurst J.

although some have latterly been introduced by the highway acts. Thus, where it was moved to quash an indictment for a nuisance in building a barn upon the King's highway, the Court said, that they could hear nothing unless a certificate was produced of the removal of such nuisance. (*a*) And in a like case, C. J. Foster said, that the justices must certify that there had not been an encroachment, before they could relieve the defendant. He might take this course, or join issue, and then exceptions to the indictment would be entertained. (*b*) Again, upon an indictment for stopping a way, it was said to be the course of the Court, that the offender, upon his submission, should be prepared with a certificate that the way had been repaired. And this must have been before verdict, for it was held, that a certificate afterwards would not serve, but that a *constat* (*c*) should issue to the sheriff, who would return the way as repaired, since the verdict, being matter of record, could only be answered by matter of record. (*d*)

So, where an objection was made to an indictment for digging in the highway, the Court would put the parties to plead, and denied to hear it without a certificate of

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(*a*) Cro. Car. 584. *Leyton's* case.

(*b*) 1 Keb. 256. *Rex* v. *Randall.*

(*c*) A *constat* is the name of a certificate which the clerk of the pipe, and auditors of the Exchequer, make at the request of any person who intends to plead or move in that Court for the discharge of any thing; and the effect of it is the certifying what (*constat*) appears upon record touching the matter in question. See Toml. Law Dict. tit. *Constat.*

(*d*) Sir Thos. Raym. 215. *Rex* v. *Houghton.* 3 Salk. 183. S. C.

amendment. (*a*) And where a certificate was read, stating that the way in question had been repaired, the Court quashed the indictment. (*b*) However, in arrest of judgment no certification is required, because, issue having been joined, the matter for quashing the proceedings will appear on the record. (*c*)

When a party has been found guilty and fined, the matter, nevertheless, is not at an end, but writs of *distringas* are to issue *in infinitum*, until the Court is certified that the wrong has been repaired. Yet, it is to be observed, that the quashing of indictments respecting ways (*d*) with a certificate, is confined to cases directly for non-repair, for a charge against a defendant who had omitted to work in the highway with his team, was quashed for defect of form without certificate, the omission of working being by no means so considerable as the way itself. (*e*)

Moreover, a certificate as to the state of repair is always called for when the Court is about to impose a fine. And so, in a case for not amending a common footway, some justices of the peace were required to vouch for the sufficient repair before the Court would proceed

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(*a*) 2 Keb. 221. *Rex* v. *Shelderton Inhabitants*. S. P. 2 Ro. Rep. 412. *Nottingham's* case. Sty. 108. 1 Keb. 291. *Anonymous*. 6 Mod. 163. *The Queen* v. *Cluworth Inhabitants*. 1 Salk. 359. S. C. *Holt's* Cases, 339. 2 Keb. 454. *Rex* v. *Atwell*, in the case of a bridge; and see Com. Dig. tit. *Chimin*. 6 T. R. 631., where all the authorities are collected.

(*b*) Sty. 163. *Rex* v. *Mile End Inhabitants*.

(*c*) 2 Keb. 728. *Rex* v. *Glaston Inhabitants*.

(*d*) 1 Salk. 359. (*e*) 2 Keb. 354. *Rex* v. *Waterer*.

to fine. (*a*) It operates, consequently, in mitigation of punishment; and being, as we have seen, of judicial cognizance, it is necessarily a high perversion of justice to deceive a bench of magistrates by interposing a false certificate. Several persons were indicted for conspiring to give in evidence a paper-writing, as and for a true certificate touching a certain road in Surrey, and stating it to be in good repair; whereas, to the knowledge of the defendants, that road was ruinous and in great decay. Amongst many points urged by the defendant's counsel, the power of granting these instruments was questioned, and at the most, it was argued, that their reception by the Justices at sessions, was an act of courtesy calculated to save expence. But after a very learned argument, in which most of the authorities in support of the certificate were cited, the Court held decidedly, that the practice then sought to be impugned, was too inveterate to be overturned, and that, if magistrates chose to make a certificate, they were bound to know that the contents of it were true; and the rule for arresting the judgment was discharged. (*b*)

Another certificate by Justices, is that which vouches a new way to be in good condition and repair before the old is stopped up. Thus, by 19 G. 3. c. 78. s. 19., no such inclosure or stoppage shall be made until such new ways shall be completed and put into good condition and repair, and so certified by two Justices of the peace

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(*a*) 6 Mod. 163. *The Queen* v. *Cluworth Inhabitants.* 6 T. R. 620. S. P.

(*b*) 6 T. R. 619. *Rex* v. *Sir Jos. Mawbey*, Bart. *and others.*

upon view thereof; which certificate shall be returned to the clerk of the peace, and by him enrolled among the records of the Court of Quarter Sessions.

A question has arisen upon the form of this document, and upon its enrolment. The defendants justified in trespass for a common and public footway, and a verdict passed for the plaintiff; subject to a case, in which it was stated, first, that the owner of the land, through which the new way was to pass, had consented to the change. Secondly, that four Justices at a special sessions, had approved of the new path, having found it to be in good condition and repair. Thirdly, that the old road had been stopped up by order of three of the aforesaid Justices, the new road being fit for the reception of travellers, and the soil ordered to be sold, &c. Other matters were set forth not relevant to the point before us. These orders and certificates were not entered or transcribed upon any roll, such not being the custom in Surrey, but were enrolled of record, and were part of the rolls of the Court of Quarter Sessions, and kept in the same manner with all other records of the same Court. It was objected for the defendant, that there was no certificate, and admitting that there had been such, that it had not been enrolled according to the statute. The Court were of opinion, that the orders of the magistrates containing their adjudication of the fitness of the new road, were sufficient certificates to satisfy the act of parliament, and that by analogy to decisions on the register and annuity acts, the statute was only directory to the officer whose duty it might have been to enrol the records; but that it was even questionable, whether the term enrolment meant

any thing more than placing the orders among the records of the sessions. (*a*)

The provisions of 19 G. 3. respecting certificates, were re-enacted by 55 G. 3. c. 68. s. 4., and these statutes are not repealed by the general turnpike act of 3 G. 4., which enumerates and absolutely repeals a variety of acts. (*b*)

Certificates relating to bridges.

The same rule has been observed on quashing indictments for not repairing bridges, which we have mentioned as subsisting with regard to highways. Thus, a certificate of repair was required, where the defendants objected to an indictment, because all the names of the parties bound to repair, had not been presented. (*c*)

By 52 G. 3. c. 110. s. 2. after a power given to the Justices at sessions, to order payments of sums not exceeding 10*l*., to be made for the repair of bridges under an order of Justices, by virtue of the first section, where there has been no presentment; it is provided, that before such payment be ordered, a certificate be returned to the Justices at sessions, signed by two of the Justices at least, appointed to superintend the repair of bridges, who shall have so ordered the repairs, stating the nature of such repairs, and the defects, damage, or injuries which they had so ordered to be repaired, and their reason for their so ordering such immediate repairs.

It would be idle to pretend, that there were not many

(*a*) 5 Taunt. 634. *De Ponthieu* v. *Pennyfeather*. 1 Marsh. 261. S. C. and see 8 East, 394. *Welsh* v. *Nash*.

(*b*) 3 G. 4. c. 126.

(*c*) 2 Keb. 454. *Rex* v. *Atwell*.

other instruments of this kind grantable by Justices of the peace; it has been thought sufficient, nevertheless, to limit the inquiry in this place to such as have been disputed, or which are connected with matters open to litigation, at the same time reserving a place in the Chapter on Sundry Certificates for such as are of public interest, and in the execution of which a Justice may act singly, or may be indirectly concerned.

CHAP. V.

OF CERTIFICATES BY THE SPEAKER OF THE HOUSE OF COMMONS; BY COMMISSIONERS UNDER VARIOUS ACTS OF PARLIAMENT; BY THE RECORDER OF LONDON, *ORE TENUS* OF THE CUSTOMS OF LONDON; AND OTHER OFFICERS, &c.

Certificate by the Speaker respecting the costs of contested elections.

FOR the purpose of discouraging unsuccessful parties at controverted elections from presenting frivolous or vexatious petitions, it was provided by 28 G. 3. c. 52. s. 19., that wherever the committee appointed to examine the merits of a petition, shall report to the House, that the same appeared to them to be frivolous or vexatious, the parties, if any, who shall have appeared before the committee in opposition to such petition, shall be entitled to recover from the person or persons, or any of them, who shall have signed such petition, the full costs and expences which such party or parties shall have incurred in opposing the same; such costs and expences to be ascertained in the manner thereinafter directed; and by s. 22., the mode of ascertaining these expences is prescribed. On application to the Speaker, he shall direct such costs and expences to be taxed by two persons, who are thereby required to examine the same, and to report the amount thereof to the Speaker; who shall, on

application, deliver to the party or parties a certificate signed by himself, expressing the amount of the costs and expences allowed in such report. By s. 23. such costs may be recovered by action of debt.

It is further enacted by 53 G. 3. c. 71., that in all cases where any question shall arise as to the amount of the reasonable costs, expences, or fees, which shall be due and payable to any witness, or to any clerk or officer of the House of Commons, on the trial of any petition, the Speaker shall direct the same to be taxed in the like manner as is prescribed by 28 G. 3., when the petition, or the opposition to a petition has been declared frivolous or vexatious; and shall in like manner give his certificate, at the foot of which, the witness or other person shall, on payment, give his receipt, which shall be a sufficient discharge. And s. 13. declares, that the certificate, both under this act and that of 28 G. 3., shall have the force and effect of a warrant of attorney to confess judgment; and the Court in which such action shall be commenced, shall, upon motion, and on the production of such certificate, enter up judgment for the sum specified in such certificate to be due from the defendant or defendants in such action, in like manner as if the said defendant or defendants had signed a warrant to confess judgment in the said action to that amount.

Some decisions have taken place upon the prior statute, to the effect, that costs cannot be taxed jointly under 28 G. 3. c. 52., though the Speaker of a new parliament may grant a new certificate in the room of invalid certificates which he had issued during the previous session, and that the returning officer is a party entitled within the act to recover his costs and expences.

Sir Henry Strachey and Mr. Giles, had been returned members for East Grinstead, and two petitions were presented at two several times against their return, the first by the unsuccessful candidate, the latter by some of the electors. The Committee appointed to examine into the petition, reported it frivolous and vexatious, on which an inquisition was made into the costs of Sir H. S, and Mr. G., and a certificate of the Speaker granted as to their amount. An application was made subsequently for a second certificate, in order to ascertain the joint and separate costs incurred by the parties to the two petitions respectively, both having been referred to the same committee, and so become, in a manner, one consolidated petition. The result of this was another certificate, in which the difference of costs between the joint and separate prosecution of the petition, appeared very considerable. Payment of these costs was demanded, and refused; on which an action of debt was brought; and, on a special case, the Court were of opinion, that the power given by the statute, was to tax the costs of such petitions separately; that the term petition was used in the singular number, and that the 24th section, enabling persons to recover a proportionable share of expences, referred only to joint petitioners in the same petition. It might happen, they said, that one person or set of persons might petition against the return of a sitting member, on one single ground, such as his being under age, and that another set of petitioners might impeach his eligibility on the charges of corruption and bribery of a majority of the voters, and thus the respective costs would be widely different, and yet it would be too much to say, that in case of failure, these burthens should be sustained equally.

The issue sought by the petitioners was indeed the same, but their interests might be severed afterwards. Upon this, the counsel for the plaintiffs, after consideration, acceded to a suggestion from the Bench, that a nonsuit should be entered in each separate, as well as in the joint action; since it might happen, that a recovery upon the separate taxation might be set up against any fresh action upon a new certificate. (*a*) Another objection was made on this occasion, that the Speaker, having once issued his certificate, became *functus officio*, and incapable of granting a new certificate. (*b*) This point was fully considered in a subsequent litigation between the same parties. In the interim, a new parliament had met, and of course, the Speaker had been chosen by a different House of Commons. He granted to the original plaintiffs a certificate estimating the costs of their opponents separately, and upon their refusal to pay, a new action was brought, and a case again stated for a judicial opinion. It was contended for the defendants, that the Speaker could only sign one certificate, and that admitting his ability to do so, his power expired with the dissolution of the parliament. But the Court, while they allowed, that had the Speaker issued in the first instance an effective certificate, he would have been incapable of granting another, held clearly, that the last, which alone pursued the authority given by the act, was valid. With respect to the other point, they adjudged the Speaker's power upon these occasions to be a statuteable authority given to be exercised by that

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(*a*) 7 East, 507. *Strachey and another* v. *Turley and others.*
(*b*) 7 East, 512.

officer for the time being; and so, if not well executed by one, that it might be executed by another. (*a*) And by Lord Ellenborough: suppose the Speaker had died after the report of the committee, and before a direction to the officers could have been made, or suppose after such direction, that the particular officers charged with the taxation, had died, can it be contended, that the succeeding Speaker in the one case, could not have directed the costs to be taxed; or in the other, that the same Speaker would have had no power to direct the taxation to be made by other officers in the place of those who had died. (*b*)

Some years afterwards, it was endeavoured to be shown, that the returning officer was not a party within the 28 G. 3. capable of recovering his costs and expences on a petition against him, charging corruption and bribery, and the argument went to confine the remedy to parties who oppose the return. But the Court recognised distinctly the generality of the act, as applying to every party or parties appearing before the committee in opposition to the petition. In the case before them, the returning officer being complained against, was compelled to vindicate himself before the committee, and so came within the express provision of the act. (*c*)

(*a*) 11 East, 194. *Strachey and another* v. *Turley and others.* (*b*) 11 East, 201.

(*c*) 4 M. & S. 234. *Trueman* v. *Lambert and others.* Where a member dies during a recess or prorogation, it is ordained by 24 G. 3. c. 26., that two other members shall certify his death to the Speaker, who then issues his warrant to the clerk of the crown for a new writ. See Male on Elections, Appendix, No. VI.

Another certificate, not issued indeed by the Speaker, but directing a part of his ministerial conduct, is mentioned beneath in the note.

Commissioners of sewers.

By 13 El. c. 9., it is enacted, that all commissions of sewers shall continue in force for ten years, unless sooner determined by supersedeas or new commission; and that all laws, ordinances, and constitutions, made by force of such commission, being written in parchment, indented, and under seal, shall, without the certificate or royal assent required by 23 H. 8. c. 5., (which certificate was to be engrossed in parchment, and certified under the seals of the commissioners into Chancery), continue in force, notwithstanding the determination of the commission by supersedeas, until repealed or altered by new commissioners; and that all laws so sealed shall, without certificate or royal assent, be in force for one year after the determination of such commission by the expiration of ten years from its teste. (*c*)

By commissioners of enquiry into forfeited estates.

The commissioners of inquiry into such estates as had been forfeited during the rebellion of 1715, certified to the Court of Exchequer that certain tenants had not disclosed their lands according to the directions, and within the time limited by the statute; on which that Court was moved for a *scire facias*, there being an affidavit of the commissioners who had signed such certificate. But the Court held, that the clause respecting the certificate was alone applicable where the tenants had committed waste, and that in the present case, the

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(*a*) See 9 East, 109. *Rex* v. *The Commissioners of Sewers for Somerset.*

forfeiture vested in the Crown without office, and they refused to allow the enrolment of the certificate. (*a*)

However, by a subsequent statute, the Court of Exchequer was directed to proceed in such a case as upon an inquisition, and on a similar motion with a certificate, the Court of Exchequer then granted a *scire facias*. (*b*)

Certificate of receiver's recognizance by the Barons of the Exchequer.

A receiver appointed by the Court of Exchequer under recognizance, whose estates were entirely situate in Ireland, became in arrear, and it was moved, that his recognizance might be transmitted by mittimus into the Court of Exchequer in Ireland, in order that process might issue upon it out of that Court. But the Barons directed that a bill should be filed on the foot of the recognizance in the Court of Chancery in Ireland, against the receiver and his sureties, to have an account; so that when issue was joined, the certificate of the recognizance here, would be evidence of it in the Court there. (*c*)

Certifying customs of London by Recorder.

Whenever any matter arises within the realm which may be determined by a reference to the customs of London, the Recorder comes to the bar and certifies *ore tenus*, whether there does or does not exist such an usage. (*d*) This proceeding is of the earliest date (*e*); it is, in effect, the declaration of the mayor and aldermen by the mouth of their officer (*f*); and supersedes the

(*a*) Bunb. 14. *Rex* v. *The Tenants of Lord Derwentwater.*
(*b*) Bunb. 16. n.
(*c*) Bunb. 249. *Lord Castlecomer* v. *Lady Castlecomer.*
(*d*) Cro. Car. 517. 2 Saund. 231. 1 Burr. 248.
(*e*) 5 E. 4. 30. 21 E. 4. 16. Co. Litt. 74. a. 2 Ro. Ab. 579.
(*f*) Co. Litt. 74. (a.) 9 Rep. 31.

trial by jury where the custom is denied by the adverse party. (*a*)

It seems, however, that this certificate cannot be allowed in cases where any personal profit to the citizens, as a body, comes in question; since, although no recent authority appears directly upon the point, there is a solemn judgment to that effect in Lord Hobart, on the principle that no one should be a judge in his own cause. To an action of trespass, the defendant pleaded a right in the mayor, citizens, and commonalty of London, to take wharfage-dues. The plaintiff replied a custom, that all freemen of that city were exempted from such a tax. The defendant denied the custom, and surmised, that it should be certified in the ordinary manner, and prayed the King's writ to the mayor and aldermen; upon which the plaintiff said, the issue ought to be tried by the country, and not by certificate: to which the defendant demurred. And Lord C. J. Hobart, who delivered the resolution of the Court, although he said that the case before them was more in the nature of prescription than custom, yet held clearly, that it was against natural right and justice to allow parties their certificate to try and judge their own cause. (*b*) In another case, not very long afterwards, where the Recorder of London had certified against a custom alleged regarding a manual trade, it was moved, that there had been a mis-trial, for being a custom which concerned all the citizens, it should have been tried by jury. But the Court said, that the defendant had consented in this case to the awarding of

(*a*) 2 Inst. 126.
(*b*) Hob. 85. *Day* v. *Savadge*. Jenk. 21.

the writ by joining issue on the custom, and besides, this custom did not concern all the persons of London, but those only who used manual trades, and so it was adjudged for the plaintiff. (*a*)

This point was partially brought before the Court of King's Bench in the last reign. It arose upon a rule calling upon the mayor and aldermen of London to show cause why a writ of mandamus should not issue, directed to them, commanding them to admit a certain person to the office of one of the auditors of the Chamberlain's and Bridgemasters' accounts of the city of London. On showing cause, a custom was alleged, that no person should serve that office for more than two years successively. And it was shown that the claimant had held the situation for two years, upon which the Court discharged the rule, saying, that no ground had been laid for the writ, that a mandamus was not to be had merely for asking it, and that a positive custom appeared to the contrary. (*b*)

This decision is not by any means at variance with that in Hobart. For in the former case the result immediately concerned the personal interests of a large corporate body; whereas in the latter, an internal regulation respecting one of their own offices was the matter in dispute; and although it may be well that they should not be invested with power to enforce their customs against the public at large, where they have any great stake at issue, it is reasonable, that they should enjoy

(*a*) Cro. Car. 516. *Appleton* v. *Stoughton.*

(*b*) 1 T. R. 423. *The King* v. *The Mayor and Aldermen of London.*

such usages, confirmed as they have been by act of parliament (*a*), in matters of less import, or such as relate to their own economy.

The custom must be found and certified.

However, the Courts cannot take judicial notice of any such usage unless it be found and certified in due form. So that, where in trover for jewels the defendant said, that he had bought them in an open shop in London, which he alleged by the custom of that city, to be a market overt, it was holden, on a special verdict, that, as these customs are in all cases pleaded or found, and as in the present instance neither of those courses had been adopted, no notice could be taken of the defendant's allegation. (*b*) And so it was, where a libel had been brought in the Spiritual Court for the word "whore," and sentence given; after which a prohibition was moved for, stating a defect of jurisdiction, the word having been spoken in London, where, by the custom, an action lies. The Court denied the motion, observing, that the party came too late after sentence, and that it was a rule not to allege matter at that stage *dehors* the libel as a ground of prohibition. As, therefore, the custom did not appear, there was no ground to imply a defect of jurisdiction. (*c*) Consequently, an affidavit verifying the custom is necessary on such occasions. (*d*) Yet the

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(*a*) 7 R. 2. c. 2.

(*b*) 2 Str. 1187. *Hartop* v. *Hoare*. 1 Wils. 8. S. C.

(*c*) 1 Str. 187. *Argyle* v. *Hunt*. Fort. 347. S. C. *Cook* v. *Wingfield*. S. P. cited in And. 300. *Driver* v. *Driver*. And. 304.

(*d*) 1 Str. 188. Andr. 8. in *Surby et ux.* v. *York*. Id. 304. *Driver* v. *Driver*. 4 Burr. 2032. *Theyer* v. *Eastwick*; and see Cowp. 330. *Caton* v. *Burton*. Id. 422. *Full* v. *Hutchins*.

Court have such a private knowledge of these rules, as not to put the party to his affidavit upon motions (*a*), unless, indeed, the other party will insist upon it, which is not usually the case. (*b*) Nevertheless, if the Recorder have certified any particular custom, the Court are bound to take notice of it.

Thus, the custom of foreign attachment having been certified, the Court held, on a motion for a prohibition to the mayor's court in London, that they were bound to recognize such custom judicially on account of the certification, although in the particular case, they discharged the rule, because the party applied for relief after judgment, there being neither a bill of exceptions, nor a special verdict, and so was too late; and the Court would not suffer the custom to be certified a second time. They would have held upon that occasion that trust-money was not within the custom, and could not, consequently, be attached (*c*) On the whole, therefore, the rule seems to be, that where the Recorder has certified an usage *ore tenus*, the Court must notice it judicially. Where such an usage exists but not certified, the party wishing to avail himself of it must plead or verify it upon oath; upon which the other side probably denies it, and a writ of certiorari issues. Where, however, the opposite party chooses to take issue upon it, he cannot allege afterwards the want of a certification. (*d*)

The ceremony is performed by the Recorder coming to the bar in a purple cloth robe faced with black velvet, Form.

(*a*) 2 Str. 1187. (*b*) 1 Str. 188.
(*c*) Dougl. 378. *Blaquiere* v. *Hawkins*.
(*d*) See 1 Burr. 248.

and there delivering in his return to the certiorari, upon which the writ is ordered to be filed, and the return recorded. (*a*) In a case of this kind, recent by comparison, Sir Wm. Moreton, upon pleas of two customs and joinder in issue, certified, that there was such a custom as alleged in the former plea, but that there was no such custom as alleged in the latter plea. (*b*)

False certificate.

If the certificate be false, the party shall have his remedy by an action upon the case, not against the Recorder, but the mayor and aldermen, for it is their certificate by their ministerial officer. (*c*)

Certificate by the Sheriff of London.

If the issue be whether the defendant be a citizen of London or a foreigner, on his pleading privilege to be sued only in the city courts, the certificate of the Sheriff of London shall be the final trial (*d*); but claims of such an exemption are seldom if ever pursued at the present time.

By Sheriff of his own return.

Each officer is authorized to certify the peculiar practices or customs of his own court. And so, a ministerial officer may avouch his own record. Thus, a return by the Sheriff, if questioned, shall be tried by his certificate. (*e*)

Other certificates.

Other instruments of this nature are: Where the Chancellor of either University claims cognizance of

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(*a*) 1 Burr. 252.

(*b*) 1 Burr. 248. *Plummer* v. *Bentham*. Sir James Burrow, the reporter of this case, says, that no instance of the kind had happened since the reign of H. 6. in that Court, [the K. B.] although it had in the Court of Chancery; but see Cro. Car. 516., where the Recorder certified in K. B. respecting a manual trade.

(*c*) Hob. 87. 10 H. 6. 10. 9 Rep. 31. (*d*) 1 Inst. 74.

(*e*) 9 Rep. 31.

of a cause to be tried by certificate (*a*); whence an appeal lies to the congregation, convocation, and ultimately, to the King in Chancery: Where a mayor of the staple certifies a statute taken before him to the Lord Chancellor after the party has detained it (*b*): Where, in like manner, a statute-merchant is certified under a writ for that purpose (*c*): with many of a similar kind, on the production of which the form or nature of the document never comes in question, and which are not, therefore, proper subjects for this chapter.

We may also enumerate here, certificates of a plaintiff in the Mayor's Court, that he has obtained judgment there, which is exhibited to the garnishee (*d*); of gaolers, stating the causes for which a prisoner is detained, in order to his discharge, by reason of the plaintiff's negligence in not declaring, or not proceeding to final judgment and execution (*e*); of the clerk, where a plaintiff in error alleges diminution, and prays a certiorari, which the said clerk awards, and of which, he is bound, upon request, to give a certificate (*f*); of clergymen, in cases of outlawry, stating the death and burial of outlaws in their respective parishes; which document is fortified by an affidavit of some person who was acquainted with the deceased, and who was present at his death or burial (*g*); of the clerk of outlawries in cases of *amoveas manus*, certifying the reversal of an outlawry (*a*); of the secondaries in the Common Pleas, that no cause has been

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(*a*) See Cro. Car. 73. Hardw. 505.
(*b*) Tomlin's Law Dict.
(*c*) Ibid.
(*d*) 4 Moore, 173.
(*e*) Tidd's Pract. 374.
(*f*) Tidd's Pract. 1217.
(*g*) Id. 163.
(*h*) Id. 164.

shown upon a replication of *nul tiel* record to a plea of abatement (*a*), &c. &c.

There are also certificates of the tenor of indictments, convictions, &c. by the clerks of the Crown, assize, and peace, into the King's Bench, under penalties, by 34 & 35 H. 8. c. 14., and 3 W. & M. c. 9.

Certificate by the Master in the Court of Exchequer.

Where an order is made in the Exchequer for the taxation of costs, it is usual for the Master, after taxing them, to produce his certificate of the arrangements which he has made. There was an attempt made on one or two occasions to take exception against report of this officer, without any further formalities. As, where application was made for leave to except to a taxation of costs, without stating the cause of the objection; the Court upon this, finding that no affidavit had been filed in support of the motion, declared their opinion that such an affidavit was necessary, and refused the rule. (*b*)

So, where there was a motion made to the same effect, and the notice was in general terms, it was insisted, that such notice ought to specify the exceptions, and that an affidavit of facts on which they were founded was necessary. On which the Court agreed to the objections, and the Lord Chief Baron denied, that a motion of this kind could be obtained as a mere matter of course. (*c*)

(*a*) Tidd's Practice, 786.

(*b*) 9 Price. 216. (n.) *Oliver* v. *Court*

(*c*) Id. 215. *Jenkinson* v. *Royston*, and see 8 Price, 87. n. *Donison* v. *Curry*.

CHAP. VI.

OF PAROCHIAL CERTIFICATES.

THIS chapter will be dedicated to the consideration of certificates which enable a man to leave his own parish, and to reside in another, on the condition, that if he become chargeable to the latter place, the officers of the former shall receive him again, and reimburse any expences which have been incurred on his behalf as a pauper. These writings, therefore, were originally contemplated by the legislature as useful indemnities to the respective parishes which received strangers. They helped townships, &c. as the preamble of the act of William attests, to disburthen themselves from the maintenance of robust parishioners, who were capable of labour elsewhere, they threw able-bodied persons into districts where assistance might be wanted for the purposes of husbandry; at the same time being a sufficient guarantee, that little or no loss should fall upon the inhabitants who were thus compelled to receive the new comers. Much litigation, however, arose upon the construction of these certificates; with respect to the form of them, their effect, the number of persons in a family which their provisions embraced, and many other matters springing from their use. Parochial officers were, consequently, discouraged from the practice of granting

them, whilst the reasons which led to their first introduction remained unimpaired. Hence it was, that the 35 G. 3. c. 101. declared plainly in its preamble, how very ineffectual the remedy intended to have been applied by the use of certificates had been; and by prohibiting the removal of any person, except in particular cases, until such person becomes actually chargeable, the necessity for granting certificates has been almost entirely superseded.

Nevertheless, as many points have been recently discussed which have arisen upon old certificates, and as the legislature, so far from abolishing, has expressly recognized them in many statutes subsequent to that of 35 G. 3., the writer of this, after consideration, trusts that it cannot be deemed unadvisable to consolidate the law upon the subject in a work of this kind, it being probable, that several years will elapse before the mention of such certificates will cease altogether in our courts. It is proposed, then, to notice the statutes which gave them birth; the form pursued in creating and making them available; their general and particular effects upon parties and parishes; the mode of determining them, with the subject of reimbursement, as it regards the certified parish, and other incidental matters belonging to them; as, their description, how they are to be given in evidence, &c.

SECT. I.

Of the Statutes creating these Certificates, their Form, delivery to the certificated Parish, &c.

Statutes introducing parochial certificates.

BY 13 & 14 Car. 2. c. 12. s. 3., it is provided, that any person or persons may go into any county, parish, or place, to work in time of harvest, or any time to work at any other work, so that he or they carry with him or them a certificate from the minister of the parish, and one of the churchwardens, and one of the overseers of the poor for the said year, that he or they have a dwelling-house or place in which he or they inhabit, and have left wife or children, or some of them there, (or otherwise, as the conditions of the persons shall require,) and is or are declared an inhabitant or inhabitants there. If the person fall sick, or become impotent, he is prevented from gaining a settlement, and becomes liable to be sent home by two Justices. If he refuse to return, he is to be sent to the house of correction, or public workhouse; and if any churchwarden, &c. refuse to receive such person on his removal, they shall be amenable to the sessions.

Then followed 8 & 9 W. 3. c. 30. as follows: "Forasmuch as many poor persons chargeable to the parish, township, or place where they live, merely for want of work, would, in any other place where sufficient employment is to be had, maintain themselves and families, without being burthensome to any parish, township, or place, but not being able to give such security as will or may be expected and required upon their coming to

settle themselves in any other place; and the certificates that have been usually given in such cases having been oftentimes construed into a notice in hand-writing, they are for the most part confined to live in their own parishes, townships, or places, and not permitted to inhabit elsewhere, though their labour is wanted in many other places, where the increase of manufactures would employ more hands: be it therefore enacted, &c. that if any person or persons whatsoever, after May 1, 1697, shall come into any parish or other place there to inhabit and reside, and shall at the same time procure, bring, and deliver to the churchwardens or overseers of the poor of the parish or place where any such person shall come to inhabit, or to any or either of them, a certificate under the hands and seals of the churchwardens and overseers of the poor of any other parish, township, or place, or the major part of them, or under the hands and seals of the overseers of the poor of any other place where there are no churchwardens, to be attested respectively by two or more credible witnesses, thereby owning and acknowledging the person or persons mentioned in the said certificate to be an inhabitant or inhabitants legally settled in that parish, township, or place, every such certificate, having been allowed of and subscribed by two or more of the Justices of the Peace of the county, city, liberty, borough, or town corporate, wherein the parish or place, from whence any such certificate shall come, doth lie, shall oblige the said parish or place to receive and provide for the person mentioned in the said certificate, together with his or her family, as inhabitants of that parish, whenever he, she, or they shall happen to become chargeable to, or be forced to ask relief of the parish, township, or place to which such certificate was given; and then, and not

before, it shall and may be lawful for any such person, and his and her children, though born in that parish, not having otherwise acquired a legal settlement there, to be removed, conveyed, and settled in the parish or place from whence such certificate was brought."

