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TO

SIR WILLIAM FOSTER STAWELL,

CHIEF JUSTICE OF VICTORIA.
INTRODUCTION.

It was said by Jeremy Bentham, that "to permit any class of men not trained to the study of the law and the weighing of evidence to administer justice, is nothing better than a permission to one section of the community to sport with the liberties and the properties of others."

But whatever objection there may be to entrusting such powers to unqualified persons, it is highly important that some local authority shall be empowered to punish certain offences, and that some tribunal shall exist in each neighbourhood in which persons having small claims against, or disputes with, each other may have them cheaply and promptly disposed of.

And it is this, doubtless, which has induced the Legislature to extend, so much as it has done of late years, the jurisdiction of justices of the peace in both civil and criminal cases, and has led to the establishment of courts of petty sessions all over the country.

To each court, however, is attached a clerk who is necessarily acquainted with its practice and the mode of carrying on its proceedings, and almost all of these courts are now visited periodically by police magistrates, who, although, with one or two exceptions, not professional lawyers, are engaged every day of their lives in this one occupation, and who, therefore unless singularly wanting in aptness and intelligence, must have acquired some skill in weighing evidence, and some knowledge of the law, in so far at least as it affects their own powers and proceedings.
The great checks, however, upon the proceedings of courts of petty sessions, and the ones that make it possible to entrust them with such large powers, are the facts that all their proceedings are carefully watched by the public and the press, and that any serious irregularity, or even mistake, committed by the magistrates may be revised by the Supreme Court, and the mistake rectified; and, should the court think fit, at the magistrate's expense.

Magistrates may be said, indeed, to live under a kind of microscope, and it is therefore not very surprising that the scrutiny to which they are thus subjected, should lead to the discovery of a good many faults; or that, when everything they say and everything they do is noted down, it should be found that they, like other people, occasionally say and do very foolish things.

Sometimes, indeed, it happens that the comments upon what is called, in derision, "Justice's justice," are founded upon a misconception of the law, or the facts of the case under review, and it turns out that the "Justice Shallows" and "village Solons" are right and their reviewers wrong; but as a rule, the criticisms of the press are perfectly fair and just.

Taking it for granted then that magistrates are likely to make mistakes, it may be fairly assumed that, everything else being equal, those magistrates are likely to make the most mistakes who are least conversant with their duties: and it is therefore for their own interest, as well as for the public good, that they should know as much as possible of the ingredients of that justice which they are entrusted to dispense.

But to anyone not accustomed to the study of the law: not having access to a law library, and not even knowing the names of the books containing the necessary information, it is no easy matter—it is in fact almost an impossibility—to acquire a knowledge of even the elementary principles of justice.

To most laymen, indeed, the very name of law, or of a law book, is an abomination, and when called upon to discharge the duties of magistrates they would much rather trust to their own opinions of what is right, than attempt to make out what appears, to many of them, a mass of incomprehensible jargon.
The opinion, however, of one man differs very often from that of another; and the result therefore of this mode of administering justice would be that, except by chance, each case would be decided, not according to the law as it is, but according to what each magistrate thought the law ought to be.

But it is a maxim of the English law (Broom's Legal Maxims, page 85) that, "that system of law is best which confides as little as possible to the discretion of the judge—that judge the best who relies as little as possible upon his own opinion." And it was laid down by Lord Mansfield in the case of Regina v. Wilkes (2 Burr., 25, 39), that the term "discretion," when applied to a court of justice, means "sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague, and fanciful, but legal and regular." So in the case of Freeman v. Tranah (22 C. B., pages 413-14), Mr. Justice Maule, speaking of the necessity of justice being administered according to law, said, "There is no court in England which is entrusted to administer justice without restraint. That restraint has been imposed from the earliest times: and although instances are constantly occurring where the courts might be profitably employed in doing simple justice between the parties unrestrained by precedent, or by any technical rule, the law has wisely considered it inconvenient to confer such powers upon those whose duty it is to preside in courts of justice.

"The proceedings of all courts must take a defined course, and be administered according to a certain uniform system of laws, which in the general result is more satisfactory than if a more arbitrary jurisdiction was given to them. Such restrictions have prevailed in all civilised countries, and it is probably more advantageous that it should be so, though at the expense of occasional injustice."

The necessity for acting according to law being admitted, it follows that it becomes the duty of every magistrate, who takes upon himself its administration, to acquire by some means or other as much knowledge as he can of its provisions.

And in that aspect, and for that reason, therefore, I make no doubt that the accompanying pages will prove interesting and
acceptable to a number of persons who have themselves neither
the inclination nor the opportunity to collect the information
which they contain.

It may be said that I have made somewhat too free a use of
the labours of others, but to this I would reply, in perfect
sincerity, that I do not think there is any chance of this publica-
tion entering into competition with, or lessening the demand for,
the works from which this information has been culled.

On the contrary, I venture to think that the effect of the pub-
lication in this form of extracts from Paley, Broom, Roscoe, and
Addison, will be to make a number of persons acquainted with
these writers who never heard of them before; and that a
perusal of the extracts from their works will increase the demand
for the works themselves.

And it would be impossible for a magistrate, not previously
acquainted with those writers, to study their works with any
degree of care and attention, without getting a better knowledge
of his own powers and obligations, and being the less likely,
therefore, "to sport with the liberties and the properties of
others."

W. TEMPLETON.

Windsor, April, 1878.
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PART I.

SUMMARY JURISDICTION.
CHAPTER I.

OF THE SUMMARY JURISDICTION OF JUSTICES OF THE PEACE.

Section 1.—Of the Jurisdictions in General.

The examination and punishment of offences, and the making of orders in a summary manner by justices of the peace in petty sessions, and without the intervention of a jury, are founded entirely upon a special authority conferred and regulated by statute. Nor can any powers expressly given to a justice, to do a particular act, be enlarged by inference. Thus, although the justices of the peace had jurisdiction given them to determine disputes between masters and servants employed in manufacture or trade, this did not give them jurisdiction to settle disputes between masters and household servants.—Paley on Summary Convictions, page 17.

Section 2.—Of the Limits of the Jurisdiction within which Justices may act, or their Powers be Available.

The authority of justices of the peace appointed by commission from the Crown is limited to the bailiwick therein specified.

The mayors of the city of Melbourne and town of Geelong, and of all boroughs, and the presidents of shires, are also during their year of office, and the year succeeding, justices of the peace for Victoria; but they can only sit in the bailiwick within which the limits of their jurisdiction as mayor or president are comprised.

Maps showing the boundaries of the various bailiwicks have been supplied to each clerk of petty sessions, and magistrates should be very careful to make themselves acquainted with the
SUMMARY JURISDICTION.

limits of their respective jurisdictions; "for, justices acting judicially must appear to be acting in their jurisdiction as well as for it; and any judicial act of theirs would be altogether void unless done within those limits."—Paley, pages 19-20.

And if a statute refers a matter to "any justice," or "any two justices," they must be justices having jurisdiction in the locality.

The jurisdiction is also limited to offences committed, or causes of action arising within the bailiwick; and though an Act expressly directs the matter to be inquired into by justices residing near the place where it occurs, or by "any two justices," that cannot give jurisdiction to any other than justices of the place within which it occurred.—Ibid, page 27.

It is provided, however, by the 14th section of the "Justices of the Peace Statute 1865," that when any justice issues a summons or warrant, purporting to have been issued within his jurisdiction, such summons or warrant may be served or executed anywhere in Victoria, although beyond the limits of his jurisdiction.

Section 3.—Of a Qualified Jurisdiction as to Number and Description of Justices.

The number of justices necessary to the exercise of a summary jurisdiction depends entirely upon the particular Act of Parliament giving the authority. An authority given to two justices cannot be exercised by one.—Paley, page 33.

It is provided, however, by sections 10 and 11 of the "Justices of the Peace Statute 1865," that all matters preliminary and subsequent to the hearing may be done by one justice, and by section 31 it is provided that where, by law, two justices are required to adjudicate, one justice may act if both parties enter their consent on the minutes of the court.

Police magistrates are empowered in almost every case to do alone whatever is required to be done by two justices, and the Legislature has recently conferred a special jurisdiction upon them in certain cases.

By the "Lands Compensation Statute 1869" it is enacted that where the value of the land required to be taken for any public purpose is under £200, a police magistrate shall alone determine the amount of compensation to be paid to the owners; and by the "Land Act 1869" it is essential that one of the justices ordering or issuing a warrant of ejectment under the Act shall be a police magistrate.

Wherever the concurrence of two justices is requisite for any judicial act, they must be present and acting together during the whole hearing and determination of the case.—Paley, page 35.
Section 4.—Of the Limitation of Authority as to Time.

Where no time is fixed by the particular statute under which the proceedings are taken, the information must be laid, or the complaint made within twelve months from the time when the matters arose.—(See "Justices of the Peace Statute," section 51, and note.) [See Note A.]

In a case reported in "Plunkett's Australian Magistrate," pages 527–8, it was, however, decided by the Supreme Court of New South Wales that this limitation only applied to offences or causes of action arising and terminating the same day.

The meaning of the words in a statute limiting the time to twelve months from the time "when the matter of the complaint arose," is that proceedings shall be taken within twelve months from the time when the liability of defendant was complete.—Paley, page 56.

For instance, under the "Boroughs" and "Shires Statutes," any person neglecting to pay his rates after he has received fourteen days notice that they are due, may be summoned and ordered to pay; but in those cases the liability is not complete until after the expiration of the fourteen days; and the twelve months, therefore, do not begin to run until then.

If the information or complaints be laid or made within the time limited, it is sufficient, although the issuing of the summons may be suspended for a time by the magistrate.—Paley, page 85.
Section 1.—Information on Complaint.

It is requisite in all summary proceedings that there should be an information or complaint, which is the basis of all the subsequent proceedings, and without which the justice is not authorised in intermeddling.—Paley, page 64.

The adjudication of the justices is confined within the limits of the information or complaint. Thus, where a defendant was summoned on a charge of being drunk and guilty of riotous behaviour, and the magistrates convicted him of drunkenness only, the conviction was held to be bad.—Ibid, page 66. So, on a summons to answer for an assault upon a constable in the execution of his duty, the defendant cannot be convicted of a common assault.—Ibid, page 67.

The information must be laid before a justice having jurisdiction over the charge. One justice is competent to receive it, except when the statute under which it is laid expressly requires it to be laid before two. The information must be laid by the informant himself, or by his counsel, attorney, or other person authorised in his behalf—Justices of the Peace Statute, section 73—and must be for one matter of complaint, or one offence only.—Ibid.

A married woman may be convicted on a penal statute, if she has not acted under the coercion, actual or implied, of her husband.—Paley, page 71. And an infant may be convicted in like manner provided he be of sufficient understanding.—Ibid.

The general rule of law is that no one can be made criminally responsible for the acts of third persons, but in some cases a man may be brought within a penal statute by the acts of his servants or agents. The employment of an agent in the defendant's usual course of business is sufficient evidence in such cases, whence the magistrate's may, if they think fit, presume that such an agent was authorised to do the prohibited act with which it is sought to charge the principal.—Ibid, page 72. In a case, indeed, decided by the Supreme Court of New South Wales (reported in Plunkett, page 532), the principle was carried much further, for it was there held "that the owner or occupier of the slaughter-house was answerable for the acts of his servants,
unless he could prove that he had taken all necessary precautions for the prevention of the offence in question; such as that he had employed thoroughly competent persons for the conduct of his business, and had given them strict orders to do the act required by law to be done."

But in another case (see Plunkett, page 564), where the magistrates had convicted a person of permitting the sale of spirits without a license, and it appeared that the spirits had been sold by the defendant’s wife, and there was no evidence that he was a consenting or approving party, the same court in ordering a prohibition against the magistrate’s conviction, said “It was a clear and unquestionable principle of law, that no man could be made responsible, as a crime, for the act of another, unless he was directly implicated with reference to that act.

“In the present case there was not the slightest evidence of concurrence, either direct or indirect, on the part of the applicant (defendant below). The fine, wherever the magistrates got it from [it had been paid into the Treasury] must be returned.

“This, however, was a case in which it was imperative on that court to give costs against the magistrates. The country was undoubtedly under great obligations to the gentlemen who then administered justice in the interior without salary, and there was no moral imputation sought to be cast upon the particular magistrates who had dealt with this case. But where there was a very great mistake in point of law, and this mistake had been attended with great hardships, full justice must be rendered to the party complaining. Such was the case here.”

The distinction between the two cases above quoted appears to be this:—That where the law imposes a duty upon anyone, it is for him to see that it is properly discharged; and if he entrusts its performance to others, who neglect it, he may be punished for their default. But where the law prohibits an act from being done it must, to bring him within its penalties, be shown that the person charged has himself done, or authorised, or concurred in, the forbidden act.

By the 50th section of the “Justices Statute,” it is enacted that persons aiding, abetting, counselling, or procuring the commission of any offence punishable on summary conviction, may be convicted either with the principal, or before, or after him.

Where the act is such that several may concur in it, all the offenders may be included in the same information. Unless required expressly by the statute under which it is laid, the information need not be in writing, nor upon oath, unless it be intended to issue a warrant instead of a summons in the first instance, in which case the matter of the information must always be substantiated by the oath or affirmation of the informant, or of some witness on his behalf, before the warrant is issued.—Paley, pages 73-4.
Section 2.—Of Procuring the Attendance of the Parties and their Witnesses.

If the information or complaint appears to justify the interference of the magistrates, the next step is to give the party accused notice of the accusation, and an opportunity of answering it by issuing a summons, containing the substance of the charge or matter of complaint, or by granting a warrant for his apprehension.—Paley, page 81.

Upon a sufficient information or complaint properly laid or made, and where there is no reasonable doubt of their jurisdiction, magistrates are bound to issue a summons or a warrant, and proceed to a hearing; and if they refuse to do so they will be compelled by mandamus.—Ibid, page 84.

If the information be for a penalty or the non-payment of money, the magistrate should in general issue a summons, in the first instance, unless it is probable that the party will abscond, or the object of the prosecution will be otherwise defeated.—Ibid.

The summons should be under the hand and seal of the justice himself by whom it is issued, and should be directed to the party against whom the complaint is made.—Ibid.

The intention of the summons being to afford the person accused or complained against an opportunity of making his defence, it contains the substance of the charge or matter of complaint, and fixes a day for his appearance, allowing a sufficient time for the attendance of himself and his witnesses.—Ibid.

A summons to appear immediately upon its receipt has been thought insufficient; and in another an objection made to the summons that it was to appear on the same day, was only removed by the fact of the defendant having actually appeared, and so waived any irregularity in the notice.—Ibid, page 85.

If a summons issue for an offence under one statute and the conviction proceed under another, this is an excess of jurisdiction, for which the conviction may be quashed.

The summons may be served by a constable or other person to whom it has been delivered, and the service should be made
a reasonable time before the period therein appointed for appearance.

The sufficiency of the service is generally a question for the justices to decide, and the court will not interfere with their decision, unless it clearly appears that there was in fact no service, or that the justice has mistaken the law as to the kind of service required.

The foregoing rules, it should be observed, apply only to those cases where the defendant does not appear, for if he actually appears, and pleads, there is no longer any question upon the sufficiency or regularity of the summons or its service.

No objection can be taken to the summons for any defect in substance or form, or for any variance between it and the evidence adduced at the hearing; but if such variance has deceived or misled the defendant, the hearing may be adjourned.

—Ibid, pages 87 to 89.

But if a person is summoned or brought before a magistrate to answer a particular charge, he cannot be lawfully convicted on a totally different charge, nor, if the evidence fails to substantiate the particular charge, can the proceedings be amended or altered so as to change the nature of the offence originally charged.—Martin v. Pridgeon, 28 L.J.M.C., page 179.

So, in a case which came before the Supreme Court of New South Wales (see Plunkett, page 531), where a person had been convicted on an information for having (as alleged) slaughtered a calf on his premises, not being a licensed slaughter-house, it was objected that the evidence did not support the information, and that according to it the person charged was guilty (if anything) of causing to be slaughtered, but not of slaughtering, as it was stated that the servant man slaughtered the beast; and as the section of the Act ran thus—"It shall not be lawful for any person to slaughter, or cause to be slaughtered, &c."—the charge could not be entertained.

The Court concurred, and the conviction was quashed.

The nature of the offence or matter concerning which the justice is to enquire and determine must be correctly stated, in order to show that the justice has jurisdiction over it. It should be described in the words of the statute creating the offence, and care must be taken not to mis-describe it.—Ex parte Smith, 27 L.J.M.C., page 186.

Thus where an Act made the wilful mis-appropriation of parish funds a penal offence, to be adjudicated upon by justices, and the information merely charged a mis-appropriation of the money without saying that it was wilful, it was held that there was no offence charged of which the justices had anything to take cognizance.—Carpenter v. Mann, 12 A. & E., page 630.

And magistrates cannot give themselves jurisdiction merely by their own affirmation of it; and, therefore, where the charge laid
before the magistrate does not amount in law to the offence over
which the statute gives them jurisdiction, their finding the party
guilty in the very words of the statute would not avail to give
them jurisdiction. Accordingly, if the charge being really insuffi­
cient, the magistrates mis-state it in drawing up the proceedings,
so that they appear to be regular, it would be clearly competent
for the defendant to show by affidavits what the real charge was,
and that appearing to be insufficient the court would quash the

And if a magistrate convicts a person of an offence without
having any jurisdiction in the matter, and then proceeds to sign
or issue a warrant of commitment or distress, under which an
imprisonment is effected or goods seized, the conviction may be
removed to the Queen’s Bench (or Supreme Court) and quashed,
and an action may then be brought against the magistrate.

And similar proceedings may be taken against him when he
has exceeded his jurisdiction, and done more than the law
authorised him to do.—*Mitchell v. Forbes,* 12 A. & E„ page 475.

The necessity for carefully observing the foregoing rules will
be the more obvious when it is borne in mind, that a person
bringing an action against a magistrate for anything done
within his jurisdiction, must expressly allege and prove that the act was
done maliciously and without reasonable and probable cause; but
for any act done by a magistrate in a matter of which by law he
has not jurisdiction, or in which he has exceeded his jurisdiction,
he may be sued as if it were the act of a private individual.—
*Justices of the Peace Statute,* sections 162-3.

Section 3.—Of the Apprehension, Appearance, or Default.

If the defendant, being duly summonsed, neglect or refuse to
appear, the magistrate may issue a warrant for his apprehension,
if it be proved that the summons had been duly served a reason­
able time before the time appointed for appearance, and if the
matter of the information or complaint be substantiated upon
oath to the satisfaction of the justice.—*Justices of the Peace
Statute,* section 67.

The appearance may be either by the defendant personally or
by his counsel or attorney on his behalf.—*Justices of the Peace
Statute,* section 103.

In the case of the *Queen v. Wilson and Others,* reported in the
*Argus* of the 14th September, 1865, the Supreme Court quashed
the conviction (costs not asked for) because the magistrates
would not allow the defendant to be represented in his absence
by an attorney, or permit the attorney to put any questions to
the witnesses except through them.

In cases arising under the 14th section of the *Justices Act,*
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the complainant may appear either personally, or by any person in his exclusive employment, duly authorised by writing in that behalf.—Section 42.

Under the recent "Shires" and "Boroughs Statutes," officers of these bodies may appear on their behalf.—See Acts No. 358 and 359, sections 184 and 164 respectively.

If the party, being duly summoned, neglect or refuse to attend, the magistrates may, instead of issuing their warrant to compel his attendance, proceed to examine and give judgment ex parte; but the non-attendance of the party does not authorise a judgment without a due examination of the facts upon oath, with the same formalities as if he were present and made defence—Paley, page 96.

Or instead of issuing a summons in the first instance, the justice before whom an information is laid for an offence punishable on summary conviction, may issue his warrant to apprehend the person charged; but in such a case the information must be in writing, and be substantiated by the oath of the person making the charge.—Justices Statute, sections 59-60.

Under section 56 of the "Police Offences Statute 1865," and sections 401, 402 and 405 of the "Criminal Law 1864," any person whatsoever may apprehend a person found offending against certain provisions of these acts; but to make the arrest legal the person must be found in the act; and it is not enough to show that the offence has been committed, however recently, to justify the arrest.—See Simmons v. Millingen, 2 C. B., 524.

And where the party charged is not in legal custody, the justices are not seized of the case, and have no jurisdiction. In re Cornillac, Wy. & W., Vol. I., page 193.

Section 5.—Proceedings after Appearance.

If the defendant appears, any irregularity in the summons, or even the want of a summons altogether, becomes immaterial.—Paley, page 97.

The objection that a condition precedent to the issuing of the summons has not been performed should, at all events in civil cases, be taken before the merits of the case were entered upon, otherwise the objection will be waived.—Ibid.

When the justices are acting judicially, their proceedings are open to the public, and they are not warranted in removing a person from the place where they are exercising such authority, unless he interrupts their proceeding.—Ibid, page 98.

By the 39th section of the "Justices Statute," magistrates are empowered to punish by fine or imprisonment any person wilfully misbehaving himself in any court of petty sessions, or wilfully interrupting the proceedings, or who, in the opinion of
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the adjudicating magistrate, is guilty of wilful prevarication in giving his evidence.

Upon the defendant's appearance the substance of the information or complaint is stated to him, and if he denies the charge or matter of complaint, and asks for time for his defence and to procure further evidence, it is reasonable, and the law seems to require that he should be allowed a proper interval for that purpose.—*Paley*, page 98.

*In re Balcombe and other Justices ex parte Hann* (reported in Wy. & W., Vol I., page 49) where the justices refused to adjourn the hearing for the attendance of the defendant, who was absent from home when the summons was served, and was not aware that it had issued, the Supreme Court "felt constrained" to refuse the prohibition asked for, but marked its sense of the "harsh and arbitrary" conduct of the magistrates by refusing to allow them their costs.

Section 6.—Witnesses.

If it is made to appear to any justice, upon the oath of any credible person, that anyone within his jurisdiction is likely to give material evidence, and will not voluntary attend for the purpose of being examined as a witness at the time and place appointed for the hearing, such justice is required to issue his summons to such person under his hand and seal, requiring him to appear and testify what he shall know concerning the matter of the said information or complaint.

If the person so summoned neglect to appear, and no just excuse is offered for his neglect, a warrant may issue against him, after proof upon oath that the summons was *duly* served upon him, and that a reasonable sum was paid or tendered to him for his costs and expenses in that behalf.

Or the justice may issue his warrant in the first instance, if he is satisfied by evidence on oath that the witness will not attend unless compelled. And any person so summoned or brought before the justices refusing to be sworn, or being sworn refusing to answer any question put to him without offering any just excuse for such refusal, may be committed to gaol for any time not exceeding seven days, unless he shall in the meantime consent to be examined. *Justices Statute*, sections 74–5–6.

Incompetency from Want of Religious Principle.

"*General rule.*] It is an established rule that all witnesses who are examined upon any trial, civil or criminal, must give their evidence under the sanction of an oath. This rule is laid
down as an acknowledged proposition by some of our earliest writers; and it appears to be of universal application, except in those cases in which a solemn affirmation or declaration has been allowed by statute (see 'Statute of Evidence 1864,' section 34) in lieu of an oath.† No exemption from this obligation can be claimed in consequence of the rank or station of a witness.

An examination on oath implies that a witness should go through a ceremony of a particular import, and also that he should acknowledge the accuracy of that ceremony to speak the truth. It is therefore necessary, in order that a witness's testimony should be received, that he should believe in the existence of a God, by whom truth is enjoined and falsehood punished. It is not sufficient that a witness believes himself bound to speak the truth from a regard to character, or to the common interests of society, or from a fear of the punishment which the law inflicts upon persons guilty of perjury. Atheists, therefore, and such infidels as do not possess any religion that can bind their consciences to speak the truth, are excluded from being witnesses.

It was said by Willes, C. J., that he was clearly of opinion that those infidels (if any such there be) who either do not believe in a God, or if they do, do not think that He will either reward or punish them in this world or the next, cannot be witnesses in any case, nor under any circumstances, for this plain reason, that an oath cannot possibly be any tie or obligation upon them.

It is not yet settled by the Scotch law, whether a witness professing his disbelief in a God, and in a future state of rewards and punishments, is admissible. "When the point shall arrive," says Mr. Alison, "it is well worthy of consideration, whether there is any rational ground for such an exception;—whether the risk of allowing unwilling witnesses to disqualify themselves by the simple expedient of alleging that they are atheists, is not greater than that of admitting the testimony of such as make this profession."

"Form of the oath."

The particular form or ceremony of administering an oath is quite distinct from the substance of the oath itself. The form of oath under which God is invoked as a witness, or as an avenger of perjury, is to be accommodated to the religious persuasion which the swearer entertains of God; it being vain to compel a man to swear by a God in whom he does not believe, and whom he therefore does not reverence."

† It will be seen, however, by reference to the statute, that although where the taking of an oath is contrary to the religious belief of the person, an affirmation or declaration may be substituted; it does not dispense with the necessity of his having a religious belief.
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"Questions as to religious belief." The only means of ascertaining the competency of a witness, with reference to religious principle, is by examining the party himself. * * * It seems that it would be sufficient to inquire, whether he believed in a God who would punish falsehood either in this world, or in the next."—Page 124. [See Note B.]

INCOMPETENCY FROM WANT OF UNDERSTANDING.

"Infants." Of late years no particular age is required in practice to render the evidence of a child admissible. A more reasonable rule has been adopted, and the competency of children is now regulated, not by their age, but by the degree of understanding which they appear to possess. * * * It is said by Blackstone, that 'where the evidence of children is admitted, it is much to be wished, in order to render it credible, that there should be some concurrent testimony of time, place, and circumstances, in order to make out the fact; and that the conviction should not be grounded solely on the unsupported testimony of an infant under years of discretion.' In many cases undoubtedly the statements of children are to be received with great caution, but it is clear that a person may be legally convicted upon such evidence alone and unsupported; and whether the account of the child requires to be corroborated in any part, or to what extent, is a question exclusively for the jury, to be determined by them on a review of all the circumstances of the case, and especially of the manner in which the evidence of the child has been given."—Pages 117–18–19.

