Seal — Certificate. &c. —

1. Dowl: & Ryl: Rep. 324
Ex parte Church & al.

The Notarial certificate and Seal, verified by the British consul, whose handwriting is sworn to, of the execution of a power of Attorney, executed in America, to a person in London to receive money there for the party abroad, is not evidence in a Court of Law, of the due execution of the instrument, without the affidavit of the subscribing witness. —

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3. Taunt: Rep. 162.
Waldron & al. v. Coombe

The Certificate of a British Vice-Consul at the Brasils, of the amount of the proceeds of damaged goods, which by the law of that Country are compelled to be sold under his inspection, is not evidence.

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4. Camp. Rep. 129
Chesmer. v. Noyes.

A Notarial protest under Seal, is no evidence that a foreign bill of Exchange has been presented for payment in England. — L. Ellenborough. The protest may be sufficient to prove a presentment which took place in a foreign Country; but I am quite clear, that the presentment of a foreign bill in England must be proved in the same manner as if it were an Inland bill, or a promissory note. —

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3. East. Rep. 221.
Henry. v. Adey.

In action upon a Judgment obtained in the Island of Grenada — Held — that it was not sufficient to prove the Judge's hand writing — subscribed to it, without proving that the Seal affixed thereto is the Seal of the Court. —

Seal, Certificate, &c.

2. Starkie. N. P. Rep. 6.
Appleton. v. Ld. Braybrook

In an action on a Judgment in the Court of the Island of Jamaica — It was proposed to authenticate the Judgment in the follows manner — 1st. To shew by a certificate of the Governor under the great seal of the Island, that Clayton was a Notary public and Secretary of the Island. 2d. To prove by a certificate of Clayton, the Notary public, that Smith, was Chief Clerk of the Supreme Court — and 3d. by producing an instrument, which purported to be a copy of a Judgment under the hand of the Chief clerk — It was proved that the Court had no seal, but the handwriting of Smith to the document in question was not proved.

This was held insufficient proof of the Judgt and a nonsuit was entered against the plff.

4 Camp. Rep. 28.
Alves. v Bunbury

In an action on a foreign Judgment, the Judgment produced at the trial, must be authenticated by the Seal of the foreign Court — or evidence must be given that the Court has no Seal, and then the Judgment may be established by proving the Signature of the Judge

Seamen — Impressing &c.

The power of impressing seamen, Sea-faring men, and persons whose occupations and callings are to work in vessels and boats upon Rivers, is founded upon immemorial usage. — And there may be a legal right of exemption upon the same foundation. —

2 Coup. 512. Rex. v. John Tubbs. —

Seamen — of Royal Navy — arrest of &c

No Seaman to be arrested (except for some Criminal matter) unless affidavit be made, that the debt amounts to £20 Stg at least, and was contracted before Defendant entered into H.M.'s Majy's Service — A memorandum of the cause to be — indorsed on the back of the process —

See 31 Geo. 2d. ch. 10. Sec. 28. &
32 Geo. 3d. ch. 33. Sec. 22. &

A Judge of the Court may discharge on complaint of the Defendt — or one of his Superior Officers when arrested contrary to the Act, and costs awarded — 31 Geo. 2. ch. 10. Sec. 28. —

Sheriff &c — not to discharge Seamen whether arrested by Civil or Criminal process, on payment of debt &c — but deliver over the Prisr to the principal Naval Commander &c —

44 Geo. 3. ch. 13. Sec. 1. & 2.

Creditors may proceed and file com. appearance on notice given to Seaman, or left at his last place residence — 31 Geo. 2, ch. 10, Sec. 29. —

Sheriff suffering an escape forfeits £100. &

44 Geo. ch. 13. Sec. 4 —

Seamen — Impressment of &c

2. & 3. An. ch. 6. S. 4. — Apprentices bound under the direction of this act, are exempt from impressment for three years from the date of Indenture. —

Id. — " — S. 15. — Indentures to be registered and certificates given by the Collector of the port and protections thereon granted —

4. An. ch. 19. S. 17. — No person of the age of 18 to have any exemption who shall have been in the Sea Service before he bound himself apprentice. —

13. Geo. 2. ch. 17. S. 1 — Persons aged 55, or under 18, and every foreigner serving on board an English Merchant Ship are exempted from being impressed. —

do — do — S. 2 — And all persons for the space of two years from their first going to Sea —

do — do — S. 3. — The Lr. High Admiral or Commissioners of the Admiralty to grant protections to such persons —

14. Geo: 2. ch. 30. Sec. 7. — In case of actual, or threatened invasion of any of the Colonies in America, or any other unforseen and emergent necessity or occasion requiring it; Commanders there stationed may with the concurrence and consent of the Governor and Council, impress such a number of Seamen as may complete their full complement —

Separation de Corps & de biens.