The nature of this certificate seems to have been greatly misapprehended; it was even supposed to have been a notice in writing, in order to the gaining of a settlement, and so much doubt existed whether a settlement could be acquired under it, that the statute 9 & 10 W. 3. c. 11. passed to explain the matter, wherein, after reciting the enactment of the previous year, it proceeds, "Whereas some doubts have arisen upon construction of the said act, by what acts any person coming to inhabit or reside within any parish, by virtue of any such certificates as aforesaid, may procure a legal settlement in such parish, and whether such certificate did not amount to a notice in writing, in order to gain a settlement; for explaining thereof and of the said act, be it therefore enacted, &c., that no person or persons whatsoever, who shall come into any parish, by any such certificate as aforesaid, shall be adjudged by any act whatsoever to have procured a legal settlement in such parish, unless he or they shall really and *bonâ fide* take a lease of a tenement of the value of ten pounds, or shall execute some annual office in such parish, being legally placed in such office."

The most usual contents of the certificate are, that the person certificated is legally settled in the parish certifying, and that the churchwardens and overseers so acknowledge him. But it is no objection to such a document, that the words "legally settled," are not inserted, if there be expressions tantamount; as, for example,

that A. and B. " are inhabitants of our said parish, and so shall from time to time, and at all times hereafter, be taken and acknowledged to be inhabitants thereof," with a promise to maintain them in case of their return. (*a*)

Not compulsory on parish officers to grant, nor on Justices to allow them.

We may observe, in the first instance, a fact, which must have mainly contributed to the passing 35 G. 3. c. 101., the entire discretion confided to the parish officers on the subject of granting these instruments. For, previous to that statute, a motion was made for a mandamus to the parish officers of Saint Ives to grant a certificate on the behalf of a person clearly settled in the parish, and who had an opportunity of procuring beneficial employment in another into which he desired to be certificated; but the Court rejected the application at once as a very strange attempt. (*b*) And if the certificate be lost by casualty, it has been holden, that there is no obligation on the part of the parish to grant another, though, at the same time, the certificated person is not removable by reason of the accident. (*c*) Neither, if the instrument be actually issued by the parish, are the Justices bound to allow it, if they see good reason to the contrary. So that, where a person had received a certificate duly granted and attested, but not allowed, and was then removed to a parish where he had gained a settlement by hiring and service, the Court declared, that Justices were not bound ministerially to allow and

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(*a*) Burr. S. C. 277. *Rex* v. *Hilperton*.

(*b*) 2 Sess. Ca. 153. *Rex* v. *Saint Ives*. 2 Bott. 561. S. C. 2 Nolan. P. L. 165.

(*c*) 2 Bott. 566.

sign a certificate, and that the checks and guards imposed by the act must be strictly kept. (*a*)

Form of the certificate.

We have seen from the stat. of William, that the parish officer and the magistrate must concur before a valid certificate can be granted and allowed; which we shall presently notice. The 3 G. 2. c. 29. s. 8. made this addition, that the witnesses, or one of them, who attest the execution of the certificate, shall make oath that they saw it sealed and signed, which oath shall be certified by the justices.

With respect to the signatures of parish officers.

The words of the act, respecting the signatures of parish officers, are, "that it (the certificate) be under the hands and seals of the churchwardens and overseers of the poor, or the major part of them, or under the hands and seals of the overseers of the poor where there are no churchwardens;" and upon the correctness of these signatures by far the greater part of the objections made at different times against the form of the writing, have been raised. These difficulties have, however, been removed to a very great degree by recent enactments.

It has not been determined, whether a majority both of churchwardens and overseers respectively, is essential for this purpose (*b*); and it is now immaterial by reason of the new acts. But where there were six churchwardens and four overseers, and two of each executed

(*a*) Burr. Sett. Ca. 581. *Rex* v. *Wootton Saint Lawrence.* 2 Bott. 563. S. C. 4 Burn, 164.

(*b*) See 8 East, 333., the judgment of Lord Ellenborough C. J. 3 T. R. 595., Lord Kenyon's observations as to a majority of parish officers; and ibid. *per* Buller J., when he says, "the usage shows what is meant by the general term 'churchwardens and overseers.'" Nolan. P. L. 167. n. 3.

the instrument, it was held void. (*a*) So where the signatures of one churchwarden and one overseer only appeared, when there were four churchwardens and two overseers attached to the parish. (*b*) So, where there were two churchwardens, one of whom served the office of overseer of the poor alone, and signed, jointly with the other churchwarden, a certificate of settlement, it was held clearly, that an act directed to be performed by two overseers at the least, joined to the churchwardens, or the major part of them, could neither be done by one of each, nor by the two together, one acting in the double character of churchwarden and overseer. (*c*) Still, although officers may describe themselves as of a parish at large, when it may turn out that the parish consists of several hamlets having separate officers, as evidence may be admitted to elucidate the instrument in question, if the result be that the churchwardens, &c. of the particular hamlet where the pauper resides have signed, the certificate will be valid, for the act is thoroughly satisfied, and it has been thus decided. (*d*) And, as the Courts will support these residences by every possible intendment, a distinction has been entertained between cases where it has been positively stated, that the officer has been appointed for the year, and where a favourable

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(*a*) Caldec. 28. *Rex* v. *Tamworth.* 2 Nolan, P. L. 167. 2 Bott. 564.

(*b*) 1 T. R. 775. *Rex* v. *Margam.*

(*c*) 8 East, 332. *Rex* v. *St. Margaret, Leicester,* and see 2 East, 168. *Rex* v. *Clifton,* post, in this chapter. 6 T. R. 553. *per* Lord Kenyon C. J.

(*d*) 3 T. R. 609. *Rex* v. *Samborn.* See 2 Nolan, P.L.170. n. 2.

conjecture may be formed that some extraordinary custom exists, or that some vacancy has happened. This was the feeling in a case wherein the certificate granted in 1761 was produced with the signature of one churchwarden and one overseer only. It was said, that if by custom there may be but one churchwarden, by reason of a vacancy by death or otherwise, one of two overseers necessarily appointed according to law might sign, and thus one churchwarden and one overseer, would constitute the major part of the persons originally appointed. (*a*)

To remedy the mischief which accrued from the circumstance of there being only two or three officers in some small parishes, it was enacted by 51 G. 3. c. 80. s. 1. that all certificates of the settlement of poor persons, which have been heretofore executed and signed by two persons only, acting or purporting to act in the capacity of churchwardens, as well as of overseers of the poor; and also all such certificates as shall hereafter be signed, shall be considered as good, valid, and effectual, as if the same had been executed and signed by distinct persons as churchwardens, and distinct persons as overseers of the poor. Sect. 2. provides, that no decision in any court of law shall be done away or altered by the act.

This provision does not apply to a township maintaining its own poor, and not having any churchwardens. And it has consequently been supposed, that a legal certificate, coming from a place of the latter description, should be signed by all the overseers. Nevertheless, as an original appointment of one overseer is bad in law,

(*a*) 2 B. & C. 814. *Rex* v. *Catesby*.

where such a person was appointed alone to act for a township, and he granted a certificate, it was held void. (*a*)

It was also debated, in the case mentioned above, whether the churchwardens of the parish at large ought not to join with the overseers of the township in granting certificates; and two Judges (*b*) inclined to think that it would not be necessary, although it was not incumbent upon them to decide that point. (*c*) And the statutes 2 & 3 Ann. c. 6. s. 3., and 17 G. 2. c. 38. s. 15., seem to confirm the opinions of those learned persons. By the former it is expressly enacted, that the overseers of the poor of every such township or village shall and may, from time to time, within every such township or village, do, perform, and execute all and every the acts, powers, and authorities hereby enacted or directed to be done, performed, or executed by the churchwardens or overseers of the poor of a parish; any thing therein contained, &c.

The latter statute declares, that overseers of the poor within every township or place where there are no churchwardens, shall, from time to time, do, perform, and execute all and every the acts, powers, and authorities concerning the relief of, and other matters and things relating to the poor, as churchwardens and overseers of the poor may do, perform, and execute by this act, or any former statute concerning the poor, and shall lose, forfeit, and suffer all such pains and penalties for neglect, abuse, or non-performance thereof, as churchwardens and overseers of the poor are liable to, by virtue of this or any former statute concerning the

(*a*) 2 East, 168. *Rex* v. *Clifton*. 2 Bott. 573.
(*b*) Sir Soulden Lawrence, Sir Simon Le Blanc.
(*c*) 2 East, 174. 176.

poor. But now, by 51 G. 3. c. 80. s. 1., all certificates of the settlement of poor persons which have been heretofore executed and *signed by two persons only*, acting or purporting to act in the capacity of churchwardens as well as of overseers of the poor; and also all such certificates as shall hereafter be signed, shall be considered as good, valid, and effectual, as if the same had been executed and signed by distinct persons as churchwardens, and distinct persons as overseers of the poor, according to the said recited act; any thing, &c. Sect. 2. declares, that no prior decision in any court shall be affected by the act. And by 54 G. 3. c. 107. s. 2. all certificates of the settlement of poor persons, which shall have been heretofore signed and executed, or which may hereafter be signed and executed by the overseers of the poor of any township, hamlet, chapelry, or place, and the churchwarden or churchwardens, chapelwarden or chapelwardens, acting for, or appointed in respect of such township, &c. or the major part of them, shall be deemed and taken to be as good, valid, and effectual, as if the said certificates had been signed and executed by such overseers, and the churchwardens of the parish wherein such township, &c. is situated, or the major part of them.

Lastly, by 1 & 2 G. 4. c. 32. it is enacted as follows: "Whereas in divers parishes, townships, hamlets, chapelries, and places in England, for a long period of time, only one churchwarden or chapelwarden has been annually appointed, where two or more churchwardens or chapelwardens had been formerly appointed for each of such parishes, &c. And whereas divers indentures, &c. and certificates of the settlement of poor persons, which may have been executed and signed by such single

churchwarden or chapelwarden, acting in and for a parish, &c. for which formerly two or more churchwardens or chapelwardens had been appointed, may on that account, if contested in a Court of Law, be deemed to be null and void: and whereas much litigation has recently arisen between parishes, owing to the discovery of such defect as above-mentioned in the appointment of churchwardens and chapelwardens, and it would tend to prevent future litigation, if such indentures and certificates as before-mentioned were in certain cases declared to be valid and effectual." May it therefore, &c. and be it enacted, &c. that from and after the passing of this act, all indentures, &c. and certificates of the settlement or settlements of poor persons, which have been, previous to the passing of this act, executed or signed by one churchwarden or chapelwarden, acting or purporting to act in the capacity of churchwarden, &c. for any parish, &c. for which two churchwardens or chapelwardens had formerly been appointed, shall be deemed and taken to be as good and effectual to all intents and purposes as if the same indentures or certificates had been executed by one or more churchwarden or chapelwarden, &c. legally appointed, any law, &c.

Sect. 2. provides, that no decisions already given shall be affected by the act. (*a*)

Officers de jure should have signed before 54 G. 3.

It seems to have been pretty well understood, that the validity of the instrument would have been mainly shaken by the signature of officers *de facto* only. So that, where two churchwardens and four overseers of a parish, in

(*a*) These statutes include within their provisions all parish indentures signed in like manner.

which it had been usual to appoint four churchwardens and eight overseers, had signed a certificate, although the case was decided on another ground, a strong opinion was intimated that the document would have been bad; for as four overseers only are recognized by law, it would have been impossible to have distinguished, on considering the legality of the appointment, which were the first, or which the last officers, and to say that the four first were legally appointed. (*a*)

This doubt was, therefore, set at rest by 54 G. 3. c. 107. s. 1., which provided, that all certificates of the settlements of poor persons which had been heretofore signed and executed, or which shall hereafter be signed, &c. by a person or persons who, at the time of his or their signing and executing such certificate of settlement, acted as churchwarden or churchwardens, chapelwarden or chapelwardens, of the township, hamlet, or chapelry granting such certificate of settlement, shall be deemed and taken to be as good, valid, and effectual, as if the same had been signed and executed by a person or persons actually sworn into the office of churchwarden, &c.: provided always, that such person or persons shall have been duly sworn into the offices respectively mentioned.

It may not be irrelevant to attempt a summary of the law in this place respecting these signatures. The original requisition was a major part of the hands and seals of the churchwardens and overseers of the poor. It was then determined, that churchwardens, being over-

(*a*) 6 T. R. 552. *Rex* v. *Wymondham*, 553. *per* Lord Kenyon C. J., and see observations on this case in 2 East, 175 *per* Lawrence J.

seers at the same time, could not, unless in such distinct capacity, give effect to a certificate. This produced the 51 G. 3. The signatures of churchwardens and overseers of a township, &c. were then declared to be as valid and effectual by 54 G. 3. c. 107., as the signatures of churchwardens and overseers of the parish within which such township, &c. is situate. It was then objected, that parties on occasion had not been duly sworn, on which the 54 G. 3. came to remedy that defect; and, lastly, the 1 & 2 G. 4. made the act of one churchwarden valid conjointly with overseers, in all cases of this kind, previous to May 1821. The statutes of G. 3. are prospective as well as retrospective; that of G. 4. is only retrospective.

Sealing the certificate.

The execution of certificates by sealing them remains as solemnly as before the late statutes, and it has been decided lately, that a majority of seals as well as of signatures is indispensable. The instrument was signed by two churchwardens and one overseer, but there appeared only two seals. Lord Ellenborough assimilated the instance before the Court to the execution of powers which can be satisfied only by a literal and precise performance, as they bind and operate upon other persons at their peril, and the certificate was holden invalid. (*a*)

There should be, it seems, an addition of church-

(*a*) 2 Nolan, P. L. 167. *Rex* v. *Austrey*. East. 1817, cited from Maule and Selwyn's MSS. Phil. on Ev. 4th ed. p. 510. citing the same. One seal was opposite to the two first names, and the other seal opposite to the last; no trace of any other seal appeared on the instrument, and the certificate was above thirty years old. 2 Nolan, P. L. 166. n. 1.

warden or overseer, according to the fact (*a*), but we have seen, that parol evidence may be let in to show that officers who have signed themselves as of a parish at large, belonged in truth to a particular hamlet.

Attestation.

The attestation, we find, was to be by two or (*b*) more credible witnesses. It was, therefore, for the facilitating of proofs in these matters that the 3 G. 2. c. 29. s. 8. was passed. By that act the witnesses who attest the execution of such certificates by the churchwarden or churchwardens, overseer or overseers signing and sealing the same, or one of the said witnesses, shall make oath before the justices of the peace, who by the said act are directed to allow the same, (which oath they are hereby authorized to administer,) that such witness or witnesses did see the churchwarden or churchwardens, overseer or overseers, whose names and seals are thereunto subscribed and set, severally sign and seal the said certificate, and that the names of such witnesses attesting the said certificate are of their own proper hand-writing; which said Justices of the peace shall also certify that such oath was made before them; and every such certificate so allowed, and oath of the execution thereof so certified by the said justices of the peace, shall be taken, deemed, and allowed, in all Courts whatsoever, as duly and fully proved, and shall be taken and received as evidence, with other proof thereof.

It was disputed some time since, whether a person who had attested with a mark, could be said to have sworn legally that the names of such witnesses attesting, &c. were of their own proper hand-writing. But the

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(*a*) 2 Nolan, P. L. 170. (*b*) Ante, in this chapter.

Court said, they could not suffer a parish, after thirty years lapse, to quibble off a writing in that manner, and they thought that sufficient proof had been given of the attestation. (*a*)

The stat. of G. 2. did not repeal the form of witnessing prescribed by 8&9 W. 3. c. 30.; and, therefore, where a certificate of more than fifty years standing was produced, allowed, and signed by two Justices under the latter act, it was held valid from length of time, although it had not certified the affidavit of the witnesses. (*b*)

But if the certificate of attestation had been relied on as a proof of the writing, it must have been shown that the requisites of 3 G. 2. had been complied with. The Justice's certificate was "allowed by us, being first proved to be duly executed as the statute in that case directs and appoints." And it was thought by Ashhurst and Grose, Justices, that the proper formalities did not hereby appear; whilst Mr. Justice Buller considered the words "duly executed," as implying that every thing had been duly performed. And he said, that support should be given to these warranties by all possible intendments, and that credit should not be denied to the magistrates in the execution of that trust, which the legislature has reposed in them. (*c*)

It is not incompetent for justices of peace to attest as witnesses; but their signatures to that effect will not be evidence of an allowance of the certificate. So that in a case of this kind, the Court refused to confirm the writing in question, saying, that although indeed there need

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(*a*) Caldwell, 117. *Rex* v. *Ashton Keimes.* 2 Bott. 563.
(*b*) 2 T. R. 466. *Rex* v. *Farringdon.*
(*c*) 2 T. R. 471, 472.

not be four distinct persons to attest and allow, yet that they must appear to act in both capacities; for otherwise, magistrates might be drawn in to sign without even knowing the nature of the instrument, or in the least intending to sanction an allowance of such a paper. (*a*)

Nevertheless, it has been decided, that if the certificate appears to have been allowed, the Court will presume its due attestation, for the one must precede the other. (*b*)

And if a certificate be stated in the special case to have been duly and legally made, executed, and delivered, the Court will, by a reasonable intendment, presume that the attestation and allowance are inserted. (*c*)

The allowance being given, and a direction to the parish contemplated being put upon the certificate, as far as relates to form, it becomes perfect.

Direction of certificate.

And, indeed, it seems to be the more received opinion, that no direction need be adopted; for a general acknowledgment is given that the party in question is a parishioner. (*d*)

Thus, where A. came from the parish of W. with a certificate addressed to the parish of H., but which was misnamed, being called H. near Dover-court, instead of St. Nicholas in H., the Court quashed the order of sessions, who had holden the document not binding on W., saying, it was conclusive against W. for all the world. (*e*)

(*a*) 1 Str. 94. *Between the Parishes of Horncastle and Boston.* Fort. 301. S. C. 1 Sess. Ca. 161. S. C. cited in *Rex* v. *Newton.*

(*b*) 1 Str. 402. *Between the Parishes of Barleycroft and Coleoverton.* (*c*) Burr. S. C. 189. in *Rex* v. *Hilton.*

(*d*) 2 Str. 1163.

(*e*) 2 Str. 1163. *Between the Parishes of St. Nicholas, in*

So, that here, even a misdirection was not considered a void direction. Again, where a certificate directed to the churchwardens, &c. of the parish of Holy Trinity, or any other parish in the city and county of Coventry, was delivered to the parish officers of Saint John Baptist, where the pauper resided, it was considered altogether unnecessary to the validity of a certificate, that it should be directed to the parish to which it might happen to be delivered; and the case of St. Nicholas, Harwich, was relied on as decisive of the point. (*a*) So, where the parish of M. sent one I. with a certificate to the parish of R., who after a residence for some years in R. got back the certificate, and went with it to another parish in the same township, where he had purchased a freehold, and delivered it to the parish officers there, it was holden, that it could not affect any other parishes than M. and R.; and, besides, that the person in question had a right to reside upon his freehold. So that his apprentice was adjudged to have been illegally removed from his master's place of abode. (*b*) The only apparent contradiction to the doctrine just advanced, is to be found in some expressions of Lord Kenyon, which he himself afterwards qualified and explained. In one case, he said, that a certificate must be directed to one parish in particular (*c*), and in another, that there must be a particular parish in contemplation at the time of granting

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Harwich and Woolverstone, in Suffolk. Burr. S. C. 171. S. C. But see as to this latter point many authorities *contra* in a subsequent part of the chapter.

(*a*) 1 East, 438. *Rex* v. *Lillington.*

(*b*) 2 Bott. 579. *Rex* v. *Bishopside.* Burr. S. C. 381. S.C. Sayer, 231. S C. (*c*) 6 T. R. 553.

the certificate. (*a*) Yet, the learned Chief Justice declared in a subsequent case, that the only dictum to the contrary was a loose expression of his own, in *Rex* v. *Wymondham*, which the principal question in the case did not call for. True, however, it was, that the certificate could not be considered a transferrible instrument, for it then would operate as a licence for vagrancy, and so far a particular parish is intended by the officers. (*b*)

Delivery of the certificate to the parish officers.

The statute of William is express, that the certificated person shall at the same time bring and deliver it to the churchwardens, &c. of the place where such person shall come to inhabit; although, therefore, it be regularly signed, attested, and allowed, it will be of no force unless duly delivered. (*c*) As, where one having a legal settlement at Wensley, was bound apprentice to a master at Chesterfield, the master was told he must procure a certificate or he would be removed, which he did, but never delivered it. Some time afterwards the pauper left his master, and then the certificate was delivered, but not before the master had obtained a settlement, and his apprentice under him, if the certificate were of no avail. The Court held the instrument inoperative for want of due delivery, and quashed the sessions' orders. (*d*)

So, where there was a residence for one month in A., on a tenement of 10*l.* a year, and then the parish of B. granted a certificate to A., it was held that the settlement in A. could not be thus defeated, although, at the time of granting it, the residence of forty days had not

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(*a*) 4 T. R. 255. (*b*) 1 East, 440.
(*c*) 2 Bott. 561. *Rex* v. *St. Nicholas.*
(*d*) 5 T. R. 154. *Rex* v. *Wensley.* 2 Bott. 569.

expired. (*a*) For, wherever the master might gain a settlement by such a default, the apprentice also stands under like favourable circumstances. (*b*) Nevertheless, as in a case where there had been a servitude for twenty-two days, if the master receive and deliver a certificate within the forty days, another disability attaches, for the service of forty days is indispensable to the acquiring of a settlement. (*c*)

Yet the parish granting the instrument, will be estopped from setting up any settlement gained in another parish previous to the grant, though not subsequently. (*d*)

By the friendly society act, 33 G. 3. c. 54. s. 17., no member of the society who shall come to inhabit in any parish, and shall deliver to the churchwardens or overseers of the poor of such parish a certificate, &c. shall be removeable till actually chargeable. But it has been held, that in such a case the certificate must be delivered, or a settlement may be gained; for it is the duty of parish officers to be watchful of the interests of their places. And so, where evidence was given of the due concoction of a certificate, but none whatever of its having been duly delivered, the Court held, that an apprentice of such certificated friendly member had acquired a settlement. (*e*)

(*a*) 2 Bott. 582. *Rex* v. *Findern.*
(*b*) Burr. S. C. 161. *Rex* v. *Clisthydon.*
(*c*) Burr. S. C. 470. *Rex* v. *Westbury.* 2 Bott. 434.
(*d*) Caldec. 64. *Rex* v. *Buckingham.* 4 Burn, 573.
(*e*) 14 East, 253. *Rex* v. *Egremont.*

SECT. II.

To what Persons a Certificate may be granted, and to whom it will extend.

THE parishes of St. Peter and St. Paul, Bath, had purchased some land, and built a poorhouse thereon; after which they removed the pauper with others to it, at the same time certificating them, as the house stood in another parish. On the removal of these persons from their abode, which removal was confirmed by the sessions, the Court was very clear, that the certificate acts authorize the whole body of poor, of whatever denomination, and with whatever object, to remove into another parish, provided they have the protection of a certificate. (*a*) To what persons generally.

Some doubt, however, was once expressed upon this subject by Mr. Just. Foster, in a case wherein a lunatic had been specially certificated into an hospital for cure, although the case was not determined upon that ground. The learned Judge rather considered the certificate-acts, as looking to persons who came out of one parish into another to get their livelihood by their work and labour. (*b*)

A certificate only protects three classes of persons; those who are named in it; those who are part of the family of the certificated person when it is granted; and To what branches of a family.

(*a*) Caldec. 213. *Rex* v. *St. Peters and St. Pauls, Bath.* 4 Burn, 567.

(*b*) Burr. S. C. 286.

his children born in the certificated parish after that time. (*a*)

By 12 Ann. c. 18. s. 2., apprentices and hired servants belonging to certificated persons are precluded from gaining a settlement by virtue of such apprenticeships or services, and are referred to their original places of settlement.

I. Persons expressly named.

It has been customary to name the head of the family expressly in the certificate, and sometimes to insert the names of his children in like manner. But much litigation and subtle distinctions have arisen on the question of a particular mention of such children, and the mere generalizing of them in a writing of this kind.

It has been determined, however, without conflicting authority, that the children of a son, not so named, are without the protection of the certificate, and such grandchildren may therefore acquire a settlement in the certificated parish. (*b*)

So, where the son of a certificated man married, and lived in a house of his own in the certificated parish, not being expressly named, it was holden, on one occasion, that he might gain a settlement (*c*), and on another that his apprentice might gain a settlemeut by serving him. (*d*) Again, it has never been doubted, but that a child, even though named, but continuing in the

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(*a*) 7 T. R. 137. *per* Grose J.

(*b*) 4 T. R. 797. *Rex* v. *Darlington*, and see 3 T. R. 44. *Rex* v. *St. Mary Westport*. 2 East, 277.

(*c*) 5 T. R. 583. *Rex* v. *Heath*. 1 Wils. 183. *Rex* v. *Bugden*. Burr. S. C. 270. S. C.

(*d*) 6 East, 397. *Rex* v. *Mortlake*. 1 M. & S. 669. *Rex* v. *Thwaites*. 2 M. & S. 417. *Rex* v. *Morley*.

father's family, should participate in the derivative settlement of the parent. (*a*)

And so the earlier cases on the subject, which have recently been sustained, decided, that a child remaining resident with its parent should follow a derivative settlement gained by the latter. (*b*) Then came the question, whether a child named in this manner, and living apart from the parental roof, should be returned upon the certifying parish, or pursue the derivative settlement. As, where a certificate was granted to A. and his children, naming them severally, and one of these married, and lived apart from his father, it was held, that his becoming the head of a new family, did not emancipate him from the certificate, and that an order of justices, removing him and his children to the certifying parish, was right. (*c*) Some years afterwards, a case very similar to those of *Cold Ashton* and *Deddington* arose, but it has been postponed until the last, because the authority of the prior authorities was upon that occasion much canvassed. A certificate was granted, naming the father, and son, and several other children; but the son remained domiciled with the father until his removal, which was to a place of settlement newly acquired by his parent, and so derivative; on which the sessions quashed the order, thereby intimating the liability of the certifying parish, as in the cases last cited in the notes; but the Court quashed the session's orders, and held that the

(*a*) 16 East, 124. the judgment of Le Blanc J.

(*b*) Burr. S. C. 444. *Rex* v. *Cold Ashton.*

(*c*) 5 T. R. 258. *Rex* v. *Testerton.* 8 T. R. 446. *Rex* v. *Bath Easton*, and see Caldec. 144. *Rex* v. *Keel.* 2 Nolan. P. L. 183. n. 1.

son's settlement had shifted with that of the father. (*a*) The principal feature in this case, is the doubt thrown over *Rex* v. *Testerton* and *Rex* v. *Bath Easton*, and the general principle of distinguishing between the naming children, and omitting any mention of them. So that, though these decisions were not overturned, because here was a continuance under the parental roof, whereas there was a departure from it there, they may be considered as of doubtful authority, and liable to be set aside by a subsequent resolution. Lord Ellenborough said, that the naming of the family was mere matter of convenience, in order the more easily to identify them; but that it was not directed by the legislature, and that no powers were taken away from or given to such children, on account of their being named or not named in the certificate. The learned Lord stated the cases we have above mentioned as in decided opposition to each other, and thought that those of *Cold Ashton* and *Deddington* ranged more strictly within the statutes of William than the others: while Le Blanc J. pointed out the distinction which probably saved the latter cases from being overruled at that time. (*b*)

(*a*) 16 East, 118. *Rex* v. *Leek Wootton.*

(*b*) Id. 122, 123. *per* Lord Ellenborough C. J. Id. 124. *per* Le Blanc J., and see 2 M. & S. 420. *per* Lord Ellenborough C. J. 2 Nolan. P. L. 174. n. 2. Mr. Nolan, in the second volume of his Poor Laws, page 189. n. 1., adds the following *quære*, Whether the expressly naming persons in a certificate who would otherwise be included under the general denomination of family, may not have been intended, in many instances, to save the trouble of granting other certificates, and extend its protection to such children after

II. Persons, part of the family at the time of granting the certificate.

All the family, unless there be a particular exemption, are included within the certificate, although not named; but there may be an individual exclusion for some reason. As, where the father was removed with his wife and two younger children from Storrington to Patching, but the elder being capable of maintaining himself, was suffered to remain, the parish officers saying, that as he could support himself they would have nothing to do with him. The father returned to Storrington with a certificate, in which the name of the eldest son was left out, but the father, mother, and two youngest children were mentioned; the son in question gained a settlement in Storrington, and became chargeable, upon which he was removed to Patching; but the Court held, that it was competent for parties to narrow a certificate; that the instrument in question appeared to have been specially framed for excluding the pauper, and that the order of session, quashing the removal, was right. (*a*)

III. Persons who become members of the family pending the certificate.

All legitimate children, born while this document continues in force, are virtually included within its operation. (*b*) And so, by statute, are apprentices and servants during the residence of their masters under certificates. (*c*)

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they cease to be part of their father's family, without affecting their condition while they continue members of it; as for instance, in case of the father's death, or the certificate's being abandoned by him?

(*a*) 7 T. R. 133. *Rex* v. *Storrington.*

(*b*) Burr. S. C. 182. *Rex* v. *Sherborne.* 1 Sess. Ca. 322. S. C. 2 Sess. Ca. 383. S. C. 2 Str. 1165. S. C. 2 Bott. 576. Sayer's Rep. 171. *Rex* v. *Lechlade.* Burr. S. C. 380. S. C.

(*c*) 12 Ann. st. 1. c. 18. s. 2.

So that the son of a certificated person, born after the certificate, could not acquire a settlement by hiring and service in the parish where his father was, since he was virtually within that instrument. (*a*)

And where the acknowledgment was, that "A. C., spinster, and the child or children she now goeth with, are our inhabitants legally settled in our parish," it was held, that the parish so certifying were bound to maintain the child, though born a bastard in another parish (*b*); for it was expressly named in the certificate. So, where the parish officers of T. desired E. J. to procure a certificate from I., his place of settlement, which he did, with an acknowledgment for himself, wife, and son, but who was illegitimate, it was contended that the certificate had been improperly obtained; but as it did not appear that the parish officers recommended him to get a certificate for the son, nor that he had desired the son to be included in it, it was held conclusive by analogy to the case of *Rex* v. *Headcorn* (*c*), where the recognition of a person as a wife, although she had not been legally married, was considered sufficient as against the parish. (*d*)

But where the certificate mentioned the woman expressly, at the same time leaving out the child of which she was then *ensient*, and which turned out to be illegi-

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(*a*) 2 Bott. 578. *Rex* v. *Bray*. 1 Wils. 121. S. C. Burr. S. C. 259. S. C. *Buckingham* v. *Maid's Moreton*. Ib. in the n. acc. Caldwell, 121. Burr. S. C. 314. S. C.

(*b*) Burr. S. C. 650. *Rex* v. *Ipsley*. 2 Bott. 519.

(*c*) Burr. S. C. 253. 2 Sess. Ca. 391. 2 Bott. 511. 2 Str. 1233.