INCOMPETENCY—HUSBAND AND WIFE.

"General rule." Husband and wife are in criminal cases incompetent witnesses, either for or against each other, on the ground partly of policy, and partly of identity of interest. The circumstance of one of the parties being called for or against the other, makes no distinction in the law. When the testimony of either is admissible against the other, it is likewise admissible in favour of the other.‡ * * * The declarations of husband and wife are

‡ "It would hardly be necessary to add that the wife of a prosecutor in any such proceeding is not excluded from giving evidence (Taylor, Ev., p. 1060), were it not for the following extraordinary decision of the Parramatta Bench a few months ago:—The wife of a man who had been most brutally assaulted was called to give evidence corroborating that of her husband, but the magistrates were persuaded by the attorney for the defence, that the wife was incompetent to give evidence for the husband, and they dismissed the case, alleging that they did so because the husband's evidence was unsupported."—Note to Plunkett's Magistrate, page 167.
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subject to the same rule of exclusion as their *viva voce* testimony. But although neither the evidence nor the declaration of a wife are admissible against the husband on a criminal charge, yet observations made by her to him upon the subject of the offence, to which he gives no answer, or an evasive reply, are receivable in evidence as an implied admission on his part. "So what a prisoner is overheard to say to his wife, or to himself, is evidence against him."—Page 126.

"*Only extends to lawful husband and wife.*] It is only where there has been a valid marriage, that the parties are excluded from giving evidence for or against each other. Therefore, on an indictment for bigamy, *after proof of the first marriage*, the second wife is a competent witness against the husband, for the marriage is void. So where a woman had married the plaintiff, and lived with him as his wife during the time of the transactions to which she was called to speak, but had left him on the return of a former husband, who had been absent from England upwards of thirty years, and was supposed to be dead; Patteson, J., held that there was no objection to her giving evidence for the defendant. A woman who cohabits with a man as his wife, but is not so in fact, is a competent witness for or against him."—Page 127.

"*Cases where husband or wife has been held incompetent.*] It is a settled rule, that in cases of bigamy, the first and lawful wife is not a competent witness; although the second wife is."—Page 129.

"*Cases of personal violence.*] It is quite clear that a wife is a competent witness against her husband, in respect of any charge which affects her liberty or person."—Page 130.

**Admissibility of Accomplices.**

"*Accomplices in general.*] The evidence of persons who have been accomplices in the commission of a crime with which the prisoner stands charged, is, in all cases, admissible against him. This rule has been stated to be founded on necessity, since, if accomplices were not admitted, it would frequently be impossible to find evidence to convict the greatest offenders."—Page 132.

"*Accomplice—when competent for prisoner.*] It is quite clear that an accomplice is a competent witness for the prisoner, in conjunction with whom he himself committed the crime."—Page 133.
"Accomplice—effect of his evidence—confirmation.] A conviction on the testimony of an accomplice, uncorroborated, is legal. * * * This rule, however, is in practice seldom acted upon. Judges' observes Lord Ellenborough, 'in their discretion, will advise a jury not to believe an accomplice, unless he is confirmed, or only in so far as he is confirmed; but if he is believed his testimony is unquestionably sufficient to establish the facts he deposes to.' So where, on an indictment for highway robbery, an accomplice only was called, the court, though it was admitted that such evidence was legal, thought it too dangerous to permit a conviction to take place, and the prisoners were acquitted. The practice, therefore, is for the court to direct the jury in such cases to acquit the prisoner, unless in some respects the evidence is confirmed. * * * Although in practice, in order to give it effect, the evidence of an accomplice requires confirmation, it is obvious that it cannot be required to be confirmed in every particular; for if that were requisite, his testimony would be better omitted altogether. Even in Scotland, where the evidence of an accomplice unsupported is insufficient to convict, a confirmation of his testimony on certain parts of the case is all that is required. 'The true way,' says an eminent writer on the criminal law of Scotland, 'to test the credibility of a socius is, to examine him minutely as to small matters, which have already been fully explained by previous unsuspected witnesses, and on which there is no likelihood that he could think of framing a story, nor any probability that such a story, if framed, would be consistent with the facts previously deposed to by unimpeachable witnesses. If what he says coincides with what has previously been established, in the seemingly trifling, but really important matters, the presumption is strong that he has also spoken truly in those more important points which directly concern the prisoner; if it is contradicted by these witnesses, the inference is almost unavoidable, that he has made up a story, and is unworthy of credit in any particular.'"—Pages 133-4.

"Accomplice—confirmation by whom.] The practice of requiring the evidence of an accomplice to be confirmed, appears to apply equally when two or more accomplices are produced against a prisoner. In a case where two accomplices spoke distinctly to the prisoner, Littledale, J., told the jury, that if their statements were the only evidence, he could not advise them to convict the prisoner, adding, that it was not usual to convict on the evidence of one accomplice without confirmation, and that in his opinion it made no difference whether there were more accomplices than one."—Page 136.

See further, as to the incompetency of witnesses, "Statute of Evidence 1864," section 45.
Section 7.—Of the Mode of Examination.

Although no mode of examination is pointed out by the statutes giving jurisdiction over the offence; yet, as justice requires that the accused should be confronted with the witnesses against him, and have an opportunity of cross-examining them, it is required by law (the "Justices Statute" here) that the evidence should be taken in the presence of the defendant.—Paley, page 113.

And as showing the necessity of paying very strict attention to this principle of justice, it may be well to quote the words of Lord Langdale (reported in 7 Beavan, page 455) on setting aside an award on the ground of an interview having taken place between an arbitrator and one of the parties in the absence of the other:—

"In every case in which matters are litigated, you must attend to the representations of both sides, and you must not in the administration of justice, in whatever form, whether in regularly constituted courts or in arbitrations, whether before lawyers or merchants, permit one side to use means of influencing the conduct and decisions of the judge, which means are not known to the other side."

It is laid down by Paley, page 417, that the evidence should be taken down carefully in writing; but it was decided in the case of Regina v. Call, which came recently before the Supreme Court here (the report of which will be found in the Notes of Cases, 9th December, 1869), that justices are not compelled to take the evidence in writing.

The magistrate who convicts must have heard the evidence given, and not allow it to be taken in his absence by his clerk or any other person.—Paley, page 417.

Examination of Witnesses.

"Ordering witnesses out of court.] In general the court will, on the application of either of the parties, direct that all the witnesses but the one under examination shall leave the court. And the right of either party to require the unexamined witnesses to retire, may be exercised at any period of the cause. * * * The rule has been held not to extend to the attorney in the cause, who may remain and still be examined as a witness, his assistance being in most cases necessary to the proper conduct of the cause. But it extends to the prosecutor, if it be proposed to examine him as a witness. * * * If a witness remains in court after an order made for the witnesses on both sides to withdraw * * * the judge has no right to reject the witness on this ground,
however much his wilful disobedience of the order may lessen the value of his evidence."—Roscoe's Criminal Evidence, Fifth Edition, pages 139-40.

"Calling all parties present at any transaction.] In R. v. Holden, it appeared that three surgeons had examined the body of the deceased, and that there was a difference of opinion among them. Two of them were called for the prosecution, but the third was not, and as his name was not on the indictment, the counsel for the prosecution declined calling him. Patteson, J., said, 'He is a material witness who is not called on the part of the prosecution, and as he is in court I shall call him for the furtherance of justice.' He was accordingly examined by the learned judge."—Page 141.

"Recalling and questioning witnesses by the court.] It has already appeared (supra), that the judge may in his discretion, for the furtherance of justice, call witnesses whom the counsel for the prosecution has refused to put into the box. So he may recall witnesses that have already been examined. But where, after the examination of witnesses to facts on behalf of a prisoner, the judge (there being no counsel for the prosecution) called back and examined a witness for the prosecution, it was held, that the prisoner's counsel had a right to cross-examine again if he thought it material. So during the progress of the trial the judge may question the witnesses, and although the prosecutor's counsel has closed his case, and the counsel for the defendant has taken an objection to the evidence, the judge may make any further inquiries of the witnesses he thinks fit, in order to answer the objection."—Page 141.

"Voir dire.] The most convenient time to object to the competency of a witness is before he is sworn, when the witness is questioned by the court upon the points suggested by the objecting party, and extrinsic evidence upon the point may also be received. But a witness may be objected to at any time after he is sworn, if anything to suggest his incompetency be discovered; and the court will then inquire into the point in the same way."—Page 142.

"Examination in chief.] After the witness has been duly sworn by the officer of the court, he is examined in chief by the party calling him. Being supposed to be in the interest of that party, it is a rule, that upon such examination leading questions shall not be put to him. Questions to which the answer 'yes,' or 'no,' would not be conclusive upon the matter in issue, are not in general objectionable. It is necessary, to a certain extent, to lead the mind of the witness to the subject of the inquiry. Thus where the question is, whether A. and B. were partners, a witness
may be asked whether A. has interfered in the business of B. So where a witness being called to prove a partnership could not recollect the names of the component members of the firm, so as to repeat them without suggestion; Lord Ellenborough, alluding to a case tried before Lord Mansfield, in which the witness had been allowed to read a written list of names, ruled, that there was no objection to asking the witness whether certain specified persons were members of the firm. So for the purpose of identification, a particular prisoner may be pointed out to the witness, who may be asked whether he is the man. And in *R. v. Watson*, the court held that the counsel for the prosecution might ask, in the most direct terms, whether any of the prisoners was the person meant and described by the witness. So where a question arose as to the contents of a written instrument which had been lost, and in order to contradict a witness who had been examined as to the contents, another witness was called; Lord Ellenborough ruled, that after exhausting the witness's memory as to the contents of the letter, he might be asked if it contained a particular passage recited to him, which had been sworn to on the other side, otherwise it would be impossible ever to come to a direct contradiction.

"Upon the same principle, viz., the difficulty or impossibility of attaining the object for which the witness is called, unless leading questions are permitted to be put to him, they have been allowed where they are necessary in order to establish a contradiction. Thus where counsel, on cross-examination, asked a witness as to some expressions he had used, for the purpose of laying a foundation for contradicting him, and the witness denying having used them, the counsel called a person to prove that he had, and read to him the particular words from his brief, Abbot, C. J., held that he was entitled to do so.

"Where a witness, examined in chief, by his conduct in the box shows himself decidedly averse to the party calling him, it is in the discretion of the judge to allow him to be examined, as if he were on cross-examination. But if he stands in a situation which, of necessity, makes him adverse to the party calling him, it was held by Best, C. J., that the counsel may, as a matter of right, cross-examine him. Somewhat similar to this is the question whether, where a witness, called for one party, is afterwards recalled by the other, the latter party may give his examination the form of a cross-examination; and it has been held, by Lord Kenyon, that he may; for, having been originally examined as the witness of one party, the privilege of the other to cross-examine remains through every stage of the case."—Pages 142–3.

"Cross-examination.] Leading questions are admitted on cross-examination, in which much larger powers are given to counsel than in the original examination. The form of a cross-examination,
however, depends in some degree like that of an examination in chief, upon the bias and disposition evinced by the witness under interrogation. If he should display a zeal against the party cross-examining him, great latitude with regard to leading questions may with propriety be admitted. But if, on the other hand, he betrays a desire to serve the party who cross-examines him, although the court will not in general interfere to prevent the counsel from putting leading questions, yet it has been rightly observed, that evidence obtained in this manner is very unsatisfactory and open to much remark. The rule with regard to putting leading questions on cross-examination, was thus laid down by Mr. Justice Buller: 'You may lead a witness upon cross-examination, to bring him directly to the point, as to the answer; but you cannot go the length of putting into the witness's mouth the very words he is to echo back again.'

"In a later case, where an objection was made to leading a willing witness, Alderson, B., said, 'I apprehend you may put a leading question to an unwilling witness, on the examination in chief, at the discretion of the judge; but you may always put a leading question in cross-examination, whether a witness be unwilling or not.'"—Page 143.

"Cross-examination of witnesses on irrelevant subjects.] Upon his cross-examination a witness may be asked any question which has the effect of testing his credibility, however wide it may be of the main subject of inquiry. But if it neither have the effect of testing the witness's credibility, nor be relevant, it cannot be put; though questions of this sort are very frequently attempted, for the purpose of prejudicing the jury. Thus in R. v. Collins, the defendant was indicted for publishing a seditious libel at a meeting of a society called 'the Convention,' held on the 5th of July, 1839; the counsel for the defendant asked a witness on cross-examination whether he was not present at a meeting of 'the Convention,' on the 6th of August, 1838. Littledale, J., refused to allow the question to be put, as it only went to show the truth of certain portions of the libel, which was not in issue. As to how far the witness may be contradicted, see supra, page 87."—Page 145.

"Cross-examination of witnesses producing documents only.] Where a witness is called merely to produce a document which can be proved by another, and he is not sworn, he is not subject to cross-examination. * * * But where the party producing a document is sworn, the other side is entitled to cross-examine him, although he is not examined in chief."—Pages 145-6.

"Re-examination.] A re-examination, which is allowed only for the purpose of explaining any facts which may come out on
cross-examination, must of course be confined to the subject-matter of the cross-examination. The re-examination of a witness is not to extend to any new matter, unconnected with the cross-examination, and which might have been inquired into on the examination in chief. If new matter is wanted, the usual course is to ask the judge to make the inquiry; in such cases he will exercise his discretion, and determine how the inquiry, if necessary, may be most conveniently made, whether by himself or by the counsel."—Page 146.

"Memorandum to refresh witness's memory."
It has already been stated, that a witness may refer to an informal examination taken down by himself, in order to refresh his memory. So he may refer to any entry or memorandum he has made shortly after the occurrence of the fact to which it relates."—Page 147.

"Examinations as to belief."
A witness can depose to such facts only as are within his own knowledge; but even in giving evidence in chief, there is no rule which requires a witness to depose to facts with an expression of certainty that excludes all doubt in his mind. It is the constant practice to receive in evidence a witness's belief of the identity of a person, or of the fact of a certain writing being the handwriting of a particular individual; though the witness will not aver positively to these facts, it has been decided, that for false evidence so given, a witness may be indicted for perjury."—Pages 153-4.

Privileged Communications.

"General rule."
Although a witness is sworn to speak the truth, the whole truth, and nothing but the truth, yet there are certain matters which he is not only not bound to disclose, but which it is his duty, even under the obligation of an oath, not to disclose. Where a communication takes place between a counsel or an attorney and his client, or between government and some of its agents, such communication is privileged, on the ground that, should it be suffered to be disclosed, the due administration of justice and government could not proceed; such administration requiring the observance of inviolable secrecy. But the rule does not extend beyond the two classes of persons above mentioned, whatever obligation of concealment the party may have incurred."—Page 156.

"What persons are privileged—husband and wife."
'No husband shall be compellable to disclose any communication made to him by his wife during marriage, and no wife shall be compellable to
disclose any communication made to her by her husband during marriage.'"—Page 156.

"What persons are privileged—professional advisers.] Except in the case of matters of state, the privilege of not disclosing confidential communications is confined to counsel, solicitors, attorneys, and their agents and clerks.

A person who acts as interpreter between a client and his attorney, will not be permitted to divulge what passed; for what passed through the medium of an interpreter is equally in confidence as if said directly to the attorney; but it is otherwise with regard to conversation between the interpreter and the client in the absence of the attorney.

The privilege is that of the client, and not of the attorney, and the courts will prevent the latter, although willing, from making the disclosure. But if the attorney of one of the parties is called by his client and examined as to a matter of confidential communication, he may be cross-examined as to that matter, though not as to others. If an attorney has communicated the contents of a document, such secondary evidence would be admissible, if the original were not produced at the trial.

The rule applies not only to the professional advisers of the parties in the case, but also to the professional advisers of strangers to the inquiry. Thus an attorney is not at liberty to disclose what is communicated to him confidentially by his client, although the latter be not in any shape before the court."—Pages 156-7.

"What matters are privileged.] Although some doubt has been entertained, as to the extent to which matters communicated to a barrister or an attorney in his professional character are privileged, where they do not relate to a suit or controversy either pending or contemplated, and although the rule was attempted to be restricted, by Lord Tenterden, to the latter cases only, yet it seems to be at length settled, that all such communications are privileged, whether made with reference to a pending or contemplated suit or not.

A communication made to a solicitor, if confidential, is privileged in whatever form made, and equally when conveyed by means of sight instead of words. Thus an attorney cannot give evidence as to the destruction of an instrument, which he has been admitted in confidence to see destroyed."—Page 158.

"What matters are privileged—production of deeds, &c.] A communication in writing is privileged, as well as a communication by parol; and deeds and other writings deposited with an attorney in his professional capacity, will not be allowed to be produced by him."—Page 158.
"What matters are not privileged—matters of fact.] Where the subject inquired into is a collateral matter of fact, which the party setting up the privilege obtained a knowledge of in his individual capacity, and not in his character of professional adviser, he will be compelled to disclose it. Thus an attorney, who has witnessed a deed produced in a cause, may be examined as to the true time of execution; or if a question arise as to a razure in a deed or bond, he may be asked whether he ever saw the instrument in any other state, that being a fact within his own knowledge; but he ought not to be permitted to discover any confession which his client may have made to him on that head. It has been said that the above case applies only where the attorney has his knowledge independently of any communication with his client. * * * In Dwyer v. Collins, it was held, that the right of an attorney not to disclose matters with which he has become acquainted in the course of his employment, as such, does not extend to matters of fact which he knows by any other means than confidential communication with his client, though, if he had not been employed as attorney, he probably would not have known them; and that upon this ground an attorney of a party to a suit is bound to answer on a trial, whether a particular document belonging to his client is in his possession, and is then in court. * * * Where an act is done in pursuance of a bargain between two parties, and in presence of the attorney for each of them, the communication by one party to his attorney, relating to that act, is not privileged so as to prevent the attorney from giving evidence of it. Weeks v. Argent, Parke, B., in that case, says, 'The communication is made in the presence of a third party; how, then, can it be privileged?' 'If a party employs an attorney who is also employed on the other side, the privilege is confined to such communications as are clearly made to him in the character of his own attorney.'"—Pages 159-60.

"What matters are not privileged—attorney party to transaction.] Another exception to the rule of privileged communications is, where the attorney is so far himself a party to the transaction, that the communications may be supposed to be made to him in that character, and not in the character of professional adviser."—Page 161.

"What other matters are privileged—disclosures by informers, &c.] Another class of privileged communications are those disclosures which are made by informers, or persons employed for the purpose, to the government, the magistracy or the police, with the object of detecting and punishing offenders. The general rule on this subject is thus laid down by Eyre, C. J.: 'It is perfectly right that all opportunities should be given to discuss the truth
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of the evidence given against a prisoner; but there is a rule, which has universally obtained, on account of its importance to the public for the detection of crimes, that those persons who are the channel by means of which that detection is made, should not be unnecessarily disclosed; if it can be made to appear that it is necessary to the investigation of the truth of the case, that the name of the person should be disclosed, I should be very unwilling to stop it; but it does not appear to me, that it is within the ordinary course to do it, or that there is any necessity for it in the present case.' It is not of course every communication made by an informer, to any person to whom he thinks fit to make it, that is privileged from being inquired into, but those only which are made to persons standing in a certain situation, and for the purposes of legal investigation or state inquiry. Communications made to government respecting treasonable matters are privileged, and a communication to a member of government, is to be considered as a communication to government itself; and that person cannot be asked whether he has conveyed the information to the government. * * * The protection extends to all communications made to officers of justice, or to persons who form links in the chain by which the information is conveyed to officers of justice. A witness who had given information, admitted on a trial for high treason, that he had communicated what he knew to a friend, who had advised him to make a disclosure to another person. He was asked whether that friend was a magistrate, and on his answering in the negative, he was asked who was the friend? It was objected, that the person by whose advice the information was given to one standing in the situation of magistrate, was in fact the informer, and that his name could not be disclosed. The judges differed. Eyre, C. J., Hotham, B., and Grose, J., thought the question objectionable; Macdonald, C. B., and Buller, J., were of opinion it should be admitted. Eyre, C. J., said, 'Those questions which tend to the discovery of the channels by which the disclosure was made to the officers of justice, are not permitted to be asked. Such matters cannot be disclosed, upon the general principle of the convenience of public justice. It is no more competent to ask who the person was that advised the witness to make a disclosure, than it is to ask to whom he made the disclosure in consequence of that advice; or than it is to ask any other question respecting the channel of information, or what was done under it.' Hotham, B., said, that the disclosure was made under a persuasion, that through the friend it would be conveyed to a magistrate, and, that there was no distinction between a disclosure to the magistrate himself, and to a friend to communicate it to him. Macdonald, C. B., said, that if he were satisfied that the friend was a link in the chain of communication, he should agree that the rule applied, but that not being connected either with the magistracy or the executive
government, the case did not appear to him to fall within the rule; and the opinion of Buller, J., was founded on the same reason. The above cases were cited and considered in The Attorney-General v. Briant, where the court decided, that upon the trial of an information for the breach of the revenue laws, a witness for the crown cannot be asked in cross-examination, 'Did you give the information.'”—Pages 163–4.

Section 8.—Of the Proofs Necessary to Support the Charge.

The evidence must support the charge, or matter of complaint, by proof of every material fact, assigning a specific date and place to the offence.

The degree of evidence and the credit due to the witnesses is exclusively for the judgment of the magistrates.—Paley, page 118.

Where the facts constituting an offence are all of a positive character, there can be no doubt that they must be established in proof by the prosecutor, before any judgment of conviction can be pronounced, unless the statute which creates the offence expressly exempts the prosecutor from doing so.—Ibid, page 120.

Onus Probandi.

"General rule—affirmative to be proved.] It is a general rule of evidence established for the purpose of shortening and facilitating investigations, that the point in issue is to be proved by the party who asserts the affirmative. It is, however, necessary to look to the substance, and not to the form of the issue, for in many cases a party, by making a slight change in the form of his pleading, might make the issue affirmative at his pleasure. There are some exceptions to the above rule.”—Roscoe’s Criminal Evidence, Fifth Edition, page 71.

"Where the presumption of law is in favour of the affirmative.] In general, therefore, as the law presumes that every person acts legally, and performs all the matters which he is by law required to perform, the party who charges another with the omission to do an act enjoined by law, must prove such omission, although it involves the proof of a negative. Thus in an information against Lord Halifax for refusing to deliver up the rolls of the auditor of the Exchequer, it was held that the plaintiff was bound to prove the negative, viz., that Lord Halifax did not deliver them, for a person shall be presumed duly to have executed his office till the contrary appear. So in an action for the recovery of
penalties under the 'Hawkers and Pedlars' Act' (29 Geo. 3, c. 26, s. 4; repealed and re-enacted by 50 Geo. 3, c. 41, s. 7), against a person charged with having sold goods by auction in a place in which he was not a householder, some proof of this negative, viz., of the defendant not being a householder in the place, would be necessary on the part of the plaintiff. So in ejectment for not insuring according to covenant, it lies upon the plaintiff to prove that no insurance had been effected. * * * Where a person on whom stolen property is found gives a reasonable account of how he came by it, the prosecutor ought to show on the trial that the account is untrue. Aliter, if that account be unreasonable or improbable on the face of it. Where a piece of wood, which had been stolen, had been found by a constable in the possession of the prisoner five days after it was lost, who said that he had bought it of N., who lived about two miles off, Mr. Baron Alderson held that it was incumbent on the prosecutor to negative this statement. N. was not called by either party. The prisoner was acquitted. So in R. v. Smith, Denman, C. J., held that where a person in whose possession stolen property is found gives a reasonable account of how he came by it, and refers to some known person from whom he received it, the examining magistrate should have that person before him, as his evidence may either entirely exonerate the accused, or may prove that in addition to his possession of the goods the accused has been giving a false account of how he came by them.”—Pages 71-2.

"Where a fact is peculiarly within the knowledge of a party."] But where a fact is peculiarly within the knowledge of one of the parties, so that he can have no difficulty in proving it, the presumption of innocence, or of acting according to law, will not render it incumbent upon the other side to prove the negative; but the party who must know the fact is put to the proof of it. * * * So where, on a conviction for selling ale without a license, the only evidence given was that the party sold ale, and no proof was offered of his selling it without a license; the party being convicted, it was held that the conviction was right, for that the informer was not bound to sustain in evidence the negative averment. It was said by Abbott, C. J., that the party thus called on to answer for an offence against the excise laws, sustains not the slightest inconvenience from the general rule, for he can immediately produce his license; whereas, if the case is taken the other way, the informer is put to a considerable inconvenience. * * * The same rule has been frequently acted upon in civil cases. Thus, on an action against a person for practising as an apothecary, without having obtained a certificate according to the 55 Geo. 3, c. 194, the proof of the certificate lies upon the defendant, and the plaintiff need not give any evidence of his practising without it.”—Page 72.
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Evidence Confined to the Issue.

"General rule." It is a general rule, both in civil and criminal cases, that the evidence shall be confined to the point in issue. In criminal proceedings it has been observed, that the necessity is stronger, if possible, than in civil cases, of strictly enforcing this rule; for where a prisoner is charged with an offence, it is of the utmost importance to him, that the facts laid before the jury should consist exclusively of the transaction which forms the subject of the indictment, which alone he can be expected to come prepared to answer. Under this rule, therefore, it is not competent for the prosecutor to give evidence of facts, tending to prove another distinct offence, for the purpose of raising an inference that the prisoner has committed the offence in question."

—Page 73.

"Cases where evidence of other transactions is admissible as referrible to the point in issue." There is strictly speaking no exception to the above rule; but it sometimes occurs that several offences have been committed in such close proximity as to form, in fact, but one transaction. In such a case the evidence is not rejected merely because it discloses other indictable offences, if it is material evidence, as relating to the offence under inquiry. Thus on an indictment for arson, evidence has been admitted to show that property which had been taken out of the house at the time of the fire, was afterwards discovered in the prisoner's possession. * * * Upon the same principle, viz., that the other acts were explanatory of the transaction in question, similar evidence was admitted in the following case:—The prisoner, who had been in the employ of the prosecutrix, was indicted for stealing six shillings. The son of the prosecutrix suspecting the prisoner, had marked a quantity of money, and put it into the till, and the prisoner was watched by him. On the first examination of the till it contained 11s. 6d. The prosecutrix's son having received another shilling from a customer, put it into the till; and another person having paid a shilling to the prisoner, he was observed to go to the till, to put in his hand and to withdraw it clenched. He then left the counter, and was seen to raise his hand clenched to his waistcoat pocket. The prosecutrix was proceeding to prove other acts of the prisoner, in going to the till and taking money, when it was objected that this would be to prove several felonies. The objection being overruled, the prosecutrix's son proved that, upon each of the several inspections of the till, after the prisoner had opened it, he found a smaller sum than ought to have been there. The prisoner having been convicted, the Court of King's Bench, on an application for staying the judgment, were of opinion that it was in the discretion of the
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judge to confine the prosecutor to the proof of one felony, or to allow him to give evidence of other acts which were all part of one entire transaction.”—Page 74.