3. Barn: & Cress. Rep 291.
Lewis v. Lee.

A woman divorced a mensa et thoro for adultery, and living separate and apart from her husband, cannot be said in England as a feme sole -

Serment. manus ad pectus. —

This mode of swearing is peculiar to the clergy and is admitted as legal and binding in all judicial proceedings.

See. Questions de Maynard
1 Vol. p. 564. & seq. —

Serviteur – Domestique.

Serpillon. on tit. 22. art. 14. ordᵉ 1667 – p. 390.

Ces mots, Serviteurs, Domestiques, ne sont pas synonimes, ils ont chacun un sens, et une signification differente, sans quoi l'ordᵉ de 1667 ne les auroit pas aussi expressement distingués. – Les Serviteurs sont les valets, servantes, portiers, Cuisiniers & autres Serviteurs semblables – Et sous le nom de Domestique, on entend les precepteurs, les – Aumoniers, les gentilshommes attachés aux maisons des Princes quand meme ils auroient des – appointements. –

Rodier. dᵉ dᵉ p. 339. –

Serviteurs ou Domestiques ne sont pas termes synonimes – Domestiques, sont ceux qui restent dans la même maison, qui sont commensaux de la partie sans faire aucune œuvre servile. tels que les Commis, agens, clercs, precepteurs, ou gouverneurs et pensionnaires – Serviteurs, sont les gens – destinés aux œuvres serviles dans la maison, et qui y sont nourris et entretenus aux depens du maitre soit qu'ils ayent des gages ou non – D'ou l'on peut conclure que les metayers qui cultivent la terre d'un maitre, ne sont pas des Serviteurs ni des domestiques, à moins qu'ils ne soient dans la même maison, et ne soient nourris journellement chez leur maitre. –

Servant. see – Libel

Sheriff — rights & duties of —

1. Raym. 136. Case of Sheriff of Essex.

The Sheriff must keep malefactors in the County Gaol, but he may keep prisoners for debt where he pleases

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1 Holt. N.P. Rep 217. Hill. v. Leighoal

In an action against the Sheriff for an escape the regular way of connecting him with his officer so as to make him responsible for his act, is by the production of the warrant — but any recognition by the Sheriff, that the Officer acted under his authority will dispense with the necessity of producing it. — An indorsement upon the writ, (returned and filed by the Sheriff) of the name of the Officer, is not sufficient to make the Sheriff responsible, without proving that his name was written upon it by the authority, or with the privity of the Sheriff. —

The writ with the Sheriff's return upon it, is only evidence against him to the extent of his duty under it, and it is no part of his duty to annex the officers name to the return. —

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2. Burr. 792. Rex. v. Beardmore

Under Sheriffs will incur a contempt, and may be fined and imprisoned for not properly carrying a Sentence into execution.

see 8. T. Reps. 324. a

Ca. temp. Hardwicke 310. Wilkinson. v. The Sheriffs of London.

Where a prisoner, entrusted by the Gaoler with the keys, is seen without the Gaol, the Sheriff becomes liable as for a voluntary escape, to an action of debt; for which he cannot justify, by alledging a recaption; Aliter had the escape been through negligence. a

Sheriff - Office & duties of.

5. Taunt: 225.- Hindle.v Blades

If the securities taken by the Sheriff are apparently responsible, he is discharged

Sheriff.

1. Bing: Rep. 156.
Ibbotson v. Tindal

Where the Defendant was already in Custody when the plaintiff's Capias issued ag.t him, and afterwards escaped, the Court refused to set aside an attachment against the Sheriff for not bringing in the body and to drive the Plaintiff to his action against the Sheriff, which was moved for on the ground, that the Sheriff having taken no bail bond, ought not to be responsible summarily by attachment. —

In the same Case, the Sheriff having returned to the Capias — "I have taken the Defendant "whose body remains in the prison &c." The Court refused to allow him to amend the return by striking it out and making another according to the fact. —

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7 Barn: & Cress. 535.
Gibbins v. Phillips.

In an action of Trover against the Sheriff for goods taken in execution, it is sufficient for the plaintiff to give in evidence the warrant issued by the Under Sheriff, under the Sheriff's Seal of Office, and he is not bound to prove the writ. —

Sheriff. liability.