(*d*) 2 Bott. 581. *Rex* v. *Tostock*. 4 Burn, 572.

timate, the Court said, that as certificates were in the nature of special contracts, and as they regarded in general legitimate children only, the child must be deemed to have been settled where born, and not under the certificate. (*a*)

And an agreement to receive an unmarried woman, the child of whom she was then pregnant, and all other children she might afterwards have, was clearly considered as no warranty to take an illegitimate offspring born several years afterwards. It was said, that *Rex* v. *Ipsley* had gone very far, but, nevertheless, that a child in *ventre sa mere* was capable of being described as in that case, but that none save legitimate issue were comprehended within the usual terms of a certificate. (*b*)

A second wife, married after the granting of the certificate, is within its provisions; and, therefore, no apprentice bound to her, even after her husband's death, can acquire a settlement. (*c*) But Mr. Justice Buller, who dissented from the Court on that occasion, said, that he considered the certificate at an end when the husband died, and that the wife might thenceforth have been at any time removed back to his parish. (*d*) Nor could the son of a certificated person gain a settlement by apprenticeship, though his father died six months before the articles were out. And it did not appear that the death in that case had made any impression on the Court, for Lord Kenyon declared, that to decide

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(*a*) 2 Sess. Ca. 389. *Rex* v. *Hipperholm.*

(*b*) 7 T. R. 362. *Rex* v. *Mathon.* 2 Bott. 601. Burr. S.C. 187. *Rex* v. *Hilton.*

(*c*) 5 T. R. 266. *Rex* v. *Hampton.* (*d*) Id. 267.

otherwise would overturn all the determinations upon the subject. (*a*)

In another case the father went with a certificate to Sowerby, where R. S. was born: he died, and the son continued to reside with his mother, and carry on business on his own behalf, where he hired a boy to assist him; the boy having afterwards become chargeable, he was removed to his master's place of settlement, and the Court were perfectly clear, that he could not possibly have obtained a settlement by this hiring and service. (*b*)

The enactment of 12 Ann. c. 18., that no person, "by virtue of such apprenticeship, indenture, or binding, should gain a settlement," has been strictly adhered to. So that an apprentice who serves a certificated master under an assignment, is as much precluded from his settlement thereby, as though he had been originally bound to him. (*c*) And Lord Mansfield said, "How can it be imagined, that another man's apprentice should gain a settlement by serving him in that parish, when his own apprentice is made incapable of doing so." (*d*) And the same rule obtains, where one originally bound to a certificated man, is assigned over to an uncertificated inhabitant of the parish. (*e*) Yet, although, while the certificate subsists, the apprentice will be incapacitated from acquiring a settlement in the certificated parish,

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(*a*) 7 T. R. 471. *Rex* v. *Alfreton.*

(*b*) 2 East, 276. *Rex* v. *Sowerby*, and see 2 B. & A. 582. *Rex* v. *Huggate.*

(*c*) Burr. S. C. 640. *Rex* v. *Rumsey.* 2 Bott. 435. 4 Burn, 586. (*d*) Burr. S. C. 641. 4 Burn, 586.

(*e*) 4 T. R. 371. *Rex* v. *Hinckley.*

he will not be estopped from doing so in a third parish; for the statutes are confined to the former. (*a*)

It has been holden, that the 33 G. 3. c. 54. is not repealed by 35 G. 3. c. 101. And, therefore, where an unemancipated daughter was delivered of a bastard child, in a township wherein her father had dwelt by virtue of a certificate under the friendly society act, the protection was held to extend not only to her, but to all the members of her family also, and, of course, that the child's settlement followed that of the mother. (*b*)

SECT. III.

Of the Effect of Certificates.

How far they conclude parishes.

ESTOPPELS, however ill-favoured and discountenanced, are yet available on occasion in courts of justice, and as far as regards the acknowledgment of a parish certifying to that which is certificated, they operate in full force. It was once, indeed, determined, that such a document was conclusive against the parish granting it for all the world: that it was as solemn as the conuzance of a fine, and an adjudication of the settlement generally beyond controversy. (*c*)

(*a*) Burr. S. C. 527. *Rex* v. *Spotland.* 2 Bott. 604. S. C. 2 Nolan, P. L. 180.

(*b*) 2 B. & A. 149. *Rex* v. *Idle.*

(*c*) 2 Salk. 535. *Inter the Inhabitants of the Parish of Honiton and St. Mary Axe.* 1 Sess. Ca. 8. S. C. Id. 90.

But in a previous case, which has since been confirmed as the real state of the law, Ch. J. Holt said, that the principal obligation lay upon the parish certificating to receive the person or persons when chargeable from that parish to which they were sent, thereby acknowledging such individuals as settled inhabitants; but that other parishes remained exactly as they were. Yet the learned Judge added, that such certificate was a mighty evidence before the Justices, as was a demand and refusal of a conversion, which yet, being specially found, would not be a conversion. (*a*) And, in a comparatively recent decision, it was adjudged, after a full argument, that the only parish absolutely protected was that to which the certificate originally applied; and Lord Kenyon observed, that estoppels should be extended only as far as the positive rules have gone, for the tendency of them is to prevent the investigation of truth; and that, although it would be a hardship on the parish which acted in the first instance on the faith of the certificate, if the certificate were not in their behalf conclusive, the same reason could not apply to a strange place, and the case of *Honiton* v. *St. Mary Axe* was denied to be law. (*b*) And Mr. Justice Buller in the last case recognized the doctrine of Lord Holt, that the writing would nevertheless be mighty evidence, though not conclusive. (*c*) The same point came afterwards before the Court in a case where

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Newark v. *Worsam*. Though he had not before any settlement there.

(*a*) 1 Salk. 530. *Inter the Parishes of All Saints and St. Giles' in Northampton*. Ca. Temp. Holt, 578. S. C.

(*b*) 4 T. R. 251. *Rex* v. *Lubbenham*. (*c*) Id. 256.

the pauper had been removed from the certificated parish, to one in which he had gained a settlement previous to the certificate, but which was not the certifying parish, and it was contended, that he should have been sent to the latter parish; but the Judges held, that the object of the statute of William had been properly disclosed in *Rex* v. *Lubbenham* and *Rex* v. *St. Giles'*; and they again noticed the estoppel, as existing only between the parishes immediately concerned in the instrument. (*a*) But, although the certificate be not delivered till after the removal of the pauper, the certifying parish shall not be allowed to set up a settlement previous to such certificate gained in the certificated parish. (*b*)

Albeit, a subsequent settlement in a third parish will be valid. And in such a case the certificate will not be conclusive, for though the agreement made between two parishes may be that one should receive the pauper, yet a private agreement cannot alter the law by which a settlement is obtained elsewhere. (*c*)

However, the acknowledgment by the parish must be unequivocal; therefore, where a certificate was sent to Bethlem Hospital, with a special intimation, "in order to get the pauper cured," and not delivered to any of the churchwardens or overseers in the parish where the hospital was situate; and further, where it appeared that the certificate was delivered back, as usual in such cases,

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(*a*) 16 East, 303. *Rex* v. *St. Martin's-at-Oak.*

(*b*) Caldec. 64. *Rex* v. *Buckingham.* 2 Bott. 565. S. C.

(*c*) 3 Salk. 253. *Harrison* v. *Lewis*, and see *post* in this chapter.

it was holden, that such a certificate could not be supported under 8 & 9 W. 3. c. 30. (*a*)

This instrument is not only conclusive as to the inhabitancy and settlement, but, except in cases of fraud, it is so equally concerning the facts stated in it. Thus, I. P. legally settled in White Waltham, where he had lived two years with a woman reputed to be his wife, was certificated to New Windsor, where they had six children. The man died; and on the woman swearing that she had never been married, the children were adjudged bastards, and their settlement considered to be in New Windsor. But the Court held the certificate conclusive upon White Waltham, and that the validity of the marriage could not be disputed; so that the children ought to have been sent to Waltham. (*b*) So, where a certificate acknowledged a man and his wife, &c. who afterwards appeared not to have been lawfully married, a former wife being alive, it was determined still that the certificate was conclusive; and that, of the two parishes who had been misled, surely that which had been certificated was not to suffer, for there the parish officers had been equally deceived. (*c*)

So, where the fact of a son having been born a bastard was suppressed at the time of granting the certificate, it

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(*a*) Burr. S. C. 283. *Rex* v. *St. George's, Southwark.*

(*b*) 1 Str. 186. *Between the Parishes of New Windsor and White Waltham.* Burr. S. C. 191. *Rex* v. *Woodchester*, and see Burr. S. C. 187. *Rex* v. *Hilton.*

(*c*) Burr. S. C. 253. *Rex* v. *Headcorn.* 2 Sess. Ca. 391. S. C. 2 Str. 1233. S. C. 2 Bott. 577. S. C. 8 T. R. 465. *Rex* v. *Ullesthorpe.*

was the opinion of the Court, that as the parish officers had recommended the father to procure a certificate for his son, and as he had not desired that his son should be included, the acknowledgment was conclusive. (*a*)

Effect of certificates upon the pauper and his family.

The principle established by law, as incident to the attainment of certificates, is, that persons resident under them cannot be removed until actually chargeable; so that it is not sufficient in general that the party is likely to become chargeable, if he is not positively in the receipt of parish relief, or will, beyond question, stand in need of it. (*b*) A certificate was given with a promise that E. P., with his wife and family, should be received again when the parish officers should be thereto requested, &c. And the grounds stated for the removal of a grandson of E. P., with his family, were, that the paupers might, according to the warranty, be returned upon request; next, that T. P., the eldest son of E. P., had received some relief during sickness previous to his death, and that his infant son had received occasional relief since; and, lastly, which more bears upon our present point, that one of T. P.'s granddaughters was pregnant with a bastard child, of which she had since been delivered. With respect to the first point, the Court said, the terms could not be applied until the request was made

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(*a*) 2 Bott. 581. *Rex* v. *Tostock*. 4 Burn. 572.

(*b*) 2 Salk. 530. *Inter the Parishes of Little-Kire and Woolfall*. Ibid. *Inter the Inhabitants of Malden and Fletwick*. Burr. S. C. 287. *Rex* v. *Hacheston*. Id. 392. *Rex* v. *Kingswood*. 1 Str. 77. *Parish of Teelby* v. *Willerton Parish*. 1 Sess. Ca. 8. *Anon*. Id. 407. *Rex* v. *Strisestead*. 2 Str. 1256., and see 1 Sess. Ca. 161. *Rex* v. *Newton*.

legally; as to the second, that the relief so afforded to the son and grandson was no ground for removing the grandfather, especially as no application had been made to the latter person for that purpose, and who, besides, had not importuned the parish to that effect; and as to the third, that, though the woman was pregnant, *non constat*, that the child must have been a bastard, since a marriage might have intervened, so that there was no certainty of her being chargeable. (*a*) But now, by 35 G. 3. c. 101. s. 6., unmarried women with child are to be deemed chargeable within the true intent and meaning of that act. It had been previously intimated, that no other members of a family than such as ask relief could be removed, for by Aston Justice (whose opinion on this point was quoted with great respect in the last authority cited) (*b*), according to the inclination of his opinion, if several persons resided in a parish under the same certificate, the asking relief by a single one of them would not render the rest removeable. (*c*)

It has been resolved, that the destruction of a certificate, by casualty, will not render the party removeable, though a new one be refused him. (*d*)

Certificate will not prevent persons from acquiring a settlement

The effect of the certificate, however, is only coextensive with the parish into which it comes. If, therefore, a party, his children, servants, or apprentices, obtain a settlement in a third, it will be unimpeachable. So that, where an apprentice to a certificated man was

(*a*) 3 T. R. 44. *Rex* v. *St. Mary, Westport.*
(*b*) *Per* Grose J. 3 T. R. 50.
(*c*) 2 Bott. 539. *Rex* v. *Framlingham.*
(*d*) 2 Bott. 566. *Rex* v. *Hayder.*

assigned to a person in another parish, he was held capable of assuring to himself a settlement there, the act only directing that the binding and inhabitation should be of no avail in the certificated parish. (*a*) And where the person certificated removed into a third parish with his apprentice, it was still holden, that a service by such apprentice for forty days accomplished the settlement. (*b*) in a third parish.

The same rule is recognized in cases of hiring and service in a third parish. (*c*)

SECT. IV.

How a Certificate may be determined.

THERE seem to be three principal agencies in the determination of a certificate, each of which will severally destroy it: the first is effected by the officers of parishes concerned in the disposal of the certificated persons; the second, by certain acts done by those per-

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(*a*) 2 Str. 1147. *Rex* v. *Petham.* 2 Sess. Ca. 209. S. C. 2 Bott. 576. S. C. Burr. S. C. 269. *Rex* v. *Silton.* 2 Bott. 41. S. C. Sayer's Rep. 287. *Rex* v. *St. Peter's, in Nottingham.* Burr. S. C. 381. *Rex* v. *Bishopside,* and see the cases *ante.* Burr. S. C. 186. *per* Dennison J. 2 Nolan, P. L. 176. 180.

(*b*) Burr. S. C. 527. *Rex* v. *Spotland.* 2 Bott. 604. S. C.

(*c*) Sayer's Rep. 228. *Rex* v. *Horsley.* Burr. S. C. 385. S. C.

sons; and the third by the operation of law. We shall find these divisions illustrated by the removal of paupers, the granting of new certificates, the abandonment of the certificate by the party interested, the acquisition of a settlement by him in that condition, and by the emancipation which happens to grown persons separating from their father's roof. And it is a rule, that a parish wishing to be rid of a certificate must show some cause in particular for its cessation, since the Court will not take upon themselves to presume matter in discharge of it. (*a*)

1. Discharged by removal.

First, a certificate will become *functus officio* if the pauper be removed home again, and he will then be capable of acquiring a settlement elsewhere. As, where the father, certificated at Uttoxeter, was removed with his family to Sudbury, and his son went out as an apprentice to Uttoxeter; it was held, that the removal gave a new right to this family, and that the son had obtained a settlement through this apprenticeship. (*b*)

So it is, where the pauper is removed by a third parish to the certifying parish (*c*), or to that which is certificated. (*d*) It is presumed, that no successful appeal takes place on these occasions. And there needs not any adjudication, where the pauper is removed by the certificated parish to that which has certified, that he has not gained a settlement in the interim, for the

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(*a*) 1 T. R. 248. *per* Ashhurst J.

(*b*) Burr. S. C. 373. *Rex* v. *Sudbury*. Sayer's Rep. 200. S. C. 2 Bott. 602. S. C. 4 Burn, 579.

(*c*) Caldec. 500. *Rex* v. *Birdham*. 2 Bott. 607. S. C.

(*d*) Caldec. 472. *Rex* v. *Ealing*. 2 Nolan, P. L. 182.

certificate and the chargeable situation of the party are alone necessary to be shown. (*a*)

II. Grant of a new certificate.

An instrument of this nature is supersedeable, and, therefore, the getting a new certificate will have the effect of annihilating the old. For the acknowledgment is of course by the same parish, and as they load themselves with the responsibility of maintenance, no injury is worked by the change, and it has been more than once decided in this manner. (*b*)

III. Abandonment of the certificate.

We come now to the pauper's own acts by which he deserts his protection in the certificated parish. This may be done by his voluntary departure from the certified place, and return to the parish whence he came, or elsewhere, provided at the same time, that he manifest no intention of repairing again to the former parish, which is the criterion for judgment in cases of this nature. (*c*)

Thus, where the party returned to the certifying parish, and died there, there was a sufficient abandonment. (*d*) So, where the certificated person remained eighteen years in the certifying parish after his return thither, the Court thought it unnecessary to have counsel in support of the abandonment: (*e*)

Again, where a person moved at two different times into two parishes, distinct from that to which he was certificated, which was Newington, and died in one of

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(*a*) 1 Str. 402. *Barleycroft* v. *Coleoverton.*

(*b*) Caldec. 500. *Rex* v. *Birdham.* 1 T. R. 218. *Rex* v. *St. Peter's, in Derby.* (*c*) 2 Nolan, P. L. 182.

(*d*) Burr. S. C. 402. *Rex* v. *Taunton St. Mary Magdalen.*

(*e*) Dougl. 418. *Rex* v. *Frampton-upon-Severn.*

the stranger parishes; there being no ground to presume that he had any purpose of returning, it was held incorrect for two justices to move one of his sons to the certifying parish, who had gained a settlement in Newington, for the certificate was at an end. (*a*) And this presumption will be warranted by the absence of the party in question for any length of time, although he return afterwards. As, where the pauper's father left the parish of St. Michael's, where he was domiciled under a certificate, and took a house in St. Sepulchre, from whence he was certified, where he lived two years and upwards, after which he went back to St. Michael's; for here was a removal not for a temporary purpose, but with a view of making St. Sepulchre the permanent place of residence; and by Ashhurst Justice, when the father went back to St. Michael's, that parish should have required a fresh certificate. (*b*) Some doubt will sometimes prevail as to a person's intention of deserting the place of protection. Thus, where the pauper left the parish to which she was certified, and remained absent seven years in the certifying parish; after which she returned voluntarily, the Court held, that as to her there had been no abandonment. (*c*) But this case, as it relates to the point just mentioned, can hardly be sustained on that ground after the later decisions. And it is said, that Lord Mansfield thought differently at first upon the subject. (*d*) Again, I. M., the grandfather of

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(*a*) 1 T. R. 354. *Rex* v. *Newington.*

(*b*) 5 T. R. 526. *Rex* v. *St. Michael's, in Coventry.*

(*c*) Caldec. 144. *Rex* v. *Keel.* 4 Burn, 583.

(*d*) 5 T. R. 586. *per* Lord Kenyon C. J. Yet, on the ground of the young woman being a minor, it seems, it may be good authority. See *post* in this chapter.

the pauper's husband, being a settled inhabitant of Darlington, came into All Saints in Cambridge, under a certificate from D. Whilst at All Saints he had a son, Thomas, who lived there, as part of his father's family, except for one year, when he lived with one C. in All Saints; after which he returned to his father, married, and had children, amongst whom was Thomas, the pauper's husband, who lived all his life in All Saints. This man was hired to and lived with B. in All Saints. Some time before this latter service, J. M., the grandfather, returned to D., leaving his family behind, and there died. The pauper, the grandson's wife, had done no act to acquire a settlement since her husband's death. It did not become necessary to adjudge whether the grandfather's return to D. was a total abandonment of a certificate, since a settlement had been gained by the grandchild in All Saints; but Lord Kenyon was strongly of opinion, that there had not been an abandonment, as the son had been left behind, a sort of pledge subsisted that such had not been the grandfather's intention. Mr. Just. Buller, however, would have considered this return as an entire destructionof the instrument, his family being those only who lived with him; and as it happens in the course of time that some of the children separate from the father, the learned Judge thought the family living with the parent identified with him on his return. (*a*) We have seen, that the death of the person originally certificated will not diminish the force of the protection gained under it, nor permit persons to acquire settlements from that cause. (*b*) It is therefore time that we

(*a*) 4 T. R. 797. *Rex* v. *Darlington*. (*b*) Ante.

should notice the fourth method of overturning the certificate; namely, by the gaining of a settlement during its existence.

IV. Gaining a new settlement.

Where a new settlement is gained, the certificate ceases as of course, and a distinction should be marked in the first instance between the acquisition of such a settlement by the certificated man himself and by his family. The former has only two ways pointed out for the attaining of it in the certificated parish; 1. the serving an office; and 2. the renting a tenement of 10*l.* a year. The latter can only be settled in such cases by an emancipation from the parental dominion, and the performance of some act which would have the same effect independently of the certificate, as being hired and serving for a year, &c. And there is another observable difference between the capacity to do this in the certificated parish, and in a third parish; for the *pater familias* and any one of his family may create a fresh settlement for themselves in the latter place; whereas, in the former, we find very close restrictions imposed by the legislature, as we have above mentioned. With respect to the third parish, little or no doubt has prevailed.

Thus, where a young woman came to B. under a certificate from L., and then served an apprenticeship in Great T., after which she returned to hiring and service in B. for a year, it was holden, that her apprenticeship in Great T., the third parish, had entirely cleared her of the certificate, and, consequently, that her settlement was in B. by virtue of the hiring and service. (*a*)

(*a*) Burr. S. C. 428. *Rex* v. *Great Torrington*. 4 Burn, 576. Burr. S. C. 429. *Rex* v. *Keynsham*.

For the private agreement of parishes shall never be effectual against the established law of the country, which throws open every parish to the settler, except that which is certificated. (*a*)

And it is no objection that the certificated parish has been consolidated with a third, in which the settlement is claimed, since, as far as regards this purpose, they must be considered as separate and distinct. (*b*)

The next question is, how the certificate can be discharged so as to lay open a settlement in the certificated parish; and here the two methods prescribed by the statute present themselves.

The first qualification is the execution of some annual office in such parish, being legally placed in such office. Upon this, Mr. Nolan observes, "The words of this act (9 & 10 W. 3. c. 11.) differ from those under which inhabitants, unfettered by certificates, are entitled to acquire a settlement under 3 W. 3. c. 11. But although they vary from each other in some particulars, the Court has inclined to give them the same construction, so far as can be done consistently with the letter of the statutes, for the purpose of placing all paupers, who are to gain a settlement by the exercise of annual offices, upon the same footing." (*c*)

It is not our province to make an inquiry in this place into the peculiar offices which thus confer a settlement, since, whatever may be the nature of the employment, the certificate remains the same. The reader is, there-

(*a*) 3 Salk. 253. *Harrison* v. *Lewis.*
(*b*) 6 T. R. 552. *Rex* v. *Wymondham.*
(*c*) 1 Nolan, P. L. 617.

fore, referred to the various works on the Poor Laws, for information on this head. (*a*) The second mode of determining the certificate as above, is by renting a tenement of 10*l.* value by the year; and the same reason, which has been just stated, will be sufficient to warrant us in merely noticing this point also. (*b*) The provisions of 59 G. 3. c. 50. are worthy, however, of especial attention, as they considerably augment the requisites for obtaining this kind of settlement. (*c*) And it is now settled, by a reasonable construction of the 9 & 10 W. 3. that these latter terms will extend to a residence on the party's own estate, or in the parish where it lies, exactly in the same manner as though no certificate existed, and this, whether by operation of law or purchase. (*d*)

It is also clear, that the 9 G. 1. respecting purchases for a less sum than 30*l.* extends to certificated persons (*e*); and, although once doubted (*f*), it has been determined, that a conveyance from natural love and affection, and also in consideration of 10*l.*, will avoid a certificate, provided there be a residence of forty days, and that a tenement be of 30*l.* value. (*g*)

It is observable, that the statute does not say whether the taking a tenement shall be before or after the certificate granted, the principle being the ability to take, and,

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(*a*) See particularly 1 Nolan, 617. ch. xxii.

(*b*) See 2 Nolan, 1. ch. xxiii.

(*c*) See 2 Nolan, P. L. 64.

(*d*) 2 Nolan, P.L. 186, 187., and the authorities there cited.

(*e*) Burr. S. C. 553. *Rex* v. *Dunchurch*. 1 Sir Wm. Bl. 596. S. C. 2 Bott. 515. S. C.

(*f*) In *Rex* v. *Warblington*. 1 T. R. 241.

(*g*) 3 T. R. 251. *Rex* v. *Ufton*.

therefore, the protection will cease under that instrument, if the party reside subsequently on an estate conveyed previously to the certificate (*a*), or by a like residence on a tenement taken before the granting of it. (*b*)

V. Determined by emancipation.

Emancipation will discharge a certificate as to those who form a part of the parent's family. To prevent repetition, the reader shall be barely reminded here, that as the authorities stand at present, a child, especially named in the certificate, will not be emancipated from the influence of that acknowledgment, although he quit his parental roof; while at the same time, it may be added, that such decisions rest on no very stable foundation. With regard to unemancipated children, it shall only be stated, that, whether named or not, the settlement acquired by their head will be communicated to them. (*c*) But the principal point reserved for our consideration now, is the criterion for judging of emancipation; and it seems certain, that wherever a child, not named in the instrument, leaves the father, and becomes the head of another family, as to him or her, the certificate will become inoperative.

And so it is, if such a child obtain a settlement elsewhere. But another question, namely, the minority, or full age of the party intervenes on this occasion, and having been the subject of several decisions, is deserving of particular notice.

It should, however, be remarked, that the cases be-

(*a*) See 3 T. R. 251. *Rex* v. *Ufton.*

(*b*) Caldec. 426. *Rex* v. *Findern.*

(*c*) See 2 Nolan, P. L. 187. n. 8. for the authorities, *ante.* 11 East, 578. *Rex* v. *Hardwick.*

neath refer principally to acts done by minors in the certifying parish, in which case no new settlement is conferred, the party being actually settled there at the time. Nevertheless, the principle still remains undisturbed, that a minor partakes of his father's settlement, unless he has become the head of another stock himself, or gained a settlement in some strange parish. (*a*)

Thus, the pauper was born in B., where her father and mother lived under a certificate from K. Her parents died, and she continued to live at B., till the age of seven, with her brother, who was named in the certificate. She then went to K., the certifying parish, and was maintained there till she reached fourteen, when she hired herself, and served two or three years in the same parish, and then returned voluntarily to her brother's house in B., and was hired and served for a year there also. Now, although the decision of the Court, which was in favour of the certificate's continuance, might be impugned with success, if it were supposed to have proceeded on the ground of there not having appeared a sufficient intention on the part of this person to desert the certificate, yet, considered as a resolution against the capacity of minors to acquire a settlement without emancipation, it seems to be in accordance with all subsequent decisions. (*b*) Again, where a son of a certificated person served for a year at B., an extra-parochial place, and then returned to the certificated place where his father lived, being under twenty-one, where he was hired, and served a year, it was held, that the certificate

(*a*) See 4 T. R. 201. *per* Lord Kenyon C. J.
(*b*) Caldec. 144. *Rex* v. *Keel.* 2 Nolan, P. L. 185.

had not expired, for he could not have acquired a settlement in B., being extra-parochial, and, consequently, he returned clothed with his father's rights and protection. (*a*) So, where the son of a certificated man served alternately in the certifying and certificated parishes, for a year in each respectively, and then returned to his father's house in that which was certificated, it was held, that he had gained no settlement on account of his nonage, and *Rex* v. *Keel*, and *Collingbourne Ducis* were cited. (*b*) Yet, it seems, that the pauper in the last case might actually have been of age at the commencement of his second service, and if so the case would have been altered. (*c*) And thus it has been determined under similar circumstances, where the party, who had served in both parishes, clearly appeared to have attained the age of twenty-one. (*d*)

A certificate may be discharged as to part of a family, but continued as to the remainder; and we have seen, that it may be entirely dispensed with, by the shifting of the parent's settlement, and consequent removal of the children, or by their acquisition of a settlement elsewhere. And thus we have also observed, that the death of the person originally certificated will not determine the certificate as to his family and servants.

(*a*) 4 T. R. 199. *Rex* v. *Collingbourne Ducis*.

(*b*) 8 T. R. 339. *Rex* v. *Ingworth*. 11 East, 578. *Rex* v. *Hardwick*.

(*c*) *Per* Lord Ellenborough C. J. 2 M. & S. 421.

(*d*) 2 M. & S. 417. *Rex* v. *Morley*.

SECT. V.

Of other Matters relating to a Certificate.

Reimbursing the certificated parish.

BY 3 G. 2. c. 29. s. 9. it is enacted, that when any overseer or overseers of the poor of any parish or place, or other person, shall remove back any person or persons, or their families, residing in any parish or place, or sent thither by certificate, and becoming chargeable as aforesaid to the parish or place to which such person or persons shall belong, such overseers or other persons shall be reimbursed such reasonable charges as they may have been put into, in maintaining and removing such person or persons, by the churchwardens or overseers of the poor of the parish or place, to which such person or persons is or are removed, the said charges being first ascertained and allowed by one or more of His Majesty's justices of the peace for the county or place to which such removal shall be made; which said charges, so ascertained and allowed, shall, in cases of refusal of payment, be levied by distress and sale of the goods and chattels of the churchwardens and overseers of the poor of the parish or place to which such certificated person or persons is or are removed, by warrant or warrants under the hand and seal or hands and seals of such justice or justices, returning the overplus, if any there be; which warrant or warrants he or they are hereby required to grant.

Punishment of persons re-

To ensure the proper use of certificates, as well as to protect the public against the inundation of vagrants,

punishments are awarded by acts of parliament against all persons who return illegally to parishes or places whence they have been removed by an order, unless they produce a certificate, declaring them settled inhabitants of some other parish. Thus the 17 G. 2. c. 5. s. 1. enacts, that all certificated persons who have been removed to the certificated parish, shall, if they return from such parish without a certificate from their own parish, be deemed idle and disorderly persons, and punished by imprisonment and hard labour, as directed by that statute. (*a*)

turning to parishes without a certificate, after an order of removal.

In a case where the pauper had been committed to the house of correction under this statute, without any previous conviction of vagrancy, the Court seemed disposed to assist the magistrate, on the ground of the integrity of his intentions; but finding the commitment illegal, they were compelled to give judgment for the plaintiff, who had brought an action for the grievance. (*b*)

According to the opinion of Lord Kenyon, the party is not punishable unless he return in a state of vagrancy (*c*); but Mr. Justice Buller has expressly declared, that the pauper would be guilty of disobedience to an order of removal if he returned even for the purpose of completing a contract, and that such a defence would be of no avail against an indictment. (*d*)

A conviction good on the face of it, by the usual rules established in such cases, cannot be controverted in evi-

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(*a*) See s. 9.
(*b*) 1 Burr. 591. *Baldwin* v. *Blackmore.*
(*c*) 2 T. R. 711. (*d*) Id. 600.

dence at Nisi Prius. (*a*) And in a late case it has been resolved, that it lies on the party to prove he did not return in a state of pauperism, by which it should seem that the opinion of Lord Kenyon is more to be preferred, as the necessary inference would be that had such a case been made, the conviction alluded to would have been vitiated. An action of false imprisonment was brought against a magistrate, and the defence was, a regularly recorded conviction of the plaintiff, setting forth the fact of his having returned to B. parish, after his removal thence, and without a certificate. It was contended in support of the action, that no act of vagrancy had been placed on record, but that such a misdeed was only to be inferred from the absence of the certificate, and, therefore, that the conviction was bad. But the Court said, that the defence against vagrancy lay upon the party returning; that it would indeed be singular if such a person were allowed to sue a magistrate after having refused to answer, and suffered the magistrate to convict him; and judgment was given for the defendant. (*b*) The words of Best, Justice, are remarkable; he declared, that the parish officers had acted most improperly in taking up a man who was at work in the harvest field, but that the magistrate could not, under the circumstances, act otherwise than to convict; which expressions would imply, that the inclination of that learned Judge was in favor of a defence, by denying

(*a*) See 7 T. R. 634., in the note at the end.
(*b*) 3 B. & A. 103, *Mann* v. *Davers*.

vagrancy, and, consequently, in accordance with that delivered by Lord Kenyon. (*a*)

There cannot be a donbt, but that the fabrication of a certificate of this kind is a misdemeanor at common law, and so punishable with fine and imprisonment; for it is a gross imposition and fraud upon the parish to which the supposed certificate is taken, whose officers receive the applicant on such an occasion upon the faith of a false token. (*b*)

Penalty for forging a certificate.

SECT. VI.

Of the Evidence.

THE short enquiry proposed in this section will be chiefly directed to the proof required for substantiating these documents, the presumption of their validity from long usage, &c.; points which have been illustrated by some recent authorities.