“Receiving stolen goods on other occasions.” With regard to the case of a receiver of stolen goods, it has been frequently held that as the question is one entirely of guilty knowledge, evidence of receiving other goods of a similar nature, stolen from the same prosecutor, may be given; even though indictments are pending for the other larcenies. But it appears that the other occasions on which the stolen property was received must not be so far removed in point of time as to form entirely different transactions.”—Page 83.

“Evidence to explain motives and intention.” Sometimes, in order to explain the motives or intention of a prisoner, evidence is allowed to be given which does not otherwise bear upon the issue to be tried. * * * Upon the same principle the declarations of a prisoner made at former times are admissible, where they tend to prove his intent at the time of committing the offence. Thus, on an indictment for murder, evidence of former grudges and antecedent menaces may be given to show the prisoner’s malice against the deceased.”—Pages 84-5.

“Evidence of character.” As a general rule evidence of character is not admissible in forensic proceedings; but there are many exceptions to this rule both in civil and criminal cases. With regard to the latter, the question assumes a somewhat different aspect according as the evidence is produced for the prosecution or defence; as it is intended to accredit or discredit the person to whom it relates; and as it relates to the principals or the witnesses.”—Page 85.

“Evidence of character for prosecution—good character.” The only cases in which evidence of good character can be evidence for the prosecution are, where the character of the prosecutor or of the witnesses for the prosecution have been impeached by the prisoner, either by direct evidence, or by cross-examination.”—Page 85.

“Evidence of character for prosecution—bad character of prisoner.” The only cases in which evidence of the bad character of the prisoner can be given for the prosecution are where the prisoner has himself called witnesses to his character, in which case it may be rebutted by evidence showing the contrary.”—Page 85.

“Evidence of character for prosecution—bad character of witnesses.” The credibility of a witness is always in issue, and
accordingly evidence is receivable from the opposite side, to show that the character and reputation which he bears are such that he is unworthy to be believed, even upon his oath.' But it is not allowed (with the exception of facts which go to prove that the witness is not an impartial one, see p. 87) to prove particular facts in order to discredit him. The proper question is, 'From your knowledge of his general character, would you believe him on his oath?'

"But the person who calls a witness is always supposed to put him forward as a person worthy of belief; he cannot, therefore, if his testimony should turn out unfavourably, or even if the witness should assume a position of hostility, give general evidence to discredit him. How far a party may contradict his own witness, we shall see presently."—Pages 85-6.

"Evidence of character for defence—good character of prisoner.] In trials for high treason, for felony, and for misdemeanours (where the direct object of the prosecution is to punish the offence), the prisoner is always permitted to call witnesses to his general character; and in every case of doubt, proof of good character will be entitled to great weight. The rule does not extend to actions or informations for penalties, as to an information for keeping false weights. To admit such evidence in that case would be contrary to the true line of distinction, which is this, that in a direct prosecution for a crime it is admissible, but where the prosecution is not directly for the crime, but for the penalty, it is not. If evidence of character were admissible in such a case as this, it would be necessary to try character in every charge of fraud upon the excise and custom-house laws. The inquiry as to the prisoner's general character ought manifestly to bear some analogy and reference to the charge against him. On a charge for stealing, it would be irrelevant and absurd to inquire into the prisoner's loyalty or humanity; on a charge of high treason, it would be equally absurd to inquire into his honesty and punctuality in private dealings. Such evidence relates to principles of moral conduct, which, however they might act on other occasions, would not be likely to operate on that which alone is the subject of inquiry; it would not afford the least presumption that the prisoner might not have been tempted to commit the crime for which he is tried, and is, therefore, totally inapplicable to the point in question. The inquiry must also be as to the general character; for it is the general character alone which can afford any test of general conduct, or raise a presumption that the person who had maintained a fair reputation down to a certain period, would not then begin to act a dishonest, unworthy part. Proof of particular transactions in which the defendant may have been concerned, is not admissible as evidence of his general good character. It frequently happens
that witnesses, after speaking to the general opinion of the prisoner's character, state their own personal experience and opinion of his honesty; but when this statement is admitted, it is rather from favour to the prisoner than strictly as evidence of general character.

"In cases where the intention forms a principal ingredient in the offence, a wider scope is allowed. On a charge of murder, for instance, expressions of goodwill and acts of kindness on the part of the prisoner towards the deceased are always considered important evidence. So evidence of antecedent menaces is admissible against the prisoner.

"'It has been usual,' says a very sensible writer, 'to treat the good character of the party accused as evidence to be taken in consideration only in doubtful cases. Juries have generally been told that where the facts proved are such as to satisfy their minds of the guilt of the prisoner, character, however excellent, is no subject for their consideration; but that when they entertain any doubt of the guilt of the party, they may properly turn their attention to the good character which he has received. It is, however, submitted with deference, that the good character of the party accused, satisfactorily established by competent witnesses, is an ingredient which ought always to be submitted to the consideration of the jury, together with the other facts and circumstances of the case. The nature of the charge, and the evidence by which it is supported, will often render such ingredient of little or no avail; but the more correct course seems to be, not in any case to withdraw it from consideration, but to leave the jury to form their conclusion upon the whole of the evidence, whether an individual, whose character was previously unblemished, has or has not committed the particular crime for which he is called upon to answer.'"—Pages 86-7.

"Evidence of character for defence—good character of witnesses.
This can only be given when the character of the witnesses for the defence has been impeached either by direct evidence, or by cross-examination."—Page 87.

"Evidence of character for defence—bad character of prosecutor.
If the prosecutor, as is almost always the case, is a witness for prosecution, his credibility may be impeached like that of any other witness by general evidence, showing that he is a person unworthy of credit. But there is one class of cases in which the character of a prosecutrix may be attacked on another point besides that of her credibility; namely, in charges of rape, or attempts to commit rape, it is always considered allowable to give evidence of the want of chastity of the prosecutrix. The limits of the inquiry into the woman's character on this point are stated in the chapter on Rape."—Page 87.
"Evidence of character for defence—bad character of witnesses.] For the defence, in precisely the same way as for the prosecution, and subject to the same rules and exceptions, the witnesses on the opposite side may be discredited by general evidence of their want of credibility, but the witnesses called by the prisoner himself may not be so discredited, though they may to some extent be contradicted."—Page 87.

"Evidence to contradict the opponent witnesses.] This may always be given on points relevant to the issue. But if an opponent witness be asked questions on cross-examination which are not relevant to the issue, which as we shall hereafter see may be done (p. 146), the answer must be taken, and he cannot be contradicted by other evidence. In R. v. Yewin, 2 Camp., 638, where a witness was asked whether he had not been charged with robbing the prisoner, his master, which he denied, Lawrence, J., refused to allow him to be contradicted on this point.”—Page 87.

"Evidence of particular facts to impeach the credit of opponent witnesses.] What has been just said, and also what was said in p. 85, as to evidence of the bad character of witnesses, must be taken in connection with the following rule. The credit of a witness may be impeached by proving misconduct connected with the proceedings, or other circumstances evincing that he does not stand indifferent between the contending parties. Thus, in the case last quoted, the same witness was asked, whether he had not said that he would be avenged upon his master, and would soon fix him in gaol. This also he denied, but, in this case, Lawrence, J., allowed him to be contradicted. So also it may be proved that a witness has been bribed to give his evidence.”—Pages 87-8.

"Evidence to contradict the party’s own witness.] It has already been said, that a party who calls a witness cannot bring general evidence to discredit him; but if a witness state material facts which make against the party who calls him, other witnesses may be called to prove the facts were otherwise; but there has been great doubt whether it is competent to a party to prove that a witness called by him, who has given evidence against him, has made at other times a statement contrary to that made by him at the trial."—Page 88.

Section 9.—Of the Defence.

When the witnesses in support of the charge have been heard, the defendant should be called upon for his defence, and the
The magistrate is bound to hear the evidence tendered by him.—*Paley*, page 136.

The evidence adduced on behalf of the defendant may be simply to contradict or throw a different or innocent complexion on the facts proved by the witnesses on the other side; or to prove that the defendant is within some proviso or exception, excusing or qualifying the facts charged (an *onus* as above shown thrown upon him); or to disprove some fact which by the statute is to be against him till the contrary is shown; or to set up such a *bona fide* claim or dispute as will oust the jurisdiction of the justices, and compel them to abstain from adjudicating; or to show that the matter had already been decided, or that the remedy has been misconceived.—*Ibid*, page 137.

It has always been a maxim that where the title to property is in question, the exercise of a summary jurisdiction by justices of the peace is ousted. This principle is not founded upon any Legislative provision, but is a qualification which the law itself raises in the execution of penal statutes, and is always implied in their construction; and so rigid is the rule that even where a statute allows the defendant to go into a question of title, he is not obliged to do so, and may object to the jurisdiction of the justices.—*Ibid*, pages 137-8.

The claim of title must be on behalf of the defendant, or those through whom he claims, and he cannot set up a *jus tertii*.—*Ibid*, page 139.

In every case where a question of right to do the act complained of occurs, it may be prudent for magistrates to abstain from any other inquiry than whether the act was really done under an idea of authority entertained at the time, and not fabricated afterwards for the mere purpose of evading the penalties; and if it appears to have been done under such real impression, to dismiss the complaint, without investigating the legal grounds of the claim at all.—*Ibid*, page 143.

In every case, indeed, the claim of title must be *bona fide*, and not a mere pretence to oust jurisdiction, whether it raise a question of title or any other matter which the justices can decide; and it is for the justices to decide whether the claim be *bona fide* or a mere pretence.

They cannot, however, decide contrary to the facts, and so give themselves jurisdiction, but must have some reasonable and probable cause for their decision.—*Ibid*, page 143.

The objection to the jurisdiction must have been raised at the hearing; in strictness it should be taken in the first instance, before endeavouring to obtain a decision on the merits: it is not, however, too late to take it after the case has been heard, and immediately before the justices give their decision, but it must be distinctly raised before the decision is actually pronounced.—*Ibid*, page 145.
In strict law no agreement between the complainant and the defendant in criminal cases can put an end to the proceedings; and even if the proceedings be merely civil, and for the benefit of individuals, justices may disregard any agreement set up by way of defence, if it is not between all the parties concerned. Thus, where the father of a bastard child had agreed to pay the mother 5s. a week for its support, and had then paid her £10, in consideration of which she agreed to release him from all further payments, it was held that this was no bar to the jurisdiction of the justice to make an order for the support of the child on the mother's subsequent application, as the statute was for the benefit of the child as well as the mother; but that the justice ought to take it into consideration, together with the other circumstances, and then exercise his discretion as to making an order.—*Ibid*, page 153.

**Section 10.—Evidence in Reply.**

If the defendant has examined any witnesses, or given any evidence other than as to his general character, the prosecutor or complainant may examine witnesses in reply.

The prosecutor or complainant, however, is not entitled to make any observations in reply upon the evidence given by the defendant, nor is the defendant entitled to make any observation in reply upon the evidence given by the other side, and when both sides have been heard the justices shall either convict or dismiss the complaint.—*Justices Statute*, section 105.

The general rule is that if the charge is substantiated, and no valid defence proved, the duty of the justices is to convict, whilst if the case for the prosecution fail, or a valid defence shown, it becomes their duty to dismiss the charge. But it is sometimes enacted, as for instance by the 66th section of the "*Criminal Law* 1864," that even when the charge has been confessed or proved, the justices who have heard the charge may, if they think fit, dismiss the person charged without proceeding to a conviction.

It is provided by the 107th section of the "*Justices Statute*" that if the justices dismiss the information or complaint, such justices, if they think fit and are required to do so, may issue a certificate to that effect, and this certificate will be a bar to any subsequent information or complaint for the same matters against the same party in a court of petty sessions. But it is no bar to any second proceeding for the same matter between the same parties, in the County Court or other court of jurisdiction superior to petty sessions.—*Regina v. Skinner*, Wy. W. & A'B., Vol. IV., part 1, page 39.
Section 11.—Of Awarding Costs.

It is enacted by the "Justices Statute," sections 114-15-16, that costs may be awarded to either complainant or defendant, and may be recovered by distress, or in default of distress the person ordered to pay them may be imprisoned for a month. But it would appear that it is only in cases where the justices "convict" or "make an order," or dismiss the information or complaint, or where express power is given by the statute under which the proceedings are taken, that justices have power to award costs.—Regina v. Fraser, W. W. & A'B., Vol. II., part 1, page 3. See also, as to the distinctions between "convictions," or "orders," and warrants of ejectment, Regina v. Carr, Australian Jurists Reports, Vol. I., part 1, page 1.

The sections of the "Justices Statute" above quoted enact that the costs to be awarded shall be such as to the justices shall seem "just and reasonable." But as each magistrate may form a different opinion as to what is "just and reasonable," it may be useful to quote a decision of the Court of Exchequer as to the principle upon which costs should be ascertained and allowed:—

"Costs are an indemnity; they are given to the person who receives them to indemnify him in respect of some proceeding which the other person has compelled him to take.

"They are not a punishment on the party who is pay them, nor a bonus to the party who is to receive them. Therefore, on the question of the costs, if you can find out the extent of that damnification, you can find out the extent to which costs ought to be allowed. Of course I do not mean to say that there are not exceptional cases, but as a general rule costs are an indemnity."—Per Bramwell, B., in Harold v. Smith, 29 L.J. Exch., page 144. [See Note C.]
PART II.

EVIDENCE.
RULES OF EVIDENCE IN CRIMINAL AND CIVIL CASES.

"The general rules of evidence are the same in criminal and in civil proceedings. 'There is no difference as to the rules of evidence,' says Abbott, J., 'between criminal and civil cases: what may be received in the one may be received in the other; and what is rejected in the one ought to be rejected in the other.'"

BEST EVIDENCE.

"It is the first and most signal rule of evidence, that the best evidence of which the case is capable shall be given; for if the best evidence be not produced, it affords a presumption that it would make against the party neglecting to produce it."—Page 1.

"Written instruments.] The most important application of this principle is that which rejects secondary, and requires primary evidence of the contents of written documents, of every description. The rule was so stated by the judges in answer to certain questions put to them by the House of Lords on the occasion of the trial of Queen Caroline, and is perfectly general in its application; the only exception to it being founded on special grounds. These may be divided into the following classes:—(1.) Where the written document is lost or destroyed: (2.) Where it is in the possession of an adverse party who refuses or neglects to produce it: (3.) Where it is in the possession of a party who is privileged to withhold it, and who insists on his privilege: (4.) Where the production of the document would be, on physical grounds, impossible, or highly inconvenient: (5.) Where the document is of a public nature, and some other mode of proof has been specially substituted for reasons of convenience. It is apparent, therefore, that in order to let in the secondary evidence in these cases, certain preliminary conditions must be fulfilled; we shall speak of each of these cases more particularly when we come to treat of secondary evidence.
"It is not necessary, in every case where the fact that is to be proved has been committed to writing, that the writing should be produced, but (unless the contents of the written document is itself a fact in issue) only in those cases where the documents contain statements of facts which, by the policy of the law, are required to be put in writing, or where they have been drawn up by the consent of the parties for the express purpose of being evidence of the facts contained in them."—Page 2.

"Handwriting.] In proving handwriting the evidence of third persons is not inferior to that of the party himself. 'Such evidence,' says Mr. Phillipps, 'is not in its nature inferior or secondary, and though it may generally be true that a writer is best acquainted with his own handwriting, and therefore his evidence will generally be thought the most satisfactory, yet his knowledge is acquired precisely by the same means as the knowledge of other persons, who have been in the habit of seeing him write, and differs not so much in kind as in degree. The testimony of such persons, therefore, is not of a secondary species, nor does it give reason to suspect, as in the case where primary evidence is withheld, that the fact to which they speak is not true.' Nor do the slightness and infrequency of the opportunities which the witness had of judging of the handwriting make any difference as to his competency. These are only matters of observation to the jury; as also is the fact that the witness has had no recent opportunities of forming a judgment. In B. v. Horne Tooke, the witness had not seen Mr. Tooke's writing for twenty years previous to the trial; and in Lewis v. Sapio, the witness had only seen the defendant write his surname.

"If the evidence of third persons be admissible to prove handwriting, it seems necessarily to follow, that it is equally admissible for the purpose of disproving it, the question of genuine or not genuine being the same in both cases. Accordingly, although in an early case, where it was requisite to prove that certain alterations in a receipt were forged, it was held that the party who had written the receipt ought to be called as the best and most satisfactory evidence, yet in subsequent cases of prosecutions for forgery it has been held that the handwriting may be disproved by any person acquainted with the genuine handwriting. So in R. v. Hurley, it was held that the person whose name was alleged to have been forged need not be called, either to disprove the handwriting, or to show that he did not authorise any other person to use his name. On certain indictments for putting away Bank of England notes, knowing them to be forged, &c., the judges were of opinion that it was unnecessary to produce the signing clerk to show that he never signed the notes, if it were established by the evidence of persons acquainted with his handwriting, that the signature was not in his handwriting."—Pages 4-5.
"Persons acting in a public capacity.\] Where persons acting in a public capacity have been appointed by instruments in writing, those instruments are not considered the only evidence of the appointment, but it is sufficient to show that they have publicly acted in the capacity attributed to them. Thus, in the case of all peace officers, justices of the peace, constables, &c., it is sufficient to prove that they acted in those characters without producing their appointments; and this even in the case of murder."—Page 6.

"Admission by party.\] Where a party is himself a defendant in a civil or criminal proceeding, and is charged as bearing some particular character, the fact of his having acted in that character will, in all cases, be sufficient evidence, as an admission, without reference, to his appointment being in writing."—Page 6. [See Note D.]

"In general, where a contract has been reduced into writing by the parties, the writing is the best evidence of its contents, and must be produced. So where a person was engaged as secretary on the terms contained in a resolution entered in a certain book of the employer; in action for his salary the book must be produced. * * * If, for instance, the narrative of an extrinsic fact has been committed to writing, the fact may yet be proved by parol evidence. Thus, a receipt for money will not exclude parol evidence of the payment. So where, in trover, the witness stated that he had verbally required the defendant to deliver up the property and at the same time served upon him a notice in writing to the same effect, Lord Ellenborough ruled that it was not necessary that the writing should be produced. In the same manner what a party says, admitting a debt, is evidence, although the promise to pay is reduced into writing.

"The fact of a tenancy under a particular person, cannot be so proved, where there is a writing; but although there exists a deed of partnership, the fact of partnership may be proved by the acts of the parties. The fact of the employment of an agent to sell may be proved by parol, though the terms of his commission are contained in a letter. Where it is necessary to prove a marriage, the entry in the parish register is not the only evidence; but the fact may be proved by the testimony of persons who were present and witnessed the ceremony, or by general reputation.

"Though a written contract must be produced in an action founded on it, yet a mere memorandum, not signed by the parties nor intended to be final, will not prevent the introduction of parol evidence of a contract. So where a verbal contract is made for the sale of goods, and is put into writing afterwards by the vendor's agent for the purpose of assisting his recollection, but
is not signed by the vendee, the contract may be proved by parol. A vendee may give evidence of warranty, although a note of the sale and receipt of the money, given by the vendor to the vendee after the conclusion of a parol contract, contained no notice of any warranty. So of the memorandum of the terms of a lease, not signed by the lessor, but only by the wife of the lessee.”—Roscoe’s Civil Evidence, Ninth Edition, pages 1-2-3.

SECONDARY EVIDENCE.

“Lost documents.] We have already seen that in certain cases secondary evidence of the contents of written documents is admissible. The most frequent case is that in which the document has been lost or destroyed. In order to lay the necessary foundation for the admission of secondary evidence in this case, it must be shown, either that the document has once existed and has either actually ceased to exist, or that all reasonable efforts have been made to find it and have failed.—Roscoe’s Criminal Evidence, Fifth Edition, page 7.

“Documents in the hands of adverse party.] In the case where a document is in the hands of an adverse party, a notice to produce it in court must be given to him, before secondary evidence of its contents can be received. Its object is not, as was formerly thought, to give the opposite party an opportunity of providing the proper testimony to support or impeach the document, but it is merely to enable him to produce it if he likes at the trial, and thus to secure the best evidence of its contents.

“A notice to produce will let in secondary evidence in criminal as well as civil cases, where the document to be produced appears to have been in the hands of the agent or servant of the prisoner, under such circumstances as that, it might be presumed to have come to his own hands.

“But in order to render a notice to produce available, the original instrument must be shown to be in the possession of the opposite party, or of some person in privity with him, who is bound to give up possession of it to him. Therefore, where a document is in the hands of a person as a stakeholder between the defendant and a third party, a notice to produce will not let in secondary evidence of its contents.”—Pages 8-9.

“Notice to produce—form of.] It is not necessary that a notice to produce should be in writing; and if a notice by parol and in writing be given at the same time, it is sufficient to prove the parol notice alone.—Page 10.

“Notice to produce—to whom and when.] In criminal as well
as in civil cases it is sufficient to serve the notice to produce, either upon the defendant or prisoner himself, or upon his attorney. * * * It must be served within a reasonable time, but what shall be deemed a reasonable time must depend upon the circumstances of each particular case.”—Page 10.

"Consequences of notice to produce.] The only consequence of giving a notice to produce, is that it entitles the party giving it, after proof that the document in question is in the hands of the party to whom it is given, or of his agent, to go into secondary evidence of its contents, but does not authorise any inference against the party failing to produce it.

"If a party to the suit refuses to produce a document when called on, he cannot afterwards produce it as his own evidence; and if the defendant refuses to produce a document, and the plaintiff is thereby compelled to give secondary evidence of its contents, the defendant cannot afterwards produce it as part of his own case, in order to contradict the secondary evidence. If he calls for papers, and inspects them, they will be rendered evidence for the opposite party.”—Page 11.

"Physical inconvenience.] The nature of the obstacles which render it impossible, or highly inconvenient, to produce a document on physical grounds, must be proved in the usual way. This being done to the satisfaction of the court, secondary evidence of the contents will be admitted. Thus, where in an indictment for unlawfully assembling, the question was, what were the devices and inscriptions on certain banners carried at a public meeting, it was held that parol evidence of the inscriptions was admissible. So the inscription on a monument may be proved by parol. But where a notice was suspended by a nail to the wall of an office, it was held that it must be produced.”—Page 12.

"Parol evidence inadmissible to vary or contradict a writing.] Parol evidence, being inferior in degree to written evidence, is not admitted to vary, enlarge, or contradict the terms of an instrument in writing inter partes; for whether the writing be required by law, or spontaneously resorted to by the parties, it is evidently the intention to exclude the uncertainty of oral testimony. Thus where it was agreed in writing that A., for certain considerations, should have the produce of Boreham meadow, it was held that he could not prove that it was at the same time agreed by parol that he should have both Milcroft and Boreham meadow.

"So parol evidence is inadmissible to alter the legal effect and construction of a written agreement. Thus, where an agreement for the sale of goods was silent as to the time of delivery, in which case the law implies a contract to deliver in a reasonable
time, it was held that parol evidence of an agreement to take them away immediately was inadmissible. So where a contract of sale, being silent as to time of payment, implies payment on delivery, proof of intended credit is inadmissible.

"But in order to exclude parol proof of a contract, the writing must purport to be a complete contract. Therefore where a written order for goods was sent without mentioning a time of payment, and they were delivered with an invoice accordingly, it was ruled in an action for goods sold, that a parol agreement for six months' credit might be proved; for the order per se was no contract, but only evidence of some of the terms of one.

"And it would seem that when a writing is not ex necessitate legis (as under the 'Statute of Frauds'), the apparent deficiencies of a written agreement as to some particulars of price, time of delivery, &c., may be supplied by oral evidence, although the jury would be directed to presume a reasonable price, or reasonable time, &c., in the absence of such evidence; for such evidence does not contradict or vary the written document as far as it goes; and it may be that the parties themselves did not intend to commit to paper the whole of the contract.

"Where the 'Statute of Frauds' applies, oral evidence to supply the intention of the parties would not be admissible, as we have seen above.

"If a party signs an agreement in his own name he cannot afterwards defeat an action on it by proving that he signed only as agent for another. * * * But in an action on a written contract between plaintiff and B., parol evidence is admissible in behalf of the plaintiff, to show that the contract was in fact, though not in form, made by B. as agent of the defendant. For the evidence tends not to discharge B., but to charge the dormant principal.

"Nor is it an exception to this general rule that it does not extend to the exclusion of all the legal incidents which by the general law, merchant, or common law attach to certain instruments. Thus, the days of grace allowed to parties to bills; the necessity of notice of dishonour, &c., are not specified on the bill; so of implied warranties on policies, &c. In such cases no evidence is usually offered, for the court will take notice of all legal incidents. It is otherwise in regard to particular usages or local customs, which will be mentioned hereafter."—Roscoe's Civil Evidence, Ninth Edition, pages 14–15–16.

"Parol evidence, when admissible to prove a consideration or to vary the date, or description, &c.] A guarantee purported to be 'in consideration of your having advanced this day,' &c.; parol evidence was admitted to show that the advance was contemporaneous with the guarantee, and was therefore a good consideration."—Page 16.
“Parol Evidence admissible to prove fraud, illegality, or error.] Where fraud is imputed, any consideration or fact, however contrary to the averment of a deed, may be proved to show the fraudulent nature of the transaction; for fraud is a matter extrinsic and collateral, which vitiates all transactions even the most solemn. Thus, in order to set aside a will, parol evidence may be given of what passed at the signing, and what the testator said, to show that his signature was obtained by fraud. And, in general, matter which in law avoids an instrument, whether it be fraud, forgery, duress, illegality, &c., may be proved by parol, however contradictory to its tenor, provided the pleadings be adapted to such evidence.”—Page 17.