2. Blacks. Reps. p. 831. 2. 3 Sanderson. v. Baker & al' note (d)

The Sheriff is personally liable for every act of his bailiff, for all civil purposes. — So actions for breach of duty of the office of Sheriff, must be brought against the Sheriff, and not against the Under Sheriff or bailiff 2. T. Reps. 148. & Ashurst. J. — and 1. Doug. 40 — also Cameron. v. Reynolds. 1 Cowp. 403. — Peshall. v. Layton. 2 T. Rep. 712. — Sturny. q. t. v. Smith 11 East. 25.

But the relation between the Sheriff and his bailiff must be made out — Drake. v. Sykes. 7 T. Rep. 113. — Jones. v. Wood. 3 Camp. 228. — Which may be done among other means, by shewing some recognition by the former of the act of the latter, Martin. v. Bell. 1 Stark. 413. —

see Bac. Abr. tit. Sheriff (H.) s. 4. Com. Dig. (Viscount (D. 2) —

Signature — see also — Handwriting.

1 Moody & Malkins N. P. Ca. p. 176. Mitchell v Johnson

Where the attesting witness to a bond cannot be produced, proof of his signature is sufficient evidence of the execution by the Defendant the obligor, though the Defendt signs only by mark. —

Id. p. 79. Page vs Man. & al.

Proof of the handwriting of the subscribing witness to an instrument is sufficient, he being dead, without any further proof of the identity of the parties, except the identity of the name & description.

Id. p. 286. — Kay & others. — vs Brookman & others

Where the subscribing witness to a deed cannot be produced, proof of his handwriting is sufficient evidence of the execution by the parties whose signature purports to be affixed to it, without any further evidence of their identity. —

Note. In addition to Nelson v Whittall, and the cases cited in Selw. N. P. 6th edit. 548, n. — The doubt therefore expressed by Bayley. J. in Nelson v Whittall, and by Ld Kenyon in Wallis v Delancey, 7. T. Rep. 266. n. may be considered as completely removed by the concurrent practice of both Courts, in cases where the existence of that doubt was pressed on their consideration.

Id. p. 39. — Lewis & al. v Lapio

The Signature of a party to bill of exchange may be proved by a person who has seen him write his surname only. —

Solidité —

De Ste Vast
Cout. de M. & A.
p. 340.

M. de Parence dit, d'apres de Renusson, traité des propres, que deux Marchands, quoique non en societé, signant un billet s'obligent solidairement quoiqu'il n'en soit point fait mention — Arrest du Parlt de Toulouse du 17 Juin 1672. —

and p. 437. — Mr. de Parence dit, d'apres Bardet, que toute sous signature privée de plusieurs marchands pour marchandises, emporte la Solidité, quoique non exprimée. —
Arret du 18 Janv. 1633. liv. 2. c. 3.
Journal du Palais. t. 2. p. 51. —

Statute of Frauds.

3. Brod: & Bing: Rep. p. 14.

Jenkins & al. v. Reynolds.

The following promise to pay the debt of another, was considered as not binding — because it did not express the consideration for which the promise was made so as to constitute a valid agreement —

To the amount of £100. — consider me as Security on Mr James Cowing & Co's account — signed & dated, by the Defendant —

☞ The decisions had on this clause of the Statute of frauds are in this case very fully considered and the Court of Com. Pleas seem strongly of opinion, that the promise here according to those decisions, was not binding. — This therefore we must take to be the law, but it is certainly contrary to the general course of dealing among merchants, and I would almost say against the justice of the Case, for in a transaction of this kind consideration might almost be presumed, and the giving credit to Cowing & Co. here might well have been considered as a consideration for the Defendants sufficient to bind the promise. —

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11 Price's Rep. 494.
Lilley & al. v. Hewitt

It is not necessary in a declaration against a person on his undertaking to be answerable for or to pay the debt of another, to state an agreement, note or memorandum, or the terms of any such, or the parties thereto, or that it was in writing, or signed by the defendant; nor is it necessary to do so in the replication to a plea averring that no agreement ~~or~~ note, or memorandum stating the consideration

consideration in writing signed by the defendant was stated or shewn — Such a plea held bad on demurrer, notwithstanding the Case of Saunders. Vs. Wakefield — 4 Barn. & Ald. 595. —