It is enacted by 3 G. 2. c. 29. s. 8. that all certificates given in pursuance of 8 & 9 W. 3., shall be taken and allowed in all Courts as evidence, without other proof, provided the same are duly allowed by two Justices of the peace, as by the said act is required. However, the certificate itself must, if possible, be produced, and it will not be sufficient to prove its existence from an old book, especially if it be tendered by the parties interested in supporting such evidence. Thus, for the purpose of establishing a certificate said

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(*a*) 3 B. & A. 106. (*b*) See 2 Sess. Ca. 366.

to have been delivered by the appellants to the respondent parish, the latter produced a book from their parish chest, in which their certificates appeared as regularly entered, and amongst the names was that of the pauper; the Sessions rejected this writing as inadmissible. It was urged on a case stated, that here was no attempt to favor the contents of the certificate, but merely to show the fact of the delivery; but the Court held, in conformity with the principle, that nothing said or done by a person having an interest at the time in the subject matter shall be evidence either for him or for persons claiming under him, that the Bench had been justified in refusing to allow this mode of proof. (*a*)

And, where one S. M. stated himself to have come into Kingsworthy parish with a certificate, but of which instrument the officers declared their utter ignorance; or, that if it had existed, it must have been mislaid, the Sessions would not adjudge his apprentice to have gained a settlement by virtue of such a supposed certificate, and the allegation of S. M. that he had delivered it to a parochial officer was still deemed insufficient, for the writing itself was the best evidence, and should have been produced. (*b*) Yet, if the certificate be destroyed by casualty, the testimony of the pauper will be sufficient to establish it, and so it has been resolved without argument. (*c*)

Where such a writing has been in force for thirty years, a mighty presumption in its favor will be raised, so that an apparent failure in the ordinary forms re-

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(*a*) 2 B. & A. 185. *Rex* v. *Debenham.*

(*b*) Burr. S. C. 296. *Rex* v. *St. Maurice in Winchester.*

(*c*) 2 Bott. 566. *Rex* v. *Hayder.*

quired to give it validity will be disregarded after so long a continuance. Thus, where the instrument tendered, which was fifty years old, was sufficiently allowed and attested, but the certificate of magistrates testifying the oath of a witness as to the due execution of it, under 3 G. 2., was written on another leaf of the same sheet of paper, the Sessions disallowed it, and it was contended on a rule to show cause why their order should not be quashed that this last document could not in any way be connected with the former, and *non constat*, that it might not have been inserted just before the sessions; but the Court waving the determination of that point (*a*) were clear, that a certificate of thirty years standing proved itself, and that the act of G. 2. did not destroy any mode of proof in use before it passed, but was rather adopted for the purpose of facilitating such proof. (*b*) So, in a subsequent case, the Court without having counsel on either side, declared themselves satisfied with a certificate of the age of thirty years, and said that the bare production of such a writing would be sufficient, and that there was no occasion for compelling a parish officer to give an account of it. The order of Sessions was quashed. (*c*) The point was given up in a

(*a*) Mr. J. Ashhurst doubted whether the two writings could have been connected, had it been necessary to have decided that point; while Mr. J. Buller conceived the document good under both the statutes of W. 3. and G. 2., there being no particular form of allowance prescribed by the act. Mr. J. Grose inclined against the certificate, as involved with the debateable question; but all the Court were clear as to the validity of so ancient a muniment on its own merits.

(*b*) 2 T. R. 466. *Rex* v. *Farringdon.*

(*c*) 5 T. R. 259. *Rex* v. *Ryton.* This witness had been

posterior case, the counsel in support of the order of Sessions declaring that he could not sustain their decision after *Rex* v. *Ryton*. (*a*) The principle which governed these authorities seems to be, that where the ancient document purports to belong to the party producing it, no proof can be requisite as to the place of its custody. (*b*)

Other matters relating to the form of the certificate, as given in evidence, such as the attestation, &c., have been already mentioned in the preceding part of this chapter.

It is allowable to receive evidence for the purpose of explaining a certificate, as where the officers of A. had granted one, describing themselves as of the parish at large, whereas each hamlet in the parish had separate churchwardens and overseers; evidence to shew that these persons were the officers of the hamlet in which the pauper was settled, was deemed admissible, for it did not tend to contradict, but to explain the instrument. (*c*)

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rejected at the sessions as an interested witness, being a parishioner.

(*a*) 2 M. & S. 337. *Rex* v. *Netherthong*. Scarlett, who was against the order, mentioned the stat. 3 G. 2. as ordaining that the certificate, after allowance, and oath of its execution certified by the Justice, should be received without proof. But it may be suggested, that this provision referred rather to the facts contained in the certificate, than to collateral evidence of its invalidity, such as the custody, from whence it sprang, &c.

(*b*) See Phil. on Ev. 4th ed. p. 503.

(*c*) 3 T. R. 609. *Rex* v. *Samborn*.

CHAP. VII.

OF PROFESSIONAL CERTIFICATES.

THE principal professional certificates which we shall have occasion to notice in the ensuing chapter, are prescribed by various acts of parliament to legal and medical practitioners; and it may be thus early remarked, that by far the greater proportion of cases, or applications to the Courts, upon this subject, have arisen upon the efficacy of these instruments in preserving the attorney's privilege, or upon the conditions of his practice or readmission to the profession, where he has neglected to comply with the statutory regulations which introduced them. We will, therefore, consider, in the first instance, the certificates of attornies and solicitors.

Of the attorney's certificate.

This document was first ordained by stat. 25 G. 3. c. 80., and by 37 G. 3. c. 90. Every solicitor or attorney in any of His Majesty's Courts at Westminster, or in any other Court in England, holding pleas where the debt or damage shall amount to 40*s.* or more, is directed during the time of his practising in such Courts, and before he commences his practice, to deliver in annually, between the first day of November and the end of Michaelmas term following, his name and place of residence to the Stamp Office, upon which, and on payment of the duties, a certificate is issued under the hand of the

proper officer. The certificate is to be dated on the second of November, if issued between the first of that month and the end of Michaelmas Term, if afterwards, the date should be on the day it issues. (*a*)

By the 30th section of the same statute, the certificate is to be entered (*b*) in one of the Courts in which the person described therein shall be admitted and enrolled, with the officer of such Court appointed by 25 G. 3. c. 80. to grant certificates of enrolment or admission, within the time before prescribed, and before the person is allowed to practise; and the name of such person with that of his place of residence, is to be entered in a book or roll in alphabetical order, as he is described in his certificate, for a fee of one shilling, and the said book or roll is to be open without fee or reward at all seasonable times. The 31st section declares, that an omission to take out a certificate for one whole year in the manner prescribed by the act shall occasion the admission, entry, and enrolment of the party neglecting to be thenceforth null and void; but a power is reserved to the Courts to readmit such person, on his paying the arrears of duty, and such further sum of money, by way of penalty, as they shall think fit to order and direct. It is further provided, that any person acting either in his own name, or in that of another person for fee or reward, or otherwise as an attorney, without obtaining a certificate, or delivering in a statement of his place of residence with intent to evade the higher duties payable

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(*a*) See the stat. 37 G. 3. c. 90. s. 26. & 28.

(*b*) By 44 G. 3. c. 59. s. 3. the time for entering the certificate is enlarged to the commencement of Hilary term. Maugham, p. 69.

in respect of certificates (*a*), shall forfeit 50*l.*, and be incapable of maintaining or prosecuting any action, &c. for the recovering of his fees. And by 44 G. 3. c. 98. s. 14., every person who shall for or in expectation of any fee, gain, or reward, directly or indirectly draw or prepare any conveyance of, or deed relating to any real or personal estate, or any proceedings in law or equity other than and except serjeants at law, barristers, solicitors, attornies, notaries, proctors, agents, or procurators, having obtained regular certificates, and special pleaders, draftsmen in equity, and conveyancers, being members of one of the four Inns of Court, and having taken out the certificates mentioned in the schedule to that act annexed; and other than and except persons solely employed to engross any deed, instrument, or other proceedings, not drawn or prepared by themselves, and for their own account respectively; and other than and except public officers, drawing or preparing

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(*a*) *Duties payable for Certificates under* 55 *G.* 3. *c.* 184.

	£.	s.	d.
By an attorney or solicitor in any of His Majesty's courts at Westminster, if he reside in the city of London or Westminster, or within the limits of the twopenny post in England, or within the city or shire of Edinburgh, and shall have been admitted, or in possession of his office for three years or upwards - - - -	12	0	0
If he shall not have been so long admitted, under those circumstances - - -	6	0	0
If he shall reside elsewhere, and have been admitted, or in possession of his office for three years or upwards - - - -	8	0	0
If not so long - - - - -	4	0	0

official instruments applicable to their respective offices, and in the course of their duty, shall forfeit and pay for every such offence the sum of 50*l.* Provided always, that nothing therein contained shall extend, or be construed to extend, to prevent any person or persons drawing or preparing any will or other testamentary papers, or any agreement not under seal, or any letter of attorney.

Upon this last statute it is to be observed, that no one, except a member of one of the four Inns of Court, is compellable to avail himself of a certificate in cases where a will or an agreement not under seal, &c. is to be drawn. Therefore, where the plaintiff had been instrumental in forwarding a negociation for the transfer of a certain medical practice, and had prepared an agreement to that effect, Gibbs C. J., held, on an objection taken as to the plaintiff's competency to do this without a certificate, that it could not be called a proceeding in law or equity, and that the clause of the act referred only to members of Inns of Court who should prepare such contracts. The learned Judge added an opinion, that supposing the certificate necessary, the agreement would not be invalid, although, indeed, a penalty might have attached on the plaintiff for his omission. (*a*) Yet, where there is an act to be done by a person who for that purpose must be an attorney, it seems that he must be a certificated attorney. As where a notice had been served upon a magistrate, specifying the form of action about to be commenced against him,

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(*a*) Holt, N. P. 528. *Edgar* v. *Hunter*, and see 14 East, 576.

the attorney whose name appeared indorsed upon the notice, was asked whether he had taken out his certificate. (*a*)

In reviewing the enactments before us, we shall have occasion to consider whether the want of these certificates affects in any way the privileges of the attorney, what is his best remedy where there has been a neglect either on the part of himself or his agent to procure them, and the legitimate method of recovering the prescribed penalties.

However, it may be premised, that the certificate act does not extend to the County Court. So that where the plaintiff had obtained a verdict against a person acting as an attorney for penalties upon the 37 G. 3., and amongst others, for carrying on proceedings in certain actions in the County Court of the Sheriff of Lancaster by virtue of His Majesty's writ of Justices, when the damages were laid at 9*l.*, judgment was arrested as to two of the counts which related to such proceedings in the inferior Court. (*b*)

Certificate as it respects the attorney's privilege.

Before the statutes of the late King respecting certificates, it seems, that an attorney might have forfeited his privilege by being in the custody of the marshal (*c*), or, according to an old rule of court in Michaelmas 1654, by non-attendance to business for a year. (*d*) And, al-

(*a*) 2 Campb. 296. *Sabin* v. *De Burgh.*

(*b*) 6 T. R. 663. *Cross* v. *Kaye.*

(*c*) 1 Str. 191. *Windmil* v. *Cutting.*

(*d*) 1 B. & P. 5. It does not appear that this rule has been acted upon *, and it has been doubted † whether it

* *Per* Le Blanc J. 2 M. & S. 606.

† *Per* Lord Ellenborough C. J. Ibid.

though there is an old case in Lutwyche, in which it was held, that an attorney should have his privilege as long as he should be an attorney on record (*a*), a different rule was afterwards adopted.

So, that where an attorney, who had not practised for three years, was sued and held to bail; but between the day of issuing the writ and his capture, had taken out his certificate, and acted in his profession, the Court refused to set aside the bail-bond, and held, that the privilege should be confined to the time of suing out the writ. (*b*) So, where a defendant had purchased a stamp with a view to obtain his certificate under 25 G. 3. c. 80., and then applied to the Court for his discharge, on entering a common appearance, Mr. Justice Buller said, that the defendant should have stated in his affidavit, that he had practised within a year previous to the arrest; and also, that he should inform the Court, whether he had had a certificate within the year; without which, added the learned Judge, a strong presumption will lay against him. (*c*) The additional arrangement effected by the 37 G. 3. seems to have been, that if the party neglects to procure his certificate for one whole year, his admission,

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came within the saving clause of stat. 12 Car. 2. c. 12., having been made in the time of the Commonwealth; and it has even been said *, that the rule probably applied to the year then last past.

(*a*) 2 Lutw. 1664. *Routh* v. *Weddell.*

(*b*) 7 T. R. 25. *Brooke* v. *Bryant.*

(*c*) 1 Bos. & Pul. 4. *Dyson* v. *Birch, One, &c.*

* *Per* Dampier J. 2 M. & S. 606.

&c. shall from thenceforth be void. Thus, where an attorney moved to be discharged, and that his bail-bond should be cancelled, it was objected, that he was without his certificate; but the Court said, that the time of one year, as ordained by the statute, could not be altered, and as that time had not elapsed, they made the rule absolute. (*a*) Again, where the plaintiff sued in his professional capacity by attachment of privilege, after the expiration of his certificate, a rule for setting it aside was denied, for a year had not passed over since his neglect. (*b*) And in this case it was, that the Court seemed to shake the rule of Michaelmas 1654, regarding the non-attendance of attornies for a year, which circumstance has been previously mentioned in a note. (*c*) There appears to be a distinction between actions brought by an attorney on these occasions in his own behalf, and on the account of third persons. For in the case last mentioned, where the plaintiff had been a prisoner in the King's Bench for more than a year, the Court inclined, that the stat. 37 G. 3. related to the carrying on of suits for strangers, and in a prior case it had been holden, that an attorney plaintiff, a prisoner in the Fleet, might sue by attachment of privilege for a debt due to himself, notwithstanding the act of 12 G. 2., which forbids an attorney from commencing a suit who is a prisoner in any gaol. (*d*) And this distinction is confirmed by a recent case, where the defendant, an attorney, moved to enter an exoneretur upon his bail piece, being detained

(*a*) 5 M. & S. 281. *Skirrow* v. *Tagg.*
(*b*) 2 M. & S. 605. *Prior* v. *Moore.* (*c*) Ante, p. 291.
(*d*) 7 T. R. 671. *Kaye, One, &c.* v. *Denew.*

for debt at the same time in other actions. The Court treated this person as being in actual custody, and, therefore, incapable of attending to the interests of his clients in Court according to his duty, and, therefore, discharged the rule. (*a*)

So, where costs had been taxed for the plaintiff, an objection was taken, that his attorney had not been certificated during the years 1819, 1820, and 1821, and that he had not been readmitted, and was, therefore, incapable of practising. A learned Judge at chambers, had directed the defendant to pay the costs into Court subject to a rule to refund them; but the Court held, that the punishments prescribed by the legislature were entirely directed against the attorney, and not against an innocent plaintiff. The rule was consequently refused. (*b*) And by 4 G. 4. c. 1., contracts or indentures of clerkship to attornies, solicitors, &c. are to be registered by the proper officer, although such attornies, &c. may not have taken out their annual certificates, if the parties applying have themselves paid the proper stamp duties.

The reader will from hence perceive, that as well before as after the 25 & 37 G. 3. the attorney who is confined, although he may proceed as a private person, cannot defend or prosecute suits for others; and the salutary regulation of 1654, although in a measure set aside by a recent decision, has been succeeded by the annual certificate, in default of which for a whole year, the practice and privilege of the negligent party must

(*a*) 4 B. & A. 88. *Byles* v. *Wilton, One, &c.*
(*b*) 3 Bingh. 9. *Reader* v. *Bloom.*

cease altogether. And it may be further remarked, that the rule laid down in *Brooke* v. *Bryant*, is not by any means invaded, for there is no provision in the certificate acts, which were especially intended to benefit the revenue, to prevent the Court from interposing, if an attorney should procure his certificate under embarrassed circumstances, in order to profit by an undue privilege.

Readmission of attornies.

We have already adverted to the power given to the Courts under 37 G. 3., of readmitting an attorney upon payment of his arrears of duty, and a discretionary penalty; it may be added, that this indulgence is always granted if the individual in question will comply with the conditions imposed, and if he has long discontinued his practice, will show the nature of his employment during the interval. This latter caution has been adopted, in order that it may appear whether the applicant has been engaged in duties incompatible with the pursuit of his profession. (*a*)

Therefore, where an attorney of the Common Pleas entered into trade, and discontinued his practice for twelve years, that Court, before they would readmit him, required a satisfactory explanation of his reasons for quitting his trade, and a statement in his affidavit that no cause of complaint existed against him. (*b*) And where an attorney had been struck off the roll for seditious practices, but had received a pardon, the Court would not readmit him if it were only on the ground of his inexperience, from having discontinued practice. (*c*)

(*a*) 2 Smith Rep. 155.
(*b*) 5 Moore, 141. *Ex parte Mayer.*
(*c*) 1 Ch. Rep. 558. in the notes. *Ex parte Frost.*

The course is, to move for a rule to show cause, with an affidavit stating that the duty has been paid upon the articles of clerkship, the admission of the attorney, up to what time he has obtained his certificate, and if such be the case, that he has discontinued to practise. It is then, in general, alleged, that a term's notice has been given of the intention to move the Court, and that notice of the party's name and place of abode has been served on the solicitor to the commissioners of the stamp duties. (*a*) This must be done, although the party has never availed himself of a prior admission, nor taken out his certificate; for there is no qualification in the act of parliament to prevent the avoidance of such former compliance with its terms. (*b*)

With regard to the term's notice, it has been holden, that pecuniary difficulties and illness (*c*), or absence abroad (*d*), will not excuse it, if there has been a discontinuance of practice, but that it must be put up at the Judge's chambers, as in the case of an original admission. (*e*) Yet, where an agent in town had omitted to take out a certificate for his employer, who resided in the country and continued to practise, the Court thought it reasonable to dispense with the term's notice; for the fault was committed unconsciously. (*f*) So, where a solicitor had commissioned his clerk for the like pur-

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(*a*) See 1 Chit. Rep. 102. (a.) Tidd. Pract. p. 73. 1 Chit. Rep. 207.

(*b*) 6 Taunt. 408. *Ex parte Nicholas.* 2 Marsh. 123. S. C.

(*c*) 1 Chit. Rep. 207. *Ex parte Bartlett.*

(*d*) Id. 208. *Ex parte Watson.*

(*e*) Tidd. Pract. p. 72. *Ex parte Vaughan.* E. 45 G. 3.

(*f*) 1 B. & A. 189. *Ex parte Dent.*

poses and had given him the money; but the latter had applied it to his own use. (*a*) So, where the clerk, through inadvertence, had omitted to take out the certificate. (*b*) And again, in the Common Pleas, where remittances for agency bills, and expences of certificate, had been duly made by an attorney at Norwich, but in consequence of the agent's negligence, those instruments had never been procured, an application to remit this notice was successful. (*c*)

A case similar to these, was where an attorney, whose name was indorsed on a notice to a magistrate respecting the form of action against him, was asked if he were certificated, and said, that he had given money to his clerk for this purpose. Lord Ellenborough held this sufficient evidence of his qualification to act as an attorney. (*d*)

The payment of the arrearages of duty, with the penalty, remains for our consideration. And here it is to be observed, that the Courts have adhered strictly to the statutory provisions which impose the certificate solely on the practising attorney, who is on the roll. Therefore, where the applicant for readmission showed, that he had at his own request been struck off the roll, had acted as clerk to another attorney, and had not in the interval practised on his own account, it was urged, that the discharge of arrears should not be made part of the

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(*a*) 1 B. & A. 190. *Ex parte Winter.* 8 Taunt. 129. *In re James Winter.*

(*b*) 1 Ch. Rep. 165. *Ex parte Anon.*

(*c*) 3 Moore, 578. *Ex parte Christian.*

(*d*) 2 Campb. 196. *Sabin* v. *De Burgh.*

rule; and this suggestion was acceded to by the Court. (*a*) And on another occasion, it was argued, that the act pointed at attornies who had neglected to take out their certificates, and not to such as had been struck off the roll at their own instance; and that was agreed by the two Judges (*b*) in Court, to be the true construction. (*c*) And in a case where the person claiming to be readmitted had been struck off the roll voluntarily, before the operation of 37 G. 3., and afterwards prayed to be excused from the arrearages, or even a penalty, it was considered to be too clear for argument, that act being wholly prospective, and the rule was made absolute in his favour. (*d*) But sometimes, and especially if the individual continues to be an attorney on record, the duty is required, and a small fine. This penalty varies according to the discretion of the Court; it might be as low as 6*s.* 8*d.* (*e*), but usually, it is said to be 20*s.* (*f*)

An affidavit of ill-health, or embarrassed circumstances, will procure a readmission without payment of the arrears of duty, if it be sworn that the party has ceased to practise during the interval (*g*); or, that illness had prevented the individual from practising. (*h*) So,

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(*a*) 2 B. & A. 314. *Ex parte Clarke.*

(*b*) Bayley J. and Holroyd J.

(*c*) 2 B. & A. 315. n. *Ex parte Calland.*

(*d*) 2 Taunt. 398. *Ex parte Scrope.* (*e*) 2 Taunt. 399.

(*f*) Tidd. Pract. p. 73. *Ex parte Jones.*

(*g*) 7 Moore, 410. *Ex parte Cunningham.* 1 Bingh. 91. S. C. 1 Ch. Rep. 646. *Ex parte* ———. Id. 316. *Ex parte* ———.

(*h*) 1 Ch. Rep. 101. *Ex parte Richards.* 7 Moore, 495. *Ex parte Maliphant.*

after a discontinuance of practice for five years, the same indulgence was allowed on an affidavit that no cause of complaint existed, although it was not stated, that the party was not under any apprehension of a complaint. (*a*) So, where the attorney had taken out his certificate for one year, but had not practised, the Court of King's Bench held, that he might be readmitted without a fine at any subsequent time; but on this point the practice of the Common Pleas has been said to differ. (*b*). And again, where one had been admitted in 1799, and had regularly taken out his certificate, until 1814, when he became, for two years, managing-clerk to an attorney in the country; after which he recommenced practice on his account with a certificate, and continued thus certificated till 1822, the time of the application, the Court readmitted him on payment of a small fine, and the duty for the two years during which he had omitted his certificate. (*c*)

Nevertheless, in a very modern case, where the annual certificate had been omitted through the agent's negligence, and the attorney continued to practise, the Court intimated their opinion, that it would be for the good of the profession if practitioners were to make enquiries as to the fidelity of their agents in this respect. And they expressed their resolution never to readmit without a fine, which should be imposed at that time, merely for the establishment of the rule; and they accordingly gave the rule on payment of the arrears of

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(*a*) 1 Ch. Rep. 692. *Ex parte Smith.*

(*b*) Id. 729. *Ex parte Davis.* 7 Moore, 411. *per* Onslow Serjeant.

(*c*) 7 Moore, 493. *Ex parte Sherwood.*

duty, and a fine of 5*l.* (*a*) It is observable, that the word "neglect" in this statute means culpable neglect. So, that an attorney who discontinues his practice after the expiration of his certificate, may be readmitted without the payment of either fine or duty. (*b*)

Solicitors are readmitted in the Court of Chancery with the same indulgence, upon an affidavit stating that they have not practised since the expiration of the last certificate. (*c*)

Filing certificates in the wrong court.

An application was lately made to the Court of Common Pleas, on an affidavit which stated, that the certificates of an attorney, the applicant, had been filed by mistake in the Court of King's Bench, and that they had been filed through the inadvertence of a new agent in the Common Pleas, until the mistake: upon which, Mr. Justice Burrough directed that a notice should be given to the Stamp Office for the purpose of ascertaining whether the duties had been paid for the four years, and on a subsequent day, the rule was made absolute. (*d*)

Common informers upon statutes regarding these certificates.

Notwithstanding an adverse decision of the Court of King's Bench (*e*), it is now decidedly holden, that penalties upon these acts may be recovered by common informers. By the 29th section of 25 G. 3. c. 80,, the

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(*a*) 4 B. & A. 90. *Ex parte Leacroft, One, &c.*

(*b*) 2 Dowl. & Ry. 238. *Ex parte Matson.*

(*c*) Turner Rep. 56. *Ex parte Murray.* Id. 57. n. *Ex parte Adey.* Ordered, that the applicant should be readmitted a solicitor of the Court, if his Honour the Master of the Rolls should so please, upon payment of such a fine as his Honour should think proper. This is usually 6*s.* 8*d.*

(*d*) 4 Moore, 347. *Ex parte Jones.*

(*e*) 2 East, 569. *Barnard* v. *Gostling.*

sums given for neglecting to take out certificates were to enure to the use to any plaintiff who might sue for the same, but a similar provision was not introduced into the 37 G. 3., wherefore it was contended, and on one occasion with success, that this silence signified the dissolution of the original mode of suing (*a*), and of course, that the proceeding could only be carried on in the name of the Attorney-General. But the Court of Exchequer Chamber decided upon another case in error, from the King's Bench, in which the error assigned was, that a common informer was not competent to sue; that the judgment of the Court below was right; (for it seems the objection had not been made in that last case) and the ground was, that the statutes were in *pari materiâ*, and the case of *Duck* v. *Addington*, relative to hackney coaches (*b*), was relied on. (*c*) Shortly after this, the case of *Barnard* v. *Gostling*, came down also upon this error assigned amongst others, when Mansfield C. J., intimated, that they must reverse the judgment below, in consistency with their late determination, if no other ground were shown for affirming it; upon which, a point of pleading was raised in behalf of the defendants in error, which terminated in their favour. (*d*) The penalties were sought for against two proctors, who were joined in the same declaration, which was holden bad; and, moreover, it was laid down, that this proceeding could not be considered as for one offence, since, though the several

(*a*) 2 East, 569. *Barnard* v. *Gostling*.
(*b*) 4 T. R. 447.
(*c*) 3 B. & P. 382. *Davis, One, &c.* v. *Edmonson* in error.
(*d*) 1 New Rep. 245. *Barnard* v. *Gostling* in error.

partners in this case might have done one act, yet each had acted as a proctor, and had thus made himself separately liable. This differed, therefore, from the game laws, the analogy of which was urged for the plaintiff in error; for if several persons join in killing a greyhound or hare, it is still but one act. (*a*)

It may still be a question, whether a separate penalty may be recovered for every step taken in a cause commenced without a certificate; although Lord Kenyon has observed at Nisi Prius, that such a construction of the statute would be harsh, and the jury, in the case alluded to, found a verdict for one penalty only (*b*), it was, however, there holden, that an attorney might be proceeded against when in partnership with another, although, from particular circumstances, the former derived no advantage from the business. (*c*)

Evidence of certificate.

With respect to the mode of using the certificate as a defence to an action of this kind, there cannot be a doubt but that it may be given in evidence under the general plea of not guilty, although scarcely any one would be rash enough to venture upon such a suit, unless he had assured himself, by searching the roll, that no such saving document existed. (*d*)

Acts of indemnity

Indemnity acts are passed occasionally to release at-

(*a*) 1 New Rep. 245. *Barnard* v. *Gostling* in error. The reporters add a quære, Whether it be not bad to sue under the statute, for not having obtained and entered a certificate without distinguishing which of those two omissions the person sued has been guilty of?

(*b*) 4 Esp. N. P. Rep. 14. *Edmonson q. t.* v. *Davis.*

(*c*) Ibid.

(*d*) See generally on a point of evidence in an action of this nature, 4 Esp. 160. *Edmonstone* v. *Plaisted, One, &c.* Phil. on Ev. 4th ed. p. 390.

tornies from penalties, who have neglected to procure their certificates in due time. (*a*) for not taking out certificate.

By *55* G.3. c. 194. s. 7. in the preamble, it is intimated, that the object of the statute is to prevent the health and lives of the King's subjects from being endangered by ignorant and incompetent practitioners. Twelve persons are therefore appointed (*c*), as a court of examiners, the major part of whom, at the least, are to examine all persons desirous of practising as apothecaries, and are empowered to grant or withhold certificates as they think fit. By s. 14. no person, not in practice before August 1st, 1815, shall practise as an apothecary, unless he shall have been examined by the said court of examiners, or the major part of them, and have received a certificate from the said court of examiners, or the major part of them, as aforesaid. There is a proviso (*d*), that no one shall be admitted to such examination, unless he shall have served an apprenticeship to an apothecary of five years, and unless he shall produce testimonials, to the satisfaction of the court of examiners, of his medical education and moral conduct. The 20th section imposes a penalty of 20*l.* upon any person acting as an apothecary without the requisites above prescribed, and 5*l.* upon any assistant so practising. Apothecaries. (*b*)

And by s. 21., no apothecary shall be allowed to recover any charges by him claimed in any court of law, unless such apothecary shall prove on the trial that he was in practice as an apothecary prior to, or on the 1st

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(*a*) See Tidd's Practice, pp. 58. and 72., where the statutes are mentioned in full; and see, lastly, 4 G. 4. c. 1.

(*b*) See 6 G.4. c. 133.

(*c*) By s. 9. (*d*) Sect. 15.

day of August, 1815; or that he has obtained a certificate to practise as an apothecary from the master, wardens, and society of apothecaries.

The 24th section enables the said master, &c. to dispose of the money arising from these certificates as they shall deem most expedient. By s. 25., one half of the penalties recovered by virtue of the act is secured to the said master, &c., to be laid out according to their discretion, and one half to the informer. And by s. 26., the penalties are to be sued for, if more than 5*l.*, in His Majesty's courts at Westminster; if less, by distress of the goods and chattels of the offender under the warrant of a Justice; and in default of such distress, the pain of imprisonment for one calendar month is imposed, unless the penalties, forfeitures and costs be sooner paid or satisfied.

The fifth section of this act prescribes, that for the third offence, of refusing to compound physician's prescriptions, or of falsely, unfaithfully, fraudulently, or unduly mixing them, the medical certificate shall be forfeited altogether, and the party rendered incapable of further practice in his occupation, unless he promise, and find sufficient security that he will not repeat the offence. For the first and second offences penalties of 5*l.* and 10*l.* are respectively given. The 30th section limits the time for bringing actions to six calendar months next after the fact committed; or, in case of a continuation of damages, to six calendar months after the ceasing of such damage. And it further provides, that every action shall be brought in the county where the matter in dispute shall arise; and that the defendant, if he recover, shall have double costs. And these latter provisions are continued under the new act.

The new act, 6 G. 4. c. 133. s. 4., which is to continue in force until the 1st of August 1826, exempts surgeons and assistant surgeons in the navy, surgeons, assistant surgeons, and apothecaries in the army, and surgeons and assistant surgeons in the service of the East India Company from this examination, whilst it provides at the same time that their respective commissions shall be sufficient proof, on their behalf, in order to recover their charges in courts of law.

By s. 6., the court of examiners are authorized to examine persons who have served apprenticeships of five years to surgeons, as to their fitness for, or qualifications to act as apothecaries. The eighth section enables the said court to examine parties who have been twice rejected, for a third or other subsequent time, such a power not having been expressly given by the act of G. 3. And by s. 9. the penalties of *5l.* given by *55* G. 3. c. 194., shall be recovered in the names of the master, wardens, &c. of the Apothecaries' Company, in like manner as the penalties of *20l.* are directed to be recovered; it being premised, that no means of recovering these penalties of *5l.* had been pointed out by *55* G. 3.