“Parol Evidence when admissible, to control or explain agricultural contracts.] A custom affecting the contract may be proved by parol in other, as well as in mercantile contracts; as in the case of customs affecting agricultural contracts. * * * Or, that a lessee by deed is entitled by custom to an away-going crop, though it be not mentioned in the deed. But where a covenant excludes the customary right by an express provision on the subject matter of the custom, evidence of such right is inadmissible. * * * A sale of hops ‘at 100s,’ may be explained to mean £5 per cwt. A contract of hiring may be qualified by proof of customary holidays.”—Page 20.

“Parol evidence admissible to discharge written agreements.] A deed cannot be revoked or discharged by parol, or even by writing not under seal; but an executory agreement in writing not under seal may, before breach, be discharged by a subsequent parol agreement. * * * In these cases, wherever the subsequent parol agreement has had the effect, in point of law, of varying or discharging the original one, it is admissible in evidence. Thus, in an action for not accepting goods, where it appeared that the agreement in writing was to deliver at a fixed time, the plaintiff may show a subsequent extension of the time by verbal agreement. Where an auctioneer sold for £6 an article described as silver in a printed catalogue, but which he publicly stated at the sale to be only plated; held, that this was a sale by parol of a plated article.

“A distinction, however, is to be observed on this head between contracts in writing under the ‘Statute of Frauds,’ and contracts at common law. In the former case, a parol contract will not be admitted to show a subsequent variation in the written contract; as where several lots of land were bought together, it cannot be shown that the purchaser has, by parol, waived the contract as to one lot to which the vendor could not make title; or, that the parties varied the day of completion. But the court said it would have been otherwise if the contract had not been subject to the
control of an Act of Parliament; for where such a contract has
been reduced into writing, it is competent to the parties, at any
time before the breach of it, by a new contract not in writing,
either altogether to waive, dissolve, or alter the former agreement,
or to qualify the terms of it, and thus to make a new contract to
be proved partly by the written agreement, and partly by the
subsequent verbal terms engrafted upon it.”—Pages 21–2.

“Parol evidence admissible to explain latent ambiguity.] Where
a blank is left in a written agreement which need not have been
reduced into writing, and would have been equally binding if
written or unwritten (as if the agreement be to deliver goods to
the amount of less than ten pounds, and a blank be left for the
quantity of goods to be delivered), in such a case it should seem
that in an action for the non-performance of the contract, parol
evidence may be admitted to supply the defect.”—Page 24.

Presumptions.

“General nature of presumptive evidence.] No subject of
criminal law has been more frequently or more amply discussed
than that of presumptive evidence. It is not possible to discuss,
in this place, the general principles of evidence, but it is necessary
to point out what is the general nature of presumptive evidence.

'A presumption of any fact is properly an inference of that fact
from other facts that are known; it is an act of reasoning.'
When the fact itself cannot be proved, that which comes nearest
to the proof of the fact is the proof of the circumstances that
necessarily and usually attend such fact, and these are called
presumptions and not proofs; for they stand instead of the proofs
of the fact till the contrary is proved. The instance selected by
Chief Baron Gilbert to illustrate the nature of presumption is,
where a man is discovered suddenly dead in a room, and another
is found running out in haste with a bloody sword; this is a
violent presumption that he is the murderer; for the blood, the
weapon, and the hasty flight, are all the necessary concomitants
of such facts; and the next proof to the sight of the fact itself is,
the proof of those circumstances that usually attend such fact.

'It is evident that, in every trial, numberless presumptions
must be made by the jury; many so obvious that we are hardly
aware that they are necessary, and these present no difficulty;
but with regard to others, great care and caution is necessary in
making them, and it is for this reason that there are certain
practical rules which it is always desirable to observe on this
subject.

'There are indeed some presumptions which, as the phrase is,
the law itself makes: that is, the law forbids, under certain
circumstances and for certain purposes, any other than one inference to be drawn. There are but few in criminal cases, and those few mostly in favour of the prisoner. Where presumptions against the prisoner have been imperatively directed by the law, the rule has generally been looked on with disfavour; as, for instance, the presumption required by the 21 Jac. 1, c. 27, that a woman delivered of a bastard child, who should endeavour to conceal its birth should be deemed guilty of murder. This odious statute was repealed by 11 Geo. 4, and 1 Wm. 4, c. 66, s. 12.

"These two kinds of presumptions are generally distinguished as presumptions of law and presumptions of fact, respectively. With regard to presumptions of law there is not much difficulty, the circumstances under which they arise being generally pretty clearly defined. It is not so, however, with regard to presumptions of fact, there being frequently the difficulty not only of deciding whether a particular presumption ought to be made at all, but which of several presumptions arising out of the same state of facts is the right one.

"The principal difference,' observes an eminent writer on the law of evidence, 'to be remarked between civil and criminal cases, with reference to the modes of proof by direct or circumstantial evidence, is, that in the former, where civil rights are ascertained, a less degree of probability may be safely adopted as a ground of judgment than in the latter case, which affects life and liberty.'

"The same doctrine is asserted by Mr. M'Nally in his Rules of Evidence on Pleas of the Crown, page 578. 'Everything,' he observes, 'is a doubt in a civil case where the jury weigh the evidence, and having struck a fair balance, decide according to the weight of the evidence. This, however, is not the rule in criminal cases, for it is an established maxim, that the jury are not to weigh the evidence, but in cases of doubt to acquit the prisoner.'

"The soundness of this distinction may, perhaps, be doubted. The rules adopted with regard to the admission of presumptions in civil cases, are grounded on the principle that they tend to the discovery of the truth, and the consequences which are to ensue upon that discovery seem to have no bearing on the application of the rule.

"Great caution is doubtless necessary in all cases of presumptive evidence; and, accordingly, Lord Hale has laid down two rules with regard to the acting upon such evidence in criminal cases. 'I would never,' he says, 'convict any person of stealing the goods of a certain person unknown, merely because he would not give an account how he came by them, unless there was due proof made that a felony was committed of these goods.' And again, 'I would never convict any person of murder or manslaughter, unless the fact were proved to be done, or at least, the
body found dead.' (See Regina v. Murphy, Wy. W. & A'B., Vol. IV., Part I., page 63.)

"So it is said by Sir William Blackstone, that all presumptive evidence of felony should be admitted cautiously, for the law holds that it is better that ten guilty persons escape, than that one innocent suffer.

"The following case on this subject was cited by Garrow. The mother and reputed father of a bastard child, were observed to take it to the margin of the dock in Liverpool, and after stripping it, to throw it into the dock. The body of the infant was not afterwards seen, but as the tide of the sea flowed and reflowed into and out of the dock, the learned judge who tried the father and mother for the murder of their child, observed that it was possible the tide might have carried out the living infant, and the prisoners were acquitted.

"With respect to the comparative weight due to direct and presumptive evidence, it has been said that circumstances are in many cases of greater force and more to be depended on than the testimony of living witnesses; inasmuch as witnesses may either be mistaken themselves, or wickedly intend to deceive others; whereas circumstances and presumptions naturally and necessarily arising out of a given fact cannot lie.

"It may be observed, that it is generally the property of circumstantial evidence to bring a more extensive assemblage of facts under the cognisance of a jury, and to require a greater number of witnesses than where the evidence is direct, whereby such circumstantial evidence is more capable of being disproved if untrue.

"On the other hand it may be observed, that circumstantial evidence ought to be acted on with great caution, especially where an anxiety is naturally felt for the detection of great crimes. This anxiety often leads witnesses to mistake or exaggerate facts, and juries to draw rash inferences; there is also a kind of pride or vanity felt in drawing conclusions from a number of isolated facts, which is apt to deceive the judgment.

"Not unfrequently a presumption is formed from circumstances which would not have existed as a ground of crimination, but for the accusation itself; such are the conduct, demeanour, and expressions of a suspected person, when scrutinized by those who suspect him. And it may be observed, that circumstantial evidence, which must in general be submitted to a court of justice through the means of witnesses, is capable of being perverted in like manner as direct evidence, and that, moreover, it is subjected to this additional infirmity, that it is composed of inferences each of which may be fallacious.'"—Roscoe's Criminal Evidence, Fifth Edition, pages 14–15–16.

"General instances of presumption.] Proof of the possession
of land, or the receipt of rent, is *prima facie* evidence of seisin in fee. So possession is presumptive evidence of property in chattels. * * * So the law presumes that a party intended that which is the immediate or probable consequence of his act. So a letter is presumed, as against the writer, to have been written upon the day on which it bears date.”—Page 16.

“*Presumption of innocence and legality.*] The law presumes a man to be innocent until the contrary is proved, or appears from some stronger presumption. In other words, a man cannot be presumed to have committed a crime without some evidence of it. But any evidence, however small, if it be such that a reasonable man might fairly be convinced by it, is sufficient for the purpose.”—Page 17.

“*Presumption omnia rite esse acta.*] This well-known presumption is of very common application. Upon this principle it is presumed that all persons assuming to act in a public capacity have been duly appointed.”—Page 17.

“*Presumptions from the course of nature.*] It is a presumption of law that males under fourteen are incapable of sexual intercourse. So it is a presumption of fact that the period of gestation in women is about nine calendar months. The exact limits of this period are, both legally and scientifically, very unsettled; and, if there were any circumstances from which an unusually long or short period of gestation might be inferred, or if it were necessary to ascertain the period with any nicety, it would be desirable to have special medical testimony upon the subject.

“The subject was elaborately discussed in the Gardiner Peerage case, and the scientific evidence given in that case will be found in the report of it by Le Marchant. For ordinary purposes, however, it will be a safe presumption that intercourse and parturition are separated by a period not varying more than a week either way from that above mentioned.”—Pages 17–18.

“*Presumption of guilt arising from the conduct of the party charged.*] In almost every criminal case a portion of the evidence laid before the jury consists of the conduct of the party, either before or after being charged with the offence, presented not as part of the *res gesta* of the criminal act itself, but as indication of a guilty mind. The probative force of such testimony has been elaborately, carefully, and popularly considered by Bentham, in his *Rationale of Judicial Evidence*, c. 4.

“In weighing the effect of such evidence nothing more than ordinary caution is required. The best rule is for the jury to apply honestly their experience, and to draw such inference as that experience indicates ought to be drawn in matters of the
gravest importance. This will, in general, be found a safer guide than a consideration of some of the extreme cases which are related in many of the books on evidence. These must be considered as somewhat exceptional, and it may be fairly said that this is a very useful kind of evidence, and one which no judge need seek to withdraw from the consideration of a jury.

—Page 18.

"Presumption of guilt arising from the possession of stolen property." It has already been stated that possession is presumptive evidence of property, supra, p. 15; but where it is proved, or may be reasonably presumed, that the property in question is stolen property, the onus probandi is shifted, and the possessor is bound to show that he came by it honestly; and, if he fail to do so, the presumption is that he is the thief. In every case, therefore, either the property must be shown to have been stolen by the true owner swearing to its identity, and that he has lost it, or, if this cannot be done, the circumstances must be such as to lead in themselves to the conclusion that the property was not honestly come by.

"In the latter class of cases there are two presumptions: first, that the property was stolen; secondly, that it was stolen by the prisoner. The circumstances under which the former of these presumptions may be safely made are tolerably obvious. 'Thus,' it is said in 2 East, P. C., 656, 'a man being found coming out of another's barn, and upon search corn being found upon him of the same kind with what was in the barn, is pregnant evidence of guilt. So persons employed in carrying sugar and other articles from ships, and wharves, have often been convicted of larceny at the Old Bailey, upon evidence that they were detected with property of the same kind upon them, recently upon coming from such places, although the identity of the property, as belonging to such and such persons, could not otherwise be proved. But this must be understood of articles like those above mentioned, the identity of which is not capable of strict proof from the nature of them.'†

† "A man was robbed. Among the coins he had was a sou, a Portsea token, and another, the name of which I forget, a sort of halfpenny. A man was taken up on suspicion, and in his pocket, with some other money, were three such coins. The prosecutor could only swear that he had had three such. He could not identify, nor could he swear to any of the other pieces. The counsel for the defence proved in evidence that all these coins are extremely common in Brighton, where the robbery took place, and the case seemed, by the countenances of the jury, to have broken down. 'Gentlemen,' said the Chief Justice (Sir John Jervis), 'the question has to be tried by the doctrine of chances. The sou is common, the token is common, and the third coin too. The chances are, that perhaps a thousand sous are in the pockets of different people in Brighton; that five hundred tokens are so too, and perhaps fifteen hundred of the other; but the chances are very great against two men in
"If the property be proved to have been stolen, or may fairly be presumed to have been so, then the question arises whether or not the prisoner is to be called upon to account for the possession of them. This he will be bound to do, and on his failing to do so the presumption against him will arise, if, taking into consideration the nature of the goods in question, they can be said to have been *recently* stolen. * * * Parke, B., directed an acquittal where the only evidence against the prisoner was that certain tools had been traced to his possession, three months after their loss; and Maule, J., did the same, where a horse, alleged to have been stolen, was not traced to the possession of the prisoner until six months from the date of the robbery.

"The following remarks by Mr. East on this subject are well deserving of attention. 'It has been stated before that the person in whose possession stolen goods are found must account how he came by them, otherwise he may be presumed to be the thief; and it is a common mode of defence, to state a delivery by a person unknown, and of whom no evidence is given, little or no reliance can consequently be had upon it. Yet cases of that sort have been known to happen, where persons really innocent have suffered under such a presumption; and therefore, where this excuse is urged, it is a matter of no little weight to consider how far the conduct of the prisoner has tallied with his defence, from the time when the goods might be presumed to have first come into his possession.'"—Pages 19-20-1.

"*Presumption of malice.*] Much of the difficulty connected with this subject will be removed by considering what malice is in the legal sense of the term. 'Malice in its legal sense denotes a wrongful act done intentionally without just cause or excuse.' * * * All, therefore, that is meant by the presumption of malice is that when a man commits an unlawful act, unaccompanied by any circumstances justifying its commission, it is presumed that he has acted advisedly and with an intent to produce the natural consequences of such an act.'"—Page 21.

"*Presumption of payment.*] If a landlord gives a receipt for the rent last due, it is presumable that all former rent has been paid. Where a bill of exchange, negotiated after acceptance, is produced from the hands of the acceptor after it is due, the presumption is, that the acceptor has paid it; but not without proof of circulation after acceptance. Proof that the plaintiff

Brighton having each a sou and a token, and almost infinite against two men having each in his pocket, at the same time, a sou, a token, and the third coin. You must, therefore, add this to the rest of the evidence, not as a weak link, but as a very strong one.'"—*Life and Letters of the Rev. Frederick W. Robertson*, Vol. II., pages 143-4.
and other workmen employed by the defendant came regularly to receive their wages from the defendant, whose practice was to pay every week, and that the plaintiff had not been heard to complain of non-payment, is presumptive evidence of payment.

"So where the demand was for the proceeds of milk sold daily to customers by the defendant as agent to the plaintiff, and it appeared that the course of dealing was for the defendant to pay the plaintiff every day the money she had received, without any written voucher passing, it was ruled that it was presumed that the defendant had in fact accounted, and that the onus of proving the contrary lay on the plaintiff.

"The production of a cheque drawn by the defendant upon his banker, and payable to the plaintiff, with proof that plaintiff indorsed his name upon it, and that it has been paid, affords prima facie evidence of payment to him. It was ruled by Dallas, C. J., that the mere proof of a cheque being made payable to A., and of A. having received payment of it, is not evidence of the payment of money by the maker to A., for it might have been given to a third person, and by him to A. But this decision is qualified and corrected by Mountford v. Harper, where the drawing of a cheque by A. in favour of B., and payment of it to B. was held proof of payment by A. to B., without showing that A. gave it to B.

"In an action by indorsee against acceptor, to which defendant pleaded payment, the plaintiff produced the bill on which a receipt was indorsed; proof was given that an unknown person had, after dishonour by the defendant, paid the amount to a holder, and taken it away with the receipt indorsed: held that this was no evidence of payment by the defendant."—Roscoe's Civil Evidence, Ninth Edition, Pages 27–8.

"Presumption of dedication of way to the public.] If the owner of the soil throws open a passage, and neither marks by any visible distinction that he means to preserve all his rights over it, nor excludes persons from passing over it by positive prohibition, he shall be presumed to have dedicated it to the public. But proof of a bar having been placed across the street soon after the houses, which form the street, were finished, will rebut the presumption of dedication, though the bar was soon afterwards knocked down, and the way used as a thoroughfare.

"The question of dedication depends upon the time and nature of the enjoyment of the passage over the land; therefore, where the plaintiff erected a street leading out of a highway across his own close, and terminating at the edge of the defendant's adjoining close, which was separated by the defendant's fence from the end of the street, after twenty-one years (during nineteen of which the houses were completed, and the street publicly watched, cleansed, and lighted, and both footways and half the
horseway paved at the expense of the inhabitants), it was held, that this street was not to be presumed to be so dedicated to the public, as that the defendant, pulling down his own wall, might enter it at the end adjoining to his land and use it as a highway.

"It seems that there may be a limited dedication of a highway to the public; as a way excluding carriages, &c. But not a dedication to a limited portion of the public, as to a parish.

"Trustees, in whom land is vested for public purposes, may lawfully dedicate the surface of it to the use of the public as a highway, if such use be not inconsistent with the purposes of their trust.

"It has been held in one case, that six years may be sufficient to found the presumption of dedication; and where the *locus in quo* had been in lease for a long term down to the year 1780, and from that year till the year 1788 the public were permitted to have the free use of it as a way, this was held sufficient time for presuming a dedication.

"Whether there be a dedication or not, is always a question of intention, and may be disproved by the acts of the owner, or the circumstances under which the user has been permitted. If the land is in the possession of a tenant, such tenant cannot dedicate it to the public, so as to bind the owner of the fee. But after a long lapse of time and a frequent change of tenants, Lord Ellenborough said, that, from the notorious and uninterrupted use of a way by the public, it might be presumed that the landlord had notice of the user, and that it was with his concurrence. And where public user alone for six or seven years was shown, the presumption was held not to be rebutted by proof that the land had been a short time before in strict settlement, but had been sold in fee under a power before the user begun.

"It lies on those who deny the dedication to show that there was no one *in esse* at the time who was competent to dedicate.

"Where a public footway over Crown land was extinguished by an inclosure act, but for twenty years after the inclosure took place the public had continued to use the way, it was ruled that this user was no evidence of a dedication to the public, as it did not appear to have been with the knowledge of the Crown. Yet there may be a dedication by the Crown; and where the user has been uninterrupted for forty or fifty years, and the land not under lease, the dedication *ought* to be presumed, whether the freehold be in the Crown, or in an unknown party."—Pages 31–2.

"*Presumption of the duration of life.*] As to persons of whom no account can be given, the presumption of the duration of life generally ends at the expiration of seven years from the time when they were last known to be living. * * * Proof that a
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person sailed in a ship bound for the West Indies two or three years ago, and that the ship has not since been heard of, is presumptive evidence that the person is dead; but the precise time of the death, if material, must depend upon the circumstances of the case.

"The fact of the party being alive or dead at any particular period within, or at the end of, the seven years, must be proved by the party asserting that fact. * * * Presumptions as to the continuance of life are not legal presumptions, but presumptions of fact only, depending on the circumstances of each case."
—Pages 32-3.

HEARSAY.

"General nature of hearsay evidence.] Evidence of facts with which the witness is not acquainted of his own knowledge, but which he merely states from the relation of others, is inadmissible upon two grounds. First, that the party originally stating the facts does not make the statement under the sanction of an oath: and secondly, that the party against whom the evidence is offered would lose the opportunity of examining into the means of knowledge of the party making the statement."—Roscoe’s Criminal Evidence, Fifth Edition, page 23.

"Evidence to explain the nature of the transaction.] The term hearsay evidence is frequently applied to that which is really not so. Thus where the inquiry is into the nature and character of a certain transaction, not only what was done, but also what was said, by both parties, during the continuance of the transaction is admissible; and this is sometimes represented as an exception to the rule which excludes hearsay evidence. But this is not hearsay evidence; it is original evidence of the most important and unexceptionable kind. In this case, it is not the relation of third persons unconnected with the fact, which is received, but the declarations of the parties to the fact themselves, or of others connected with them in the transaction, which are admitted for the purpose of illustrating its peculiar character and circumstances.

"Thus it has been held on a prosecution for high treason, that the cry of the mob who accompanied the prisoner, may be received in evidence as part of the transaction. So in * R. v. Smyth, where a constable entered a house, and searched it; upon an indictment against him and others for a forcible entry, evidence was permitted to be given of what the constable said at the time, as to the person for whom he was searching, and, generally, where it is necessary to prove the intention with which an act was done, in order to ascertain the nature of it, the declaration of the person who does the act, made in close connection with it, is evidence as part of the res gestae."—Pages 23-4.
"Evidence of complaint in case of rape.\] The evidence which is almost always given in cases of rape that the woman made a complaint, and the nature of it is not hearsay, but original evidence of a fact, which is most important, and which cannot be ascertained in any other way. * * * It thus appears that these cases are unanimous, that where the person who makes the complaint is called as a witness and is competent, the fact that the complaint was made, and the bare nature of it may be given in evidence."—Pages 24-5. (See also Regina v. Cooper, Wy. W. & A'B., Vol. I., page 123.)

"Evidence of complaint in other cases.\] The same rule applies to other cases as to rape, viz., that where a person has been in any way outraged, the fact that this person made a complaint is good evidence, both relevant and admissible. * * * In an action for assault upon the wife, Holt, C. J., allowed what the wife had said, 'immediate upon the hurt received, and before that she had time to devise and contrive anything for her own advantage,' to be given in evidence."—Pages 25-6

Confessions.

"Ground of admissibility.\] The confessions of prisoners are received in evidence upon the same principle upon which admissions in civil suits are received, viz., the presumption that a person will not make an untrue statement against his own interest."—Page 36.

"Degree of credit to be given to.\] With regard to the degree of credit which a jury ought to attach to a confession, much difference of opinion has existed. By some it has been considered as forming the highest and most satisfactory evidence of guilt. Per Grose, J., delivering the opinion of the judges in R. v. Lambe, 'The voluntary confession of the party in interest,' says Chief Baron Gilbert, 'is reckoned the best evidence; for, if a man swearing for his own interest can give no credit, he must certainly give most credit when he swears against it.' So it is stated by the court in R. v. Warickshall, that a free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the highest sense of guilt, and therefore it is admitted as proof of the crime to which it refers.

"On the other hand it is said by Mr. Justice Foster, that hasty confessions made to persons having no authority to examine, are the weakest and most suspicious of all evidence. Proof may be too easily procured, words are often misreported, through ignorance, inattention, or malice, and they are extremely liable to misconstruction. Moreover, this evidence is not, in the usual course of things, to be disproved by that sort of negative evidence
by which the proof of plain facts may be, and often is confronted. This opinion has also been adopted by Sir W. Blackstone. It has been said that it is not to be conceived that a man would be induced to make a free and voluntary confession of guilt, so contrary to the feelings and principles of human nature, if the facts confessed were not true.”—Page 37.

“Confessions obtained by questioning admissible.] A confession is admissible in evidence where it has been elicited by questions put by a person in authority; R. v. Thornton, where the questions were put by the police constable to a boy fourteen years of age, and the prisoner was also treated with considerable harshness. Nor does it appear that it makes any difference that the questions put assume the guilt of the prisoner.

“In R. v. Kerr, Park, J., seemed to think that it might not be in some cases improper for a policeman to interrogate a prisoner, but the practice is reproubated by most of the judges; and in one case where it appeared that the constable was in the practice of interrogating prisoners in his custody, Patteson, J., threatened to cause him to be dismissed from his office.

“The wisest course for policemen and others to adopt is to say nothing to the prisoner, either by way of advice, caution, or interrogation.”—Page 46.

“By agents.] In general, a person is not answerable criminally for the acts of his servants or agents, and therefore the declarations or confessions of a servant or agent will not be evidence against him. But it is otherwise, where the declaration relates to a fact in the ordinary course of the agents employment, in which case such declarations accompanying an act done, will be evidence in a criminal proceeding, as well as in a civil suit.”—Page 48.

“The whole of a confession must be taken together.] In criminal as well as in civil cases, the whole of an admission made by a party is to be given in evidence. The rule is thus laid down by Abbott, C. J., in the Queen’s case. If, on the part of the prosecution, a confession or admission of the defendant, made in the course of a conversation with the witness, be brought forward, the defendant has a right to lay before the court the whole of what was said in that conversation; not only so much as may explain or qualify the matter introduced by the previous examination, but even matter not properly connected with the matter introduced on the previous examination, provided only that it relates to the subject-matter of the suit: because it would not be just to take part of a conversation as evidence against a party, without giving to the party at the same time the benefit of the entire residue of what he said on the same occasion.
"'There is no doubt,' says Mr. Justice Bosanquet, 'that, if a prosecutor uses the declaration of a prisoner, he must take the whole of it together, and cannot select one part and leave another; and if there be either no other evidence in the case, or no other evidence incompatible with it, the declaration so adduced in evidence must be taken as true. But if, after the whole of the statement of the prisoner is given in evidence, the prosecutor is in a situation to contradict any part of it, he is at liberty to do so, and then the statement of the prisoner, and the whole of the other evidence must be left to the jury, for their consideration, precisely as in any other case where one part of the evidence is contradictory to another.'"—Pages 48-9.

"Confessions inferred from silence or demeanour."

Besides the proof of direct confessions the conduct or demeanour of a prisoner on being charged with the crime, or upon allusions being made to it, is frequently given in evidence against him. Thus, although neither the evidence nor the declaration of a wife is admissible against the husband on a criminal charge, yet observations made by her to him, upon the subject of the offence, to which he gives no answer or an evasive reply, are receivable in evidence as an implied admission on his part. So evidence of a prisoner's demeanour on a former occasion is admissible to prove guilty knowledge.