It is not matter of objection to such a declaration, that the consideration for such collateral undertaking as set out is inadequate; for it is not necessary to state a full and adequate consideration to maintain Assumpsit on the promise and undertaking — A good and valuable consideration in law, is all that is necessary to state for that purpose. — Therefore, if the undertaking were, to be answerable for and to repay money advanced, and to be advanced to a limited amount to a third person, it cannot be objected that the money already advanced was an insufficient consideration to ground the undertaking. — It is not necessary in such a declaration to aver a request made to the party himself in the first instance to pay the debt before the guarantee was resorted to: at least an averment that he had neglected and refused to repay the money, is sufficient for the purpose of maintaining the action against the guarantee. —

See the opinion expressed by Mr Baron Wood, on the pleadings in this case. —

"The rule of pleading I have always understood to be
" this — whenever the declaration is framed upon a deed
" it must be pleaded with a profert, to enable the Defendt
" to crave oyer and prepare his plea — but if the Plff
" declare on an agreement in writing, signed but not
" under Seal, he need not state it in the declaration
" to be in writing or to be signed; and the reason is,
" because he is not obliged to make profert of it, nor
" can the defendant demand oyer, or a copy of it. —

"It

"It is considered as a simple Contract.— It is necessary
" however that he should prove it at the trial, but that
" does not oblige him to set out the terms of it in his
" declaration, and it is sufficient, if he set out enough
" of the tenor of it to shew that he has good cause of
" action." &c—

In the Case referred to of Saunders. v. Wakefield 4. Barn: & Ald. 595— it was held— That by the 4th Section of the Statute of frauds, an agreement to pay the debt of another, must, in order to give a cause of action, be in writing, and must contain the consideration for the promise, as well as the promise itself, and parol evidence of the consideration is inadmissible. —

☞ It would seem here however that this decision was founded upon the principle that the pltff had by his replication shewn a different promise or agreement from that declared upon, and in which no consideration was mentioned. —

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8 Dow: & Ryl. 343.
Elsmore v Kingscote

A note in writing of a bargain for the purchase and sale of goods, must state the price of the goods or it will not satisfy the requisites of the Statute of Frauds. —

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10 Moore's Rep. 395.
Morley & al: v. Boothby & Clarke.

The defendts signed and addressed to the Pffs the following written Agreement— We hereby promise that your draft on W. C. Son & Co. due at Messrs Masterman's at six months, due on 27 Novr next shall then be paid out of money to be received from St Phillip's Church, say amount £174. 13. 5.
Held— that this was not an undertaking to bind the Defendants within the Statute of Frauds, as no consideration for the promise, — appeared on the face of it. —

Statute of Frauds.

12. Moore's Rep. 177.
Wells. v. Horton. Exer &c

Where an agreement is to be performed on a Contingency which may happen within the year after it is made, and it does not appear on the face of the agreement, that it is to be performed after the year, it does not fall within the 4th Sec. of the Statute of Frauds which requires an agreement that is not to be performed within the year from the making thereof, to be in writing. — Where therefore the debtor to the plaintiff stated to the plaintiff's Solicitor on being applied to for payment, that he, the debtor could not pay then or during his lifetime, but that he had provided for payment by his will and directed his Executors to pay. — Held — to be binding on the Executor, although there was no promise in writing by the testator to pay. —

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2. Mr Bl. Rep. 63. —
Rondeau. v. Wyatt.

A. & B. enter into a verbal agreement for the sale of goods to be delivered to A, at a future period; there is neither earnest paid — a note or memorandum in writing signed — nor any part of the goods delivered. This Contract is void, being within the Stautute of Frauds, though it is executory — and though it has been admitted by B. in his answer to a bill in Chancery. —

☞ The principle of this decision is recognized in subsequent Cases — vid. Cooper. v. Elston. 7. T. R. 14 Groves. v. Buck. 3. M. & S. 178. — Garbutt. v. Watson 5. B & A. 613. —

But a principal point here decided is

as

as to the effect of the Defendants admission of the Contract in his answer to the Bill in Chancery — It would seem that the Defendant in his answers to this bill admitted the Contract, but pleaded the Statute of frauds, and averred that there was no note or memorandum in writing, nor a delivery of any part of the flour to the plff &c following the words of the Statute, and that plea having been over-ruled, this action was brought, in which the above admission was given in evidence to support the demand —

Ld Loughborough however held that the admission of the Defendant could not set aside the law where that law was invoked against the Validity of the Contract — That although the preventing of perjury might have been one object of the Statute, yet it was not the only object — it was also necessary to lay down a clear and positive rule to determine when the Contract of sale should be complete — accordingly the Statute has made it necessary, that either the party buying should accept and receive part of the goods sold, or give something in earnest to bind the bargain, or that there should be some note or memorandum in writing signed by the parties to the Contract — Something therefore direct and specific is to be done, to shew that the agreement is complete, that there may be no room for doubt or hesitation. —