Who an apothecary at the time mentioned in the act. (*a*)

In an action for a libel, the plaintiff showed, that he had been articled as an apprentice to an apothecary for five years and a half, till the age of twenty-one; that he had served for three years and a half, and that at the end of that time, four years before the action then brought, he had been appointed, on his master's quitting business, by the trustees of the Stafford Infirmary their house apothecary; in which situation he had been em-

(*a*) See 6 G. 4. c. 133. s. 4.

ployed in mixing medicines for the patients of that charity, but not for any others. It was objected, that the allegation of his being an apothecary had not been proved, and the operation of the new act was urged against him; but the learned Judge at the trial was of opinion, that he was clearly within the exception in the 14th section; and by Gibbs C. J., "I am quite clear, that a person who had four years since been admitted to officiate as apothecary to that infirmary, comes within the proviso of the act, as a person already in practice, for whom it is not necessary to obtain any other diploma." (*a*)

But whether there has been a practising before the 1st of August 1815 or not, if evidence be adduced to show that the person professing to act as an apothecary, was utterly unable at the time in question to perform the duties enjoined by the fifth section, of compounding medicines; by reason of his inability, for example, to make up a physician's prescription, it will be out of the question to say, that he comes within the exception of the 14th section, respecting practitioners before the 1st of August. And it was holden quite correct for the learned Judge, in a case of this kind, to point the attention of the jury particularly to the fifth section, and that he acted right in leaving it to them to determine, whether the defendant's ignorance was not cogent evidence, from which they might conclude that he had never practised as an apothecary, although he had administered medicines in several instances. (*b*)

(*a*) 7 Taunt. 401. *Wogan* v. *Somerville.* 1 Moore, 103. S.C.
(*b*) 3 B. & A. 40. *Apothecaries' Company* v. *Warburton.*

The time specified, the 1st of August, has been most strictly respected in construing this act. So that, where there had been a practising in July, it was holden insufficient, unless that practice extended to the day first mentioned. The Apothecaries' Company sued a person for a penalty on the 55 G. 3., who gave evidence of his having been a practitioner on the 12th of July 1815, on which day the act received the royal assent, but who left town before the 1st of August to become an assistant to an apothecary at Chatham. The Court, admitting that there might be a doubt whether the words "already in practice as such," referred to the day of passing the act, or to the 1st of August, observed, that looking to the 17th section, there could not be any scruple, for the words "from and after the 1st of August, it shall not be lawful for any person or persons, (except the persons then acting as assistants, &c.") clearly refer back the time to the 1st of that month. And it was added, that the saving clause in the 29th section, which saved the rights of persons practising as apothecaries previously to the 1st of August, contained also the words, "except as altered, varied, or amended by this act;" and that the alteration was to be found in s. 20., which imposed penalties on persons not in practice on the 1st of August. (*a*) It has been holden, that the defendant, who may be sued for penalties, must prove the affirmative of his having obtained a certificate, although the plaintiffs, in their declaration, have made an allegation to the contrary. (*b*)

By 6 G. 4. c. 133. s. 5. it is declared, that the first mentioned exception contained in the said act, shall be

(*a*) 5 B. & A. 949. *Apothecaries' Company* v. *Roby*.
(*b*) 1 Ry. & M. 159. *Apothecaries' Company* v. *Bentley*.

deemed and construed to extend to such persons only who were in actual practice as apothecaries on or before the said 1st of August 1815; and that the exception contained in the said act from the penalty of 20*l.* thereby imposed, shall, in like manner, be construed to extend only to persons who were in actual practice as apothecaries on or before the said 1st day of August 1815; and that the exception contained in the said recited act, from the penalty of 5*l.* thereby imposed, shall, in like manner, be construed to extend only to persons who were, on or before the said 1st day of August 1815, acting as assistants to apothecaries therein mentioned; or who have actually served an apprenticeship of five years as an apothecary: and in like manner the day on which any apothecary, claiming to recover any charges in any court of law or equity in England and Wales, shall be obliged to prove himself to have been in practice, so as to entitle him to recover such charges, without showing that he has received a certificate of his qualification from the said court of examiners, appointed in pursuance of the said recited act, shall be construed to be the said 1st day of August 1815. The same provision is extended to the saving right, which is declared to refer to the same day.

Proofs, since 55 G. 3. c. 194., for the recovery of an apothecary's bill.

With regard to the evidence necessary to support an action for a professional bill, we are only concerned as far as it respects this statute. It was objected in one case, that no apprenticeship under the 15th section had been proved. But the substantial evidence of a certificate duly granted having been produced, the objection was over-ruled; and the Court, on application for a new trial, thought the certificate conclusive of the apprentice-

ship. (*a*) The principal medium of proof, therefore, is the certificate. And it has been holden unnecessary to prove all the signatures of the court of examiners, it being only required that the document should be in some way shown to be genuine. Thus, where on behalf of the plaintiff's claim, a witness proved the hand-writing of one of the examiners, and also of the secretary, and it was objected, that at least a majority of the signatures should be identified; and that the secretary's hand, not being required by the act, was a mere nullity; the learned Judge suffered the plaintiff to take a verdict, thinking the testimony sufficient; and his opinion was afterwards confirmed by the Court, who decided, that it was not incumbent upon the plaintiff to prove the hand-writing of every name attached to the certificate, and that the secretary's signature was a warranty that the instrument was genuine. (*b*)

Where an action was brought upon a promissory note, the consideration for which was for "care and medical attendance bestowed upon the maker," evidence was admitted for the defence, to show that the consideration was for services *as an apothecary*, on which Best C. J. held, that the plaintiff must bring himself within 55 G. 3. c. 194. s. 21., which requires the certificate to be proved, and the plaintiff was nonsuited. (*c*)

This certificate, as well as the attorney's, should be given in evidence under the general issue in debt for penalties.

Giving the certificate in evidence.

(*a*) 1 Bing. 204. *Sherwin* v. *Smith*.
(*b*) 3 B. & C. 218. *Walmsley* v. *Abbott*.
(*c*) 1 Ry. & M. 125. *Blogg* v. *Pinkers*.

The seventh section of the new act is as follows: "And whereas the authenticating the certificates of qualification of such persons as have been, or as shall be examined by the court of examiners, in pursuance of the aforesaid act has been attended with considerable expence, and might often be difficult of proof if such certificates were required to be authenticated in different parts of England at the same time in different actions: for remedy whereof, be it enacted, &c. that from and after the passing of this act, the common seal of the said society of the art and mystery of apothecaries of the city of London, shall be deemed to be, and shall be received in every court of law or equity in any part of England or Wales, as sufficient proof of the authenticity of the certificate to which such seal shall be affixed, and that the person therein named is duly qualified to practise as an apothecary in any part of England or Wales."

CHAP. VIII.

OF THE CERTIFICATE OF A SHIP'S REGISTRY.

In the fourth year of the present reign, an act was passed for the registering of ships, which entirely repealed all the enactments upon that subject previously in force; and as it became expedient to introduce another statute in the last session of parliament, which fully directs the method of these registries, that also, which had been so recently enacted, was declared, according to the present system of legislation, to be repealed.

It has, therefore, been considered the most efficient mode of placing this matter before the reader, to give those parts of the new act which have a relation to certificates and their incidents, as the text; and to subjoin notes, containing such decisions as, by analogy to enactments of a similar import, may be again available.

The three most remarkable objects noticed by the ancient statutes are still retained: the certificate of registry; the indorsement required to be made on such certificate, in cases where the property of a ship is transferred to another in the same port; and the recital of the certificate in the bill of sale, or other instrument employed for the purpose of conveying the property.

There are many alterations calculated to facilitate the proof of title to the ship, and to avoid those shoals in litigation which have occasionally proved so dangerous.

By 6. G. 4. c. 110. sec. 2. it is enacted, that no ship or vessel shall be entitled to any of the privileges or advantages of a British registered ship, until the person or persons claiming property therein shall have caused the same to be registered in manner herein-after mentioned, and shall have obtained a certificate of such registry, from the person or persons authorized to make such registry, and grant such certificate as herein-after directed; the form of which certificate shall be as follows; *videlicet*,

Certificate of registry.

'This is to certify, that in pursuance of an act passed 'in the sixth year of the reign of king George the 'fourth, intituled *An act* [*here insert the title of this act, 'the names, occupation, and residence of the subscribing 'owners*], having taken and subscribed the oath required 'by this act, and having sworn that [he *or* they] to-'gether with [*names, occupations, and residence of non-'subscribing owners*] is [*or* are] sole owner or owners, in 'the proportions specified on the back hereof, of the 'the ship or vessel called the [*ship's name*] of [*place to 'which the vessel belongs*], which is of the burthen of '[*number of tons*], and whereof [*master's name*] is master, 'and that the said ship or vessel was] *when and where built, 'or condemned as prize, referring to builder's certificate, 'Judge's certificate, or certificate of last registry, then deliver-'ed up to be cancelled*], and [*name and employment of survey-'ing officer*] having certified to us that the said ship or 'vessel has [*number*] decks and [*number*] masts, that her 'length from the fore part of the main stem to the after 'part of the stern post aloft is [*number of feet and inches*], 'her breadth at the broadest part [*stating whether that 'be above or below the main wales*] is [*number of feet and 'inches*], her [*height between decks, if more than one deck*,

'*or depth in the hold, if only one deck*] is [*number of feet* '*and inches*], that she is [*how rigged*] rigged with a '[*standing or running*] bowsprit, is [*description of stern*] 'sterned [*carvel or clinker*] built, has [*whether any or no*] 'gallery, and [*kind if head if any*] head; and the said 'subscription owners having consented and agreed to 'the above description, and having caused sufficient se-'curity to be given, as is required by the said act, the 'said ship or vessel called the [*name*] has been duly 'registered at the port of [*name of port*]. Certified under 'our hands at the Custom-house, in the said port of '[*name of port*] this [*date*] day of [*name of month*] in the 'year [*words at length.*]

'[*Signed*] Collector.
'[*Signed*] Comptroller.'

And on the back of such certificate of registry there shall be an account of the parts or shares held by each of the owners mentioned and described in such certificate, in the form and manner following:

'Names of the several owners within mentioned. — Number of sixty-fourth shares held by each owner.

'[*Name* ——— *Thirty-two.*
'[*Name* ——— *Sixteen.*
'[*Name* ——— *Eight.*
'[*Name* ——— *Eight.*]

'[*Signed*] Collector.
'[*Signed*] Comptroller.'

By s. 3. the persons authorized and required to make such registry and grant such certificates shall be the collector and comptroller of His Majesty's customs in

Persons authorized to make registry and

to grant certificates.

any port of the united kingdon of Great Britain and Ireland, and in the Isle of Man respectively, in respect of ships or vessels to be there registered; and the principal officers of His Majesty's customs in the island of Guernsey or Jersey, together with the governor, lieutenant governor, or commander in chief of those islands respectively, in respect of ships or vessels to be there registered: and the collector and comptroller of His Majesty's customs of any port in the colonies, plantations, islands, and territories to His Majesty belonging in Asia, Africa, and America, together with the governor, lieutenant governor, or commander in chief of such colonies, plantations, islands, and territories respectively, in respect of ships or vessels to be there registered; and the collector of duties at any port in the territories under the government of the East India Company, and other territories belonging to His Majesty, within the limits of the charter of the said company, payable to the said company, or any other person of the rank in the said company's service of senior merchant, or of six years standing in the said service, being respectively appointed to act in the execution of this act, by any of the governments of the said company in India, in any ports in which there shall be no collector and comptroller of His Majesty's customs, in respect of ships or vessels to be there registered; and the governor, lieutenant governor, or commander in chief of Malta, Gibraltar, Heligoland, and Cape of Good Hope respectively, in respect of ships or vessels to be there registered: provided always, that no ship or vessel shall be registered at Malta, Gibraltar, or Heligoland, except such as are wholly of the built of those places respectively,

and such ships or vessels shall not be registered elsewhere; and that such ships or vessels so registered shall not be entitled to the privileges and advantages of British ships in any trade between the said united kingdom and any of the colonies, plantations, islands, or territories in America to his Majesty belonging: provided also, that wherever in and by this act it is directed or provided that any act, matter, or thing shall and may be done or performed by, to, or with any collector and comptroller of His Majesty's customs, the same shall or may be done or performed by, to, or with the principal officers of customs in the islands of Guernsey or Jersey, together with the governor, lieutenant governor, or commander in chief of those islands respectively, and also by, to, or with such collector or other person in India in the service of the East India Company as aforesaid, and also by, to, or with the governor, lieutenant governor, or commander in chief of Malta, Gibraltar, Heligoland, or Cape of Good Hope, and according as the same act, matter, or thing is to be done or performed at the said several and respective places, and within the jurisdiction of the said several persons respectively: provided also, that wherever in and by this act it is directed or provided that any act, matter, or thing shall or may be done or performed by, to, or with the commissioners of His Majesty's customs, the same shall or may be done or performed by, to, or with the said commissioners, or any two or more of them, in England, Ireland, or Scotland respectively, and also by, to, or with the governor, lieutenant governor, or commander in chief of any place where any ship or vessel may be registered under the authority of this act, so far as such act, mat-

Acts may be done by two Commissioners of customs in England, Ireland, and Scotland, and by governors, &c. where vessels may be registered.

ter, or thing can be applicable to the registering of any ship or vessel at such place.

Ships exercising privileges before registry, to be forfeited;

By s. 4., in case any ship or vessel, not being duly registered, and not having obtained such certificate of registry as aforesaid, shall exercise any of the privileges of a British ship, the same shall be subject to forfeiture, and also all the guns, furniture, ammunition, tackle, and apparel to the same ship or vessel belonging, and shall and may be seized by any officer or officers of His Majesty's customs: provided always, that nothing in this act shall extend or be construed to extend to affect the privileges of any ship or vessel which shall have been registered by virtue of any act or acts which was or were in force for the registry of British ships and granting certificates thereof prior to the thirty-first day of December one thousand eight hundred and twenty-three, or by virtue of any act or acts which was or were in force at the time of the commencement of this act, until such time or times as such ships or vessels shall be required by this act to be registered *de novo* under the regulations thereof.

but not to affect vessels already registered, till required to be registered de novo.

By s. 6. it may be certified on the certificate of registry by the collector or comptroller of a foreign port, to which a ship may arrive, that it has been proved to the satisfaction of the Commissioners of His Majesty's customs, that the ship's privileges have not been forfeited by reason of certain foreign repairs.

Ships shall be registered at the port to which they belong.

By s. 11., no such registry shall hereafter be made, or certificate thereof granted, by any person or persons herein-before authorized to make such registry and grant such certificate, in any other port or place than the port or place to which such ship or vessel shall

properly belong, (*a*) except so far as relates to such ships or vessels as shall be condemned as prizes in any

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(*a*) Hence, it seems, that a register at another port, whether the ship have or not an intention of returning to her own port, will not be valid without the licence of the Commissioners of customs.

Under the old statutes, where the ownership of a vessel was changed, while such vessel was in her own port, or while at sea, and there was a manifest intention that she should return again to her own port, the 15th and 16th sections of 34 G. 3. c. 68. positively exacts an indorsement on the certificate of registry, for the purpose of completing a title to the ship. And, indeed, the Judges of the Court of King's Bench more than once delivered their opinions, that, where a ship, while at sea, was sold to a person who translated her immediately to another port, and there registered her *de novo*, according to the provisions of 7 & 8 W. 3., such purchase was incomplete without the indorsement and memorandum required by the sections above mentioned, it being considered, that a party, who acted thus, as it were, *per saltum*, had no interest in the ship. *

However, in the great case of *Hubbard* v. *Johnstone* †, five Judges against two ‡ held this registration *de novo*, where the ship was changed to a new port, sufficient. The ship Fishburn belonged to the port of Newcastle-upon-Tyne, and whilst at sea, was sold to the plaintiff in error, (who had been the defendant in three actions of this nature in the King's Bench, and had failed in all,) he registered the vessel in the port of London, and afterwards sold her by public auction. The ship never returned to her port at Newcastle. It was found, that no indorsement of transfer had been made on the certificate to the plaintiff in error, nor by him to any

* 4 East, 110. *Heath* v. *Hubbard*. † 3 Taunt. 177.

‡ For reversing the judgment of the Court of King's Bench — Wood B., Graham B., Chambre J., Heath J., Macdonald C. B. For affirming the judgment — Thomson B., Mansfield C. J.

Commissioners of

of the islands of Guernsey, Jersey, or Man, which ships or vessels shall in future be registered in manner hereinafter directed; but that all and every registry and cer-

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other person. After two arguments, a judgment was given for the defendant in error by the Court below; and the error assigned was, that it appeared by the record, that Hubbard, (the plaintiff in error,) had a good title to the ship, by the assignment and registry *de novo*. The learned Judges who were for reversing this judgment, and who composed a majority on the question then debated, thought, on principle, that the identity of the ship had been sufficiently marked out by the delivering up and cancelling the former certificate, that the history of the ship wanted no link, for, if a person enquired at Newcastle, he would be referred to London; that she might thus be traced from port to port from her birth, with sufficient certainty to prevent foreigners from having the benefit of her navigation. And on the construction of the statutes, they held, that being read and contemplated together, they could only have reference to ships which returned to the same port from whence they came, or which, being absent from such port, were intended by their owners, before sale, to return thither, and that the acts in question had respect only to such cases, in which all the requisitions of the register acts could be complied with, which would often be rationally impossible; for if a ship were registered in the East or West Indies, and sold in Great Britain, it would not be contended, that she should go back to the East or West Indies to have an indorsement made on her certificate, a copy of such indorsement delivered, and should bring back her certificate to Great Britain to be registered *de novo*. Mansfield C. J., said, "the unfathomable intention of the purchaser to transfer her to another port, cannot, I think, be material. I think the purchaser of a ship may carry her to another port, and register her there; but then he must first deliver a copy of the bill of sale." It is said, the history of the ship may be traced without a copy of the

tificate, granted in any port or place to which any such ship or vessel does not properly belong, shall be utterly null and void to all intents and purposes, unless the officers aforesaid shall be specially authorized and empowered to make such registry and grant such certificate in any other port, by an order in writing under the hands of the Commissioners of His Majesty's customs, which order the said Commissioners are hereby authorized and empowered to issue in manner aforesaid, if they shall see fit; and at every port where registry shall be made in pursuance of this act, a book shall be kept by the collector and comptroller, in which all the particulars contained in the form of the certificate of the registry herein-before directed to be used, shall be duly entered; and every registry shall be numbered in progression, beginning such progressive numeration at the commencement of each and every year; and such collector and comptroller shall forthwith, or within one month at the farthest, transmit to the Commissioners of His Majesty's customs a true and exact copy, together with the number of every certificate which shall be by them so granted.

customs may permit registry at other ports.

Book of registers to be kept.

By s. 12. every ship or vessel shall be deemed to belong to some port at or near to which some or one of the owners, who shall take and subscribe the oath required by this act before registry be made, shall reside (*a*), and whenever such owner or owners shall have

Ports to which vessels shall be deemed to belong.

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bill of sale being sent; some of its history may be traced, but a sale may be suppressed. *

(*a*) By 26 G. 3. it was considered to be the port from which she usually traded.

* 3 Taunt. 224. See also 6 East, 144. *Moss* v. *Mills*.

Change of subscribing owners to require registry de novo.

transferred all his or their share or shares in such ship or vessel, the same shall be registered *de novo* before such ship or vessel shall sail or depart from the port to which she shall then belong, or from any other port which shall be in the same part of the United Kingdom, or the same colony, plantation, island, or territory as the said port shall be in: provided always, that if the owner or owners of such ship or vessel cannot in sufficient time comply with the requisites of this act, so that registry may be made before it shall be necessary for such ship or vessel to sail or depart upon another voyage, it shall be lawful for the collector and comptroller of the port where such ship or vessel may then be, to certify upon the back of the existing certificate, of registry of such ship or vessel, that the same is to remain in force for the voyage upon which the said ship or vessel is then about to sail or depart: provided also, that if any ship or vessel shall be built in any of the colonies, plantations, islands, or territories in Asia, Africa, or America, to His Majesty belonging, for owners residing in the United Kingdom, it shall be lawful for such ship or vessel to proceed to any part of the United Kingdom, whether by a direct or circuitous voyage, and there to import a cargo, before registry shall have been made of such ship or vessel; provided the master of such ship or vessel, or the agent for the owner or owners thereof, shall have produced to the collector and comptroller of the port at or near to which such ship or vessel was built, or from which she shall be cleared for her voyage as aforesaid, the certificate of the builder required by this act, and shall have made oath before such collector and comptroller, of the names and descriptions of the principal owners of such ship or vessel,

If registry de novo cannot be made, ship may go one voyage with permission indorsed on certificate of registry.

Ships built in foreign possessions, for owners resident in United Kingdom may proceed on their voyage, on receiving certificate from the collector, &c.

and that she is the identical ship or vessel mentioned in such certificate of the builder, and that no foreigner, to the best of his knowledge and belief, has any interest therein; whereupon the collector and comptroller of such port shall cause such ship or vessel to be surveyed and measured in like manner as is directed for the purpose of registering any ship or vessel, and shall give the master of such ship or vessel a certificate under their hands and seals, purporting to be under the authority of this act, and stating when and where, and by whom such ship or vessel was built, the description, tonnage, and other particulars required on registry of any ship or vessel, and the voyage for which such ship or vessel is cleared by them; and such certificate shall, for such voyage, have all the force and virtue of a certificate of registry under this act; and such collector and comptroller shall transmit a copy of such certificate to the commissioners of His Majesty's customs.

Oath to be taken by subscribing owners previous to registry.

By s. 14., no registry shall henceforth be made, or certificate granted, until the following oath be taken and subscribed before the person or persons herein-before authorized to make such registry and grant such certificate respectively, (which they are hereby respectively empowered to administer,) by the owner of such ship or vessel, if such ship or vessel is owned by or belongs to one person only; or in case there shall be two joint owners, then by both of such joint owners, if both shall be resident within twenty miles of the port or place where such register is required, or by one of such owners, if one or both of them shall be resident at a greater distance from such port or place; or if the number of such owners or proprietors shall exceed two, then by the greater part of the number of such owners

Proportion of owners who shall subscribe

and take the oath.

or proprietors, if the greater number of them shall be resident within twenty miles of such port or place as aforesaid, not in any case exceeding three of such owners or proprietors, unless a greater number shall be desirous to join in taking and subscribing the said oath, or by one of such owners, if all, or all except one, shall be resident at a greater distance:

Form of oath.

'I *A. B.* of [*place of residence and occupation*] do 'make oath, that the ship or vessel [*name*] [of *port or* '*place*] whereof [*master's name*] is at present master, 'being [*kind of built, burthen, et cætera, as described in the* '*certificate of the surveying officer*], was [*when and where* '*built, or if prize or forfeited, capture and condemnation,* '*as such*], and that I the said *A. B.* [*and the other* '*owners names and occupations, if any, and where they* '*respectively reside, videlicet, town, place, or parish, and* '*county, or if member of and resident in any factory in* '*foreign parts, or in any foreign town or city, being an* '*agent for or partner in any house or copartnership* '*actually carrying on trade in* Great Britain *or* Ireland, '*the name of such factory, foreign town, or city, and the* '*names of such house or copartnership*] am [*or* are] sole 'owner [*or* owners] of the said vessel, and that no other 'person or persons whatever hath or have any right, 'title, interest, share, or property therein or thereto; and 'that I the said *A. B.* [*and the said other owners, if any*] 'am [*or* are] truly and *bonâ fide* a subject [*or* subjects] 'of *Great Britain*; and that I the said *A. B.* have not '[*nor have any of the other owners, to the best of my* '*knowledge and belief*] taken the oath of allegiance to 'any foreign state whatever, [*except under the terms of* '*some capitulation, describing the particulars thereof,*] or 'that since my taking [*or* his *or* their taking] the oath

'of allegiance to [*naming the foreign states respectively 'to which he or any of the said owners shall have taken 'the same*], I have [*or* he or they hath or have] become 'a denizen [*or* denizens, *or* naturalized subject or sub-'jects, *as the case may be*] of the United Kingdom of 'Great Britain and Ireland, by His Majesty's letters 'patent, or by an act of parliament, [*naming the times 'when such letters of denization have been granted re-'spectively, or the year or years in which such act or acts 'for naturalization have passed respectively,*] and that no 'foreigner directly or indirectly hath any share or part 'interest in the said ship or vessel.'

Provided always, that if it shall become necessary to register any ship or vessel belonging to any corporate body in the United Kingdom, the following oath, in lieu of the oath herein-before directed, shall be taken and subscribed by the secretary or other proper officer of such corporate body; (that is to say),

'I *A. B.* secretary or officer of [*name of company or 'corporation*], do make oath, that the ship or vessel '[*name*] of [*port*] whereof [*master's name*] is at present 'master, being [*kind of built, burthen, et cætera, as de-'scribed in the certificate of the surveying officer*] was '[*when and where built, or if prize or forfeited, capture 'and condemnation, as such*], and that the same doth 'wholly and truly belong to [*name of company or cor-'poration.*']

Addition to oath in case therequired number of owners do not attend.

By s. 15., in case the required number of joint owners or proprietors of any ship or vessel shall not personally attend to take and subscribe the oath herein-before directed to be taken and subscribed, then and in such case such owner or owners, proprietor or proprietors, as shall per-

sonally attend, and take and subscribe the oath aforesaid, shall further make oath, that the part owner or part owners of such ship or vessel then absent is or are not resident within twenty miles of such port or place, and hath or have not to the best of his or their knowledge or belief wilfully absented himself or themselves, in order to avoid the taking the oath herein-before directed to be taken and subscribed, or is or are prevented by illness from attending to take and subscribe the said oath.

By the 16th section, vessels should be surveyed previous to the registry and certificate, in order that their identity may be established.

Bond to be given at the time of registry.

By s. 21., it is provided, that at the time of the obtaining of the certificate of registry as aforesaid, sufficient security by bond shall be given to His Majesty, his heirs and successors, by the master and such of the owners as shall personally attend as is herein-before required, such security to be approved of and taken by the person or persons herein-before authorized to make such registry, and grant such certificate of registry at the port or place in which such certificate shall be granted, in the penalties following; that is to say, if such ship or vessel shall be a decked vessel, or be above the burthen of fifteen tons and not exceeding fifty tons, in the penalty of one hundred pounds; if exceeding the burthen of fifty tons and not exceeding one hundred tons, in the penalty of three hundred pounds; if exceeding the burthen of one hundred tons and not exceeding two hundred tons, in the penalty of five hundred pounds; if exceeding the burthen of two hundred tons and not exceeding three hundred tons, in the penalty of eight hundred pounds; and if exceeding the burthen of three hundred tons, in the penalty of one thousand pounds;

and the condition of every such bond shall be, that such certificate shall not be sold, lent, or otherwise disposed of to any person or persons whatever, and that the same shall be solely made use of for the service of the ship or vessel for which it is granted; and that in case such ship or vessel shall be lost or taken by the enemy, burnt or broken up, or otherwise prevented from returning to the port to which she belongs, or shall on any account have lost and forfeited the privileges of a British ship, or shall have been seized and legally condemned for illicit trading, or shall have been taken in execution for debt and sold by due process of law, or shall have been sold to the crown, or shall under any circumstances have been registered *de novo*, the certificate, if preserved, shall be delivered up within one month after the arrival of the master in any port or place in His Majesty's dominions to the collector and comptroller of some port of Great Britain, or of the Isle of Man, or of the British plantations, or to the governor, lieutenant governor, or commander-in-chief for the time being of the islands of Guernsey or Jersey; and that if any foreigner, or any person or persons for his use and benefit, shall purchase or otherwise become entitled to the whole or any part or share of, or any interest in such ship or vessel, and the same shall be within the limits of any port of Great Britain, Guernsey, Jersey, Man, or the British colonies, plantations, islands, or territories aforesaid, then and in such case the certificate of registry shall, within seven days after such purchase or transfer of property in such ship or vessel, be delivered up to the person or persons hereinbefore authorized to make registry and grant certificate of registry at such port or place respectively as aforesaid; and if such ship or vessel shall be in any

Conditions that the certificate shall be solely made use of for the service of the vessel, &c.

foreign port when such purchase or transfer of interest or property shall take place, then, that the same shall be delivered up to the British consul or other chief British officer resident at or nearest to such foreign port; or if such ship or vessel shall be at sea when such purchase or transfer of interest or property shall take place, then that the same shall be delivered up to the British consul or other chief British officer at the foreign port or place in or at which the master or other person having or taking the charge or command of such ship or vessel shall first arrive, after such purchase or transfer of property at sea, immediately after his arrival at such foreign port; but if such master or other person who had the command thereof at the time of such purchase or transfer of property at sea, shall not arrive at a foreign port, but shall arrive at some port of Great Britain, Guernsey, Jersey, Man, or His Majesty's said colonies, plantations, islands, or territories, then that the same shall be delivered up in manner aforesaid, within fourteen days after the arrival of such ship or vessel, or of the person who had the command thereof, in any port of Great Britain, Guernsey, Jersey, Man, or any of His Majesty's said colonies, plantations, islands, or territories: provided always, that if it shall happen that at the time of registry of any ship or vessel the same shall be at any other port than the port to which she belongs, so that the master of such ship or vessel cannot attend at the port of registry to join with the owner or owners in such bond as aforesaid, it shall be lawful for him to give a separate bond, to the like effect, at the port where such ship or vessel may then be; and the collector and comptroller of such other port shall transmit such bond to the collector and comptroller of the port where such

If ship, at the time of registry, be at any other port than that of registry, the master may there give bond.

ship or vessel is to be registered; and such bond, and the bond also given by the owner or owners, shall together be of the same effect against the master and owner or owners, or either of them, as if they had bound themselves jointly and severally in one bond.

When master is changed, new master to give similar bond, and his name to be indorsed on certificate of registry.

And by s. 22., when and so often as the master or other person having or taking the charge or command of any ship or vessel registered in manner herein-before directed shall be changed, the master or owner of such ship or vessel shall deliver to the person or persons herein-before authorized to make such registry and grant such certificates of registry at the port where such change shall take place, the certificate of registry belonging to such ship or vessel, who shall thereupon indorse and subscribe a memorandum of such change, and shall forthwith give notice of the same to the proper officer of the port or place where such ship or vessel was last registered pursuant to this act, who shall likewise make a memorandum of the same in the book of registers which is hereby directed and required to be kept, and shall forthwith give notice thereof to the Commissioners of His Majesty's customs: provided always, that before the name of such new master shall be indorsed on the certificate of registry, he shall be required to give, and shall give a bond, in the like penalties, and under the same conditions, as are contained in the bond herein-before required to be given at the time of registry of any ship or vessel.

Certificate of registry to be given up, as directed by the bond.

And it is further enacted by s. 23., that if any person whatever shall at any time have possession of, and wilfully detain any certificate of registry granted under this or any other act, which ought to be delivered up to be cancelled according to any of the conditions of the bond

herein-before required to be given upon the registry of any ship or vessel, such person is hereby required and enjoined to deliver up such certificate of registry, in manner directed by the conditions of such bond, in the respective cases, and under the respective penalties therein provided.

Certificate of registry lost or mislaid.

By s. 26., if the certificate of registry of any ship or vessel shall be lost or mislaid, so that the same cannot be found or obtained for the use of such ship or vessel when needful, and proof thereof shall be made to the satisfaction of the Commissioners of His Majesty's customs, such Commissioners shall and may permit such ship or vessel to be registered *de novo*, and a certificate thereof to be granted: provided always, that if such ship or vessel be absent and far distant from the port to which she belongs, or by reason of the absence of the owner or owners, or of any other impediment, registry of the same cannot then be made in sufficient time, such Commissioners shall and may grant a licence for the present use of such ship or vessel; which licence shall, for the time and to the extent specified therein, and no longer, be of the same force and virtue as a certificate of registry granted under this act: provided always, that before such registry *de novo* be made, the owner or owners and master shall give bond to the Commissioners aforesaid, in such sum as to them shall seem fit, with a condition that if the certificate of registry shall at any time afterwards be found, the same shall be forthwith delivered to the proper officers of His Majesty's customs to be cancelled, and that no illegal use has been or shall be made thereof with his or their privity or knowledge; and further, that before any such licence shall be granted as aforesaid, the master of such ship or vessel shall also make

Commissioners may permit registry de novo;

or grant a licence.

Bond respecting lost certificate of registry: condition.