"Mr. Phillipps after remarking that a confession may in some cases be collected or inferred from the conduct and demeanour of a prisoner, on hearing a statement affecting himself, adds, 'As such statements frequently contain much hearsay and other objectionable evidence, and as the demeanour of a person upon hearing a criminal charge against himself is liable to great misconstruction, evidence of this description ought to be regarded with much caution.'"—Page 50.

"Confessions taken down in writing."

If the confession is taken down in writing and signed by the prisoner, or its truth acknowledged by parol, or if it be written by him, then it is put in as an ordinary document and read by the officer of the court. But if it be taken down by a person who is present when the confession is made, and is not signed by the prisoner, the document is not itself evidence, but may be used by the person who made it to refresh his memory. According to general principles, if the confession were contained in a document which was in existence and admissible in evidence, parol evidence could not be given of it."—Page 50.

"Receipts."

The acknowledgment, in a deed, of the receipt of money, is conclusive evidence, as between the parties to it, of such receipt. But such receipt will not be conclusive, where the
recital of the deed shows only an ‘agreement to pay,’ and the receipt is of money ‘so paid as above mentioned,’ as is usual in purchase deeds. Nor is the receipt indorsed on the back of the deed conclusive. In general, a receipt not under seal is only a 
prima facie 
acknowledgment that the money has been paid; and therefore may be contradicted or explained.”—Roscoe’s Civil Evidence, Ninth Edition, page 54.

“Admissions by agents.] Where a party to the suit directly or impliedly constitutes a third person his agent for the purpose of an admission, the admission so made is evidence. Thus, if a person agrees to admit a claim, provided J. S. will make an affidavit in support of it, such affidavit is proof against him. * * * So if the vendee of goods denies having received them, but adds, ‘If the carrier’s servant says he delivered the goods, I will pay you,’ the answer of the servant, when applied to on the subject, may be given in evidence.

“With regard to the admissions of agents in general, the rule is this:—When it is proved that A. is agent to B., whatever A. does, or says, or writes, in the making of a contract as agent of B., is admissible in evidence against B., because it is part of the contract which he makes for B., and which therefore binds B.; but it is not admissible as the agents account of what has passed.

“In all cases, before the admissions of an agent can be given in evidence, the fact of his agency must be established; and evidence that the party has acted as agent in other like instances, in which the principal has recognised his acts, will be evidence of a general authority.”—Pages 57–8.

“Admission by partner.] After prima facie evidence of partnership, the declaration of one partner is evidence against his co-partners as to partnership business, though the former is no party to the suit. And it is evidence, though made after the dissolution of partnership, if made as to a transaction which took place before the dissolution, but not so as to bind his co-partner as to a transaction which occurred previously to the partnership, unless a joint responsibility be proved as a foundation for the evidence. Admissions made by one of several partners after the dissolution of the partnership, are admissible to prove payment, after the dissolution, of a debt due to the partnership.”—Page 58

“Admissions by wife.] In general the admissions of a wife will not affect the husband. Thus the wife’s receipt for money, or admission of a trespass, is not evidence against the husband. But where the wife can be considered the agent of her husband, her admissions may be received as evidence against him. Thus in an action for goods sold and delivered at the defendant’s shop, an offer made by his wife to settle the demand is admissible in
EVIDENCE.

Evidence, if she was accustomed to serve in the shop, and to transact the business in her husband’s absence. * * * Pratt, C. J., admitted the wife’s declaration that she agreed to pay four shillings per week for nursing a child, to charge the husband; it being a matter usually transacted by women.”—Page 59.

“Whole admission to be taken together.] The whole of an admission must be taken together; therefore, where an account rendered by the defendant is produced to establish the plaintiff’s demand, it is evidence to prove both the debtor and creditor side of the account. But the jury are not bound to believe both sides of the account; therefore, where the plaintiff put in evidence an account rendered by the defendant in which he had stated a counter-claim, the plaintiff was permitted to disprove the counter-claim, and to recover the amount admitted.”—Page 69.

Proof and Effect of Documents.

“Proof of judgment in an inferior court.] The judgment of a county court, court baron, or other inferior jurisdiction, may be proved by the production of the book or rolls, containing the proceedings of the court from the proper custody; and if not made up in form, the minutes of the proceedings will be evidence; or an examined copy of them. But this rule does not extend to the proceedings of the court of quarter sessions on the crown side, which is a court of record and is not an inferior court.”—Page 106.

“Proof of entries in public books, postmarks, &c.] The postmark on a letter is usually taken as genuine without proof; but, if disputed, it has been doubted whether the person who made it must be called; or whether it may be proved by any postmaster; or by any one in the habit of receiving letters through the same post-office. The postmark on a letter has been admitted as evidence of the date of its being sent; but a postmark may be contradicted by parol evidence of the real date of posting. The postmark is no proof of a publication of the contents of the letter at the place of posting. Where it was required to prove that A. effected an insurance by order of B., the production by B. of the order in a letter, with the postmark, addressed to A., was received as evidence that a policy effected in A.’s name of the date of the letter was effected under that order.”—Pages 110–177–8.

“Proof of private deeds and writings.—Attesting witness, when to be called.] It was long a settled rule that wherever a deed or other instrument is subscribed by attesting witnesses, one of them
at least, must be called to prove the execution; and it was held that such testimony could not be dispensed with. * * * This rule was considered of indispensable obligation, and to be ‘so inflexible, clear, and universal as not to be set aside by any reasoning, however cogent.’ Hence, it was ruled in Whyman v. Gath, that the plaintiff can neither prove the execution of an attested deed by the testimony in open court of the defendant who executed it, nor examine such defendant as to the contents of it.

"The law has now been so far amended as to make it unnecessary to call the attesting witness of an instrument, to the validity of which no attestation was necessary. But as there are many instruments to which attestation is essential, as wills, instruments under powers, &c., it is, at present, necessary to retain many of the old decisions on the subject, and to remind the reader that, as long as Whyman v. Gath is recognised as law, no admission of a party in or out of court (except a formal admission *inter partes* for the purpose of the trial) can safely be relied upon as dispensing with the production of the attesting witness of an instrument, to which attestation is necessary.

"Where the attesting witness is dead, or insane, or infamous, or absent in a foreign country, or not amenable to the process of the superior courts, although he might have been examined on interrogatories; or where he cannot be found after diligent inquiry;—evidence of the witness's handwriting has always been admissible. A subscribing witness, who has become blind, ought nevertheless to be called in order to learn from him anything material that passed at the execution.

"The sufficiency of the inquiry is for the determination of the judge, who will found his opinion on the nature and circumstances of each case. It therefore seems of little importance to collect all the cases that have been decided upon this point. When the court is satisfied that due diligence has been used to find the witness, then it is sufficient to prove his handwriting without proving the handwriting of the party, unless with a view to establish his identity."—Pages 115-16-17.

"Execution, how proved.] Where attestation is necessary to the validity of a writing, the form and nature of it must depend on the provision of the law or other authority which has made it necessary. Unless it be otherwise provided, in attesting a deed it is not necessary that the witness should see the party sign or seal; if he sees him deliver it already signed and sealed, or sealed only where signature is unnecessary, it will be sufficient. Thus, proof by the witness that he was not present when the deed was executed, but was afterwards requested by one of several parties to sign the attestation, is sufficient evidence of the execution by such party."—Page 118.
"Proof of awards.] In a proceeding to enforce an award it is necessary to prove as well the submission of all parties to arbitration as the execution of the award; for without proof of the submission it does not appear that the arbitrator had competent authority to decide the question between the parties. If the submission be to two arbitrators named, and to a third person to be appointed by them, the appointment of such third person must be duly proved. A recital of such appointment in the award, signed by the three, will not be sufficient; nor will it be enough to show that the third person acted with the other arbitrators, and signed the award."—Pages 130-31.

"Effects of awards.] An award, regularly made by an arbitrator to whom matters in difference are referred, is conclusive in an action at law between the parties to the reference upon all matters inquired into within the submission.

"Thus where a covenantor and a covenantee submitted the amount of damages on a breach of covenant to arbitration, the award was held conclusive of the amount in an action on the covenant to which defendant pleaded non est factum. So where in an action of ejectment it appeared that the lessor of the plaintiff and the defendant had before referred their right to the land to an arbitrator, who had awarded in favour of the lessor, it was held that the award precluded the defendant from disputing the lessor's title.

"But where, on a reference by landlord and tenant, the arbitrator awarded that a stack of hay, left upon the premises by the tenant, should be delivered up by him to the landlord upon the tenant being paid a certain sum, it was held that the property in the hay did not pass to the landlord on his tender of the money by mere force of the award.

"Where the commissioners under an inclosure act were directed to make an award respecting the boundaries of a parish, and to advertise a description of the boundaries so fixed, and the boundaries so fixed were to be inserted in their award, and to be binding, final, and conclusive, but the boundaries mentioned in the award varied from those which had been advertised; it was held that, the commissioners not having pursued their authority, their award was not binding as to the boundaries.

"An award made on a reference of all matters in difference between the parties will not be a bar with regard to any demand which was not in difference between them at the time of the submission, nor referred by them to the arbitrators. And awards under inclosure acts are so far on the same footing as private submissions, that if the award goes beyond the powers of the commissioners, it is void pro tanto; and if it omits to decide on anything within the scope of the submission, the interest of parties remains in statu quo.
"But where an action by a person for his salary, and also for damages for dismissal from service, was referred, and the plaintiff gave evidence of dismissal, but claimed no damages for it before the arbitrator, who only awarded the amount of salary: held that the award was nevertheless a bar to a second action for damages for the dismissal."—Pages 180-81.

See also, as to proof and effect of documents, "Statute of Evidence 1864," sections 20 to 31, and 54 to 56.
PART III.

LEGAL MAXIMS.
"Where the provisions of an earlier statute are opposed to those of a later, the earlier statute is considered repealed."

But in order to repeal an existing enactment, a statute must have either express words of repeal, or must be contrary to, or inconsistent with, the provisions of the law said to be repealed, or at least mention must be made of that law, showing an intention of the framers of the later Act of Parliament to repeal the former.

"Where, then, both Acts are merely affirmative, and the substance such that both may stand together, the later does not repeal the former, but they shall both have a concurrent efficacy. * * * So, the general rule of law and construction undoubtedly is, that, where an Act of Parliament does not create a duty or offence, but only adds a remedy in respect of a duty or offence which existed before, it is to be construed as cumulative; this rule must, however, in each particular case, be applied with due attention to the language of the Act of Parliament in question. If, for example, a crime be created by statute, with a given penalty, and be afterwards repeated in a subsequent enactment with a lesser penalty attached to it, the new Act would, in effect, operate to repeal the former penalty; for though there may no doubt be two remedies in respect of the same matter, yet they must be of different kinds.

"Not merely does an old statute give place to a new one, but, where the common law and the statute differ, the common law gives place to the statute, if expressed in negative terms. And, in like manner, an ancient custom may be abrogated and destroyed by the express provisions of a statute; or where inconsistent with and repugnant to its positive language. But 'the law and customs of England cannot be changed without an Act of Parliament, for this, that the law and custom of England is the inheritance of the subject, which he cannot be deprived of without his assent in Parliament.'"—Pages 27, 30, 31, 34.

"No man should be condemned unheard." It has long been a received rule, that no one is to be condemned, punished, or deprived of his property in any judicial proceeding, unless he has had an opportunity of being heard. A writ of sequestration, therefore, cannot properly issue from the Consistory Court of the diocese to a vicar, who has disobeyed a monition from his bishop, without notice previously given to the incumbent, to show cause why it should not issue: for the sequestration is a proceeding partly in poenam, and no proposition is more clearly established than that 'a man cannot incur the loss of liberty or property for an offence by a judicial proceeding until he has had a fair opportunity of answering the charge against him, unless, indeed, the Legislature has expressly or impliedly given an authority to act without that necessary preliminary.'

So the judge of a county or other inferior court, who has made an order simpliciter for the payment of a debt by instalments, cannot, upon default made, issue his warrant for the imprisonment of the debtor, without giving him an opportunity of being heard as to the cause of non-payment. And if a County Court judge order a defendant to pay the amount of the claim against him at a future day, or in default to be committed, the defendant, on making default, cannot be committed without being examined as to the cause of such default, for 'it may have become impossible for the debtor, by reason of circumstances beyond his control, and which he ought to have had an opportunity to explain, to obey the former order.' The laws of God and man, says Fortescue, J., in Dr. Bentley's case, 'both give the party an opportunity to make his defence, if he has any.' And immemorial custom cannot avail in contravention of this principle.

In conformity also with the elementary principle under consideration, when a complaint has been made, or an information exhibited before a justice of the peace, the accused person has due notice given him, by summons or otherwise, of the accusation against him, in order that he may have an opportunity of answering it.

A statute establishing a gas-light company enacted that if any person should refuse or neglect, for a period of ten days after demand, to pay any rent due from him to the company for the supply of gas, such rent should be recovered by the company or their clerk by warrant of a justice of the peace and execution thereunder. A warrant issued by a justice under this Act, without previously summoning and hearing the party to be distrained upon, was held to be illegal, though a summons and hearing were not in terms required by the Act; for the warrant

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2 See also Taylor v. Patterson, Wy. & W., Vol. II., page 32.
3 See section 119 of the "Justices of the Peace Statute 1865."
is in the nature of an execution; without a summons the party charged has no opportunity of going to the justice, and a man shall not 'suffer in person or in purse without an opportunity of being heard.'

"The Metropolis Local Management Act 1855' (18 & 19 Vic., c. 120) s. 76, empowers the vestry or district board to alter or demolish a house where the builder has neglected to give notice of his intention to build seven days before proceeding to lay or dig the foundation. Held, that this enactment does not empower the board to demolish such building without first giving the party guilty of the omission an opportunity of being heard, for 'a tribunal which is by law invested with power to affect the property of one of Her Majesty's subjects, is bound to give such subject an opportunity of being heard before it proceeds,' and 'that rule is of universal application and founded upon the plainest principles of justice.'"—Pages 114 to 117.

"No man can be a judge in his own cause." It is a fundamental rule in the administration of justice, that a person cannot be judge in a cause wherein he is interested.

"It is a rule always observed in practice, and of the application of which instances not unfrequently occur, that, where a judge is interested in the result of a cause, he cannot, either personally or by deputy, sit in judgment upon it.

"The leading case in illustration of this maxim is Dimes v. The Proprietors of the Grand Junction Canal, where the facts were as under:—The Canal Company filed a bill in equity against a landowner in a matter touching their interest as copyholders in certain land. The suit was heard before the Vice-Chancellor, who granted the relief sought by the company, and the Lord Chancellor—who was a shareholder in the company, this fact being unknown to the defendant in the suit—affirmed the order of the Vice-Chancellor. It was held on appeal to the House of Lords, that the decree of the Lord Chancellor was under the circumstances voidable and ought to be reversed. Lord Campbell, C. J., observing: 'It is of the last importance that the maxim that 'no man is to be a judge in his own cause' should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest. * * * We have again and again set aside proceedings in inferior tribunals, because an individual, who had an interest in a cause took a part in the decision. And it will have a most salutary effect on these tribunals when it is known that this high

court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree was on that account a decree not according to law, and should be set aside. This will be a lesson to all inferior tribunals to take care, not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of labouring under such an influence.'

"Nor does the principle under consideration apply to avoid the award of a referee to whom, though necessarily interested in the result, parties have contracted to submit their differences, though ordinarily it is 'contrary to reason that an arbitrator or umpire should be sole and uncontrolled judge in his own cause.'

"Conformable to the general rule was a decision in the following case:—Upon an appeal to the Quarter Sessions of the borough of Cambridge, by a water company against an assessment to the poor-rate, the deputy recorder of the borough presiding, the rate was reduced and costs given to the appellants; at the time of hearing the appeal the deputy recorder was a shareholder in the company, and although he had in fact sold his shares he had not completed the transfer of them; he was held incompetent to try the appeal.

"Neither can a justice of the peace, who is interested in a matter pending before the Court of Quarter Sessions, take any part in the proceedings, unless, indeed, all parties know that he is interested, and consent, either tacitly or expressly, to his presence and interference. In such a case, it has been recently held that the presence of one interested magistrate will render the court improperly constituted, and vitiate the proceedings; it being no answer to the objection, that there was a majority in favour of the decision, without reckoning the vote of the interested party."—Pages 118 to 122.

"He is not to be heard who alleges things contradictory to each other.] The above, which is obviously an elementary rule of logic, and is not unfrequently applied in our courts of justice, will receive occasional illustration in the course of this work. As it would, however, be tedious to collect, in this place, the various instances of its application which will hereafter, in connection with different subjects of inquiry, present themselves to the reader, we shall for the present merely observe that it expresses, in technical language, the trite saying of Lord Kenyon, that a man shall not be permitted to 'blow hot and cold' with reference to the same transaction, or insist, at different times, on the truth of each of two conflicting allegations, according to the promptings of his private interest.

"So where a vendor has recognised the right of his vendee to dispose of goods remaining in the actual possession of the vendor, he cannot defeat the right of a person claiming under the vendee
on the ground that no property passed to the latter by reason of the want of a specific appropriation of the goods. Nor can an individual who has procured an act to be done sue as one of several co-plaintiffs for the doing of that very act.

"Again, where a person is charged as a member of a partnership, not because he is a member, but because he has represented himself as such, the law proceeds on the principle, that if a person so conduct himself as to lead another to imagine that he fills a particular situation, it would be unjust to enable him to turn round and say that he did not fill that situation. If, therefore, he appears to the world—or as the common and more correct expression is, if he appears to the party who is seeking to charge him—to be a partner, and has represented himself as such, he is not allowed afterwards to say that that representation was incorrect, and that he was not a partner.'

"So, where rent accruing due subsequently to the expiration of a notice to quit, is paid by the tenant and accepted by the landlord, that is an act of the parties which evidences an intention that the tenancy should be considered as still subsisting. So, if there be a distress, the distrainor affirms by a solemn act that a tenancy subsists; and it is not competent to him afterwards to deny it.

"So, where a witness in a court of justice makes contradictory statements relative to the same transaction, the rule applicable in determining the degree of credibility to which he may be entitled obviously is, allegans contraria non est audiendus."—Pages 169, 171 to 174.

"Ignorance of fact excuses; but ignorance of law does not excuse."] In criminal cases the above maxim as to ignorantia facti applies when a man, intending to do a lawful act, does that which is unlawful. In this case there is not that conjunction between the deed and the will which is necessary to form a criminal act; but, in order that he may stand excused, there must be an ignorance or mistake of fact, and not an error in point of law: as, if a man, intending to kill a thief or housebreaker in his own house, and under circumstances which would justify him in so doing, by mistake kills one of his own family, this is no criminal action; but if a man thinks he has a right to kill a person excommunicated or outlawed wherever he meets him, and does so, this is wilful murder. For a mistake in point of law, which every person of discretion not only may, but is bound and presumed to know, is, in criminal cases, no sort of defence. Ignorantia eorum quae quis scire tenetur non excusat.

"Lastly, every man is presumed to be cognisant of the statute law of this realm, and to construe it aright; and if any individual should infringe it through ignorance, he must, nevertheless, abide by the consequences of his error. It will not be competent to
him, to aver, in a court of justice, that he has mistaken the law, this being a plea which no court of justice is at liberty to receive. Where, however, the passing of a statute could not have been known to an accused at the time of doing an act thereby rendered criminal, the Crown would probably think fit, in case of conviction, to exercise its prerogative of mercy.”—Pages 249, 264, 265.

"No man should take advantage of his own wrong.] It is a maxim of law, recognised and established, that no man shall take advantage of his own wrong; and this maxim, which is based on elementary principles, is fully recognised in courts of law and of equity, and, indeed, admits of illustration from every branch of legal procedure.

"Hyde v. Watts is strikingly illustrative of the maxim, that a man shall not be permitted to take advantage of his own wrong. That was an action of debt for work and labour, to which the defendant pleaded a release under an indenture or trust deed for the benefit of such of his creditors as should execute the same. The replication set out the indenture in hæc verba, by which it appeared that the defendant covenanted, inter alia, to insure his life for £1,500, and to continue the same so insured during a period of three years; and, in case of his neglect or refusal to effect or to keep on foot this insurance, the indenture was to be utterly void to all intents and purposes whatsoever:—breach, that the defendant did not insure his life, whereby the said indenture became utterly void. The material question in the above case was, whether the deed, in case of a neglect on the part of the defendant to effect or keep alive the policy for £1,500 was absolutely void, and incapable of being confirmed as to all parties, or only void as against the plaintiff, who was a party to the deed, if he should so select; and the latter was held by the Court of Exchequer to be the true construction, by reason of the absurd consequences which would follow, if the defendant, against the consent of all other parties interested in the validity of the indenture, could avail himself of his own wrong, and thus absolve himself and the trustees from liability on their respective covenants.

"All the cases admit," says Lord Alvanley, in Touteng v. Hubbard, ‘that where a party has been disabled from performing his contract by his own default, it is not competent to him to allege the circumstances by which he was prevented as an excuse for his omission;’ and ‘if a man binds himself to do certain acts which he afterwards renders himself unable to perform, he thereby dispenses with the performance of conditions precedent to the act which he has so rendered himself unable to perform.’

"Again, where a creditor refuses a tender sufficient in amount, and duly made, he cannot afterwards, for purposes of oppression or extortion, avail himself of such refusal; for, although the
debtor still remains liable to pay whenever required so to do, yet the tender operates in bar of any claim for damages and interest for not paying or for detaining the debt, and also of the costs of an action brought to recover the demand.

"Again, where a party is sued by a wrong name, and suffers judgment to go against him, without attempting to rectify the mistake, he cannot afterwards, in an action against the sheriff for false imprisonment, complain of an execution issued against him by that name; and, if a bond, or any other instrument, is executed under an assumed name, the obligor, or party executing it, is bound thereby in the same manner as if he had executed it in his true name. So, 'if a man, having an opportunity of seeing what he is served with, wilfully abstains from looking at it, that is virtually a personal service;' and, where one of the litigating parties takes a step after having had notice that a rule has been obtained to set aside the proceedings, he does so in his own wrong, and the step taken subsequently to notice will be set aside.

"'The rule of law,' said Lord Denman, 'is clear, that, where one, by his words or conduct, wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.' So, in Gregg v. Wells, it was held, that the owner of goods, who stands by, and voluntarily allows another to treat them as his own, whereby a third person is induced to buy them bonâ fide, cannot recover them from the vendee. 'A party,' says the Lord Chief Justice, 'who negligently or culpably stands by, and allows another to contract, on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving.'

"By the term 'wilfully' above used, is to be understood 'if not that the party represents that to be true which he knows to be untrue, at least that he means his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct by negligence or omission, where there is a duty cast upon a person by usage of trade or otherwise to disclose the truth, may often have the same effect. As, for instance, a retiring partner omitting to inform his customers of the fact in the usual mode, that the continuing partners were no longer authorised to act as his agents, is bound by all contracts made by them with third persons, on the faith of their being so authorised.'"—Pages 275 to 277, 281 to 283, 286 to 288.
Acts indicate the intention. But the act does not make the man guilty unless his intention were so.] Having just seen that the law will, in some cases, imply the nature of a previous intention from a subsequent act, we purpose in the next place to consider the maxim, Actus non facit reum nisi mens sit rea, with reference mainly to penal statutes, to criminal law, and to civil proceedings for slander and libel; for, although the principle involved in it applies in many other cases, we shall defer for the present the consideration of its meaning when so applied, and restrict our remarks almost wholly in this place to an examination of the important doctrine of criminal intention.

"It is," says Lord Kenyon, 'a principle of natural justice and of our law, that the intent and the act must both concur to constitute the crime; 'a man,' as remarked by Erie, C. J., 'cannot be said to be guilty of a delict, unless to some extent his mind goes with the act,' and the first observation which suggests itself in limitation of the principle thus enunciated is, that, whenever the law positively forbids a thing to be done, it becomes ipso facto illegal to do it wilfully, or, in some cases, even ignorantly, and consequently the doing it may form the subject-matter of an indictment, information, or other penal proceeding, simpliciter and without the addition of any corrupt motive. For instance, it has been held, that a dealer in tobacco having in his possession adulterated tobacco, although ignorant of the adulteration, is liable under the statute 5 & 6 Vict., c. 98, s. 3, to the penalties therein mentioned, and this decision merely affirms the principle established in previous cases, and shows that penalties may be incurred under a prohibitory statute, without any intention on the part of the individual offending against the statute law, to infringe its provisions.

"In general, however, the intention of the party at the time of committing an act charged as an offence is as necessary to be proved as any other fact laid in the indictment, though it may happen that the proof of intention consists in showing overt acts only, the reason in such cases being, that every man is prima facie supposed to intend the necessary, or even probable or natural consequences of his own acts.

"And it is, as a general proposition, true, that if an act manifestly unlawful and dangerous be done deliberately, the mischievous intent will be presumed, unless the contrary be shown.

"It is also a rule, laid down by Lord Mansfield, and which has been said to comprise all the principles of previous decisions upon this subject, that, so long as an act rests in bare intention, it is not punishable by our law; but when an act is done, the law judges not only of the act itself, but of the intent with which it was done; and if the act be coupled with an unlawful and malicious intent, though in itself the act would otherwise have been inno-
cent, yet, the intent being criminal, the act likewise becomes criminal and punishable.

"It is accordingly important to distinguish an attempt from a bare intention; for the former a man may—and most justly, in many cases—be made answerable; for the latter he cannot be so. The 'will is not to be taken for the deed,' unless there be some external act which shows that progress has been made in the direction of it, or towards maturing and effecting it. If there be an attempt, if there be something tangible and ostensible of which the law can take hold, which can be alleged and proved—there is nothing offensive to our ideas of justice in declaring it to be criminal and punishable. Hence, an attempt to commit a felony is, in many cases, a misdemeanor; and the general rule is, that 'an attempt to commit a misdemeanor is a misdemeanor, whether the offence is created by statute, or was an offence at common law.'