As this Statute constitutes a rule of evidence in Commercial Cases, the principle here laid down will apply in our Courts in Canada. —

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The words of the Statute are very general — "No Contract "for the Sale of any goods &c" yet it has been held not to apply to sales by auction — Simon v. Metivier. 1 Black. 599. Bull. N. P. 280. — Nor for executory Contracts. — Towers. v. Sir John Osborne. Stra. 506. — Clayton v. Andrews 4. Burr. 2101. —

It would appear to be a rule, that if a party — admits an agreement in his answer in Chancery — without insisting on the Statute of Frauds, that Court will hold it to be good. — Prec. in Ch. 208. 374. 533. — but where the Statute is pleaded, and the exceptions of it negatived, the Court of Chancery will not compel the Defendant to execute it — Whaley. v. Bagenal. Parl. Ca. Brown. 6 vol. p. 45. — Whitchurch v. Bevis. — 2 Brown's Ca. in Ch. 556. —

4 Barn: & Adolp. 443
Bird v. Boulter. —

In assumpsit by an auctioneer against a purchaser for goods sold, an entry in the sale book by the — auctioneer's clerk, who attended the sale, and as each lot was knocked down, named the purchaser aloud, and on a sign of assent from him, made a note accordingly in the book — is a memorandum in writing by an agent lawfully authorised within sect. 17. of the Stat. of Frauds. For the clerk is not identified with the auctioneer (who sues) and in the business which he performs of entering the names &c — he is impliedly authorised by the persons attending the sale, to be their agent. —

Statute of Limitations.—

3 Bing. Rep. 329.
A'Court v. Cross.
28 Novr. 1825.

The defendant being arrested on a debt, more than six years old, said, I know that I owe the money, but the bill I gave is on a three penny receipt stamp, and I will never pay it— Held— not such an acknowledgment as would revive the debt, against a plea of the Statute of limitations.—

This decision certainly appears at variance with what has been determined in the Kings Bench as appears by the cases cited by the plaintiffs Counsel in the Cause— Observe what Ch. J. Best says in deciding this Case— I am sorry to be obliged to admit that the Courts of Justice have been deservedly censured for their vacillating decisions on the 21 Jac. 1. c. 16.— When by distinctions and refinements, which Ld. Mansfield says, the common sense of mankind cannot keep pace with, any branch of the law is brought into a State of uncertainty, the evil is only to be remedied by going back to the Statute: or if it be in the Common Law, settling it on some broad and intelligible principle— But this must be done with Caution, otherwise we shall encrease the Confusion that we attempt to get rid of; the authority of no one Court is sufficient in such a Case— I will therefore go no further to day than I am authorized to go by the authority of the modern decisions.—

The Statute says, that actions on the Case, account, trespass, debt, detinue, and replevin, shall be brought within six years, after the Cause of action, & not after.

These actions it will be observed, are mentioned in the same section of the act, and the limitation of the time within which they must be brought, is the same in all of them.— In all of them, except assumpsit,

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the six years commence from the moment there is a cause of action, and that time cannot be enlarged by any acknowledgment — But in assumpsit it has been holden, that although six years have elapsed since the debt was contracted. if the debtor promises to pay it within six years, he cannot avail himself of the protection of this statute, because this promise founded on a moral consideration, is a new cause of action — It seems to me the pltff should have been required to declare specially on this new promise, and ought not to have been permitted to revive his original Cause of action, for which the Statute expressly declares no action shall be brought — By the present practice, the Defendant has not such distinct information, as I think he is entitled to, that the plaintiff means to avail himself of some promise to recover a stale demand. The real Cause of action is kept entirely out of view, and one that cannot be supported brought forward — This is inconsistent with what is said to be the intent of special pleading. —

The Courts however have not stopped here, they have said, acknowledgment of a debt is sufficient, without any promise to pay it, to take a case out of the Statute. — I cannot reconcile this doctrine, either with the words of the Statute, or the language of the pleadings — The replication to the plea of non assumpsit infra sex annos, is that the Defendant did undertake and promise within six years — The mere acknowledgment of a debt is not a promise to pay it — a man may acknowledge a debt which he knows he is incapable of paying, and it is contrary to all sound reasoning to presume from such acknowledgment, that he promises to

pay

pay it; yet without regarding the circumstances under which an acknowledgment was made, the Courts, on proof of it, have presumed a promise —