Oath to be made before licence be granted.

oath that the same has been registered as a British ship, naming the port where and the time when such registry was made, and all the particulars contained in the certificate thereof, to the best of his knowledge and belief, and shall also give such bond, and with the same condition as is before mentioned: provided also, that before any such licence shall be granted, such ship or vessel shall be surveyed in like manner as if a registry *de novo* were about to be made thereof; and the certificate of such survey shall be preserved by the collector and comptroller of the port to which such ship or vessel shall belong; and in virtue thereof it shall be lawful for the said Commissioners, and they are hereby required to permit such ship or vessel to be registered after her departure, whenever the owner or owners shall personally attend to take and subscribe the oath required by this act before registry be made, and shall also comply with all other requisites of this act, except so far as relates to the bond to be given by the master of such ship or vessel; which certificate of registry the said Commissioners shall and may transmit to the collector and comptroller of any other port, to be by them given to the master of such ship or vessel, upon his giving such bond, and delivering up the licence which had been granted for the then present use of such ship or vessel.

Before licence be granted, ship to be surveyed as if for registry;

and registry may be made after departure of the ship,

and certificate transmitted to be exchanged for the licence.

By s. 27., after reciting that it is not proper that any person, under any pretence whatever, should detain the certificate of registry of any ship or vessel, or hold the same for any purpose other than the lawful use and navigation of the ship or vessel for which it was granted; it is enacted, that in case the master of any ship or vessel, or any other person, who shall have received or obtained by any means, or for any purpose whatever, the

Persons detaining certificates of registry to forfeit 100*l.*

certificate of the registry thereof (whether such master or other person shall be a part owner or not), shall wilfully detain and refuse to deliver up the same to the proper officers of His Majesty's customs, for the purposes of such ship or vessel, as occasion shall require, it may and shall be lawful to and for any owner or owners of such ship or vessel, the certificate of registry of which shall be detained and refused to be delivered up as aforesaid, to make complaint on oath against the master of the ship or vessel, or other person, who shall so detain and refuse to deliver up the same, of such detainer and refusal, to any Justice of the peace residing near to the place where such detainer and refusal shall be, in Great Britain or Ireland, or to any member of the Supreme Court of Justice, or any Justice of the peace in the islands of Jersey, Guernsey, or Man, or in any colony, plantation, island, or territory to His Majesty belonging, in Asia, Africa, or America, or Malta, Gibraltar, or Heligoland, where such detainer and refusal shall be in any of the places last mentioned; and on such complaint the said justice or other magistrate shall, and is hereby required, by warrant under his hand and seal, to cause such master or other person to be brought before him to be examined touching such detainer and refusal; and if it shall appear to the said justice or other magistrate, on examination of the master or other person, or otherwise, that the said certificate of registry is not lost or mislaid, but is wilfully detained by the said master or other person, such master or other person shall be thereof convicted, and shall forfeit and pay the sum of one hundred pounds, and on failure of payment thereof, he shall be committed to the common gaol, there to remain without bail or mainprize for such time as the

said justice or other magistrate shall, in his discretion, deem proper, not being less than three months, nor more than twelve months. (*a*) And the said Justice or other magistrate shall, and he is hereby required to certify the aforesaid detainer, refusal, and conviction, to the person or persons who granted such certificate of registry for such ship or vessel, who shall, on the terms and conditions of law being complied with, make registry of such ship or vessel *de novo*, and grant a certificate thereof conformably to law, notifying on the back of such certificate the ground upon which the ship or vessel was so registered *de novo*; and if such master or other person,

Justice to certify detainer, and ship to be registered de novo.

(*a*) This statute, like the former, inflicts punishment upon a master who refuses to give up the certificate to the registering officers, and makes no mention of a detention from the owner or owners. Where a magistrate convicted the defendant upon the 18th section of 34 G. 3. c. 68., for not delivering up a certificate of registry to the sole owner of a vessel, upon his requisition, in order that the necessary indorsement might be made upon the transfer, on several objections being taken to this conviction, Lord Ellenborough asked the counsel in support of it if he could point out any provision in the act which required that this certificate should be delivered by the master into the hands of the owner of the ship; and although it was contended, that the prior act, 28 G. 3. c. 34. s. 13., reciting the detention of these certificates to be to the prejudice of the owners, enacted, that on complaint by the owner, whose certificate of registry should be detained, and refused to be delivered up to any justice, &c., such justice should cause the master to be brought before him, to be examined touching such detainer and refusal, &c., the noble Chief Justice said, that as far as the second act differed from the first, it must be considered as a repeal of the former, and the conviction was quashed. 13 East, 91. *Rex* v. *Pixley*.

If person detaining certificate have absconded, ship may be registered as in case of lost certificate.

who shall have detained and refused to deliver up such certificate of registry as aforesaid, or shall be verily believed to have detained the same, shall have absconded, so that the said warrant of the justice or other magistrate cannot be executed upon him, and proof thereof shall be made to the satisfaction of the Commissioners of His Majesty's customs, it shall be lawful for the said Commissioners to permit such ship or vessel to be registered *de novo*, or otherwise, in their discretion, to grant a licence for the present use of such ship or vessel, in like manner as is herein-before provided in the case wherein the certificate of registry is lost or mislaid.

Ship altered in certain manner to be registered de novo.

By s. 28., if any ship or vessel, after she shall have been registered pursuant to the directions of this act, shall in any manner whatever be altered, so as not to correspond with all the particulars contained in the certificate of her registry, in such case such ship or vessel shall be registered *de novo*, in manner herein-before required, as soon as she returns to the port to which she belongs, or to any other port which shall be in the same part of the United Kingdom, or in the same colony, plantation, island, or territory, as the said port shall be in; on failure whereof such ship or vessel shall, to all intents and purposes, be considered and deemed and taken to be a ship or vessel not duly registered.

Transfers of interest to be made by bill of sale.

By s. 31., when and so often as the property in any ship or vessel, or any part thereof, belonging to any of His Majesty's subjects, shall after registry thereof be sold to any other or others of His Majesty's subjects, 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 vessel, or the principal contents thereof, otherwise such transfers shall not be valid, or

Reciting certificate of registry.

effectual for any purpose whatever, either in law or in equity (*a*): provided always, that no bill of sale shall be deemed void by reason of any error in such recital, or

Bill of sale not void by error of recital, &c.

(*a*) This provision existed before, and has been always acted upon with strictness.

So that where a bankrupt, being indebted to the defendants, gave them his promissory note, and executed a bill of sale to them of a ship, and deposited the grand bill of sale in their hands, but failed to insert the certificate in the transfer, the Court held the instrument to be a perfect nullity, although the vendees gave the bankrupt an acknowledgment in writing, by which they promised to return their securities on payment of the note, and the bankrupt's assignees recovered in an action of trover. * And a few years afterwards, when an action was brought against the defendant for work and labour in repairing a ship, the decision proceeded on the same grounds. A. and B. being joint owners of a ship, A. conveyed his moiety to B., but the certificate of registry was not recited in the bill of sale. After which B. took possession, and mortgaged the ship to A., who did not take possession. B. then ordered C. to repair the ship; on which B. conveyed one half of the ship to A., and the other half to D. A. was sued for the repairs, and he did not plead in abatement, that B. should have been sued with him. The Court thought this a very clear case. It was to be enquired who the owner was at the time of the bill of sale; for being without a recital of the certificate, it was null and void. Now A. had a moiety of the ship at the time as joint owner, and in that capacity he became liable for the act of his partner, and was thus a proper subject for the action then brought against him. † So, an executory agreement was declared void, for want of a recital of this nature under 34 G. 3. c. 68. s. 14., for agreements to transfer as well as

* 3 T. R. 406. *Rolleston* v. *Hibbert.*

† 7 T. R. 306. *Westerdell* v. *Dale.*

by the recital of any former certificate of registry instead of the existing certificate, provided the identity of the

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actual transfers, are expressly included within that statute. * But the bill of sale will not be void for want of reciting the indorsement on the certificate; for the copy of each indorsement, ordered by 34 G. 3. c. 68. s. 16. to be sent to the public officer authorized to grant certificates, is a sufficient guarantee and safeguard to the public, since the real owner must thus be known both at the port and at the custom-house; and it was resolved to this effect, where it was objected to a deed of assignment of a ship, that the indorsements had not been recited. And L. C. J. Eyre added, that, if he were called upon to say whether the want of indorsement upon the certificate made the assignment void, he should have thought not. † But this latter opinion would not now be entertained, since all contracts for sale are made null and void by 34 G. 3. c. 68. s. 15 & 16., unless such indorsements be duly made, and copies thereof delivered to authorized officers, as we have before noticed. However, where the plaintiff had advanced 2,500*l.* to the testator, and took a mortgage of some ships as his security, in which there was no recital of the certificate of registry, but an express covenant was contained in it that the testator, his executors, &c. would pay to the plaintiff the said 2,500*l.* with interest, &c., the Court held, that however prepared they might be to execute the instrument, as far as it regarded a conveyance of the ships, they could not destroy the testator's express covenant without working manifest injustice. And they referred to the case of a rector ‡, who having granted an annuity out of his benefice contrary to 13 El. c. 20., which makes all such chargings

* 1 B. & C. 327. *Biddell* v. *Leeder and another.* And so, where there was an executory contract, but the agreement was not indorsed on the certificate of registry, the sale of the ship was holden void. 4 B. & C. 120. *Mortimer* v. *Fleeming.*

† 1 B. & P. 483. *Capadoce* v. *Codnor.*

‡ 8 T. R. 411. *Mowys* v. *Leake.*

ship or vessel therein intended be effectually proved thereby. (*a*)

Property in ships to be divided into sixty-four parts or shares.

And by s. 32., the property in every ship or vessel, of which there are more than one owner, shall be taken and considered to be divided in sixty-four parts or shares, and the proportion held by each owner shall be described in the registry as being a certain number of sixty-fourth parts or shares; and that no person shall be entitled to be registered as an owner of any ship or vessel in respect of any proportion of such ship or vessel, which shall not be an integral sixty-fourth part or share of the same; and upon the first registry of any ship or vessel, the owner or owners who shall take and subscribe the oath required by this act, before registry be made, shall also declare upon oath the number of such parts or shares then held by each owner, and the same shall be so registered accordingly: provided always, that if it shall at any time happen that the property of any owner or owners in any ship or vessel cannot be reduced, by division, into any number of integral sixty-fourth parts or shares, it shall and may be lawful for the owner or owners of such fractional parts as shall be over and above such number of integral sixty-fourth parts or shares into which such property in any ship or vessel

Oath upon first registry to state the number of such shares held by each owner

Smaller portions may be

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void, was yet holden liable, upon his personal covenant, to pay such incumbrance contained in the same deed.*

(*a*) The Courts would not allow mere clerical errors to vitiate before the passing of this act, conformably with the general principles of law.†

* 8 East, 231. *Sir R. Kerrison* v. *Cole and others, Executors, &c. of Mann.* The same rule was applied to covenants for the payment of the property-tax, and extends to the land-tax, sewer-tax, &c.

† 4 T. R. 161. *Rolleston* v. *Smith.* 12 East, 471. *Cole* v. *Parkin.*

conveyed without stamp.

can be reduced by division, to transfer the same one to another, or jointly, to any new owner, by memorandum upon their respective bills of sale, or by fresh bill of sale, without such transfer being liable to stamp duty: provided also, that the right of such owner or owners to such fractional parts shall not be affected by reason of the same not having been registered: provided also, that it shall be lawful for any number of such owners, named and described in such registry, being partners in any house or copartnership actually carrying on trade in any part of His Majesty's dominions, to hold any ship or vessel, or any share or shares of any ship or vessel, in the name of such house or copartnership, as joint owners thereof, without distinguishing the proportionate interest of each of such owners; and that such ship or vessel, or the share or shares thereof so held in copartnership, shall be deemed and taken to be partnership property to all intents and purposes, and shall be governed by the same rules, both in law and equity, as relate to and govern all other partnership property in any other goods, chattels, and effects whatsoever. (*a*)

Partners may hold ships or shares without distinguishing proportionate interest of each owner.

Bills of sale not effectual until produced to officers of customs, and entered in the book of registry or of intended registry.

It is declared, by s. 37., that no bill of sale or other instrument in writing, shall be valid and effectual to pass the property in any ship or vessel, or in any share thereof, or for any other purpose, until such bill of sale or other instrument in writing shall have been produced to the collector and comptroller of the port at which such ship or vessel is registered, or to the collector and comptroller of any other port at which she is about to

(*a*) And so it was before this section was made. See 4 M. & S. 450. *ex parte Jones*; for it concerns not the public to know in what particular union or division of interest they stand towards each other.

be registered *de novo*, as the case may be, nor until such collector and comptroller respectively shall have entered in the book of registry or in the book of intended registry of such ship or vessel, as the case may be, (and which they are respectively hereby required to do upon the production of the bill of sale or other instrument for that purpose), the name, residence, and description of the vendor or mortgagor, or of each vendor or mortgagor, if more than one, the number of shares transferred, the name, residence, and description of the purchaser or mortgagee, or of each purchaser or mortgagee, if more than one, and the date of the bill of sale or other instrument, and of the production of it (*a*); and further, if such ship or vessel is not about to be registered *de novo*, the collector and comptroller of the port where such ship is registered shall and they are hereby required to indorse the aforesaid particulars of such bill of sale or other instrument on the certificate of registry of the said ship or vessel, when the same shall be produced to them for that purpose, in manner and to the effect following; *videlicet*,

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(*a*) Before this enactment, the ownership of the vessel was said to vest on its registration, and the consequent certificate, being a specific appropriation of the chattel, although the possession might have remained for some purposes in another person.* And it had been laid down, that such property, on transfer, vested immediately on the execution of the bill of sale, defeasible, nevertheless, if the register acts were not complied with. †

* 5 B. & A. 942. *Woods* v. *Russell*; and see 1 Taunt. 318. *Mucklow* v. *Manles*.

† *Per* Wood B. 3 Taunt. 206. 2 M. & S. 43. *Palmer* v. *Moxon*.

Form of indorsement.

'Custom house [*port and date; name, residence, and description of vendor or mortgagor*] has transferred by [*bill of sale or other instrument*] dated [*date; number of shares*] to [*name, residence, and description of purchaser or mortgagee.*]

'*A. B.* Collector.

'*C. D.* Comptroller.' (*a*)

(*a*) The reader observes, that, after the 5th of January, 1826, the indorsement on the certificate will be performed by the officer instead of the proprietor, by which many delays and disputes will evidently be avoided. It is observable, in conformity with the principle that the operation of law works no injury to any man, that any transfer of property in shipping, by such means, is not within the register acts. So that a conveyance by Commissioners to the assignees of a bankrupt need not be noticed on the certificate; for the statutes relate only to transfers by the act of the parties, *viz.* from a former to a new owner, and where the transfer is capable of being effectuated in the ordinary way, by the mere operation of an instrument of assignment from the one party to the other.*

This indorsement need not state that the share sold is all the vendor's interest. As, where in an action for salvage, against M. and F., the defendants showed a subsequent transfer by F. to M. of one undivided fourth part of the vessel, not calling it all his interest, on which the plaintiff was nonsuited. And on a motion for a new trial, the Court discharged the rule, saying, that if the construction contended for were to prevail, no owner wishing to sell, could divest himself of a less property than his whole interest. And Heath J. said, that on a reference to the registers, the amount of the interest appertaining to each party would appear. †

* 5 East, 407. *Bloxam* v. *Hubbard.*

† 1 Taunt. 387. *Underwood* v. *Miller and Fatkin.*

And forthwith to give notice thereof to the Commissioners of customs; and in case the collector and comptroller shall be desired so to do, and the bill of sale or other instrument shall be produced to them for that purpose, then the said collector and comptroller are hereby required to certify, by indorsement upon the said bill of sale or other instrument, that the particulars before mentioned have been so entered in the book of registry, and indorsed upon the certificate of registry as aforesaid. (*a*)

Notice to Commissioners.

By s. 39., when and after the particulars of any bill of sale, or other instrument by which any ship or vessel, or any share or shares thereof, shall be transferred, shall have been so entered in the book of registry as aforesaid, the collector and comptroller shall not enter in the book of registry the particulars of any other bill of sale,

When a bill of sale has been entered for any shares, 30 days shall be allowed for indorsing the certifi-

(*a*) The acts essential to the transfer of this property are, the indorsement, and the entry of it with the proper officer at the ship's original port. So that an omission by the officer of the out-port to send it to the officer of the custom-house in London, or by the officer in London to make an entry in the custom-house books there, will not in any way invalidate the transfer. Hence, where a sailor charged the defendants, as owners of a ship, for wages, and they proved that the officer in London had been guilty of the dereliction above-mentioned, the plaintiffs were nonsuited.* And in subsequent cases, the objection, that the officer at the out-port had omitted his duty in the manner alluded to, was, on one occasion, waived in argument, and on another, abandoned.†

* 3 Esp. 69. *Ratchford* v. *Meadows.*

† 4 East, 110. *Heath* v. *Hubbard.* 1 Taunt. 387. *Underwood* v. *Miller.*

cate of registry, before any other bill of sale for the same shall be entered.

or instrument purporting to be a transfer by the same vendor or mortgagor, or vendors or mortgagors, of the same ship or vessel, share or shares thereof, to any other person or persons, unless thirty days shall elapse from the day on which the particulars of the former bill of sale, or other instrument, were entered in the book of registry; or in case the ship or vessel was absent from the port to which she belonged at the time when the particulars of such former bill of sale or other instrument were entered in the book of registry, then, unless thirty days shall have elapsed from the day on which the ship or vessel arrived at the port to which the same belonged; and in case the particulars of two or more such bills of sale, or other instrument as aforesaid, shall at any time have been entered in the book of registry of the said ship or vessel, the collector and comptroller shall not enter in the book of registry the particulars of any other bill of sale or other instrument as aforesaid, unless thirty days shall in like manner have elapsed from the day on which the particulars of the last of such bills of sale or other instrument were entered in the books of registry, or from the day on which the ship or vessel arrived at the port to which she belonged, in case of her absence as aforesaid; and in every case where there shall at any time happen to be two or more transfers by the same owner or owners of the same property in any ship or vessel entered in the book of registry as aforesaid, the collector and comptroller are hereby required to indorse upon the certificate of registry of such ship or vessel the particulars of that bill of sale or other instrument under which the person or persons claims or claim property, who shall produce the certificate of registry for that purpose,

within thirty days next after the entry of his said bill of sale or other instrument in the book of registry as aforesaid, or within thirty days next after the return of the said ship of vessel to the port to which she belongs, in case of her absence at the time of such entry as aforesaid; and in case no person or persons shall produce the certificate of registry within either of the said spaces of thirty days, then it shall be lawful for the collector and comptroller, and they are hereby required, to indorse upon the certificate of registry the particulars of the bill of sale or other instrument to such person or persons as shall first produce the certificate of registry for that purpose, it being the true intent and meaning of this act that the several purchasers and mortgagees of such ship or vessel, share or shares thereof, when more than one appear to claim the same property, shall have priority one over the other, not according to the respective times when the particulars of the bill of sale or other instrument by which such property was transferred to them were entered in the book of registry as aforesaid, but according to the time when the indorsement is made upon the certificate of registry as aforesaid: (*a*) Provided always, that if the certificate of registry shall be lost or mislaid, or shall be detained by

Provision in case certificate be mislaid.

(*a*) Now that the indorsement is to be made by the officer instead of the proprietor, the old difficulties with regard to a reasonable time for making the indorsement has ceased, and the statute is directory to the officer to indorse at the end of thirty days. See, on the point of time before these new provisions, 2 East, 399. *Moss* v. *Charnock*. 2 M. & S. 43. *Palmer* v. *Moxon*. Id. 51. *per* Bayley J. The 4 G 4. c. 41. s. 37. has the same enactment.

any person whatever, so that the indorsement cannot in due time be made thereon, and proof thereof shall be made by the purchaser or mortgagee, or his known agent, to the satisfaction of the commissioners of His Majesty's customs, it shall be lawful for the said commissioners to grant such further time as to them shall appear necessary for the recovery of the certificate of registry, or for the registry *de novo* of the said ship or vessel under the provisions of this act, and thereupon the collector and comptroller shall make a memorandum in the book of registers of the further time so granted, and during such time no other bill of sale shall be entered for the transfer of the same ship or vessel, or the same share or shares thereof.

Bills of sale may be produced after entry at other ports than those to which vessels belong, and transfers indorsed on certificate of registry.

And by the 40th section, if the certificate of registry of such ship or vessel shall be produced to the collector and comptroller of any port where she may then be, after any such bill of sale shall have been recorded at the port to which she belongs, together with such bill of sale, containing a notification of such record, signed by the collector and comptroller of such port as before directed, it shall be lawful for the collector and comptroller of such other port, to indorse on such certificate of registry (being required so to do) the transfer mentioned in such bill of sale, and such collector and comptroller shall give notice thereof to the collector and comptroller of the port to which such ship or vessel belongs, who shall record the same in like manner as if they had made such indorsement themselves, but inserting the name of the port at which such indorsement was made: Provided always, that the collector and comptroller of such other port shall first give notice to the collector and comptroller of the port to which such

Previous notice to be given to officers at the

ship or vessel belongs, of such requisition made to them to indorse the certificate of registry, and the collector and comptroller of the port to which such ship or vessel belongs, shall thereupon send information to the collector and comptroller of such other port, whether any and what other bill or bills of sale have been recorded in the book of the registry of such ship or vessel; and the collector and comptroller of such other port, having such information, shall proceed in manner directed by this act in all respects to the indorsing of the certificate of registry, as they would do if such port were the port to which such vessel belonged. port of registry.

By s. 42., it is further enacted, that if upon any change of property in any ship or vessel, the owner or owners shall desire to have the same registered *de novo*, although not required by this act, and the owner or proper number of owners shall attend at the custom house at the port to which such ship or vessel belongs for that purpose, it shall be lawful for the collector and comptroller of His Majesty's customs at such port, to make registry *de novo* of such ship or vessel at the same port, and to grant a certificate thereof, the several requisites herein-before in this act mentioned and directed being first duly observed and complied with. Upon change of property, registry de novo may be granted if desired, although not required by law.

Sec. 43. And whereas great inconvenience hath arisen from the registering officers being served with subpœnas requiring them to bring with them and produce, on trials in courts of law relative to the ownery of vessels, or otherwise, the oaths or affidavits required to be taken by the owners thereof prior to the registering thereof, and the books of registry, or copies or extracts therefrom: and whereas it would tend much to the dispatch Copies of oaths and extracts from books of registry admitted in evidence.

of business if the attendance of such registering officers with the same upon such trials were dispensed with; be it therefore enacted, that the collector and comptroller of His Majesty's customs at any port or place, and the person or persons acting for them respectively, shall, upon every reasonable request by any person or persons whomsoever, produce and exhibit for his, her, or their inspection and examination any oath or affidavit taken or sworn by any such owner or owners, proprietor or proprietors, and also any register or entry in any book or books of registry required by this act to be made or kept relative to any ship or vessel, and shall, upon every reasonable request by any person or persons whomsoever, permit him, her, or them to take a copy or copies, or an extract or extracts thereof respectively, and that the copy or copies of any such oath or affidavit, register or entry, shall, upon being proved to be a true copy or copies thereof respectively, be allowed and received as evidence upon every trial at law, without the production of the original or originals, and without the testimony or attendance of any collector or comptroller, or other person or persons acting for them respectively, in all cases as fully and to all intents and purposes as such original or originals, if produced by any collector or collectors, comptroller or comptrollers, or other person or persons acting for them, could or might legally be admitted or received in evidence. (*a*)

(*a*) See 3 B. & P. 143. *Busher* v. *Jarratt.* 1 Esp. 50. *Cowan* v. *Abrahams.* 2 Taunt. 5. *Fraser* v. *Hopkins.* 4 East, 226. *Tinkler* v. *Walpole.* 4 Taunt. 652. *Pine* v. *Anderson.*

By s. 47. it is further enacted, that the commissioners of His Majesty's customs in Scotland and Ireland respectively, shall transmit, at the end of every month in each year, to the commissioners of His Majesty's customs in England, true and exact copies of all such certificates as shall be granted by them, or by any officer or officers with the limits of their commission, in pursuance of this act. Commissioners in Scotland, &c. to transmit copies of certificates to commissioners in England.

By s. 49. it is further enacted, that if any person or persons shall falsely make oath to any of the matters herein-before required to be so verified, such person or persons shall suffer the like pains and penalties as are incurred by persons committing wilful and corrupt perjury; and that if any person or persons shall counterfeit, erase, alter, or falsify any certificate or other instrument in writing, required or directed to be obtained, granted, or produced by this act, or shall knowingly or wilfully make use of any certificate or other instrument so counterfeited, erased, altered, or falsified, or shall wilfully grant such certificate or other instrument in writing, knowing it to be false, such person or persons shall for every such offence forfeit the sum of five hundred pounds. Punishing persons making false oath; or falsifying any document.

And by s. 51., it was enacted, that this act might be altered, varied, or repealed by any act or acts to be passed in that session of parliament. Act may be altered this session.

CHAP. IX.

OF SUNDRY CERTIFICATES.

SEVERAL certificates, which, although they do not exactly fall under any of the general heads already considered, are yet of too much importance to be passed by, have been reserved for this chapter, some being of great public interest, and others rendered interesting by the decisions which have happened respecting them.

Certificates under the acts of parliament for regulating alehouses.

Before a licence is granted to any inn-keeper or ale-house-keeper, it is incumbent for such a person to procure, under the provisions of 26 G. 2. c. 31. s. 16., a certificate under the hands of the parson, vicar or curate, and the major part of the churchwardens and overseers, or else of three or four reputable and substantial householders and inhabitants of the parish or place where such ale-house is to be, setting forth, that such person is of good fame, and of sober life and conversation, and it shall be mentioned in such licence, that such certificate was produced, otherwise such licence shall be null and void. A certificate professing to follow the directions of this statute, was signed by three or four reputable housekeepers, but the justices thought it insufficient for want of a further signature by the parson, and they refused the licence applied for; upon which the Court of King's Bench was moved for an informa-

tion against the magistrates for an unreasonable refusal to grant the licence, and the judges, although they discharged the rule, were nevertheless of opinion, that the signature by the housekeepers was valid under the act of parliament, and sufficient to warrant a licence, if there were no other ground of opposition to it. (*a*)

Upon the production of this warranty the licence is granted, if no objection is entertained by the justices in their discretion; it is in its nature a certificate, and legalizes the sale of articles mentioned in the subsequent excise certificate, on condition of the publican keeping the true assize of liquors, restraining all unlawful games and drunkenness, and keeping good rule and order in his house. Since 48 G. 3. c. 143., this writing operates merely as a permission to have an excise licence (*b*), which, however, is granted by that revenue board as a matter of course.

Another certificate is introduced by 48 G. 3. c. 143. s. 6., which enacts, that upon the death or removal of any licensed person, the commissioners of excise, upon the production of a certificate from a magistrate, testifying his approbation of such a measure, may continue the original licence, until its natural time of expiration, without the taking out of a new excise licence. And by 53 G. 3. c. 103., upon the death or removal of any licensed person or persons, the commissioners, collectors, and supervisors of excise may empower the executors, administrators, or the wife or child of such deceased person, or the assignee or assigns of such person or persons removing,

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(*a*) 1 Burr. 557. *Rex* v. *Young and Pitts.*

(*b*) Burn's Justice by Chetwynd, vol. 1. p. 61. n. (*b*)

who shall be possessed of the house or premises, in like manner to trade, deal or vend or sell the several sorts of commodities mentioned in such licence, in the same house or premises where such person or persons carried on such trade, during the residue of the term for which such licence was originally granted, without taking out a new licence.

Annuities. A certificate shall be given without fee or stamp duty, under 29 G. 3. c. 41. s. 27., by a justice of the peace, testifying an annuitant's life, evidence of which shall have been given before him upon oath, in order that such person may receive his annuity.

By 56 G. 3. c. 53. s. 2., it is enacted, that in case any person who shall have been named as a nominee, on the continuance of whose life any annuity is to depend, shall, after his or her nomination, become resident in any kingdom or state in Europe in amity with His Majesty, or if he or she shall become resident in any other kingdom, state, or place beyond the seas, then and in every such case, a certificate that such nominee was living on the day specified therein, (being some day after any annuity depending upon his or her life shall have become due,) granted under the hand and seal of the chief magistrate of any city, town, or place, or any other magistrate acting at the time as such, or for or in the place of any such chief magistrate, where such nominee may be then living, shall be deemed sufficient and effectual for proving the continuance of the life of such nominee, and for the purpose of enabling the person entitled to the annuity dependent upon the life of such nominee to receive the same; provided no British minister or consul, or governor or person acting as such, shall be resident in such city, town, or place, although

a British minister or consul, or governor or person acting as such, may be resident in the kingdom, state, or settlement wherein such nominee shall be then living. Provided always, by s. 3., that to every such certificate as aforesaid, there shall be annexed an affidavit or solemn affirmation, made before any justice of the peace or magistrate in England or Scotland respectively, or if in Ireland, before one of the barons of the Exchequer there, by the person or persons entitled to the said annuity, or by the person applying to receive the same on his, her, or their behalf, that the matters contained in such certificate, are, to the best of his or her belief, true; and that the person described or certified therein is the nominee, or one of the nominees, on whose life or lives the annuity whereof such half yearly or other payments shall be claimed, doth depend.

By commissioners to take answers from foreigners abroad.

Commissions are issued out of the Exchequer when necessary, to take a defendant's answer who resides abroad, after which the commissioners certify the due execution of their errand. On the return of a commission of this kind, it was moved to take the answer off the file upon two grounds: first, because it appeared that it had been taken through the medium of an interpreter, without an authority for so doing; and next, because it was not sufficiently evident that the interpreter had been sworn. But the Court were of opinion, that the power of employing an interpreter was incident to that of taking the answer, when such assistance was required; that as the commissioners had certified at the foot of the answer that the defendant had been sworn to his answer pursuant to the commission, they must infer *omnia rite esse acta*; and, as there was an affidavit from one of the commissioners, who swore that the oath was duly administered

to the interpreter, they must conclude that the answer was properly interpreted to and understood by the defendant. The motion was therefore refused. (*a*)

Game certificates.

By various acts of parliament passed in the last reign, certain certificates are required, on which a stamp duty is payable, previous to the destruction of game by a qualified person. For a more minute examination of which, the reader may be referred to the different treatises on the game laws, and to the second volume of Dr. Burn's Justice. (*b*)

The 52d of G. 3. c. 93. extended the duties, provisions, and penalties of the previous acts, to persons barely aiding and assisting in the killing of game; which being found inconvenient, stat. 54 G. 3. c. 191. was passed, repealing the said last-mentioned enactment, provided that the act of aiding and assisting shall be done in the company and presence of a person duly qualified, and possessed of his certificate, and who shall not act by any deputation or appointment. The penalty for not producing a certificate will not have been incurred, unless all the requisitions prescribed by the act be disobeyed. When, therefore, by 25 G. 3. c. 50. s. 15. it was enacted, that every person, on producing his certificate, should be entitled to call for the certificate of any one found sporting, and to inspect it, and that the party refusing to do so, or not having done so, refusing to give his christian and sirname, and place of residence, should forfeit 50*l.*, it was considered insufficient in an action of debt for the penalty, to show merely the non-production of the

(*a*) 6 Price, 108. *Loughman* v *Nevaes.*

(*b*) Burn, vol. 2. pp. 523—530. 23d edition.

certificate; but after such a refusal, that it was necessary to ask for the party's sirname, christian-name, and place of abode, the act intending that to be the medium of discovery of the person sporting without a certificate. (*a*)

By plaintiff's attorney certifying recovery against garnishee.