"Our law, moreover, will sometimes, with a view to determining the intention, couple together two acts which have been separated the one from the other by an appreciable interval of time, and ascribe to the later of these acts that character and quality which undeniably attached and was ascribable to the earlier; and the doctrine of relation is also occasionally brought into play with a view to determining the degree of guilt of an offender. Thus A., whilst engaged in the prosecution of some felonious act, undesignedly causes the death of B.; in strictness A. may be convicted of murder, the felonious purpose conjoined with the homicide being held to fill out the legal conception of that crime So, in Reg. v. Riley, a felonious intent was held to relate back, and couple itself with a continuing act of trespass, so as, taken in connection with it, to constitute the crime of larceny.

"Having thus briefly noticed that, with some few peculiar exceptions, in order to constitute an offence punishable by law, a criminal intention must either be presumable, as where an unlawful act is done wilfully, or must be proved to have existed from the surrounding circumstances of the case, it remains to add, that, since the guilt of offending against any law whatsoever necessarily supposes wilful disobedience, such guilt can never justly be imputed to those who are either incapable of understanding the law, or of conforming themselves to it; and, consequently, that persons labouring under a natural disability of distinguishing between good and evil, by reason of their immature years, or of mental imbecility, are not punishable by any criminal proceeding for an act done during the season of incapacity; the maxims of our own, as of the civil law, upon this subject being—In omnibus penalibus judiciis et etatis et imprudentiae succurritur, and Furiosi nulla voluntas est. With regard to acts in violation of the law, an allowance is made in respect of immaturity of
years and judgment; and one who is devoid of reason is not punishable, because he can have no criminal intention.

“In two cases, which were actions upon policies of life insurance, the doctrine relative to criminal intention was much considered. In the first of these, a proviso in the policy declared that the same should be void, *inter alia*, in case the assured ‘should die by his own hands;’ and the learned judge, who presided at the trial of the cause, left it to the jury to say, whether at the time of committing the act which immediately occasioned death, the deceased was so far deprived of his reason as to be incapable of judging between right and wrong; and this question was answered by the jury in the negative, a further question being, by assent of parties, reserved for the court, viz., whether the proviso included only criminal self-destruction. After argument in banco, three judges of the Court of Common Pleas held, in opposition to the opinion of the Chief Justice, that the words of the proviso above stated were large enough, according to their ordinary acceptation, to include all intentional acts of self-destruction, whether criminal or not, if the deceased was labouring under no delusion as to the physical consequences of the act which he was committing, and if the act itself was a voluntary and wilful act; and they thought that the question, ‘whether at the time he was capable of understanding and appreciating the moral nature and quality of his purpose,’ was not relevant to the inquiry, further than as it might help to illustrate the extent of his capacity to understand the physical character of the act itself. In a subsequent case, which came, by bill of exceptions, before the Court of Exchequer Chamber, the proviso was that the policy should be void if the insured should ‘commit suicide, or die by duelling or the hands of justice;’ and the majority of the Court held that the word ‘suicide’ must be interpreted in accordance with its ordinary meaning, and must be taken to include every act of self-destruction, provided it were the intentional act of the party, knowing at the time the probable consequences of what he was about to do. The above decisions are obviously of much importance with reference to the law of life insurance, and show in what manner and in what qualified sense the maxim, *Actus non facit reum nisi mens sit rea*, must be understood, when applied to this branch of the law.

“With regard to persons of immature years, the rule is, that no infant within the age of seven years can be guilty of felony, or be punished for any capital offence; for within that age, an infant is, by presumption of law, *doli incapax*, and cannot be endowed with any discretion, and against this presumption no averment shall be received. This legal incapacity, however, ceases, when the infant attains the age of fourteen years, after which period his act becomes subject to the same rule of construction as that of any other person.
"Between the ages of seven and fourteen years an infant is deemed \textit{prima facie} to be \textit{doli incapax}; but in this case the maxim applies, \textit{malitia supplet etatem};—malice (which is here used in its legal sense, and means the doing of a wrongful act intentionally, without just cause or excuse), supplies the want of mature years. Accordingly, at the age above-mentioned, the ordinary legal presumption may be rebutted by strong and pregnant evidence of a mischievous discretion; for the capacity of doing ill or contracting guilt is not so much measured by years and days as by the strength of the delinquent's understanding and judgment. In all such cases, however, the evidence of malice ought to be strong and clear beyond all doubt and contradiction. And two questions ought, moreover, to be left for the consideration of the jury; first, whether the accused committed the offence; and, secondly, whether at the time he had a guilty knowledge that he was doing wrong."—Pages 301 to 306, 308 to 312.

"\textit{A liberal construction should be put upon written instruments, so as to uphold, if possible, and carry into effect the intentions of the parties.}"

'The general rule,' observed Byles, J., in a recent case, 'for the construction of Acts of Parliament is, that the words are to be read in their popular, natural, and ordinary sense, giving them a meaning to their full extent and capacity, unless there is reason upon their face to believe that they were not intended to bear that construction, because of some inconvenience which could not have been absent from the mind of the framers of the Act, which must arise from the giving them such large sense.'

"Hence, although the general proposition be undisputed that 'an affirmative statute giving a new right, does not of itself and of necessity destroy a previously existing right,' it will nevertheless have such effect, 'if the apparent intention of the legislature is that the two rights should not exist together.'

"A remedial statute, therefore, shall be liberally construed, so as to include cases which are within the mischief which the statute was intended to remedy; whilst, on the other hand, where the intention of the legislature is doubtful, the inclination of the Court will always be against that construction which imposes a burthen, tax, or duty on the subject. A penalty must be imposed by clear words. The words of a penal statute shall be restrained for the benefit of him against whom the penalty is inflicted.

"The principle,' remarked Lord Abinger, C. B., 'adopted by Lord Tenterden, that a penal law ought to be construed strictly, is not only a sound one, but the only one consistent with our free institutions. The interpretation of statutes has always in modern times been highly favourable to the personal liberty of the subject, and I hope will always remain so.'

"This rule, however, which is founded on the tenderness of the law for the rights of individuals, and \textit{on the plain principle that}
the power of punishment is vested in the legislative and not in
the judicial department, must not be so applied as to narrow the
words of the statute to the exclusion of cases which those words
in their ordinary acceptation, or in that sense in which the legis­
lature has obviously used them, would comprehend.

"The 'golden rule' by which judges are to be guided in the
construction of Acts of Parliament has been frequently thus
stated, that they ought 'to look at the precise words of the
statute and construe them in their ordinary sense only if such
construction would not lead to any absurdity or manifest injustice;
but if it would, then they ought so to vary and modify the words
used as to avoid that which it certainly could not have been the
intention of the legislature should be done.' The 'golden rule,'
however, thus worded, must certainly be applied with much
cal­tion. 'If,' remarked the late Chief Justice Jervis, 'the pre­
cise words used are plain and unambiguous in our judgment, we
are bound to construe them in their ordinary sense, even though
it do lead, in our view of the case, to an absurdity or manifest
injustice. Words may be modified or varied where their import
is doubtful or obscure. But we assume the functions of legisla­
tors when we depart from the ordinary meaning of the precise
words used, merely because we see, or fancy we see, an absurdity
or manifest injustice from an adherence to their literal meaning.'"—Pages 521, 549 to 552.

"The words of an instrument shall be taken most strongly against
the party employing them." 'The prevailing rule is that the words
of a contract must be construed most strongly against the con­
tractor,' a rule 'which, however, ought to be applied only where
other rules of construction fail.'

"With respect to contracts not under seal, the generally
received doctrine of law undoubtedly is, that the party who
makes any instrument should take care so to express the amount
of his own liability, as that he may not be bound further than
it was his intention that he should be bound; and, on the other
hand, that the party who receives the instrument, and parts with
his goods on the faith of it, should rather have a construction
put upon it in his favour, because the words of the instrument
are not his, but those of the other party. This principle applies to
a policy of insurance which 'being the language of the company
must, if there be any ambiguity in it, be taken most strongly
against them.'

"Where, however, an Act of Parliament is passed for the
benefit of a canal, railway, or other company, it has been ob­
served, that this, like many other cases, is a bargain between a
company of adventurers and the public, the terms of which are
expressed and set forth in the Act, and the rule of construction
in all such cases is now fully established to be, that an ambiguity
in the terms of the contract must operate against the adventurers, and in favour of the public, the former being entitled to claim nothing which is not clearly given to them by the Act. Where, therefore, by such an Act of Parliament, rates are imposed upon the public and for the benefit of the company, such rates must be considered as a tax upon the subject; and it is a sound general rule, that a tax shall not be considered to be imposed (or at least not for the benefit of a subject) without a plain declaration of the intent of the legislature to impose it.

"In a well-known case, which is usually cited as an authority with reference to the construction of Acts for the formation of companies with a view to carrying works of a public nature into execution, the law is thus distinctly laid down by Lord Eldon:—

'When I look upon these Acts of Parliament, I regard them all in the light of contracts made by the legislature on behalf of every person interested in anything to be done under them; and I have no hesitation in asserting, that, unless that principle is applied in construing statutes of this description, they become instruments of greater oppression than anything in the whole system of administration under our constitution. Such Acts of Parliament have now become extremely numerous, and from their number and operation they so much affect individuals, that I apprehend those who come for them to Parliament do in effect undertake that they shall do and submit to whatever the legislature empowers and compels them to do, and that they shall do nothing else; that they shall do and shall forbear all that they are thereby required to do and to forbear, as well with reference to the interests of the public as with reference to the interests of individuals.' Acts of Parliament, such as here referred to, have been called 'Parliamentary bargains made with each of the landowners. Perhaps more correctly they ought to be treated as conditional powers given by Parliament to take the land of the different proprietors, through whose estates the works are to proceed. Each landowner, therefore, has a right to have the powers strictly and literally carried into effect as regards his own land, and has a right also to require that no variation shall be made to his prejudice in carrying into effect the bargain between the undertakers and any one else.'

"So, with respect to Railway Acts, it has been repeatedly laid down, that the language of these Acts of Parliament is to be treated as the language of the promoters of them; they ask the legislature to confer great privileges upon them, and profess to give the public certain advantages in return. Acts passed under such circumstances should be construed strictly against the parties obtaining them, but liberally in favour of the public. 'The statute,' says Alderson, B., speaking of a railway company's Act, 'gives this company power to take a man's land without any conveyance at all; for if they cannot find out who can make a
conveyance to them, or if he refuse to convey, or if he fail to make out a title, they may pay their money into Chancery, and the land is at once vested in them by a parliamentary title. But in order to enable them to exercise this power, they must follow the words of the Act strictly. And it is clear that the words of a statute will not be strained beyond their reasonable import to impose a burthen upon, or to restrict the operation of, a public company. It will, of course, be borne in mind, that the general principle of construing an Act of Parliament of the kind above alluded to contra proferentem, can only be applied where a doubt presents itself as to the meaning of the legislature; for such an Act, and every part of it, must be read according to the ordinary and grammatical sense of the words used, and with reference to those established rules of construction which we have already stated."—Pages 571, 574, 575, 580 to 583.

"That is sufficiently certain which can be made certain." The above maxim, which sets forth a rule of logic as well as of law, is peculiarly applicable in construing a written instrument.

"An agreement in writing for the sale of a house, did not by description ascertain the particular house, but it referred to the deeds as being in the possession of A. B., named in the agreement. The Court held the agreement sufficiently certain, inasmuch as it appeared upon the face of the agreement that the house referred to was the house of which the deeds were in the possession of A. B., and, consequently, the house might easily be ascertained before the Master, and Id certum est quod certum reddi potest.

"Again, the word 'certain' must, in a variety of cases, where a contract is entered into for the sale of goods, refer to an indefinite quantity at the time of the contract made, and must mean a quantity which is to be ascertained according to the above maxim.

"And where the law requires a particular thing to be done, but does not limit any period within which it must be done, the act required must be done within a reasonable time; and a reasonable time is capable of being ascertained by evidence, and when ascertained, is as fixed and certain as if specified by Act of Parliament."—Pages 599 to 602.

"General words may be aptly restrained according to the subject matter or person to which they relate." In construing the words of any instrument, then, it is proper to consider, 1st, what is their meaning in the largest sense which, according to the common use of language, belongs to them; and, if it should appear that that sense is larger than the sense in which they

5 See also, Re George Dill, Wy. & W., Vol. I., page 172.
must be understood in the instrument in question, then, 2ndly, what is the object for which they are used. They ought not to be extended beyond their ordinary sense in order to comprehend a case within their object, for that would be to give effect to an intention not expressed; nor can they be so restricted as to exclude a case both within their object and within their ordinary sense, without violating the fundamental rule, which requires that effect should be given to such intention of the parties as they have used fit words to express. Thus, in a settlement, the preamble usually recites what it is which the grantor intends to do, and this, like the preamble to an Act of Parliament, is the key to what comes afterwards. It is very common, moreover, to put in a sweeping clause, the use and object of which are to guard against any accidental omission; but in such cases it is meant to refer to estates or things of the same nature and description with those which have been already mentioned, and such general words are not allowed to extend further than was clearly intended by the parties.

"Lastly, it is said to be a good rule of construction, that, 'where an Act of Parliament begins with words which describe things or persons of an inferior degree and concludes with general words, the general words shall not be extended to any thing or person of a higher degree,' that is to say, 'where a particular class [of persons or things] is spoken of, and general words follow, the class first mentioned is to be taken as the most comprehensive, and the general words treated as referring to matters ejusdem generis with such class.'"—Pages 620, 622, 623, 625.

"The express mention of one thing implies the exclusion of another." The Court will not, 'by inference, insert in a contract implied provisions with respect to a subject which the contract has expressly provided for.' If a man sell a horse and warrant it to be sound, the vendor knowing at the time that the purchaser wants it for the purpose of carrying a lady, and the horse though sound proves to be unfit for that particular purpose, this would be no breach of the warranty. So, with respect to any other kind of warranty: the maxim expressum facit cessare taciturn applies to such cases. If this were not so, it would be necessary for the parties to every agreement to provide in terms that they are to be understood not to be bound by anything which is not expressly set down—which would be manifestly inconvenient.'

"This distinction must, however, be taken, that, where the warranty is one which the law implies, it is clearly admissible in evidence, notwithstanding there is a written contract, if such contract be entirely silent on the subject. For instance, the defendant sold to the plaintiff a barge, and there was a contract in writing between the parties; but it was held, that a warranty was implied by law that the barge was reasonably fit for use, and
that evidence was admissible to show that, in consequence of the
defective construction of the barge, certain cement, which the
plaintiff was conveying therein, was damaged, and that the
plaintiff incurred expense, in rendering her fit for the purpose of
his trade—a purpose to which the defendant knew, at the time
of the contract, that she was intended to be applied.

"A statute, it has been said, is to be so construed, if possible,
as to give sense and meaning to every part; and the maxim was
never more applicable than when applied to the interpretation of
a statute, that expressio unius est exclusio alterius.

"Thus it sometimes happens that in a statute, the language of
which may fairly comprehend many different cases, some only
are expressly mentioned by way of example merely, and not as
excluding others of a similar nature. So, where the words used
by the legislature are general, and the statute is only declaratory
of the common law, it shall extend to other persons and things
besides those actually named, and, consequently, in such cases,
the ordinary rule of construction cannot properly apply. Some­
times, on the contrary, the expressions used are restrictive,
and intended to exclude all things which are not enumerated.
Where, for example, certain specific things are taxed, or sub­
jected to any charge, it seems probable that it was intended to
exclude everything else even of a similar nature, and à fortiori,
all things different in genus and description from those which are
enumerated. So, it is agreed that mines in general are not rate­
able to the poor within the statute 43 Eliz. c. 2, and that the
mention in that statute of coal-mines is not by way of example,
but in exclusion of all other mines

"Lastly, where a general Act of Parliament confers immu­
nities which expressly exempt certain persons from the effect
and operation of its provisions, it excludes all exemptions to
which the subject might have been before entitled at common
law; for the introduction of the exemption is necessarily exclu­
sive of all other independent extrinsic exceptions.

"The maxim above commented on is, however, as recently re­
marked, 'by no means of universal conclusive application. For
example: it is a familiar doctrine that though where a statute
makes unlawful that which was lawful before, and appoints a
specific remedy, that remedy must be pursued, and no other;
yet where an offence was antecedently punishable by a common
law proceeding, as by indictment, and a statute describes a par­
ticular remedy in case of disobedience, that such particular
remedy is cumulative, and proceedings may be had either at
common law or under the statute.'"—Pages 626, 631, 632, 634,
637 to 641.

"He who considers merely the letter of an instrument goes but
skin-deep into its meaning." The law of England respects the
effect and substance of the matter, and not every nicety of form or circumstance. The reason and spirit of cases make law, and not the letter of particular precedents.

"In interpreting an Act of Parliament, likewise, it is not, in general, a true line of construction to decide according to the strict letter of the Act; but the Courts will rather (subject to the remarks already made upon this matter), consider what is its fair meaning, and will expound it differently from the letter in order to preserve the intent. The meaning of particular words, indeed, in statutes, as well as in other instruments, is to be found, not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion on which they are used, and the object that is intended to be attained. "Such is the imperfection of human language," remarked Sir W. Jones, "that few written laws are free from ambiguity, and it rarely happens that many minds are united in the same interpretation of them;" and hence it is that fixed rules of interpretation, which the wisdom of ages has sanctioned and established, become necessary for our guidance whenever the sense of the words used is in any way ambiguous or doubtful."—Pages 657 to 659.

"Where the right is equal, the claim of the party in possession shall prevail." The general rule is, that possession constitutes a sufficient title against every person not having a better title.

"Hence it is a familiar rule, that, in ejectment, the party controverting my title must recover by his own strength, and not by my weakness; and that, 'when you will recover anything from me, it is not enough for you to destroy my title, but you must prove your own better than mine; for without a better right, Melior est conditio possidentis.'

"So mere possession will support trespass qu. cl. fr. against any one who cannot show a better title.

"In like manner it is a rule laid down in the Digest, that the condition of the defendant shall be favoured rather than that of the plaintiff, favorabiliiores rei potius quam actores habentur.

"So, if a loss must fall upon one of two innocent persons, both parties being free from blame, and justice being thus in equilibrio, the application of the same principle will turn the scale.

"'We may lay it down,' says Ashhurst, J., 'as a broad general principle, that wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it.'

"It is seldom the case, however, that the scale of justice is exactly in equilibrio; it usually happens, that some degree of laches, negligence, or want of caution, causes it to preponderate in favour either of the plaintiff or defendant.

"And in a recent case, the law bearing on the subject before us, is thus stated—that 'a person who takes a negotiable instru-
ment _bonâ fide_ for value has undoubtedly a good title, and is not affected by the want of title of the party from whom he takes it. His having the means of knowing that the security has been lost or stolen, and neglecting to avail himself thereof, may amount to negligence; and Lord Tenterden at one time thought negligence was an answer to the action. But the doctrine of _Gill v. Cubitt_ is not now approved of. A stolen note could not be said to be taken _bonâ fide_ by one who had notice or knowledge of the theft, or who, having a suspicion thereof in his mind, and the means of knowledge in his power, wilfully disregarded them.

"The object of the law merchant," it has been judicially observed, "as to bills or notes made or become payable to bearer, is to secure their circulation as money; therefore, honest acquisition confers title. To this despotic but necessary principle, the ordinary rules of the common law are made to bend. * * * Negligence in the maker of an instrument payable to bearer makes no difference in his liability to an honest holder for value; the instrument may be lost by the maker without his negligence, or stolen from him; still he must pay. The negligence of the holder, on the other hand, makes no difference in his title. However gross the holder's negligence, if it stop short of fraud, he has a title." Thus, in the case of a bill of exchange or promissory note, "the law respects the nature and uses of the instrument more than its ordinary rules." —Pages 684 to 689.

"Let a purchaser beware." 'If a man purchase goods of a tradesman, without, in any way, relying upon the skill and judgment of the vendor, the latter is not responsible for their turning out contrary to his expectation; but, if the tradesman be informed at the time the order is given of the purpose for which the article is wanted, the buyer relying upon the seller's judgment, the latter impliedly warrants that the thing furnished shall be reasonably fit and proper for the purpose for which it is required.' Accordingly, where an agreement is for a specific chattel in its _then state_, there is no implied warranty of its fitness or merchantable quality; but if a person is employed to _make_ a specific chattel, there the law implies a contract on his part that it shall be fit for the purpose for which it is ordinarily used. And upon a sale not by sample, and without warranty, of merchandise, which the buyer has no opportunity of inspecting, a condition that the article shall fairly and reasonably answer the description in the contract is implied.

"If goods be sold by a person who is not the owner, and the owner be found out and be paid for those goods, the person who sold them under pretended authority has no right to call upon the defendant to pay him also." In an action, however, by an auctioneer for the price of a horse, sold by him in that capacity and delivered to the purchaser, it was held to be no answer to
plead that the horse was sold by the plaintiff, as an auctioneer, agent, and trustee for A., and that after the sale, and before suit brought, defendant paid to A. the purchase money.

"We have already had to observe, that, as a general rule, no man can acquire a title to chattels from a person who has himself no title to them except only by a bonâ fide sale in market overt. The second vendee of a chattel cannot, in general, stand in a better situation than his vendor. For instance, if a master entrusts his servant with the care of plate or other valuables, and the servant sells them, still, unless they are sold in market overt, the master may recover them from the purchaser. And we find it laid down that 'the owner of property wrongfully taken has a right to follow it, and, subject to a change by sale in market overt, treat it as his own, and adopt any act done to it.'

"It has been said, indeed, that if the real owner of goods suffer another to have possession of his property, or of those documents which are indicia of property, and thus enable him to hold himself out to the world as having not the possession only but the property, then, perhaps, a sale by such a person would bind the true owner. Though it seems that the proposition here stated ought to be limited to cases where the person who had possession of the goods was one who, from the nature of his employment, might be taken primâ facie to have the right to sell. And where a transfer of goods was obtained under a delivery order without authority and by false pretences, it was held that mere possession of the goods, with no further indicia of title than the delivery order, would not suffice to entitle a bonâ fide pawnee of the person fraudulently obtaining possession of the goods from the true owner, to resist the claim of the latter in an action of trover.

"Moreover, where parties contract with a known agent or factor intrusted with goods for their purchase, even with notice of his being such agent, and pay for the same in pursuance of the contract, it is enacted that such contract and payment shall be binding upon and good against the real owner, if made in the ordinary course of business, and without notice that the agent is not authorised to sell.

"A sale of goods, even by a party who has himself only the possession, and not the property, as a thief or a finder, will be valid against the rightful owner, provided it be made in market overt during the usual market hours, unless such goods were the property of the king, or unless the buyer knew that the property was not in the seller, or there was any other fraud in the transaction.

"Market overt, we may observe, is defined to be a fair or market held at stated intervals in particular places, by virtue of a charter or prescription; it has been characterised as 'an open, public, and legally constituted market.'

"One rather peculiar case may here properly be mentioned,
which is not only illustrative of the general legal doctrines regulating the rights of purchasers, but likewise of another principle, which we have already considered in connection with criminal law; viz., where a man buys a chattel which, unknown to himself and to the vendor, contains valuable property. In a modern case on this subject, a person purchased at a public auction, a bureau, in a secret drawer of which he afterwards discovered a purse containing money, which he appropriated to his own use. It appeared that, at the time of the sale, no person knew that the bureau contained anything whatever. The court held, that, although there was a delivery of the bureau, and a lawful property in it thereby vested in the purchaser, yet that there was no delivery so as to give him a lawful possession of the purse and money, for the vendor had no intention to deliver it, nor the vendee to receive it; both were ignorant of its existence; and when the purchaser discovered that there was a secret drawer containing the purse and money, it was a simple case of finding, and the law applicable to all cases of finding would apply to this. It was further observed, that the old rule, that 'if one lose his goods, and another find them, though he convert them, animo furandi, to his own use, it is no larceny,' has undergone in more recent times, some limitations. One is, that, if the finder knows who the owner of the lost chattel is, or if, from any mark upon it, or the circumstances under which it is found, the owner could be reasonably ascertained, then the taking of the chattel, with a guilty intent, and the subsequent fraudulent conversion to the taker's own use, may constitute a larceny. To this class of decisions the case under consideration was held to belong, unless the plaintiff had reason to believe that he bought the contents of the bureau, if any, and consequently had a colourable right to the property in question.

Lastly, we may observe, that negotiable instruments form the most important exception to the rule, that a valid sale cannot be made except in market overt of property to which the vendor has no right. In the leading case on this subject, it was decided, that property in a bank-note passes, like that in cash, by delivery, and that a party taking it bona fide, and for value, is entitled to retain it as against a former owner from whom it has been stolen. It is, however, a general rule, that no title can be obtained through a forgery, and hence a party from whom a promissory note was stolen, and whose indorsement on it was subsequently forged, was held entitled to recover the amount of the note from an innocent holder for value. And if a person obtains in good faith change for a cheque which turns out to be worthless, the loss must fall on him. It should further be observed, that every negotiable instrument, being in its nature precisely analogous to a bank-note payable to bearer, is subject to the same rule of law; —whoever is the holder of such an instrument has power to give
"Money paid is to be applied according to the intention of the party paying it; and money received, according to that of the recipient."

According to the law of England, the debtor may, in the first instance, appropriate the payment—solvitur in modum solventis; if he omit to do so, the creditor may make the appropriation—recipitur in modum recipientis; but if neither make any appropriation, the law appropriates the payment to the earlier debt; 'where a creditor receives, without objection, what is offered by his debtor, solvitur in modum solventis, and it must be implied that the debtor paid it in satisfaction;' where 'the party to whom the money is offered does not agree to apply it according to the expressed will of the party offering it, he must refuse and stand upon the rights which the law gives him.' Thus succinctly has the law relative to the above maxim been explained, and in accordance with this explanation, it has been held, that, where the defendant, being indebted to the plaintiff for goods supplied to his wife dum sola, and to himself after the marriage, made a payment without any specific appropriation, the plaintiff might apply the money in discharge of the debt contracted by the wife dum sola; that where part of a debt was barred by the 'Statute of Limitations,' a payment of money made generally might be applied in liquidation of that part; and that a creditor receiving money without any specific appropriation by the debtor, shall be permitted in a court of law to apply it to the discharge of a prior and purely equitable debt. Moreover, it has been held that the creditor is not bound to state at the time when a payment is made, to what debt he will apply it, but that he may make such application at any period before the matter comes under the consideration of a jury.