It has been supposed that the legislature only meant to protect persons who had paid their debts, but from length of time had lost or destroyed the proof of payment. From the title of the act to the last section, every word of it shews that it was not passed on this narrow ground — It is, as I have often heard it called by great Judges, an act of peace — Long dormant claims have often more of cruelty than of justice in them — Christianity forbids us to attempt enforcing the payt. of a debt, which time and misfortune have rendered the debtor unable to discharge. The Legislature thought, that if a demand was not attempted to be enforced for six years, some good excuse for the non-payment might be presumed, and took away the legal power of recovering it — I think, if I were now sitting in the Exchequer Chamber, I should say, that an acknowledgt. of a debt however distinct and unqualified, would not take from the party who makes it, the protection of the Statute of limitations, but I should not, after the cases that have been decided, be disposed to go so far in this Court, without consulting the Judges of the other Courts — There are many cases from which it may be collected, that if there be any thing said at the time of the acknowledgt. to repel the inference of a promise, the acknowledgt. will not take a case out of the Stat. of limitations —

In the present case, the Defdt. at the time he acknowledgd the debt, said he wd. not pay it, because the Pltff had arrested him.

I cannot therefore say, that there was any cause of action within six years before the bringing of the action, and the rule for setting aside the Non-suit must be discharged —

The rest of the court concurring — The Rule was discharged.

8. Dow: & Ryl. 347.
Thorpe. v. Coombe

Where a promissory Note was made payable two years after demand — Held — that the Statute of limitations did not begin to run until two years after the demand had elapsed. —

Here the note was dated in 1810, demand made on 18 June 1823. Action instituted in 1825. —

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10. Moore's Rep. 431.
Colledge. v. Horn. —

In assumpsit for goods sold and delivered, the Defendant pleaded the Statute of limitations, in answer to which a letter was produced, addressed by the defendant to the plaintiffs Attorney, as follows — "I this day received yours respecting T. C's (the Plaintiffs') " demand — it is not a just one. — I am ready to settle " the account, whenever T. C. (the plaintiff) thinks proper " to meet me on the business. — I am not in his debt £90 — " nor any thing like it. — Shall be happy to settle the difference " by his meeting me in London, or at my house. — I shall " write Mr C. (the plff) on the subject." — Held sufficient to take the case out of the Statute. —

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4 Bingh: Rep. 105.
Ayton. v. Bolt.

On application to the Defendant to pay a debt barred by the Statute of limitations — he said he would be happy to pay it if he could — Held — That the plaintiff must shew the Defendants ability to pay to entitle him to a verdict. —

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2. Barn: & Adolph. 431
Helps & another
v.
Winterbottom. —

Goods were sold at six months credit, payment to be then made by a bill at two or three months at the purchaser's option. — Held — That this was in effect, a nine months credit, and consequently that an action for goods sold and delivered commenced within six years from the end of the nine months, was in time to save the Statute of limitations. —

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Statute — interpretation of.

2. Barn: & Adolp. 818.
The King. —
Justices of Middlesex.

Where two acts of Parliament which passed during the same Session, and were to come into operation the same day, are repugnant to each other, that which last received the royal assent must prevail and be considered, pro tanto, a repeal of the other. —

Stolen-goods- Search-warr.

6. Barn: & Cres: Rep 232.

Crozier. v Cudney & al:-

Where a Constable having a warrant to search for certain specific goods, alledged to have been stolen, found and took away those goods, and certain others also supposed to have been stolen, but which were not mentioned in the warrant, and were not likely to be of use in substantiating the charge of stealing the goods mentioned in the warrant — Held — that the Constable was liable to an action of trespass. —

Suburbs — What so considered.

See Jones. v. Walker. 2 Coups. 628.

Ld. Mansfield. In all Dictionnaries, Suburbs are defined to be, "buildings adjoining to a great City, "without the Walls"

Welles. J. I think the word. "Suburbs", means same as "parts adjacent".