When a plaintiff has recovered in the Lord Mayor's court, his attorney certifies the judgment to the garnishee, and execution issues against the latter to compel payment; for without such a compulsory proceeding, the garnishee is not warranted, nor will he be secure, in parting with the monies of the original defendant. Thus, it was certified by Starky, Recorder of London, that the defendant should be quit after execution of the judgment (*b*), and even after execution, unless satisfaction be entered upon the record, the defendant will remain liable according to the old entries, and the authority of Lord Chief Baron Comyns. (*c*) For so soon as bail is put in by the original defendant, the attachment is at an end; and this may be done after judgment and execution, unless the plaintiff has declared himself satisfied. (*d*)

It has been holden, therefore, conformably to the spirit of the authorities which have been cited, that the mere production of a certificate by the plaintiff's attorney will by no means exonerate a garnishee who has unwarily paid over money under these circumstances. As, where an attachment issued, according to the custom,

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(*a*) 4 Esp. 215. *Molton* v. *Rogers.*

(*b*) 22 E. 4. 30. b.

(*c*) Vidian. p. 25. Com. Dig. tit. *Attachment.* E.

(*d*) Com. Dig. *ut supra*, and see Dy. 83. (a.) *Roberthon and another* v. *Norroy, King at Arms.* Co. Ent. 141. a. 3 Wils. 299. 2 H. Bl. 370. 1 Wm. Saund. 67. n. 1.

against garnishees, and a verdict passed against them, with a certificate that such a judgment had been given; the money attached was shortly paid, but there was neither execution, nor an entry of satisfaction. The plaintiffs in the original action put in bail some time afterwards, upon which the attachment was dissolved, and they then sued the garnishees for the sum so improperly disposed of. The Court, upon a special case, held clearly, that this, not being a compulsory, was not a valid payment; and that, in point of law, the custom not having been strictly pursued, the money must be considered as still remaining in the hands of the garnishees, the defendants in the action: they, therefore, gave judgment for the plaintiffs. (*a*)

Certificate by minister, churchwardens, &c. of insured's character.

Certificates have been sometimes required by officers of assurance against fire, in testimony of a person's character, who states himself to have suffered a loss redeemable by their policies. And it is now determined, that the procuring of such a document is a condition precedent to any recovery by the assured.

It is, however, rather singular, that previous to the decision of the Court of King's Bench in error from the Common Pleas, which will be mentioned presently, and in which the judgment of the latter Court was reversed, the same point had been twice resolved there, in accordance with the judgment of reversal in the last case, although by different judges. Thus, an action had been brought against the directors of the Sun Fire Office for a loss by fire, and the tenth proposal of the company so insuring was set forth in the declaration, which required that

(*a*) 4 Moore, 172. *Wetter* v. *Rucker*.

a certificate should be procured under the hand of the minister and churchwardens, together with some other reputable inhabitants of the parish, not concerned in such loss, importing that they were well acquainted with the character and circumstances of the person or persons insured, and verily knew and believed that he, she, or they really and by misfortune, without any fraud or evil practice, had sustained, by such fire, the loss and damage as his, her, or their loss, to the value therein mentioned; but that, till such affidavit and certificate of such insured's loss should be made and produced, the loss money should not be payable: the declaration then stated, that the bankrupt, the action being by assignees, could not obtain the minister's signature to his certificate by reason of his absence from the parish; but that he had tendered a certificate signed by some reputable inhabitants. A verdict was found for the petitioner, upon which it was moved, in arrest of judgment, that the due certificate had not been produced, and notwithstanding the argument that the title in this case was not preliminary, the court held that there was an absolute defect of title, and so not to be cured by intendment; and it was observed by Gould J. that nothing was said about the churchwardens, and that the excuse of the minister being at a distance was frivolous, and the judgment was arrested. (*a*) Again, the plaintiff, executrix, declared in covenant on a policy of insurance of her testator against fire, and set out a proposal similar to that mentioned in the last case; and then averred the testator's inability to procure the certificate,

(*a*) 2 H. Bl. 577. n. *Oldman and another, Assignees of Ingram* v. *Bewicke and others.*

by reason of some insinuations against his character, coupled with indemnities, made to the minister; to this the defendant pleaded several matters; but the plea on which the question turned was, that neither the testator in his lifetime, nor the plaintiff since his death, had procured such certificate, &c., as is mentioned and required in that behalf, &c. To this last plea the plaintiff demurred, but the court stopped Mr. Sergeant Lawrence, who was about to reply to the argument in support of the demurrer, saying, that the point was too clear for a doubt, and the learned serjeant had said previously, that many actions had been brought against the Sun Fire office, in the course of which their printed proposals had been strictly adhered to. (*a*) Nevertheless, a contrary doctrine was sustained in the Court of Common Pleas, very soon afterwards, in a case wherein the plaintiffs declared in covenant on a policy of assurance against fire, and shewed the tenth article of the Phœnix Company, which states in effect the same with that already recited, except, and which was relied on by the plaintiffs' counsel, that it omitted to state expressly that the money should not be paid until the certificate was produced. They then averred, that the minister and churchwardens, wrongfully, and without probable excuse, did refuse to sign their certificate, testifying the good esteem of the bankrupt among his neighbours. This allegation was denied in one of the defendant's pleas, which is alone noticed as the question mainly turned upon this point; on which the plaintiffs

(*a*) 1 H. Bl. 254. *Routledge, Executrix of Routledge* v. *Burrell* Bart.

replied, that the minister, &c. did refuse as aforesaid. There was a rejoinder denying this, and a surrejoinder joining issue. A verdict passed for the plaintiffs, on which a motion was made in arrest of judgment, and the exception noticed above was presented to the court by the counsel who supported the verdict, and he added, that the certificate was rather directory than a condition precedent, rather a matter of fairness between the parties, than of legal obligation. The decided authorities were mentioned confidently on the other side, but the court (dissentiente, Heath J.) inclined to think that a performance of the condition had taken place *cypres*, if the printed proposals were to be taken as conditions precedent; yet that, at all events, as the policy was a commercial contract, it ought to be construed liberally, and they thought the true question was, whether a loss had been fairly incurred. Judgment was entered *pro forma* for the plaintiffs, and a writ of error was then sued out, and the record removed into the King's Bench, where the plaintiff assigned for error, that the declaration, the replication, and the other pleadings of the plaintiffs below, were not sufficient to maintain the action. The case was twice argued, but the court were very clear in favour of the Insurance office: they held the certificate a condition precedent; the transaction was, that the insurers would not stipulate for the assured's indemnity on any other terms, and considering the frauds frequently in array against them, it was a reasonable caution on their part. The judgment was reversed. (*a*) This latter decision has been since recogniz-

(*a*) 2 H. Bl. 574. *Wood and others, Assignees, &c.* v. *Worsley.* 6 T. R. 710. S. C. in error.

ed with approbation, in discussing the doctrine of precedent conditions. (*a*)

Certificates respecting lunatics.

The legislature, ever watchful of the liberty of the subject, and conscious of those interested motives which so often prompt designing relations to impose an undeserved restraint on persons of whose effects they have become covetous, has laboured firmly, and to a certain extent successfully, for the prevention of such abuses; thus neither forgetting, on the one hand, the melancholy helplessness of the sufferer, nor permitting, from undue delicacy, the dangerous freedom of a maniac. Licensed houses, therefore, for the confinement of lunatics are suffered, but they are regulated and inspected with timely severity; asylums at the general cost are even encouraged as permanent and open establishments, but the medical man, the overseer, and the magistrate, must be concerned in the restraint of individual liberty. It may be indeed said, that some farther restrictions are to be desired, and that there should not be any case in which an unfortunate person might be a prey to cupidity. Much, however, by comparison with the negligence of former times, has been done, and it can hardly be doubted, that in the present improved temper of legislation, some enlightened statesman or senator will remove, by a salutary proposition, the evils which still remain.(*b*)

(*a*) 3 B. & P. 537., and see 2 New Rep. 410.

(*a*) It may be said, with much justice, that in a chapter dedicated to the consideration of a variety of certificates, and in which those respecting lunatics are introduced merely as a part, the evils, if any, of the present law, as it affects the disposal of persons said to be insane, ought not to be

By 14 G. 3. c. 49., made perpetual by 26 G. 3. c. 91. all persons harbouring lunatics without a licence shall forfeit 500l.; and by s. 27., a certificate is required from

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mixed up and made the subjects of discussion. A few very cursory remarks only shall, therefore, be intruded in this place; and while the writer is anxious to confine himself to the topic generally, leaving it to his readers to supply facts from their own personal experience, he may be allowed to state his belief, that the observations ventured below have long engaged the attention of eminent medical practitioners, and of the public at large.

Two only of the present prevalent objections against madhouses shall be selected for particular remark. It is provided by the 26 G. 3. c. 91. that every keeper, who shall receive a lunatic into his house without an order in writing under the hand and seal of some physician, surgeon, or apothecary, that such person is proper to be received as a lunatic, or shall not, within fourteen days, give notice of the receipt of such lunatic to the secretary of the Commissioners at the Royal College of Physicians in London, shall forfeit 100l. It is evident that this certificate is not required to be upon oath, and there would not be wanting sufficient testimony to show, that persons are not unfrequently removed from their homes through the misconduct of their friends, under the sanction of medical gentlemen, who may sometimes be deceived by a hasty judgment; who may not have bestowed much consideration upon the disease they are called upon to investigate; who may act with a negligence incident to the hurry of business; (it is, indeed, to be trusted, that there is no case wherein it can be proved that any practitioner has lent himself to a sinister purpose;) in any of which results manifest injustice may occur, and, perhaps, on some occasions, actually has happened. True it is, that at the time of granting licences, two justices and a physician are appointed to visit the receptacles in question, (although, even adverting to this subject, some difficulties may exist under the

some one physician, surgeon, or apothecary, under his hand and seal, previous to the reception of any person into a mad-house, which the keeper is bound to for-

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present system, which may impede, in some measure, the inquisition pointed out by the act;) but of what avail is this inquiry as an answer to the objection, when the party has been separated from domestic comforts, and placed in a painful state of durance, painful amidst all possible kindnesses? Some injustice must have been effected. The author of this note suggests, with the greatest deference, that this certificate should be upon oath of the medical man granting it, at all events as far as it respects his belief. He would go further, and say, that no practitioner should be allowed to make any such certificate unless specially appointed by the College of Physicians, if a physician; or Royal College of Surgeons, if a surgeon; or Society of Apothecaries in London, &c., if an apothecary; upon testimonials duly obtained from other medical professors, on examination before such colleges or society, tending to prove either his knowledge of the disorder of insanity, or his general capacity and intelligence. Resident medical men, whose discretion and discernment might be relied upon, might thus be of easy access to the well-disposed, whilst those who had any designing purposes to effect would thus receive a salutary check.

The next objection to the present system is one of still greater magnitude; and although it may be convenient and beneficial, in some instances, that the practice referred to beneath should exist, it is for the most part to be suspected as an engine of much probable mischief. The 26 G. 3, c. 91., which imposes the heavy penalty of 500*l.* on all persons harbouring lunatics without a licence, is directed only against such as entertain more than one lunatic at a time. So that persons who may wish to take the care of one insane person only, can do so without procuring a licence. Nor is this all: the statute regarding only places in which more than one

ward to the secretary of the commissioners of the college of physicians, within 14 days after the coming of the alleged lunatic, under a penalty of 100l.

It was thought proper on the establishment of the county asylums, to provide some security for paupers or other persons directed to be confined there; it was therefore declared by 51 G. 3. c. 79. s. 5. that the overseers of the poor of any parish, on making their application to any justice of the peace for the conveyance of any lunatic, or insane person, or dangerous idiot, to the

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lunatic is received, the provision of a certificate in the case of such one lunatic is not applicable; and it is therefore competent for an individual to take charge of a supposed maniac or idiot without any medical voucher, which is a monstrous expedient, still open to rapacious relations, and against which there is not any remedy, as the power of visitation does not extend to protect this latter description of sufferers. The writer has been informed that many houses of the kind referred to exist in the vicinity of London; and he adds, that whatever may be the respectability of the keeper or keepers, there may not be the less injustice worked by the continuance of the practice, since those guardians may be deceived by false representations, or from some means or other may be ignorant of the cause of the imputed malady. The injury, then, will have accrued, if an innocent party remain under such a roof for an hour, admitting that a proper investigation took place afterwards, (an enquiry which every keeper, it is to be presumed, would institute): it must, therefore, be suggested, that there can be no reason why all houses should not be included within the provisions of the 26 G. 3., although each of them may not contain more than one lunatic. An increase of the penalty for the default of a medical certificate may also be recommended.

asylum, should produce a certificate in writing to such justice, from some medical person, of the state and degree of lunacy imputed to the individual in question; the section then goes on to provide for his visitation and maintenance. And by 55 G. 3. c. 46. s. 8., after authorising justices to issue their warrants to the overseers of the poor of the parishes, townships and places within their several sub-divisions, to prepare true lists of all lunatics and dangerous idiots being paupers, it is provided, that a medical certificate, applicable to each person so confined, shall accompany the list, which is to be laid before the general quarter sessions.

The stat. 56 G. 3. c. 117., after reciting the expediency of making provision for the due care of persons who may, after conviction of any criminal offence, become insane, it is enacted, that upon the certificate of two physicians or surgeons, testifying the insanity of any such person, the said lunatic, &c. may be removed by a warrant under the hand of one of his Majesty's principal secretaries of state, to some lunatic asylum within the united kingdom.

Certificates of sound mind are required by the various acts before the imprisoned person is entitled to his discharge, by 55 G.3 c. 46. s. 9., relating generally to lunatic asylums, and by 56 G. 3. c. 117., relating to convicts, who are to be discharged if their term of confinement has expired, but if not, are to be remanded to their original place of punishment. The licensed houses are not liable to this certificate as a matter of course, but the proprietors necessarily ask for such a document; and it may be added, that where the Chancellor has the actual custody and cognizance of a lunatic, he always

requires such a warrant before he consents to release the party recovered, as he does before he allows a commission to issue against any one stated to be insane.

Notarial certificates.

Much certainty is required on certificates of various matters taken abroad by notaries, especially with regard to the perfect solemnity of the instrument. Thus, it was moved, that a recovery might pass, and the affidavit of the acknowledgment taken in America before a magistrate there, was authenticated by a certificate under the notarial seal of P. L., stating that J. B. esq., before whom the affidavit was in the notary's presence taken and subscribed, and who had attested the same in the usual and customary manner, was an alderman and magistrate of the city of Philadelphia, by lawful authority duly appointed, commissioned, and qualified, and by law authorised to administer oaths and affirmations. The Court, however, said, that the most important part of the case, namely, the administration, was to be gathered from inference only, and they refused the application.(a) So, where a warrant of attorney was taken and acknowledged at Cape Town before two commissioners, one of whom made the usual affidavit of caption and acknowledgment before the deputy fiscal, upon which the notarial certificate was endorsed, but the officer had left a blank for the day and year of such caption, &c., yet had placed the date with his seal at the bottom of the certificate, it was urged, that a recovery might pass under these circumstances; the date of the certificate being *prima facie* evidence that the oath had been taken

(a) 2 Taunt. 205. *Laidlaw*, demandant; *Cox*, tenant; *Brown and another*, vouchees.

on the same day; and it was cited from Mr. Piggot's book on recoveries, that being judicial executions of the agreement of parties, the law gives them all the favorable construction imaginable. The Court condemned the omission as careless, but held the defect supplied by the date at the bottom of the certificate. (*a*) A notarial certificate must be written on parchment, and it is not sufficient to translate it literally, and copy it on parchment, referring to the original. (*b*)

Perjury. By 23 G. 2. c. 11. s. 3., the judge of assize may, while the Court is sitting, or within twenty-four hours after, direct any witness, if there shall appear to him a reasonable cause, to be prosecuted for perjury: and may assign the party injured, or person undertaking such prosecution, counsel, who are to do their duty gratis: and such prosecution so directed shall be carried on without any duty or fees whatsoever. And the clerk of assize, or

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(*a*) 4 Moore, 348. *Hinde*, demandant; *Hinde*, tenant; *Bland*, vouchee.

The reporter refers to 23 El. c. 3. s. 5., by which it is enacted, that every person who shall take the knowledge of any fine or warrant of attorney of any tenant or vouchee, for suffering any common recovery, or shall certify them or any of them, shall, with the certificate of the award or warrant of attorney, certify also the day and year wherein the same was acknowledged. Yet, notwithstanding this, it is clear that the Court considered the insertion mentioned at the foot of the certificate as a certification of the day and year of the caption, and such will surely satisfy the words of the statute.

(*b*) 6 Moore, 232. *Randall*, plaintiff, *Lowring and others*, deforciants: and see 4 Moore, 162. *Palmer*, plaintiff, *Morgan and Wife*, deforciants.

other proper officer of the Court, shall give gratis to the party injured, or prosecutor, a certificate of the same being directed, together with the names of the counsel assigned him; which certificate shall be sufficient proof of such prosecution being directed; provided that no such direction or certificate shall be given in evidence on the trial.

Certificates respecting the opening and airing of goods as a security against the plague.

By 46 G. 3. c. 98. s. 5., it is ordained, that goods shall be opened and aired, and that upon production of a certificate vouching that quarantine has been performed, such goods shall not be liable to further restraint. The forging of such certificates is made a felony without benefit of clergy by 45 G. 3. c. 10. s. 30.

Recusants.

We shall be excused from considering certificates respecting recusants, a subject now nearly obsolete; the certificates, therefore, relating to those formerly unhappy persons, with the practice of certifying their relapses into the Exchequer, may now be allowed to pass without further notice.

Savings banks.

Certain certificates are occasionally granted to the trustees of banks for savings, under various acts of parliament. As, where an account is opened on behalf of the commissioners for the reduction of the national debt by such trustees; on the production of an order under the hands of the trustees on account of whom such payment is to be made, the officer of the said commissioners will grant a certificate to receive a saving bank debenture of the like amount with the money paid into the Bank of England, and interest thereupon at a certain rate therein mentioned. (*a*) When the principal or interest due on such debentures is to be paid, an order

(*a*) 58 G. 3. c. 48. s. 1.

must be indorsed therein under the hands of the trustees, and upon that the officer of the commissioners will give a certificate authorizing the payment of such sum in money (*a*); or if any three per cent consolidated or reduced bank annuities, or 3*l.* 10*s.* *per cent.* bank annuities, shall be required by the trustees to be transferred from the account of the commissioners, a like certificate shall be issued for the transfer of stock, in payment of such debentures, from the names of the commissioners into those of the trustees. (*b*)

(*a*) 58 G. 3. c. 48. s. 4.

(*b*) 58 G. 3. c. 48. s. 10. Burn's Justice, vol. i. pp. 220—224. Id. 230. 232.

CHAP. X.

WHAT CERTIFICATES ARE RECEIVABLE IN COURTS OF JUSTICE AS EVIDENCE OF PARTICULAR FACTS.

It has been endeavoured, on the consideration of each certificate hitherto treated of, to state, when it seemed necessary, whether the instrument in question might be at once received in evidence, or whether it would be necessary to plead it. Yet, as it has been of course impossible to enumerate, in a special manner, all the certificates in legal use, and as our enquiry has proceeded hitherto rather into the nature of the certificate itself, than into the general arrangement of certificates receivable in evidence, it is proposed in this last chapter to give a general view of the principles which regulate the introduction of such writings into our courts of law, by which means many, not hitherto mentioned, but which are offered upon trials to support particular facts, will be brought before the reader.

The main ground upon which evidence of this nature has been rejected seems to be, that the best testimony of the fact sought to be established has not been adduced; and it is manifest, that certificates, not clothed with the sanction of an oath, will hardly obtain a footing on the trial of a cause, especially if unsupported. It has been said by Willes C. J., that our law never allows a certifi-

cate of a mere matter of fact, not coupled with any matter of law, to be admitted as evidence. (*a*) Yet, the fact of the defendant's being in prison in the service of the mayor of Bourdeaux, alleged in avoidance of outlawry, in an old case, was ordered to be tried by the certificate of the mayor of Bourdeaux. (*b*) Again, it has been laid down by Ley C. J., in the case of a notarial certificate, that we allow here such proofs as they admit beyond the seas. (*c*) But the Lord Chief Justice Willes impugns this opinion, remarking, that the strange administration of justice in foreign parts would produce uncertainties here if such a rule were to prevail. (*d*) The rules of evidence have, during late years, been reduced to more plain principles; and it certainly does not seem open to objection, that if the certificate tendered be the most available evidence, and be at the same time authenticated, and clearly, if it be ordained by act of parliament that certain instruments of this kind are to be deemed conclusive, it will be properly admitted in proof.

Royal certificate under sign manual.

In former times the King's certificate was admitted. As, where there was a dispute respecting a promise supposed by the plaintiff to have been made to him of assurance of land upon the marriage of his lady; upon this, the King, by his letter under his signet manual, certified to the then late Chancellor and to the then present, the manner and substance of the promise as it was made to His Majesty, and the certificate was allowed for proof

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(*a*) Willes, 550.

(*b*) Co. Litt. 74. (a.) citing 4 E. 4. 10. 9 Rep. 31. Willes, 550. note (*a.*)

(*c*) 2 Ro. Rep. 346. (*d*) Willes, 549.

upon the hearing of the cause. (*a*) In the following year, one H. L. exhibited his bill against the defendant in the Court of Requests, for the non-performance of a supposed promise to the King, who answered, that he did not know of any such promise, and pleaded to the jurisdiction of the Court; the King then made a certificate that such a promise had been made, and the Court of Requests decreed for the plaintiff, embodying the royal certificate in the decree. The defendant disobeyed this decree, and was committed to the Fleet; on which the Court of King's Bench was moved for a prohibition, and that the defendant might be delivered from his imprisonment; and it was urged, that the plaintiff had his remedy at the common law by way of action on the case. The Court, however, said, that they had never met with a similar case, and that they would advise upon it, at the same time recommending an amicable arrangement. (*b*) However, it is laid down in Rolle's Abridgment, that the King cannot be a witness, as it seems, in a cause by letters under his sign manual. (*c*) And Sir John Willes, in his judgment on the case of *Omichund* v. *Barker*, distinctly denies the validity of these certificates, saying, that there never was an instance of their allowance, except in the old case of Hobart just cited. (*d*)

Certificates of foreign functionaries.

The proper and usual evidence of a fact arising beyond seas, to use the language of the very learned Judge

(*a*) Hob. 213. *Abignye* v. *Clifton*. See 3 Wood. Lect. 275.

(*b*) Godb. 198. *Sir Henry Lea and Henry Lea*'s case, and see 9 Rep. 102.

(*c*) 2 Ro. Ab. 686. where the case from Hobart is cited *contra*.

(*d*) Willes, 550.

mentioned above (*a*), is an affidavit or deposition taken before a public notary, and certified to be so under the seal of the place, or the principal officer of the place, which has been admitted as evidence in some cases where it would be too expensive, considering the nature of the cause, to take out a special commission. (*b*) Therefore, a marriage certificate, given by a minister at Utrecht, and certified under his seal, although on one occasion it was admitted as good evidence (*c*), according to a high authority in much later times, would now be rejected, as not being either legitimate or the best evidence (*d*); although, had there been no bishop, it might have been different. (*e*) So, upon issue taken for the reversal of an outlawry, a certificate was produced under the seal of the town where the outlaw was resident, that he was in service there, without any oath of the truth of such document, or any sworn interpretation of it into English; and the Court refused to admit such evidence; however, a witness then came forwards, and vouched that the party had been in service as alleged, upon which the issue was found for him. (*f*) So, where a British vice-consul at the Brazils certified the proceeds of damaged goods at a sale there according to custom, it was holden, in an action against underwriters, that his certificate ought not to have been received in evidence, although, by the laws of that country, deteriorated goods are directed to be sold under his inspection. And by

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(*a*) Sir John Willes. (*b*) Willes, 550.
(*c*) Cro. Jac. 541. *Alsop* v. *Bowtrell.*
(*d*) Willes, 549. By the Lord Chief Justice. (*e*) Ibid.
(*f*) 3 Taunt. 162. *Waldron* v. *Coombe.*

Mansfield C. J., "This is somewhat analogous to the proceedings of courts and other public functionaries. I dare say that it would be evidence in any other country. It came nearest to the case of judgments in foreign courts. But we receive judgments under the seals of the Courts. The vice-consul is no judicial officer. He has been supposed to be an agent, and so he is to some purposes. He is an auctioneer in this country; nevertheless, his certificate is no evidence in a court of justice. Any body present might have proved the facts. The chirograph of fines here proves itself; but the indorsement of the proclamation of the fine must be proved by a compared copy of the record." (*a*)

A special commission is now issued out where the matter in dispute is of much consequence, which precludes the danger of ineffective certificates; and the best evidence must be produced. So that, where a seal exists belonging to a court, it must be used, as giving a more solemn authentication than a certificate.

Assumpsit was brought for a balance due to the plaintiffs, who were West India merchants, and they proved an admission by the defendant of so much money received on their behalf. The defence was, that this balance had been attached in the defendant's hands by a judgment of the Supreme Court of Judicature in Jamaica, upon a process of foreign attachment on account of a debt due from the plaintiffs to certain persons in Jamaica. It was proposed to prove the judgment, first, by the Duke of Manchester's certificate, who was governor of the island, stating that W. B. was secretary of the island, and notary public, to which the great seal

(*a*) 3 Taunt. 166.

of the island was appended; secondly, by a certificate under the hand of W. B., as such notary public, that the clerk of the Supreme Court had signed and sealed the copy of the judgment annexed; and, thirdly, by a document purporting to be a true copy of a judgment obtained by the garnishees against the defendant, which also purported to have been signed and sealed by the clerk before mentioned. It appeared, however, that there was a seal belonging to this Supreme Court, which was so much worn as to be incapable of making any impression; but that it was occasionally used for the purpose of sealing writs of execution, and for other purposes; but that it had never been used for the attestation or exemplification of judgments. Lord Ellenborough rejected the certificates. He said, that as a seal of the Court was really in existence, the judgment should have been authenticated under that seal; that if it was no longer capable of making an impression, another should have been procured. And he observed, that great laxity had obtained of late with respect to those judgments. (*a*)

General certificates, final in their nature.

Notwithstanding these inadmissible certificates, there are some which are substantial and final in their nature, although most are of ancient dates, and at present fallen out of use. Thus, on a question whether one were absent with the king's army, a certificate of the marshal of the king's host was sufficient to decide it in proof. (*b*) The same respect was given to such an instrument, signed by the captain of Calais. (*c*)

So, where a messenger being unable to execute

(*a*) 1 Stark. 525. *Cavan* v. *Stewart.*
(*b*) Co. Litt. 74. a. 9 Rep. 31.
(*c*) 1 H. 7. 5. 9 Rep. 31. 6 T. R. 638.

the queen's commission, certified the contempt into chancery on his return home, which certificate was sent by mittimus into the exchequer; it was holden, that such a certificate was not traversable, and that a traverse tendered by the parties complained against being recorded, could not be allowed. (*a*) Again, in more modern times, a certificate from the secretary of war, as to the nature of the station, was admitted. (*b*) And the rule is, that where the writing comes from the custody of the proper officer, a due confidence shall be placed in it, and it shall be received as the best evidence. As, where there was a proviso in a duchy lease, that it should be enrolled with the auditor, the certificate of that officer or the mayor, was held sufficient evidence of its enrolment. (*c*)

Certificates made conclusive by act of parliament.

Some certificates, however, are made final by acts of parliament, and it follows, that when they are produced properly authenticated, no objection can be sustained against their admission.

For example, on the trial of an utterer of counterfeit money for the second time, a certified transcript of a former conviction, by the clerk of assize or of the peace, containing the effect and tenor of the conviction, is made sufficient proof of the former conviction by 15 G. 2. c. 28. s. 9. So, where a felon is prosecuted for being at large before the term of his transportation has expired, a certified transcript of the indictment, of the felon's conviction, and of the order for transportation, has been made

(*a*) Dy. 176. In this case they moved to be restored to their lands and goods without a fine for the contempt. Jenk. 220. 3 Inst. 180., and see Mo. 329. 9 Rep. 31.

(*b*) 1 Sir Wm. Bl. 29.

(*c*) Dougl. 56. *Kinnersley* v. *Orpe.*

evidence that the person there named has been before convicted and ordered for transportation. (*a*)

In civil cases, the same regard is paid to certificates prescribed by the legislature. By an act for stating the debts of the army, the commissioners had power to call the officers and agents before them, and if it appeared that there was any money due from one to the other, such commissioners were to give the party a certificate, and he might maintain an action for the money, as upon a stated account. In a case at Nisi Prius, the plaintiff produced this document, on which the defendant offered his accounts in evidence, by which he alleged it would appear he had not any money in his hands, and he said, that the commissioners had refused him time to produce his accounts; but Pratt C. J. would not permit the evidence, and held the certificate conclusive. (*b*) But the act giving the authority, must be inflexibly kept, so that where a similar writing was tendered as a conclusive proof, which, upon enquiry, had been signed by one commissioner at a time at their houses respectively, it was rejected, the opinion of the judges (*c*) being, that it could not be signed by the officers, except as sitting upon the commission. (*d*)

The st. 11 & 12 W. 3. c. 10. s. 2. directed, that certain silks should be warehoused until an order given for their exportation, and sufficient security found that such goods should not be landed in the kingdom of England, do-

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(*a*) 6 G. 1. c. 23. s. 7. Phil. on Ev. 4th ed. p. 382

(*b*) 1 Str. 481. *Moody* v. *Thurston*.

(*c*) Sir Robert Eyre, Sir John Fortescue Aland.

(*d*) 1 Str. 568. *Mountcan* v. *Wilson*.

minion of Wales, and town of Berwick upon Tweed; but that such securities should be discharged upon a certificate returned under the common seal of the chief magistrate in any place or places beyond the seas, or under the hands and seals of two known English merchants upon the place, that such goods were there landed, or upon proof by credible persons that such goods were taken by enemies, or perished in the seas; the examination and proof thereof being left to the judgment of the Commissioners of His Majesty's customs.

A *scire facias* was brought against two persons on their bonds given in pursuance of this act. The defendants pleaded that the goods in question had been shipped and exported to Guernsey, and they brought certificates of the goods having been landed abroad. On the trial, these writings, under the hands and seals of two British merchants at Guernsey, were tendered, on which two difficulties arose, first, because the signatures only were proved without the sealing; and, secondly, admitting the proof of the instruments sufficient, it was contended, that they could not be received at Nisi Prius. The first point was decided in another case in the same court, that the signatures only need have been proved (*a*); but with respect to the second, the Court held, that however binding under the words of the statute these documents might be upon the commissioners who might have time to investigate their validity, they could not come into proof at Nisi Prius; they merely contained a declaration of two individuals not upon oath, which by

(*a*) *Rex* v. *Dickenson*, cited in Fe 11.37.

the express language of the act rested with the judgment of the commissioners. (*a*).