"But although it is true that, where there are distinct accounts and a general payment, and no appropriation made at the time of such payment by the debtor, the creditor may apply it to which account he pleases; yet, where the accounts are treated by the parties as one entire account, this rule does not apply. For instance, in the case of a banking account, where all the sums paid in form one blended fund, the parts of which have no longer any distinct existence; there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place, and are carried into the account. Presumably, it is the sum first paid in that is first drawn out. It is the first item on the debit side of the account that is discharged or reduced by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other. Upon that principle all accounts current are settled, and particularly cash accounts. In like manner, where one of several
partners dies, and the partnership is in debt, and the surviving partners continue their dealings with a particular creditor, and the latter joins the transactions of the old and the new firm in one entire account, then the payments made from time to time by the surviving partners must be applied to the old debt. In that case it is to be presumed that all the parties have consented that it should be considered as one entire account, and that the death of one of the partners has produced no alteration whatever. It must be borne in mind, notwithstanding the preceding remarks, that, although the payment of money on account generally, without making a specific appropriation of it, would, in many cases, go to discharge the first part of an account, yet that rule cannot be taken to be conclusive—it is evidence of an appropriation only; and other evidence may be adduced, as of a particular mode of dealing, or of an express stipulation between the parties, which may vary the application of the rule.

"Where a person has two demands, one recognised by law, the other arising on a matter forbidden by law, and an unappropriated payment is made to him, the law will afterwards appropriate it to the demand which it acknowledges, and not to the demand which it prohibits."

"Where a bill of exchange or promissory note has been given by a debtor to his creditor, it is not unfrequently a matter of some difficulty to determine whether the giving of such instrument should be considered as payment, and as operating to extinguish the original debt; or whether it should be regarded merely as security for its payment, and as postponing the period of payment until the bill or note becomes due. Upon this subject which is one of great practical importance, the correct rule is thus laid down by Lord Langdale, M. R.:—'The debt,' says his Lordship, 'may be considered as actually paid if the creditor, at the time of receiving the note, has agreed to take it in payment of the debt, and to take upon himself the risk of the note being paid; or if, from the conduct of the creditor, or the special circumstances of the case, such a payment is legally to be implied. But in the absence of any special circumstances, throwing the risk of the note upon the creditor, his receiving the note in lieu of present payment of the debt, is no more than giving extended credit, postponing the demand for immediate payment, or giving time for payment on a future day, in consideration of receiving this species of security. Whilst the time runs, payment cannot legally be enforced, but the debt continues till payment is actually made; and if payment be not made when the time has run out, payment of the debt may be enforced as if the note had not been given. If payment be made at or before the expiration of the extended time allowed, it is then for the first time that the debt is paid.'"—Pages 777 to 784.
"He who does an act through another, is in law considered as doing it himself." The above maxim enunciates the general doctrine on which the law relative to the rights and liabilities of principal and agent depends.

"Where a contract is entered into with A., as agent for B., it is deemed in contemplation of law, to have been entered into with B., and the principal is, in most cases, the proper party to sue or be sued for a breach of such contract,—the agent being viewed simply as the medium through which it was effected: Qui facit per alium facit per se.

"The following instances, which are both of ordinary occurrence and practical importance, may be mentioned as illustrative of the rule, which, for certain purposes, identifies the agent with the principal:—Payment to an authorised agent, as an auctioneer, in the regular course of his employment, is payment to his principal.

"The receipt of money by an agent will charge the principal, and, in like manner, a tender made to an authorised agent will in law be regarded as made to the principal;—thus, where the evidence showed that the plaintiff directed his clerk not to receive certain money from his debtor if it should be offered to him, that the money was offered to the clerk, and that he, in pursuance of his master's orders, refused to receive it; upon the principle Qui facit per alium facit per se, the tender to the servant was held to be a good tender to the master. Payment also by an agent as such is equivalent to payment by the principal. Where, for example, a covenant was 'to pay or cause to be paid,' it was held, that the breach was sufficiently assigned by stating that the defendant had not paid, without saying, 'or caused to be paid;' for, had the defendant caused to be paid, he had paid, and, in such a case, the payment might be pleaded in discharge. So payment to an agent, if made in the ordinary course of business, will operate as payment to the principal. On the same principle, the delivery of goods to a carrier's servant is a delivery of them to the carrier, and the delivery of a cheque to the agent of A. is a delivery to A. Railway companies, moreover, are not to be placed in a different condition from all other carriers.

"Where an agent for the sale of goods contracts in his own name, and as a principal, the general rule is, that an action may be supported, either in the name of the party by whom the contract was made, and privy to it, or of the party on whose behalf and for whose benefit it was made. Even where the agent is a factor, receiving a del credere commission, the principal may, at any period after the contract of sale has been concluded, demand payment of the sum agreed on to himself, unless such payment had previously been made to the factor, in due course, and according to the terms of the contract. The following rules, respecting the liability of parties on a contract for the purchase
of goods, are likewise illustrative of the doctrine under considera-
tion, and are here briefly stated on account of their general
importance and applicability:—1st, An agent, contracting as
principal, is liable in that character; and, if the real principal be
known to the vendor at the time of the contract being entered
into by the agent dealing in his own name, and credit be given
to such agent, the latter only can be sued on the contract. 2ndly,
If the principal be unknown at the time of the contracting, whether
the agent represent himself as such or not, the vendor may, within
a reasonable time after discovering the principal, debit either
at his election. But, 3rdly, if a person act as agent without
authority, he is personally and solely liable; and if he exceed his
authority, the principal is not bound by acts done beyond the
scope of his legitimate authority. If A. employs B. to work for
C., without warrant from C., A. is liable to pay for the work
done; nor would it in this case make any difference, if B.
believed A. to be in truth the agent of C.; for, in order to charge
the last-mentioned party, the plaintiff must prove a contract with
him, either express or implied, and with him in the character of
a principal, directly, or through the intervention of an agent.

"The question how far an agent is personally liable, who,
having in fact no authority, professes to bind his principal, has
on various occasions, been discussed. There is no doubt, it was
observed in a recent judgment, that, in the case of a fraudulent
misrepresentation of his authority, with an intention to deceive,
the agent would be personally responsible; but independently of
this, which is perfectly free from doubt, there seem to be still two
other classes of cases, in which an agent, who, without actual
authority, makes a contract in the name of his principal, is
personally liable, even where no proof of such fraudulent inten-
tion can be given. First, where he has no authority, and knows
it, but nevertheless, makes the contract, as having such authority;
in which case, on the plainest principles of justice he is liable;
for he induces the other party to enter into the contract on
what amounts to a misrepresentation of a fact peculiarly within
his own knowledge; and it is but just, that he who does so should
be considered as holding himself out as one having competent
authority to contract, and as guaranteeing the consequences
arising from any want of such authority. There is also a second
class, in which the courts have held, that, where a party making
the contract as agent, bona fide believes that such authority is
vested in him, but has, in fact, no such authority, he is still
personally liable. In these cases, it is true, the agent is not
actuated by any fraudulent motives, nor has he made any state-
ment which he knows to be untrue; but still, his liability depends
on the same principles as before. It is a wrong, differing only in
degree, but not in its essence, from the former case, to state as
true, what the individual making such statement does not know
to be true, even though he does not know it to be false, but believes, without sufficient grounds, that the statement will ultimately turn out to be correct, and, if that wrong produces injury to a third person, who is wholly ignorant of the grounds on which such belief of the supposed agent is founded, and who has relied on the correctness of his assertion, it is equally just that he who makes such assertion should be personally liable for its consequences. The true principle derivable from the cases is, that there must be some wrong or omission of right on the part of the agent, in order to make him personally liable on a contract made in the name of his principal; in all of them, it will be found that the agent has either been guilty of some fraud, has made some statement which he knew to be false, or has stated as true what he did not know to be true, omitting at the same time to give such information to the other contracting party as would enable him, equally with himself, to judge as to the authority under which he proposed to act.

"On the maxim, \textit{Qui facit per alium facit per se}, depends also the liability of a co-partnership on a contract entered into by an individual member of the firm; for he is considered as the accredited agent of the rest, and will consequently bind the firm by his act or assurance made with reference to business transacted by it, and in the absence of collusion between himself and the other contracting party.

"In like manner, in the case of an action brought at suit of a creditor against a member of the managing or provisional committee of a railway or other company, the question of liability ordinarily resolves itself into the consideration, whether the defendant did or did not authorise the particular contract for which he is sought to be made responsible; in \textit{Barnett v. Lambert}, the defendant, in answer to an application from the secretary of a railway company, consented, by letter, that his name should be placed on the list of its provisional committee. His name was accordingly published in the newspapers as a provisional committee-man, and it appeared that on one occasion he attended and acted as chairman at a meeting of the committee. It was held, that the defendant was liable for the price of stationery supplied by the plaintiff on the order of the secretary, and used by the committee after the date of his letter to the secretary,—the question for decision being one of fact, and matter of inference for the jury, to be drawn from the defendant's conduct, as showing that he had constituted the secretary his agent to pledge his credit for all such things as were necessary for the working of the committee, and to enable it to go on. 'Where,' observed Alderson, B., 'a subscription has been made, and there is a fund, it is not so; because if you give money to a person to buy certain things with, the natural inference is, that you do not mean him to pledge your credit for them.'
“In Reynell v. Lewis, and Wylde v. Hopkins, decided shortly after Barnett v. Lambert, supra, the Court of Exchequer took occasion to lay down the principles applicable to cases falling within the particular class under consideration; and it may probably be better to give the substance of this judgment at some length, as it affords throughout important practical illustrations of that maxim, ‘which,’ in the words of Tindal, C. J., ‘is of almost universal application,’—Qui facit per alium facit per se.

The question,’ observed the court, ‘in all cases in which the plaintiff seeks to fix the defendant with liability upon a contract, express or implied, is, whether such contract was made by the defendant, by himself or his agent, with the plaintiff or his agent, and this is a question of fact for the decision of the jury upon the evidence before them. The plaintiff, on whom the burthen of proof lies in all these cases, must, in order to recover against the defendant, show that he (the defendant) contracted express or impliedly; expressiy, by making a contract with the plaintiff; impliedly, by giving an order to him under such circumstances as show that it was not to be gratuitously executed; and, if the contract was not made by the defendant personally, it must be proved that it was made by an agent of the defendant properly authorised, and that it was made as his contract. In these cases of actions against provisional committee-men of railways, it often happens that the contract is made by a third person, and the point to be decided is, whether that third person was an agent for the defendant for the purpose of making it, and made the contract as such. The agency may be constituted by an express limited authority to make such a contract, or a larger authority to make all falling within the class or description to which it belongs, or a general authority to make any; or it may be proved by showing that such a relation existed between the parties as by law would create the authority, as, for instance, that of partners, by which relation, when complete, one becomes by law the agent of the other for all purposes necessary for carrying on their particular partnership, whether general or special, or usually belonging to it; or the relation of husband and wife, in which the law, under certain circumstances, considers the husband to make his wife an agent. In all these cases, if the agent in making the contract acts on that authority, the principal is bound by the contract, and the agent’s contract is his contract, but not otherwise. This agency may be created by the immediate act of the party, that is, by really giving the authority to the agent, or representing to him that he is to have it, or by constituting that relation to which the law attaches agency; or it may be created by the representation of the defendant to the plaintiff that the party making the contract is the agent of the defendant, or that such relation exists as to constitute him such; and if the plaintiff really makes the contract on the faith of the defendant’s
representation, the defendant is bound,—he is estopped from disputing the truth of it with respect to that contract; and the representation of an authority is, _quoad hom_, precisely the same as a real authority given by the defendant to the supposed agent. This representation may be made directly to the plaintiff, or made publicly, so that it may be inferred to have reached him: and may be made by words and conduct. Upon none of these propositions is there, we apprehend, the slightest doubt, and the proper decision of all these questions depends upon the proper application of these principles to the facts of each case, and the jury are to apply the rule with due assistance from the judge.'

"Further, the liability of the husband for necessaries supplied to the wife results from her authority being implied by law to act as her husband's agent, and to contract on his behalf for this specific purpose; but the implied authority of the wife thus to bind her husband is put an end to by her adultery."—Pages 784, 785, 787 to 794, 796 to 799, 803, 804.

"Credence should be given to one skilled in his profession.[/] Almost all the injuries, it has been observed, which one individual may receive from another, and which lay the foundation of numberless actions, involve in them questions peculiar to the trades and conditions of the parties; and, in these cases, the jury must, according to the above maxim, attend to the witnesses, and decide according to their number, professional skill, and means of knowledge. Thus, in an action against a surgeon for ignorance, the question may turn on a nice point of surgery. In an action on a policy of life insurance, physicians must be examined. So, for injuries to a mill worked by running water, and occasioned by the erection of another mill higher up the stream, mill-weights and engineers must be called as witnesses.

"Respecting matters, then, of science, trade, and others of the same description, persons of skill may not only speak as to facts, but are even allowed to give their opinions in evidence, which is contrary to the general rule, that the opinion of a witness is not evidence. Thus the opinion of medical men is evidence as to the state of a patient whom they have seen; and even in cases where they have not themselves seen the patient, but have heard the symptoms and particulars of his state detailed by other witnesses at the trial, their opinions on the nature of such symptoms have been admitted. In prosecutions for murder, they have, therefore, been allowed to state their opinion, whether the wounds described by witnesses were likely to be the cause of death.

"Lastly, although in accordance with the principal maxim, a skilled witness may be examined as to mercantile usage, or as to the meaning of a term of art, he cannot be asked to construe a written document, for _Ad quæstionem legis respondent judices._"— Pages 896 to 898, 902.
LEGAL MAXIMS.

"Every presumption is to be made against a wrong-doer."

If a man, by his own tortious act, withhold the evidence by which the nature of his case would be manifested, every presumption to his disadvantage will be adopted. Where a party has the means in his power of rebutting and explaining the evidence adduced against him, if it does not tend to the truth, the omission to do so furnishes a strong inference against him. Thus, where a person who has wrongfully converted property will not produce it, it shall be presumed, as against him, to be of the best description. On the other hand, if goods are sold without any express stipulation as to the price, and the vendor prove the delivery of the goods, but give no evidence to fix their value, they are presumed to be worth the lowest price for which goods of that description usually sell; but, if the vendee himself be shown to have suppressed the means of ascertaining the truth, then a contrary presumption arises, and the goods are taken to be of the very best description.

Moreover, if a person is proved to have defaced or destroyed any written instrument, a presumption arises, that, if the truth had appeared, it would have been against his interest, and that his conduct is attributable to his knowledge of this circumstance, and, accordingly, slight evidence of the contents of the instrument will usually, in such a case, be sufficient.

If, indeed, the evidence alleged to be withheld is shown to be unattainable, the presumption contra spoliatorem ceases, and the inferior evidence is admissible. If, therefore, a deed be in the possession of the adverse party, and not produced, or if it be lost and destroyed, no matter whether by the adverse party or not, secondary evidence is clearly admissible; and, if the deed be in the possession of a third person, who is not by law compellable to produce it, and he refuses to do so, the result is the same, for the object is then unattainable by the party offering the secondary evidence.

The fabrication of evidence, we may further remark, is calculated to raise a presumption against the party who has recourse to such a practice, even stronger than when evidence has been suppressed or withheld.

A considerable degree of caution should, nevertheless, be applied in cases of this latter description, more especially in criminal proceedings, for experience shows that a weak but innocent man will sometimes, when appearances are against him, have recourse to falsehood and deception, for the purpose of manifesting his innocence and ensuring his safety."—Pages 903 to 907.

"A transaction between two parties ought not to operate to the disadvantage of a third." Of maxims relating to the law of evidence, the above may certainly be considered as one of the most important and most practically useful; its effect is to prevent a
litigant party from being concluded, or even affected, by the evidence, acts, conduct, or declarations of strangers. On a principle of good faith and mutual convenience, a man's own acts are binding upon himself, and are, as well as his conduct and declaration, evidence against him; yet it would not only be highly inconvenient but also manifestly unjust, that a man shall be bound by the acts of mere unauthorised strangers; and if a party ought not to be bound by the acts of strangers, so neither ought their acts or conduct to be used as evidence against him.

"The above rule, then, operates to exclude all the acts, declarations, or conduct of others as evidence to bind a party, either directly or by inference: so that, in general, no declaration, written entry, or affidavit made by a stranger, is evidence against a man; nor can a person be affected, still less concluded, by any evidence, decree, or judgment to which he was not actually, or, in consideration of law, privy.

"It has long been an established principle of evidence, that if a party who has knowledge of a fact make an entry of it, whereby he charges himself or discharges another upon whom he would otherwise have had a claim, such entry is admissible after his death in evidence of the fact, because it is against his own interest; or, as it has been said, an entry by a man against his own interest is evidence against all the world: and, in order to render an entry such as the above admissible, it is only necessary to prove the handwriting and death of the party who made it.

"An entry will also be admissible in evidence, if made at the time of the transaction to which it relates, in the usual course and routine of business, by a person (since deceased) who had no interest to mis-state what had occurred."—Pages 917, 918, 923, 924, 926.

"No man can be compelled to crinate himself."—Page 931. But it is enacted by section 48 of our "Evidence Statute," that no witness shall be permitted to refuse to answer any relevant question on the ground that the answer may disgrace or crinate himself, unless the court shall be of opinion that the answer will tend to subject such witness to punishment for treason, felony, or misdemeanour.

And by section 57 of the same Statute it is further enacted, that no confession shall be rejected on the ground that a promise or threat has been held out to the person confessing, unless the court shall be of opinion that the inducement really was calculated to cause an untrue admission of guilt to be made.

And although, as has been observed by the eminent authority from whose work the above and other maxims have been taken, "an individual charged with the commission of a criminal act,
cannot conformably to the course of justice in our tribunals, be interrogated by the court with a view to eliciting the truth;” he may (see *Ante*, page 54) be questioned by a police constable, and his answers, as sworn to by the constable, then become evidence.

It may, therefore, well be doubted whether it would not be better for the accused himself, and for the interests of justice, that he should be permitted to be interrogated openly, and to give his full answers and explanations before an impartial tribunal, than that he should be examined in private, and his answers given at second hand by a police constable, always anxious in important cases to secure a conviction, and sometimes even pecuniarily interested in the result of the proceedings.

In making these observations I wish to guard myself from being supposed to reflect upon the police force of this country, who, as a body, are undoubtedly highly efficient and trustworthy; but the following quotations from a leading authority on the subject will show how necessary it is to weigh the evidence of this class of witnesses with unusual care, and to make due allowance for the feelings by which they are, almost unavoidably, actuated.

“With respect to *policemen, constables*, and others employed in the suppression and detection of crime, their testimony against a prisoner should usually be watched with care; not because they intentionally pervert the truth, but because their professional zeal, fed as it is by an habitual intercourse with the vicious, and by the frequent contemplation of human nature in its most revolting form, almost necessarily leads them to ascribe actions to the worst motives, and to give a colouring of guilt to facts and conversations, which are, perhaps, in themselves consistent with perfect rectitude. ‘That all men are guilty, till they are proved to be innocent,’ is naturally the creed of the police; but it is a creed which finds no sanction in a court of justice. As a set-off to this tendency on the part of the police to regard conduct in the worst point of view, it must in fairness be stated, that, in every other respect, the general mode in which they give their testimony is unimpeachable; and that, except when blinded by prejudice, they may well challenge a comparison with any other body of men in their rank of life, as upright, intelligent, and trustworthy witnesses.”—*Taylor on Evidence, Second Edition, Vol. I., page 65*.

“Something occurs to raise a suspicion against a particular party. Constables and police officers are immediately on the alert, and, with professional zeal, ransack every place and paper, and examine into every circumstance which can tend to establish,
not his innocence, but his guilt. Presuming him guilty from the first, they are apt to consider his acquittal as a tacit reflection on their discrimination or skill, and, with something like the feeling of a keen sportsman, they determine, if possible, to bag their game. Innocent actions may thus be misinterpreted—innocent words misunderstood; and, as men readily believe what they anxiously desire, facts the most harmless may be construed into strong confirmation of preconceived opinions. We do not say that this is frequently the case, nor do we intend to disparage the police. The feelings by which they are actuated, are common to counsel, engineers, surveyors, medical men, antiquarians, and philosophers; indeed, to all persons who first assume that a fact or system is true, and then seek for arguments to support and prove its truth."—Page 75.
PART IV.

CONTRACTS.
SECTION I.

OF CONTRACTS BY RECORD, DEEDS, AND SIMPLE CONTRACTS.

"Nature and definition of a contract.] A contract is defined by Pothier to be 'an agreement by which two parties mutually promise and engage, or one of them only promises and engages to the other, to give some particular thing, or to do or abstain from doing some particular act.' Every contract includes a con­currence of intention between two parties, one of whom promises something to the other, who on his part accepts such promise, but it does not necessarily include a mutuality or reciprocity of contract and liability. There must be two parties to every con­tract, a promisor or party making the promise, and a promisee or party to whom the promise is made, but there may be only one contracting party. Thus, if A. promise to pay B. the price of goods to be sold by the latter to C., B. contracts no obligation to sell goods to C., though if he does the liability of A. attaches, and his engagement becomes absolute and binding. When there is a mutual contract binding one or more persons towards another, or several others, the contract is bilateral. When the contract binds one person to another without any engagement being made by the latter, it is unilateral. Contracts, also, are either principal or accessorial. The first are those which are entered into by the parties on their own account as principals; the second are those which are entered into for assuring the performance of another principal contract, such as guarantees or engagements of sureties. Contracts of all kinds, whether bilateral or unilateral, principal or accessorial, are made and authenticated either by matter of record, by deed, or by simple contract.

"Simple contracts are contracts which are made either by word of mouth or are inferred from the silent language of men's con­duct and actions, or are put into writing and signed by the parties to them, but are not sealed and delivered. They are of an inferior nature to and have much less force and efficacy than a deed. They do not, like the latter, constitute and create an immediate obligation, but present merely a mode of evidence, and cannot be
enforced unless they are founded upon some good or valuable consideration. Thus, in order to maintain an action for the breach of a promise or undertaking not under seal, the party making the promise must have obtained some advantage, or the party to whom it is made must have suffered some loss, or sustained some injury and inconvenience, in consequence of the making and acceptance of the promise. This rule has been wisely established by the law for the purpose of protecting weak and thoughtless persons from the consequences of rash, improvident, and inconsiderate engagements. When the advantage is all on one side, the transaction ought to be regarded with doubt and suspicion; and when we reflect upon the hasty and imprudent promises and declarations which are frequently made, on the imperfection of language, the loose way in which people are apt to express themselves, and the misconstruction and misunderstanding which consequently ensue, it seems right and proper that courts of law should decline to enforce mere gratuitous promises, unless the parties take care to clothe them with those solemn legal formalities which are presumed to manifest due deliberation and reflection."


"Nugatory considerations.] Neither ‘love and affection,’ nor ‘friendship,’ nor any mere moral duty or obligation, nor any voluntary courtesy, constitute a sufficient cause or consideration for the fulfilment by coercion of law of an undertaking or promise not under seal. The moral obligation which a parent is under to provide for his child, imposes on him no liability to pay the debts incurred by the child, and he cannot be made liable in respect thereof, unless he has given the child authority to incur them, or has contracted to pay them. Very slight evidence has, however, been held sufficient, under certain circumstances, to warrant a jury in inferring the existence of an authority from the parent, so as to fasten a just liability upon the latter.

"By-gone transactions cannot be made a good consideration for a promise. Therefore in pleading, if the consideration be stated in the past tense, as a by-gone transaction, at the time of making the promise, it will fail to support the promise. A promise, for example, to pay the plaintiff £20 in consideration that the plaintiff had delivered twenty sheep to the defendant, or a promise to lend the plaintiff £20 in consideration that the plaintiff had formerly lent that sum to the defendant, is a nudum pactum, and incapable of sustaining an action, and so is a promise to pay the plaintiff £140 in consideration that the plaintiff had expended that amount in the maintenance and education of the defendant, and in the management and improvement of his estate, and in the payment of the interest of a mortgage on it during the defendant’s minority, for the thing having been done and executed before the promise was made, cannot be said to be a consideration
for it; but if the act has been performed pursuant to the previous request of the party making the promise, then the promise is coupled to the consideration by the request, and is not a *nudum pactum*. And when the defendant has received and retains the benefit of the consideration, the law will imply a request, or permit the jury to infer it, for the purpose of enforcing a meritorious claim, but its existence in law is always essential, and must be stated as a fact on the face of the pleadings in order to support the promise declared upon.”—Pages 5–6–7.

“*Nugatory written promises.*] No superiority was given by the civil law to a written contract over a contract by word of mouth. ‘For writing cannot change the nature of it, neither can writing amount to a cause or consideration for the promise, but is only made use of for proof.’ Where the defendant signed a written undertaking to the following effect—‘I hereby agree to remain with Mrs. Lees for two years from the date hereof, for the purpose of learning the business of a dressmaker, &c.’ It was held, that as the engagement was all on one side, nothing being contracted to be done or performed by Mrs. Lees as a consideration or inducement for the defendant’s remaining two years in her service, it was a *nudum pactum*.

“So where a memorandum of agreement was made in the following terms—‘I, William Bradley, of Sheffield, do agree that I will work for and with John Sykes, of Sheffield, manufacturer of powder-flasks, at such work as he shall order and direct, and no other person whatsoever, from this day henceforth, during and until the expiration of twelve months, and so on from twelve months’ end to twelve months’ end, until I shall give the said John Sykes twelve months’ notice in writing that I shall quit his service,’ it was held, that this engagement being entirely unilateral, the agreement was a *nudum pactum*, and could not be enforced.”—Pages 7–8.