Tenor & Substance — difference as to statement of —

Substance, is understood to be an abstract, or general import effect of what is alledged to have been said or written —

The word, "tenor," has in law a peculiar and technical sense, and the distinction between it and, "substance", is distinctly pointed out by Mr J. Buller in the Case of — Rex. v. May. Doug. 193., where he says, that the word Tenor, has so strict and technical a meaning, as to make it necessary to recite verbatim. — that by the expression, "manner & form" used in that Case, nothing more than a substantial recital was requisite. —

Where therefore it is requisite to set out the tenor of a deed, a libel, or other writing, to set out the substance of it will not be sufficient — for two statements which may differ in words, may agree in substance. —

see Case of Wright. v. Clements. 3 ~~Colds.~~ & Barn: & ald. 503. —

In the Case of Rex. v. Gilchrist. 2. Leach's Ca. 657. Buller. J. said. Old cases have given rise to much learning and argument on the words, Purport, & Tenor, and the books are full of — distinctions as to the meaning of these words and the necessity of using the one or the other of them in indictments, where written instruments are to be stated; but among the many cases on this subject, I can find no judicial determination that the purport and the tenor, should both be stated in any Case whatever. —

Purport

Purport, means the substance of an Instrument as it appears on the face of it to every eye that reads it; Tenor, means an exact copy of it; and therefore, where an instrument is stated according to its tenor, the purport of it must necessarily appear. —

Terme — echéance &c.

Potts. Obl. № 234, & seq. — See Cases where a debt may be demanded before the expiration of the term of payt.

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2 Starkie. 227. Nickeson v. Jepson. — Goods sold at three months credit, the Vendor agreeing to take the Vendee's bill of Exchange at three months date, at the end of the first three months, if he wished for further time. — Unless the Vendee give such a bill at the end of the first three months, the Vendor may bring his action immediately. —

Id. p. 286 - Gibbon & al. v. Scott. — The payee of a bill of exchange accepted as a Security for A. engages to renew it for three months more if A. be not returned before the bill becomes due. — If the acceptor after the expiration of that time make no application for the renewal of the bill, the payee may bring his action before the expiration of the three months more. —

Testament. Inscrip.^on en faux. —

Ravot sur Perrier 1. vol. Arrets Not. sec. 164 — Somm.re No 15.216. — p. 505.

Faits de Suggestion admis contre un testament sans Inscription en Faux. —

Cette jurisprudence est pour ainsi dire, celle de tout le Royaume; le Parlement de Paris par le celebre Arret qui fut rendu à l'audience publique au mois de Janvier 1696. ne jugea-t-il pas qu'on pouvoit prouver par temoins la demence de Mr l'abbé d'Orleans? — Il est vrai neanmoins que si les faits sont directement contraire à une enonciation importante, qui n'est point de style, c'est le plus sur d'employer l'Inscription de Faux: Dans celui du 14 Juillet 1699, dont nous venons de faire mention, il s'agissoit de prouver que les temoins avoient signé le testament apres coup, et hors de la presence du Testateur: On jugea que les heritiers presomptifs n'etoient pas recevables à prouver par temoins, le fait qu'ils avancoient, et qu'ils devoient s'inscrire en faux, parceque le Notaire avoit enoncé que les temoins avoient signé en présence du Testateur et conjointement avec lui; et neanmoins comme le fait degeneroit en nullité, l'information fut convertie en enquête; par ou on prejugea qu'en pareil cas la preuve vocale pouvoit être admise. —

Ce qui est du fait et du devoir du Notaire, tombe en inscription de faux — il doit faire signer les temoins et le testateur conjointement avec lui, et en sa présence — l'Ordon.ce de Blois, art. 166. enjoint aux notaires, de pratiquer cette formalité, pour obvier aux faussetés et aux suppositions — ce sont les termes de l'Ordonnance — mais il n'en est pas de même de l'expression du Notaire touchant la capacité du Testateur — cela n'est pas de son fait, ni de

sa

sa connoissance ; tout ce qu'il en dit est un excés de precaution et de style ; il n'est pas du devoir du Notaire d'en parler ; les loix ne lui ordonnent rien à ce sujet, au lieu qu'il est obligé de faire signer en sa presence, et d'en faire mention. m—

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See the distinction taken by Perrier, where an Inscription en faux is not, and where it is necessary.-

1st Vol. p. 110. N° 8. & 9. —

L'Inscription de faux est inutile quand on n'attaque point la verité ni la forme de l'acte, on en impugne la substance, c'est à dire la volonté et la liberté du choix m —

Mais lorsque dans les faits de suggestion il y en a qui tendent à detruire la foi de l'acte, et les enonciations qu'il renferme, l'inscription de faux est indespensable, et on n'admet point indistinctement la preuve vocale pour tous les faits de Suggestion- ceux qui donnent atteinte à la forme et à la verité de l'acte ne sont reçus que par l'Inscription de Faux, à l'egard des autres ils peuvent être prouvés par la voie ordinaire.

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Testament. lu & relu.