It only remains that we should observe, that if parties will agree to submit themselves to the evidence of a certificate, it will probably be obligatory upon them, (*b*) so that if an agent should be employed to fix the amount of a loss upon a policy, his certificate assented to on both sides might be conclusive. (*c*) However, in the authority cited beneath, a certificate of damage by Lloyd's agent abroad, was rejected, on the ground that no such powers reside in such agents under the usual instructions which regulate their conduct. The plaintiff sued on a policy of insurance on sugars warranted free from average under 5*l.* per cent., and in order to prove damage to a greater amount, he tendered in evidence a certificate of the agent, resident at Petersburgh, to Lloyd's, signed by him after surveying the sugars. The Lord Chief Justice held the evidence inadmissible. It was contended, that these persons are appointed expressly to survey goods damaged by the perils of the seas, and to grant a certificate of the quantum of the damage, consequently, that in granting such a certificate, they act within the scope of their authority, and that an instrument so granted is good evidence against their principals. But the Court, referring to the general instructions given to Lloyd's agents, observed, that they were spoken of as individuals whose co-operation will facilitate the settlement of loss or average, not as having authority to settle it themselves. (*d*)

(*a*) Forr. 35. *Rex* v. *Vyse*, *Rex* v. *Spearpoint*.
(*b*) 1 B. & C. 476. *per Cur.* (*c*) Ibid.
(*d*) 1 B. & C. 473. *Drake* v. *Marryat*.

APPENDIX TO CHAP. I.

Significavit of Party being contumacious, and in contempt, under 53 G. 3. c. 127.

To His most Excellent Majesty and our Sovereign Lord George the Third, by the grace of God of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith: [*ecclesiastical judge, as the case may be,*] by Divine Providence, &c. health in him by whom kings and princes rule and govern. We hereby notify and signify unto your Majesty, that one A. B. of , in the county of , hath been duly pronounced guilty of manifest contumacy and contempt of the law and jurisdiction ecclesiastical, in not [*state the reason*] appearing before [*state the style of the ecclesiastical judge or his representative*], or in not obeying the lawful commands [*set out the commands*] of [*such judge or representative*], or in having committed a contempt in the face of the Court of [*such judge*, &c.], lawfully authorized, by [*here set out the nature and manner of such contempt*], on a day and hour now long past, in a certain cause of [*here set out the nature of the cause, and the names of the parties to the same*]. We therefore humbly implore and intreat your said most Excellent Majesty would vouchsafe to command the body of the said to be taken and imprisoned for such contumacy and contempt.

Given under the seal of our Court, the day of .

A. B. Registrar [*or*, Deputy Registrar, *as the case may be.*]

Writ de contumace capiendo.

George, &c. to the Sheriff of greeting. The [*ecclesiastical judge*] has signified to us, that of , in your county of , is manifestly contumacious, and contemns the jurisdiction and authority of [*here fully state the non-appearance or disobedience, together with the commands disobeyed, or the contempt in the face of the Court, as the case may be*]; nor will he submit to the ecclesiastical jurisdiction. But, forasmuch as the royal power ought not to be wanting to enforce such jurisdiction, We command you, that you attach the said by his body until he shall have made satisfaction for the said contempt; and how you shall execute this our precept, notify unto ; and in nowise omit this, and leave you there this writ.

Witness Ourself at Westminster, the day of , in the year of our reign.

Writ of Deliverance.

Whereas , of , in your county of , whom lately, at the denouncing of for contumacy, and by writ issued thereupon, you attached by his body until he should have made satisfaction for the contempt: Now, he having submitted himself, and satisfied the said contempt, We hereby empower and command you, that without delay you cause the said to be delivered out of the prison in which he is so detained, if upon that occasion, and no other, he shall be detained therein.

Given under the seal of our of .

A. B. Registrar [*or*, Deputy Registrar, *as the case may be.*]

Extracted by E. F. *Proctor.*

Bishop's Certificate of a legal Marriage.

I do hereby certify, that A. B. was accoupled in lawful matrimony with C. D., and that C. D. and A. B. mutually cohabited in bed and board until the death of the said .

See Cro. Car. 351.

Certificate of a Rector to the Diocesan, nominating A.B. *to a Curacy.*

These are to certify to your Lordship, that I, R. H. rector of St. Ann's, Westminster, in the county of Middlesex, and your Lordship's diocese of London, do hereby nominate and appoint the Rev. A. B. to perform the office of curate in my church of St. Ann aforesaid; and do promise to allow him a yearly sum of fifty guineas for his maintenance in the same, and to continue him to officiate in my said church, until he shall be otherwise provided of some ecclesiastical preferment*; unless, by any fault by him committed, he shall be lawfully removed from the same. And I hereby solemnly declare, that I do not fraudulently give this certificate to entitle the said A. B. to receive holy orders, but with a real intention to employ him in my said church according to what is before expressed.

Witness my hand, this 13th day of February, 1769.

Cowp. Rep. 438. R. H.

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* Or, "be provided of some place wherein he may exercise his ministerial function," according to the new rule.

APPENDIX TO CHAP. II.

Letter of Attorney to sign consent to the Commissioners' certifying the Great Seal that the Bankrupt hath conformed.

Know all men by these presents, that I, James Jackson, of &c., a creditor of Francis Fairfax, of &c., the person against whom a commission of bankrupt is awarded and issued, and now in prosecution, and who have duly proved a debt under the said commission, have made, ordained, authorized, constituted, and appointed, and by these presents do make, ordain, authorize, constitute, and appoint, and in my place and stead put William Wilson, of &c., to be my true and lawful attorney for me and in my name, place, and stead, to consent to the commissioners in and by the said commission named and authorized, or the major part of them, signing a certificate for the said bankrupt, having the allowance and benefit given to bankrupts by an act of parliament passed in the fifth year of the reign of His late Majesty King George the Second, intituled, "An act to prevent the committing of frauds by bankrupts," and that the said bankrupt may be discharged from his debts, in pursuance of the said act. In witness whereof I the said James Jackson have to these presents set my hand and seal, this day of in the year of our Lord 18 .

JAMES JACKSON (L. S.)

Signed, sealed, and delivered (being first duly stamped,) in the presence of

A. B.
X. Y.

Christian's Instructions, p. 213.

Affidavit of the Execution of the above Letter of Attorney.

of maketh oath, that he was present and did see duly sign, seal, and as his act and deed deliver the letter of attorney hereunto annexed, and that the name of subscribed against the seal of the said letter of attorney was the proper hand-writing of the said ; and that the names of this deponent and of subscribed to the said letter of attorney, as witnesses to the execution thereof, are of this deponent's and of the said own proper respective hand-writings.

JOHN JOHNSON.

Sworn at in the county of the day of in the year of our Lord, before me,

A. B. Master in Chancery Extraordinary.

Christian's Instructions, p. 214.

Affidavit of seeing Creditors sign a Bankrupt's Certificate.

In the matter of Francis Fairfax, a Bankrupt.

John Johnson, of &c., gentleman, maketh oath that he this deponent was present, and did see A. B. for himself and E. F., G. H., &c. [*insert all the creditors you saw sign, and the times when they signed*], eight of the creditors of the said bankrupt, severally subscribe their names, on the days respectively annexed to their names, at the foot of a certain instrument in writing, purporting to be a certificate under the hands and seals of the major part of the commissioners named and authorized in and by a commission of bankrupt awarded and issued against the said Francis Fairfax; and the said Francis Fairfax, the bankrupt, had in all things conformed himself to the several statutes made and now in force concerning bankrupts, whereby they testify and declare their consent to the said Commissioners signing the said certificate, and that the said bankrupt may

have such allowance and benefit as are given to bankrupts by an act of parliament made and passed in the fifth year of the reign of His late Majesty King George the Second, intituled, "An act to prevent the committing of frauds by bankrupts," and also of another act made in the forty-ninth year of the reign of His Majesty King George the Third, intituled, "An act to alter and amend the laws relating to bankrupts," and be discharged from his debts in pursuance of the same acts.

JOHN JOHNSON.

Sworn at the Public-office, the day of
before me, P. H.

Christian's Instructions, p. 216.

Form of the Certificate.

To the Right Honourable the Lord High Chancellor of Great Britain.

We whose names and seals are hereunto subscribed and set, being the major part of the commissioners named and authorized in and by a commission of bankrupt awarded and issued against Francis Fairfax, of &c. [*as described in the commission,*] bearing date at Westminster, the day of &c., directed to John Nares, Edward Christian, Robert Capper, Robert Talbot, and Francis Vesey, Esqrs., do humbly certify to your lordship, that the major part of the commissioners by the said commission authorized, having begun to put the said commission into execution, did find that the said Francis Fairfax became a bankrupt before the date and suing forth of the said commission within the true intent and meaning of the statutes made and now in force concerning bankrupts, or some of them, and did thereupon declare and adjudge him bankrupt accordingly. And we further humbly certify to your Lordship, that the said Francis Fairfax being so declared a bankrupt, the major part of the commissioners by the said commission authorized, pursuant

to the directions of the act of parliament made in the fifth year of the reign of His late Majesty King George the Second, intituled, " An act to prevent the committing of frauds by bankrupts," did cause due notice to be given and published in the London Gazette, of such commission being issued, and of the times and place of three several meetings of the said commissioners, within forty-two days next after such notice (the last of which meetings was appointed to be on the forty-second day), at which time the said Francis Fairfax was required to surrender himself to the said commissioners named in the said commission, or the major part of them, and to make a full disclosure and discovery of his estate and effects; and the creditors of the said Francis Fairfax were desired to come prepared to prove their debts, and to assent to, or to dissent from the making this certificate.

And we further humbly certify to your Lordship, that such three several meetings of the major part of the commissioners by the said commission authorized, were had pursuant to such notice so given and published; and that at one of those meetings the said Francis Fairfax did surrender himself to the major part of the said commissioners by the said commission authorized, and did sign and subscribe such surrender, and did submit to be examined from time to time, upon oath, by and before the major part of the said commissioners by the said commission authorized, and in all things to conform to the several statutes made and now in force concerning bankrupts, and particularly to the said act made in the fifth year of His late Majesty's reign. And we further humbly certify to your Lordship, that at the last * of the said three meetings the said Francis Fairfax finished his examination before the major part of the said commissioners by the said commission authorized, according to the directions of the said last-mentioned, act, and upon such his examination made a full disclosure and discovery of his estate and effects, and in all things conformed himself to the several statutes made and

* If the *last* examination was adjourned, then add, " on the day of last, to which day the last of the three meetings was adjourned."

now in force concerning bankrupts, and particularly according to the directions of the said statute made in the fifth year of His late Majesty's reign: and there doth not appear to us any reason to doubt of the truth of such discovery, or that the same is not a full discovery of all the estate and effects of the said Francis Fairfax. And we further humbly certify to your Lordship, that the creditors whose names [*or marks*] are subscribed to this certificate, are full three parts in five in number and value of the creditors of the above-named Francis Fairfax, who are creditors for not less than 20*l.* respectively, and who have duly proved their debts under the said commission; and that it doth appear to us by due proof by affidavit in writing, that such several subscribing creditors, or some person by them respectively duly authorized thereunto, did before our signing thereof, sign his certificate, and testify their consent to our signing of the same, and to the said Francis Fairfax having such allowance and benefit as by the last mentioned act are allowed to bankrupts, and to the said Francis Fairfax being discharged from his debts in pursuance of the same act; and also of another act of parliament made in the forty-ninth year of the reign of His Majesty King George the Third, intituled, "An act to alter and amend the laws relating to bankrupts." In witness whereof we have hereunto set our hands and seals, this day of in the year of the reign of &c. and in the year of our Lord 1815.

ROBERT CAPPER, (L. S.)
ROBERT TALBOT, (L. S.)
FRANCIS VESEY, (L. S.)

Signed and sealed by the three last-named commissioners, in presence of A. B. solicitor to the commission, or clerk to the solicitor to the commission, or messenger to the commission, or clerk to one of the commissioners. No other person can be a witness.

We, the creditors of the above-named Francis Fairfax, whose names [*or marks*] are hereunder subscribed, do hereby testify and declare our consent, that the major part of the commissioners by the above-mentioned commission

authorized, may sign and seal the certificate above written; and that the said Francis Fairfax may have such allowance and benefit as are given to bankrupts by the act of parliament made in the fifth year of the reign of His late Majesty King George the Second, intituled, "An act to prevent the committing of frauds by bankrupts;" and also of another act of parliament made in the forty-ninth year of the reign of His Majesty King George the Third, intituled, "An act to alter and amend the laws relating to bankrupts," and be discharged from his debts in pursuance of the same acts.

[*The creditors' names and times of signing.*]

A. B.

Christian's Instructions, p. 220. C. D.

Certificate when the Bankrupt surrenders under Order for Time.

[*As in last, to* "be on the forty-second day" *inclusive, then continue thus:*—]

But by your Lordship's order, bearing date the day of last, the time for the said bankrupt's surrendering and finishing his examination was enlarged for forty-nine days; at which meeting the said Francis Fairfax was required to surrender himself to the commissioners in the said commission named, or to the major part of them, and to make a full disclosure and discovery of his estate and effects; and the creditors of the said Francis Fairfax were desired to come prepared to prove their debts, and to assent to, or to dissent from our making this certificate. And we further humbly certify to your Lordship, that such several meetings of the major part of the commissioners by the said commission authorized, were had pursuant to such notice, and the order of your Lordship; and that the said Francis Fairfax, on the day of last, (being the forty-ninth day of the enlarged time, under your Lordship's order, as aforesaid,) did surrender, &c. [*and so go on and conclude from the form of the other certificate set out above.*]

Christian's Instructions, p. 225.

Bankrupt's Affidavit of having obtained his Creditors' consent to the Commissioners certifying his Conformity fairly and without fraud.

In Chancery. In the matter of Francis Fairfax, bankrupt.

Francis Fairfax, of &c. against whom a commission of bankrupt issued on the day of , maketh oath, that the certificate bearing date the day of , 1815, under the hands and seals of Robert Capper, Robert Talbot, and Francis Vesey, esquires, the major part of the commissioners in the said commission named and authorized, whereby they have certified to the right honourable the lord high chancellor of Great Britain, that he this deponent hath in all things conformed himself according to the directions of an act of parliament made in the fifth year of the reign of His late Majesty King George the Second, intituled, "An Act to prevent the committing of frauds by bankrupts," and the consent of all this deponent's creditors, who have subscribed their names or marks at the foot of the said certificate, authorizing the said commissioners to sign and seal the same, in order that this deponent may have such allowance and benefit as are given to bankrupts by the said act, and be discharged from his debts in pursuance thereof, was obtained fairly and without fraud.

Sworn at the Public-office, &c. FRANCIS FAIRFAX.

Christian's Instructions, p. 226.

The following advertisement is then inserted in the Gazette by the messenger:

Advertisement.

Whereas the acting commissioners in the commission of bankrupt awarded and issued forth against Francis Fairfax, of &c. merchant, dealer, and chapman, have certified to the right honourable John Lord Eldon, lord high chancellor of Great Britain, that the said Francis Fairfax hath in all things conformed himself according to the directions of the several

acts of parliament made concerning bankrupts; this is to give notice, that by virtue of an act passed in the fifth year of His late Majesty's reign, and also of another act made in the forty-ninth year of the reign of His Majesty King George the Third, intituled, "An Act to alter and amend the laws relating to bankrupts;" his certificate will be allowed and confirmed as the said acts direct, unless cause be shown to the contrary on or before the first day of January next.

Christian's Instructions, p. 227.

Memorandum of the Commissioners certifying the Bankrupt's Conformity.

At, &c.

Be it remembered, that we who have hereunto subscribed our names, being the major part of the commissioners named and authorized in and by a commission of bankrupt awarded and issued, and now in prosecution against Francis Fairfax, of &c., did meet the day and year, and at the place above mentioned, and examined the proceedings under the said commission; and finding that full three parts in five of all the creditors who have proved debts under the said commission, whose respective debts amount to 20*l.* or upwards, have signed their consent to our certifying to the lord high chancellor of Great Britain, that the said Francis Fairfax had conformed himself to the several statutes made and now in force concerning bankrupts, as appears by affidavit exhibited before us, we, thereupon, signed such certificate.

ROBERT CAPPER.
ROBERT TALBOT.
FRANCIS VESEY.

Christian's Instructions, p. 228.

Allowance of the Certificate.

day of 1815.

Whereas the usual notice hath been given in the London Gazette, of the day of last, and none of the creditors of the above-named Francis Fairfax have shewn any cause to the contrary: I do allow and confirm this certificate. ELDON, C.

Christian's Instructions, p. 229.

Supplemental Certificate.

We whose hands and seals are hereunto also subscribed, being the major part of the commissioners in the above certificate named, do, by way of supplement to the above certificate, further humbly certify to your Lordship, that it appears to us, at the time the above certificate lay before your Lordship for confirmation, M. R. preferred his petition to your Lordship, in the matter of the said bankruptcy, praying, amongst other things, to be permitted to prove his debts under the said commission, and that he might be at liberty to assent to, or dissent from the allowance of the said certificate: and your Lordship was pleased to order that the said petitioner might be at liberty to prove his debt under the said commission; and also, that the petitioner should be at liberty to assent to or dissent from the allowance of the said certificate; and for that purpose, that the said certificate should be referred back to us, the major part of the said commissioners, that we might review the same. Now we do hereby humbly certify to your Lordship, that we have, in obedience to your Lordship's said order, taken the proof of the said petitioner's said debts, and that we have also taken the proof of several other creditors' debts under the said commission; and that we have likewise reviewed the above certificate, and that the creditors whose names or marks are subscribed to this supplemental certificate, together with the other creditors who

have before subscribed their names to the above certificate, are full three parts in five in number and value of the creditors of the above-named F. F.; who are creditors for not less than 20*l.* respectively, and who have duly proved their debts under the said commission; and that it doth appear to us, by due proof by affidavits in writing, that such general subscribing creditors, or some person by them respectively authorized thereunto, did, before signing and sealing hereof, sign the above, and this supplemental certificate, and testify their consent to our signing and sealing the same: and to the said F. F. having such allowance and benefit as by the act of parliament in the above certificate last-mentioned are allowed to bankrupts, and to his having his discharge in pursuance of the said act, and also of another act made in the forty-ninth year of the reign of His Majesty King George the Third, intituled, "An Act to alter and amend the laws relating to bankrupts."

In witness, &c. we the creditors of the above-named F. F. whose names or marks are hereunto subscribed, do, &c.

[*Names and the times of each signing.*]

Christian's Instructions, p. 230.

APPENDIX TO CHAP. IV.

By two Justices, that an indicted road is in sufficient repair.

Surrey } We, two of His Majesty's justices of the peace for
to wit. } the county of Surrey, acting in and for the said county, having this day viewed and examined the state and condition of the road said to have been indicted at the last summer assizes (or at the last general quarter sessions of the peace), holden in and for the said county, leading from a place called Biddle's Green, in the parish of Wendlesham, in the said county, to a place called Westley Green, adjoin-

ing to the parish of Cobham, in the county aforesaid, do certify, that the said road is well and sufficiently repaired, and is in such a state that the king's subjects with waggons, carts, coaches, and other carriages, may pass and repass safely, and without inconvenience, and likely so to continue. Given under our hands and seals, this day of 18 . J. M. (L. S.) J. L. (L. S.)

Burn's Justice, 23d edit. vol. 2. p. 772.

Certificate to be returned to the Sessions, pursuant to 52 G. 3. c. 100. s. 2., stating the repairs of bridges, the defects ordered to be repaired, and the reason for such repair.

County of } To the justices of the peace at the general
to wit. } quarter sessions, to be holden at in the said county, the day of 18 . We, and , two of his Majesty's justices of the peace, in and for the said county, duly appointed in pursuance of the statute in that case made and provided, to superintend the county bridges, ramparts, banks, cops, and other works appertaining to the same, and the roads over the same, and so much of the roads at the ends thereof, as by law is to be repaired at the expence of the said county, within the division or hundred of in the said county, do hereby certify to the said court of quarter sessions, that on the day of last, we did inspect the county bridge situate in the parish of in the said county, and within the division aforesaid, and it having appeared to us, on our own inspection thereof, that and that it was necessary, for the purpose of preventing the further decay and injury of the same, to order the immediate repairs and amendments to be done to the same, as follows, viz. — therefore, we the said justices, did, on the said day of make our orders in writing, signed with our respective hands, and did thereby order and direct of the parish of in the

said county of , immediately to make the said repairs and amendments; provided that the sum to be expended in such repairs should not exceed the sum of pounds. And we, the said justices, do hereby further certify, that the said repairs, so directed to be made as aforesaid, have been made accordingly, by the said and that the reasonable price and charges payable to the said for the same, amounts to the sum of as per account hereto annexed, and verified on the oath of . Given under our hands, this day of , in the year of our Lord 18 .

Burn's Justice, 23d edition, vol. 1. p. 391.

APPENDIX TO CHAP. V.

Certificate by the Speaker of the House of Commons of Costs incurred in opposing an Election Petition.

Whereas J. H. Ley, Esq. clerk assistant of the House of Commons, and Nicholas Smith, Esq. one of the masters of the High Court of Chancery, who were duly authorized and directed by me, according to the act of the 28 G. 3. c. 52. to examine and tax the costs and expences of Sir H. Strachey, Bart. and D. Giles, Esq. incurred by them in opposing the petition of several persons whose names are thereunto subscribed, on behalf of themselves and others, stating themselves the electors of the town and borough of East Grinstead, presented to the House of Commons upon the 1st of December 1802, complaining of the undue election and return of them the said Sir H. L. and D. G. as burgesses to serve in parliament for the said borough of East Grinstead, have reported to me the amount of such costs and expences; now I do hereby certify, that the said costs and

expences allowed in the said report, amounted to the sum of 361*l.* 14*s.* 2*d.* Given under under my hand, this 17th of March, 1808. CHA. ABBOT, Speaker.

11 *East*, 194.

APPENDIX TO CHAP. VI.

Form of the Parochial Certificate.

To the churchwardens and overseers of the poor of the parish of A. in the county of B.

We, the churchwardens and overseers of the poor of the parish of O., in the county of W., do hereby certify, own, and acknowlege, that A. L., yeoman, is an inhabitant legally settled in our parish of O. aforesaid. In witness whereof we have hereunto set our hands and seals, the day of in the year of our Lord .

Attested by
A. W.
B. W.

A. B. } Churchwardens.
C. D. }

E. F. } Overseers of the poor.
G. H. }

Allowance by the Magistrates, &c.

We, J. P. and K. P., Esquires, two of His Majesty's justices of the peace in and for the said county of W., do allow of the above-written certificate. And we do also certify, that A. W., one of the witnesses who attested the same, hath this day made oath before us the said justices, that he the said A. W. did see the churchwardens and overseers of the poor of the parish of O. aforesaid, whose names and seals are thereunto subscribed and set, severally sign and seal the same, and that the names of A. W. and B. W., who are the witnesses attesting the said certificate, are respectively of their own proper handwriting.

Given under our hands, this day of .

APPENDIX TO CHAP. VII.

Form of Affidavit upon which a party has been readmitted an Attorney in the Court of King's Bench.

In the King's Bench.—Thomas Clarke, of in the parish in the county of Gent., maketh oath and saith, that the duty of 100*l.* imposed upon articles of clerkship, was paid on certain articles bearing date [*day and year*] and made between A. B., of , Gent., then one of the attornies of this Honourable Court [*since deceased*] of the one part, and T. C. the elder, of and his son, this deponent, of the other part, that he this deponent was duly admitted an attorney of this Honourable Court in or about Michaelmas term, in the year , and hath obtained three annual certificates authorizing him this deponent to practise during the years . And this deponent further saith that he hath ceased to renew the last of such annual certificates from the expiration thereof from the [*day and year*] on account of his having from the same [*day and year last mentioned*] until the month of June last been employed by respectable attornies of this Honorable Court and the Court of Common Pleas, and solicitors in Chancery, as their clerk, and having been thereby prevented from practising for his this deponent's advantage, and not from any desire to defraud His Majesty's revenue, nor on account of any threat, fear, or apprehension by any application or motion being made to the Court against him this deponent. And this deponent saith, he hath not incurred any penalty or penalties whatever by practising as an attorney in his own or any other person's name. And this deponent further saith, that from the said [*day and year last mentioned*] the time of the expiration of the last certificate obtained by this deponent as aforesaid, down to the present time, he hath actually abstained from acting as

an attorney for his own benefit and profit, and hath from the said [*day and year last mentioned*] until the month of June last, been employed solely as clerk to respectable attornies of the court of King's Bench and Common Pleas, and solicitors in Chancery, and for their sole benefit and profit. And that he this deponent hath not been at any time employed, concerned, or engaged, either as principal or otherwise, in any other profession or business. And this deponent likewise saith, that he this deponent did, previous to the first day of Michaelmas term last, serve the solicitor for the Commissioners of His Majesty's Stamp Duties with a notice in writing containing the name and place of abode of the deponent, and the name and last place of abode of the said A. B. deceased, and purporting that he this deponent intended to apply as at the then next Hilary term to be re-admitted an attorney of this Honourable Court, on payment of a penalty of 20*s.* and taking out a certificate for the year [*year then present*] by delivering to and leaving with the clerk of the said last-mentioned solicitor, at the stamp-office in Somerset House, a true copy of such notice. And the deponent also saith, that he this deponent did, previous to the said first day of Michaelmas term last, affix upon the outside of the court of King's Bench at Westminster Hall, and the King's Bench office, in such places as public notices are usually affixed, and also did enter in the books kept for that purpose at the chambers of each of the judges of the Honourable Court notices in writing, purporting that this deponent intended to apply as at the then next Hilary term to be readmitted an attorney of this Honourable Court, and which said entries did contain the name and place of abode of this deponent, and the name and late place of abode of the said A. B. deceased, and to the best of this deponent's knowledge and belief such notices remained and continued so affixed and entered during the whole of Michaelmas term last.

(Signed) THOMAS CLARKE.

Sworn in Court the 23d day of January .

By the Court.

See 1 *Ch. Rep.* 102. n. (a.)

APPENDIX TO CHAP. VIII.

See the forms as directed by the new act of parliament, with reference to the registry of a ship.

APPENDIX TO CHAP. IX.

Certificate from Minister, &c. that a Vintner is of good fame, &c.

We, the minister and major part of the churchwardens and overseers of the poor of the parish of in the county of W., do hereby certify, that A. B., of in the said county, yeoman, is a person of good fame, and of sober life and conversation. Witness our hands, the day of in the year of our Lord .

A. M. Minister.
A. C. } Churchwardens.
B. C. }
A. O. } Overseers.
B. O. }

If this certificate be signed by housekeepers and inhabitants, it should be so stated.

Burn's Justice, 23d edition, vol. 1. p. 61.*

Certificate of a Justice of Peace or Magistrate, for continuing the Licence granted at a general licensing-day, to a person succeeding the former occupier, in case of death or removal, pursuant to 48 *G.* 3. *c.* 143. *sec.* 6.

County of, } Whereas, at a general meeting of his Ma-
Hundred of } jesty's justices of the peace, acting in and

* This certificate is made use of where the vintner has not been licensed the year before.

for the hundred of , in the county of , holden within the said hundred, in the month of September last, for the purpose of authorizing and empowering persons to keep common inns, alehouses, or victualling-houses, within the said hundred, A. B. of the parish of , in the said hundred, was duly authorized and empowered to keep a common inn, alehouse, or victualling-house, and to utter and sell in the said house, known by the sign of the , in the said parish of , in which he then dwelt, and in the premises thereunto belonging, and not elsewhere, victuals, and all such exciseable liquors as he should be licensed and empowered to sell under the authority and permission of any excise licence which should be duly granted by the commissioners of excise, or persons to be appointed and employed by them for that purpose, or by any collector or supervisor of excise respectively; provided that the true excise in bread, in beer, ale, cider, and all other liquors should be duly kept, and that no other unlawful game or games, or any drunkenness, or other disorder, should be suffered in his said house, yard, garden, or premises; but that good order and rule should be maintained and kept therein, according to the laws of this realm in that behalf made: The authority and power thereby granted to continue in force for one whole year, from the 29th day of the said month of September, and no longer. And whereas it has been made appear to me, that the said A. B. duly obtained an excise licence, for the purposes and time aforesaid, and that the said A. B. is now removed from the said house [*or dead.*] These are to certify, that I, being one of the justices of the peace acting within the said hundred, do approve of C. D., the person to whom this certificate is given, as a fit person to be authorized and empowered to sell beer, and duly retail cider and perry, to be drank and consumed in the said house and premises, where the said A. B. carried on his trade during the residue of the term for which his licence was originally granted. Given under my hand this day of 182 . J. P.

Burn's Justice, 23d edition, vol. 1. p. 62.

Certificate of the Examination of a Lunatic, pursuant to an Order of Justices.

I do hereby certify, that by the directions of L. M. and N. O., Esqrs., justices of the peace for the county of H., I have personally examined C. D., and that the said C. D. appears to me to be of unsound mind. Dated this day of . A. B. (physician,) (surgeon,) or (apothecary,) resident at .

Burn's Justice, vol. 3. p. 294, 23*d edition.*

Certificate of the Officer of the Commissioners for the Reduction of the National Debt, to enable Payments to be made into the Bank of England.

I do hereby certify, that it appears by an order dated produced to me conformable to the provisions of two acts, made in the 57th and 58th years of the reign of King George the Third, to encourage the establishment of banks for savings in England, that two of the trustees of the saving bank established at [*insert here the town and county*] have authorized and directed A.B. to pay into the Bank of England, to the account of the Commissioners for the Reduction of the National Debt, the sum of pounds, and to receive a saving bank debenture of the like amount, (or saving debentures, making the like amount as under,) carrying interest at the rate of 3*d. per centum per diem.* Witness my hand,

G. Superintendant.

Burn's Justice, 23d edition, vol. 1. p. 280.

Certificate of the Officer of the Commissioners for the Reduction of the National Debt to enable the Payment of one or more Debentures in Money.

I do hereby certify to the Governor and Company of the Bank of England, that a debenture [*or debentures*] has [*or have*] been delivered at the office of the Commissioners for

the Reduction of the National Debt, conformably to an order under the hands of two of the trustees of the saving bank established at [*insert the town and county*] pursuant to the provisions of two acts passed in the 57th and 58th years of the reign of King George the Third, to encourage the establishment of banks for savings in England; and that the sum to be paid on account thereof in money amounts to pounds shillings and pence; which said sum pay to A. B., the person authorized by the said trustees to receive the same. Witness my hand this day of

C. D. Superintendant.

Received the sum above stated.

E. F. acting for the Trustees.

Burn, ut supra, p. 232.

The like Certificate to enable the Payment of one or more Debentures in Stock.

I do hereby certify to the Governor and Company of the Bank of England that a debenture [*or debentures*] hath [*or have*] been delivered at the office of the Commissioners for the Reduction of the National Debt, on account of the saving bank established at [*insert the town and county*] pursuant to the provisions of two acts passed in the 57th and 58th years of the reign of King George the Third, to encourage the establishment of banks for savings in England, and that the sum of three *per centum* consolidated [*or reduced*] bank annuities, [*or 3l. 10s. per centum, bank annuities*] to be transferred on account thereof from the account of the said Commissioners standing in the books of the Governor and Company of the Bank of England, into the names of A. of and B. of , two of the trustees of the said saving bank, computed according to the provisions of the said act, amounts to pounds.

Witness my hand, this day of .

C. D. Superintendant.

Burn, ut supra, p. 232.

Certificate to be granted by the Accountant-general of the Governor and Company of the Bank of England on the Transfer of Stock from the Account of the Commissioners for the Reduction of the National Debt to the Trustees of Saving Banks.

In pursuance of two acts passed in the 57th and 58th years of the reign of King George the Third to encourage the establishment of banks for savings in England, I do hereby certify, that the sum of 3*l. per centum* consolidated [*or reduced*] bank annuities [*or* 3*l.* 10*s. per centum bank annuities*] hath been this day transferred from the account of the Commissioners for the Reduction of the National Debt, into the names of A. and B., two of the trustees of the saving bank established at [*insert the town and county*] under the provisions of the said acts.

Witness my hand, this day of .

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