“*Valid considerations—works and services.*] By the civil law, if any one agreed to perform or effect anything (whether that consisted in giving or doing something, or omitting or withholding something), on the understanding that another in his turn should do something, or give or deliver something, or *vice versa*, the person in whose favour the thing executed was delivered or done, was not permitted to be deficient in performing what was stipulated on his part, but was compelled to performance, so that if there was a cause or consideration *facti vel traditionis*, a corresponding obligation or duty arose. So, by the common law, if anything is performed which the party is under no legal obligation to perform, or if anything is given or done, as the consideration or inducement for the promise whereby the promisor or party making the promise, has obtained or secured for himself
some benefit or advantage, or whereby the promisee or party to whom the promise has been made has sustained some trouble or loss, or suffered some injury or inconvenience, there is a sufficient consideration, to render the promise obligatory in law, and capable of sustaining an action. The mere surrender and delivery of a letter or other written document, which the promisee has a right to keep and retain in his possession, is a sufficient consideration for the promise, although the possession of it may turn out eventually to be of no value in a pecuniary point of view, or no benefit may have resulted to the one party, nor prejudice to the other, from the surrender and delivery of the document. If one person agrees to transfer, and another person agrees to accept, shares in a public company, upon which shares nothing has been paid, and which have no marketable value at the time of the transfer, the agreement constitutes a binding contract. If the defendant has promised the plaintiff to pay him a sum of money in consideration of the plaintiff’s procuring a tenant for the defendant, or getting him a sale or purchase and conveyance of a particular estate, there is a good and valid consideration for the promise.

“\textit{A consideration of loss or inconvenience, sustained by one party at the request of another, is as good a consideration in law for a promise by such other, as a consideration of profit or convenience to himself. It is sufficient if there be any damage or detriment to the plaintiff, though no actual benefit accrue to the party undertaking. If the plaintiff has become security for the promisor, or has accepted bills, or imposed upon himself any legal liability at the request of the latter, there is a sufficient consideration to support a promise and render it binding in law, although no actual benefit or advantage has resulted to the promisor. Any trouble or labour, too, however slight, undertaken by the plaintiff, at the request of the defendant, will support a promise by the latter, and render it binding, although such trouble and labour may have been unsuccessful and productive of no benefit or advantage to the defendant. Where the defendant promised a reward to whoever would give such information as would lead to the conviction of a felon, and the plaintiff gave the necessary information, it was held that the service rendered was a sufficient consideration for the promise, and that the plaintiff was entitled to recover the reward, although he was a constable and police-officer of the district where the felony was committed.”}—Pages 8–9.

“\textit{Works and services rendered to a third party at the request of the promisor.}” Any service, benefit, or advantage also, rendered to a third person at the request of the promisor, is a sufficient consideration for the promise. Thus, if one person should say to another, ‘heal such a poor man of his disease,’ or ‘make an high-
way,' and I will give thee so much, and he doeth it, an action lieth at the common law. * * * So, if a tailor furnishes clothes to a boy at school, and the father sees the clothes on the boy's return home, and makes no objection to the tailor, this is sufficient to warrant a jury to find that there was an implied authority from the father to the tailor to furnish the son with clothes."—Pages 9-10.

"Implied requests.] If the defendant has accepted and retains the benefit or advantage of the consideration, the law will imply a request where none exists in point of fact. Thus, if a man pays a sum of money, or buys goods for me without my knowledge or request, and afterwards I agree to the payment or receive the goods, this subsequent assent is equivalent to a previous request, in accordance with the ancient maxim of the civil law, omnis ratihabitio retrotrahitur et mandato priori aequiparatur. A request, too, is frequently implied by law for the purpose of enabling a man to enforce an express promise founded upon a meritorious claim not amounting to a strict legal right. If a man, for example, clothes, feeds, and educates an infant during his infancy, and the latter after he comes of age makes an express promise to his benefactor to pay him a certain sum of money in consideration of the benefits so rendered, the law will imply a previous request on the part of the infant for the supply of the necessaries of life so furnished. Hence it has been said that the existence of a moral duty or obligation to do a particular thing, is a sufficient consideration for an express promise to perform it. But this is not true as a general proposition in point of law."—Page 11.

"Moral obligations.] The only duties of the nature of mere moral obligations that will support an express promise, are those which could be enforced at common law, but for the intervention of some positive rule of law or statutory enactment, which, with a view to general benefit, exempts the party in that particular instance from liability. Such are the duties and obligations arising out of the debts and contracts of persons under age, and antiquated legal claims and demands barred by the 'Statute of Limitations,' where the remedy is taken away by a positive rule of law, or by express legislative enactment, and the payment of the debt, or the performance of the engagement, remains a voluntary duty, binding only in foro conscientiae. In these instances, and upon such duties and obligations so exempted, an express promise operates to revive the liability and take away the exemption. It revives a precedent good consideration, but it can give no original right of action if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statutory provision. Past seduction and past cohabitation, consequently, are not a sufficient consideration to support
an express promise to pay an annuity to the injured female.”—Page 11.

“Mutuality of contract and obligation.] There is a large class of contracts, also, which, being founded upon mutual promises, are perfected and made binding by the bare consent of the parties, the promise or undertaking of the one party to do one thing being the consideration for the promise of the other to do another. To these contracts, framed and constituted for the performance of mutual and reciprocal acts and duties, and founded upon a mutuality and reciprocity of obligation and liability, the objection of *nudum pactum* cannot apply. Such are all contracts of sale where the promise or undertaking of the one party to sell forms the consideration for the promise of the other to buy, and where ‘the bargain is struck,’ and the contract concluded, by the mere assent of the parties, neither being at liberty ‘to be off,’ provided possession of the subject-matter of the sale be tendered by the seller within a reasonable period. * * * In the case of the contracts with the dressmaker and powder-flask manufacturer, previously cited, if Mrs. Lees, the dressmaker, had engaged to teach the defendant the art of dressmaking, or John Sykes, the flask-manufacturer, had bound himself to employ Bradley, his workman, by the year, there would have been a sufficient consideration for their several promises to remain in the service of their employers for the time specified.”—Pages 12-13.

“Mutual promises.] All contracts founded upon mutual promises between persons of full age, must be obligatory upon both parties, so that each may have an action upon it, or it will bind neither; if the one only is bound, there is no consideration for the promise of the other, and such promise is consequently *nudum pactum*. A written agreement, consequently, to submit disputes and differences to arbitration, must be signed by all parties before any one can be made liable upon it, as the obligation by all to obey the award of the arbitrator is the consideration to each for his entering into the contract. Before a plaintiff, therefore, can succeed in an action upon such a contract, he must show that he had himself engaged to be bound by the award. The mutuality of obligation is the very essence of all contracts founded upon mutual promises. ‘Hence it follows,’ observes Pothier, ‘that nothing can be more contradictory to such an obligation than an entire liberty in either of the parties making the promise to perform it or not, as he may please. An agreement giving such a liberty would be absolutely void for want of obligation,’ i. e. so long as the contract remained executory, and nothing had been done under it. But if the contract has been executed by the performance of the act forming the consideration for the promise, then it is no answer to an action to say that the plaintiff was
not, by the terms of the original contract, bound to do the act, and that there was consequently no mutuality of obligation."—Pages 13-14.

"Unilateral undertakings—guarantees.] There is a large class of contracts in which there is no mutuality of engagement or liability. In the preceding cases, for example, where the consideration for the promise made by the defendant was the giving up, or surrender of letters or securities, or the performance of work and labour, or the marrying the defendant’s kinswoman, or the suspension or forbearance of legal proceedings, or the intrusting another with property, the plaintiff was not, by the terms of the original contract, bound to give up the letters, or perform the work, or marry the kinswoman, or suspend the legal proceedings, or intrust the party with property; but if, acting upon the faith of the promise made to him, he did so, the promise attaches to the consideration so performed and accomplished, and the defendant is liable upon his promise. When the defendant has had the benefit of the consideration for which he bargained, it is no answer to an action brought against him to say that the plaintiff was not bound by the contract to do the act. Thus in the case of guarantees—Suppose I say, if you will furnish goods to a third person, I will guarantee the payment; there you are not bound to furnish them; yet if you do furnish them in pursuance of the contract, you may sue me upon my guarantee.' So if a person says, 'In case you choose to employ this man as your agent for a week, I will be responsible for all such sums as he shall receive during that time and neglect to pay over to you, the party indemnified is not therefore bound to employ the person designated by the guarantee; but if he does employ him, then the guarantee attaches and becomes binding on the party who gave it.' It does not follow that, because a householder applies to a gas company for a supply of gas, and is promised a supply, and fits up his premises with stoves and fittings for the purpose of having them warmed and lighted with gas, that there is any contract on the part of the company to supply, or on the part of the householder to consume and pay for gas any longer than either of them may think fit. The householder is not bound to take gas, nor the company to supply it, for a single minute longer than each is minded so to do."—Pages 14-15.

"Contracts with infants—want of mutuality.] It is a principle of the common law, that if a contract has been entered into between an infant and a person of full age, the former may take advantage of his minority and resist the completion of his contract; but that right cannot be urged by the other to show, that as there was not a mutual obligation, there was no consideration for his promise. If, therefore, a person of full age enters into a
contract of marriage with a lady who is a minor, the latter may sue the former upon the contract, although she is not herself liable to an action for a breach of promise."—Page 15.

"Of the assent of the parties.] If the terms of a contract founded upon mutual promises have not been finally agreed upon, if either party withholds or has not given his full assent to them, the contract is incomplete; it binds neither of the parties, and can give rise to no cause of action. Where a proposal or tender is accepted, subject to the terms of a contract being arranged and drawn up for signature, there is no concluded bargain, until the terms have been arranged, and a written contract executed. A promise of marriage, so long as it remains unaccepted, amounts to a mere proposal or offer, which may be retracted at any time. Before, therefore, the plaintiff can succeed in an action upon such a promise, it must be shown that he or she accepted the proposal, and so entered into a corresponding engagement; and this acceptance may be proved and established by the conduct of the party, as well as by express words. If an offer has been made by one man to sell goods to another, such offer is not, of course, binding until it has been formally accepted by the party to whom it has been made, as the one cannot be held liable to the other for not selling the goods, unless that other, by accepting the offer, has bound himself to purchase. Where the defendant proposed to sell goods to the plaintiff at a fixed price, and gave him, at his request, a certain time to determine whether he would buy them or not, and the plaintiff, within the time determined to buy them, and gave notice thereof to the defendant, and offered to pay the price; but the latter then receded from his offer, and refused to deliver the goods and accept the money: it was held, in an action for the non-delivery of goods, that there was no complete contract of sale; that as the plaintiff was not by the original contract bound to purchase, there was no consideration to bind the defendant to sell; that the engagement was all on one side, and was therefore nudum pactum. And where there was a proposal by the defendant to take a lease from the plaintiff on certain terms, and to this proposal the plaintiff was to give a definite answer within six weeks, it was held that if six weeks are given by one party to accept an offer, the other has the same period to put an end to it. The contract must be mutual, and the one party cannot be bound without the other. If, however, anything has been given or done as the consideration for the promise, if the party to whom it is made has agreed to incur any expense or labour in consideration of the offers being continued or kept open for a certain time, then the party making the offer is not at liberty to retract it. When the promise has been accepted, and the contract concluded, the acceptance cannot be revoked, and neither party is at liberty,
without the consent of the other, to rescind the contract, or 'be off' from his bargain. But if the party to whom the offer is made does not accept it in the very terms in which it is made, and some new qualification or condition is annexed to the acceptance, the party making the offer is, of course, not bound by the acceptance."—Pages 15–16.

"Acceptance of offers made through the post-office.] Where the defendants wrote to the plaintiffs, making them an offer of merchandise at a fixed price, they 'receiving an answer in course of post,' it was held that there was a binding contract of sale the moment the offer was accepted, and that the defendants were not at liberty to retract their offer before the arrival of the time for receiving the answer; otherwise, it was observed, no contract could ever be completed by post. In this case the defendants misdirected the letter, and so caused a delay in its receipt and in the return of the answer, and not having received the answer at the expected time, they sold their merchandise to another person; and it was held that as the delay had been occasioned by their own neglect, and not by any omission or default on the part of the plaintiff, the answer must be taken to have come back in due course of post, and that the defendants were liable upon the contract for the damage sustained by the plaintiff by reason of his loss of the bargain, and of the non-delivery of the goods. If the letter in acceptance of the offer miscarries, and never reaches its destination, the contract is nevertheless complete.

"Biddings at an auction are mere offers which may be retracted at any time before the hammer is down and the offer has been accepted. Where the defendant had retracted his bidding at an auction, the court said, 'The assent of both parties is necessary to make the contract binding; that is signified on the part of the seller by knocking down the hammer, which was not done till the defendant had retracted. An auction is not unaptly called locus poenitentiae. Every bidding is nothing more than an offer on the one side, which is not binding on the other side till it is assented to.'"—Pages 16–17.

"Inadequacy of consideration.] From the preceding remarks, it will at once be perceived that it is not essential in point of law that the consideration for a simple contract or promise should be adequate in point of value. 'If there be any consideration, the court will not weigh the extent of it.' It has no means of scrutinising the varied hidden motives and reasons that may have influenced the parties, and induced them to enter into the contract, nor can it determine upon the prudence or propriety of the transaction. If parties choose to enter into unwise and improvident bargains, they must abide by the consequences of their own rashness and folly; they have contracted for themselves, and the court cannot contract for them."—Page 17.
SECTION II.

OF IMPLIED CONTRACTS AND PROMISES.

"Implied Contracts.] The intention of the parties to any particular transaction may be gathered from their acts and deeds, in connection with surrounding circumstances, as well as from their words; and the law therefore implies, from the silent language of men's conduct and actions, contracts and promises as forcible and binding as those that are made by express words, or through the medium of written memorials. If one man sends to the shop of another for food or clothing, or articles of merchandise, or enters an inn and takes refreshment, the law implies a contract or promise from him to pay a reasonable sum for the articles and refreshments received, though nothing has been said or stipulated concerning price or payment. If one man is employed to work for another, the law raises an implied promise from the employer to pay the ordinary hire or reward for the work; and if a man borrows a horse, the law implies a promise from the borrower to the lender to feed the animal properly and sufficiently whilst it remains in his charge and possession. 'The only difference between an express and an implied contract not under seal, is in the mode of substantiating it. An express contract is proved by an actual agreement; an implied contract by circumstances, and the course of dealing between the parties; but whenever a contract is once proved, the consequences resulting from the breach of it must be the same whether it be proved by direct or circumstantial evidence.'" —Pages 17-18.

"Implied promises.] If a husband wrongfully discards his wife, any person may furnish her with raiment, food, and lodging, and the necessaries of life, and the law will imply a promise from the husband to pay for the things so supplied, in the same way as if they had been supplied to himself at his express request.† As a man is bound to support his wife whilst

† "If by cruelty or threats of personal violence, or by shameless and immoral conduct, the husband renders it morally impossible for the wife to continue to cohabit and reside with him, and she accordingly leaves him, this is as much an expulsion as if he had turned her out by main force."—Addison on Contracts, page 777.

But the obligation of the husband to support his wife, and his liability for necessaries supplied to her is terminated by adultery on her part, unless the husband shall have condoned or connived at her offence.—Cooper v. Lloyd, 6 C. B. N. S., 524; Keats v. Keats, 28 S. J., Prob. & Mat., 78; Harris v. Morris, 4 Esp., 41; Norton v. Fazene, 1 B. & P., 227.
living, as being part and parcel of himself, so is he bound by
law to bury her when dead; and if the husband has abandoned
the wife, and lives in a distant land, and is unable, or being able,
is unwilling, and neglects to bury her, any stranger may under­
take the duty, and defray the expenses of a funeral suitable to
her rank or fortune; and the law implies a request on the part
of the husband to the stranger, so to do, as well as a promise to
repay the money so laid out, upon which implied promise an
action is maintainable against the husband, though the burial
was, in point of fact, undertaken, and the money paid, without
his knowledge or consent. So that in this as in other instances
of implied contracts and promises, the ancient legal maxim is
well supported, "in fictione juris subsistit aequitas."

"When a servant binds himself to work for some certain
period, and the master agrees to pay wages in proportion to the
work done, there is an implied obligation on the part of the
master to provide work. And if a person contracts to pay a
salary for services to be rendered for a certain term, there is an
implied contract on his part to permit those services to be per­
formed. Generally speaking, every workman who devotes his
labour, his talents, and his time to the service of an employer, is
entitled to a recompense; and the law implies a promise from
the employer in case nothing has been said or stipulated con­
cerning payment, to pay a reasonable compensation for the
services rendered, and the right of action upon such implied
promise or undertaking arises as soon as the work has been
completed, and he is enabled to avail himself of the benefit of
it; but the law raises no implied promise in respect of mere
gratuitous services, such as voluntary assistance in saving pro­
erty from fire; or securing property found afloat, or beasts
found astray, or voluntary and unsolicited supplies of food and
lodging, or voluntary services rendered in and about the manage­
ment of the affairs of another, for that which appears to have
been offered and accepted as a gratuity cannot afterwards be
converted into a debt. The law raises no implied promise of re­
muneration or payment in favor of a person who professes to
render services of a purely honorary character. The barrister
and physician consequently cannot maintain an action for their
fees in the absence of an express and distinct contract for re­
muneration and promise of payment.†

"Whether any contract is made, or on what terms it is made,
must depend on the circumstances of each case, and upon custom
and usage. If a fund is to be collected, and a party merely
speculates on the chance of being paid, taking the risk whether
funds will be collected and appropriated to his demand, there is

† See now "Medical Practitioners Statute 1865," and "County Court Act
1869."
no contract. If he does work on the order of another under such circumstances, that it must be presumed that he looks to be paid as a matter of right by him, then a contract would be implied with that person.”—Pages 21–22.

“Part execution of a special contract.] Where a workman had been induced to enter into a special contract to remove a quantity of rubbish for a certain sum, by reason of a false and fraudulent representation as to the depth of the rubbish, made by the employer; it was held that the workman might repudiate the special contract as soon as he discovered the fraud, and sue his employer for compensation for his lost time and labour. And when a special contract for work and services has been abandoned and put an end to, and is no longer open and in existence, and the employer has derived some benefit and advantage from work done under it, he may be made liable, upon an implied promise, to make a reasonable remuneration or payment in respect thereof.”—Page 22.

“Implied contracts of sale.] Whenever a purchaser retains goods after a special contract for the sale of them has gone off or has not been exactly performed by the vendor, the vendor may recover the value of the goods upon a new contract and promise which the law then implies from the retention of the goods. If goods have been retained by fraud and deceit, the party defrauded of his goods may, if he thinks fit, waive the tort, and sue upon an implied contract, treating the wrong-doer as a purchaser of the goods. Where a father falsely pretended to retire from business in favor of an infant son whom he introduced as his successor, stating that he should keep a watchful eye over him, and upon this representation the plaintiffs supplied the son with goods to the amount of £800, and the son refusing to pay for these goods, and being exonerated from liability by reason of his minority, the plaintiffs brought their action against the father; it was held that if the father’s statement to the plaintiffs was false, and he continued, notwithstanding his pretended retirement, to have a secret interest in the concern, he was liable upon an implied promise to pay to the plaintiffs the price of the goods as the real buyer and principal in the transaction. And where the defendant knowingly induced the plaintiff to sell goods to an insolvent, which goods were immediately afterwards made over to the defendant himself, the court held that the law would imply a contract from the defendant to pay for the goods as the real purchaser, the insolvent appearing to have been the mere creature and agent of the defendant, and a mere man of straw in the transaction, made use of by the defendant to enable him to perpetrate a fraud upon the plaintiff.”—Pages 22–23.
As to contracts of "Hiring and service."—See Addison on Contracts, pages 380 to 395.

For "Goods sold and delivered."—See Roscoe's Evidence in Actions at Nisi Prius, pages 355 to 371.

For "Money lent."—Ibid, pages 383 and 384.

For "Work and labor done" and for "Materials provided for same."—Ibid, pages 373 to 379.

For the "Use and occupation of a house, or apartments."—Ibid, pages 242 to 249.
POSTSCRIPT.

Although the preceding pages are, as their title indicates, intended for Courts of Petty Sessions—that is, for magistrates exercising the functions of a judge and jury—the rules of evidence, etc., will be found equally applicable to the proceedings of justices where they are acting ministerially—that is, where they are merely enquiring whether there is any evidence against the party charged, to warrant them in committing him to take his trial before another tribunal.

The mode of procedure in regard to indictable offences is very fully defined by the "Justices of the Peace Statute 1865," part 5; but the terms of the 96th section leave the mind in some doubt as to the course to be pursued when the case for the prosecution is completed.

By that section it is enacted that "When all the evidence offered upon the part of the prosecution against the accused party has been heard, if the justices then present be of opinion that * * * such evidence is sufficient to put the accused party upon his trial for an indictable offence, or if the evidence raise a strong, or probable, presumption of the guilt of such accused party, such justices shall by their warrant commit," etc.; and on the strength of this it has sometimes been asserted that in such cases the justices are not required, or even empowered, to hear witnesses for the defence.

But, in a charge delivered by him to the grand jury at the Taunton Assizes, held April 2nd, 1849, it was laid down by Lord Denman, that "When a person charged with an indictable
offence wishes to call witnesses for his defence, he should be allowed to do so. If they explain away the evidence for the prosecution, the prisoner should be discharged; but if they only contradict that evidence, it should be left to a jury to say which they believe."

Having been thus led to touch upon the subject of indictable offences, I am unwilling to leave it without referring to a description of evidence which, although applicable only to a few cases of that kind—and that kind only—is of vast importance in regard to those cases; is of such a character that its value, or it should be said, its existence, depends upon the manner in which it is taken; and with respect to which a mistake made at the time by the person (generally a magistrate) taking it, can never afterwards be rectified.

The subject to which I refer is the dying declarations of deceased persons; and to show the necessity for observing the utmost care and circumspection in taking these declarations, it is only necessary to refer to the cases of Regina v. Whelan (the Argus of the 7th and 13th December, 1867) and Regina v. Jenkins (the Law Reports, Crown cases reserved, Vol. I., page 187), where the prisoners, who had been convicted of murder, were discharged on the ground that the dying declarations of the murdered persons, which had been given in evidence, were not made in accordance with the strict letter of the law.

The law upon the subject will be found fully set out in the cases above quoted, and in Roscoe’s Criminal Evidence, pages 30 to 35.

The gist of the subject, in so far as it relates to the taking of dying declarations, is contained in the following extract from Oke’s Formulist, third edition, page 456, and in the subsequent remarks:—

**Dying Declaration before a Justice, in Cases of Personal Injuries to the Declarant.**

No particular form of this declaration is necessary; but it may be as well to state in this place that its principal ingre-
diants, in order to its admissibility in evidence against a person, are:

1. The cause of the death of the declarant must be the subject of inquiry.

2. The circumstances of the death of the subject of the declaration.

3. It must appear to have been made at a time when the declarant (the deceased) was perfectly aware of his danger, and entertained no hope of recovery.

If the accused can be brought into the presence of the person injured, the examination should be taken in the usual form; but if otherwise, the declaration, not on oath, should be taken by a justice, in somewhat like the following form:

I, C. D., of , in the colony of , do hereby solemnly and sincerely declare that [here set out the statement in the very words used].

Taken before me, at , in the colony of , this day of , 18 .

(Signed) J. S.,
One of Her Majesty's Justices of the Peace in and for the said colony of

It would seem from the above as if the declaration must be taken in writing by a justice of the peace; but it will be found on referring to the cases of R. v. Gay, 7 C. & P., 230; R. v. Perkins, 9 C. & P., 395; and Regina v. Jenkins, supra, that such is not the case.

But where the declaration has been reduced into writing, secondary evidence cannot be given of its contents.—R. v. Gay, supra.

"But it seems that if more than one declaration has been made, and one only has been reduced to writing, parol evidence
may be given of those which were by parol only."—*Roscoe's Criminal Evidence*, page 34.

It ought, perhaps, be added, that it is no objection to a dying declaration that it has been elicited by questions put to the deceased.—*R. v. Fagent*, 7 C. & P., 238; and *R. v. Woodcock*, 1 *Leach*, 500. In the last case the deceased was examined upon oath by a magistrate, and the examination signed by both.

It should also be borne in mind that the declaration must have been made by a person who, if alive, would have been a competent witness.—*R. v. Pike*, 3 C. & P., 598; 2 *Russell on Crimes by Greaves*, 764; 1 *Phill. Ev.*, 298, ninth edition.
NOTES.

NOTE A.

In the case referred to in the note quoted (Re Prince ex parte Binge, 1 Wy. W. & a'B., page 12, Law), it was held that the section in the "Justices Statute," limiting the jurisdiction of justices to twelve months from the time when the matter of the complaint or information arose, "is not merely in restriction of the plaintiff's right of procedure, but is also in limitation and definition of the jurisdiction of the magistrate."

But in a subsequent case (Regina v. Wells, Wy. W. & a'B., Vol. IV., Part I., page 31), the court placed what seems to be a broader construction upon the section, and held that if the defendant had by part payment, or otherwise, acknowledged the debt within twelve months, the plaintiff might recover although the original debt had been contracted more than twelve months.

NOTE B.

The last "Amended Evidence Act" completely dispenses with the necessity for administering or taking oaths.

NOTE C.

Magistrates can only award costs in cases over which they have a summary jurisdiction, not in indictable offences; therefore, where D. was charged with perjury, and the case was dismissed with £10 10s. costs, a prohibition was granted restraining the enforcement of the order for the payment of the costs. —Regina v. Daley, Wy. W. & a'B., Vol. VI., Part II., page 76.

Where a party has been brought before a County or other inferior Court, and it turns out that the court has no jurisdiction, it follows that it has no power to award costs.—Lamford v. Partridge, 26 L. J. Exc., page 147. (But see now, as to County Courts, the "County Court Act, 1869.")

And in a case where a magistrate has jurisdiction and power to award costs, if he awards an "unreasonable" sum nominally as costs, but really on other grounds, the court will issue a prohibition (with costs) against the magistrate. —Regina v. Panton, The Argus, 28th March, 1870.

NOTE D.

It was held by the Supreme Court, Victoria, in Regina v. Call ex parte Fisher (Notes of Cases, 9th December, 1869), that where a person charged under the 46th section of the "Wines, Beer, and Spirit Statute," with "allowing thieves to be on his premises," was shown to have acted as a licensed publican, it was not necessary for the prosecution to prove that he was licensed.