2. Raviot sur Perrin p. III. N° 15.

La Coutume de Paris, art. 289. exige pour la validité du Testament, qu'il ait été dicté et nommé par le Testateur aux Notaires, Curé, ou Vicaire General — il ne s'ensuit pas, que le Notaire ne puisse apporter le testament qu'il aurait écrit hors de la presence du Testateur et par son ordre: Cette Coutume n'a pas voulu que le Testament fut dicté mot à mot par le testateur ce qui seroit impossible à plusieurs: Comment une femme, un paysan, un artisan, et mille autres, pourroient ils d'eux mêmes dicter un testament, en construire les dispositions, et les tourner en termes convenables? — Mais cette Coutume qui est très sage a prescrit, que le Testateur s'expliqua de ses intentions, et qu'il nomma de sa bouche le legataire universel et ceux auxquels il veut faire part de ses dons; voila ce qu'elle appelle, dicter le Testament, sauf au Notaire, ou aux personnes experimentées de le rediger et de le mettre dans la forme du Droit Civil — C'est aussi dans cette Coutume une judicieuse precaution d'avoir ordonné que le Testament ainsi dicté et nommé soit relu, et qu'il en soit fait mention dans l'acte, parceque souvent en redigeant les volontés d'un Testateur on s'ecarteroit de ses intentions; les termes pourroient en changer la Substance — Le Testateur à qui on relit sa disposition y fait ses reflections, et l'attention qu'il y donne peut la faire modifier ou changer. —

Trader. — vide — "Marchands". —

2. New Rep. 78.
Stewart vs. Ball

A farmer who occasionally buys hay, corn, horses &c with a view to sell again for profit, does not thereby make himself a trader within the bankrupt laws. —

But in this Case the Judge left it to the Jury to determine, whether the different acts of buying and selling were incident to the occupation of the farm — & they should be of opinion that they were, he directed them to find a verdict for the Defendt, if not, for the Plff.

The Jury found for the Defendant

1. Term. Rep. 572
Patman v. Vaughan

An Inn-keeper who sells liquor out of the house to all Customers that apply for it, is subject to the bankrupt laws, however inconsiderable the extent of such dealing, and the profits arising from it may be. —

1 T. Rep. 573.
Bartholemew v. Sherwood — S on sole (a)

Where it appeared in evidence that there were many instances of the farmers buying horses which he could not use in his farming business, and others which he bought for the express purpose of selling again — this was left as matter of evidence for the consideration of the Jury, whether this was a trading within the meaning of the Statutes concerning bankrupts — and they found that it was. —

1. Brod: & Bing: Rep. 2.
Parker. vs. Barker

In order to constitute a party a trader within the meaning of the Bankrupt Laws, it is sufficient that he acknowledge himself to have been in partnership with one who was

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a trader, and is proved to have given directions in the Concern, though no act of buying or selling during the time of the partnership can be established in evidence. —

3. Carr: & Payne's Rep. 500.
Paul v. Dowling. —

The making of bricks for sale from clay taken from a mans own land, does not constitute him a trader within the meaning of the Bankrupt laws — nor will it be a trading, if such person buy chalk for the purpose of burning with the clay to improve the bricks, & afterwards sell a portion of the chalk, when converted into lime. —

S. C. 1 Moody & Malk. N. P. Ca. 263.

Transitu. Stopping in.

5. Maul. & Sel. 350
Patten & al. v Thompson

The unpaid vendor may stop in transitu before the goods come to the hands of the vendee's factor, although the factor has the bill of lading, indorsed to order, in his hands, and is under acceptance to the vendee on a general account. Wherefore in such case, where the vendee became bankrupt, and the factor also became bankrupt, and the messenger under the factor's commission upon the arrival of the ship, went on board and seized the cargo, the agent of the vendor having previously given notice to the Captain to deliver the Cargo to him and the Captain having agreed thereto,

Held – that Trover would lie by the vendor as the assignee of the bankrupt Factor.

Trespass.

4 Burr. 2455.
Bertie, v. Pickering & ux

In trespass for taking goods, the declaration must specify particulars.—
Defendt might be unable to justify the taking of divers goods &c—
and
a recovery in such case could not be pleaded in bar of another action brought for the same goods— 2° Ld Ray. 1410— see also. Str. 637.—

Trespass. & false imprisonmt.

Ryan & Moodie's N.P. Cases. p. 129.

Rogers. v. Jones

In an action against a magistrate for false imprisonment— Held that a conviction filed at the Quarter Sessions was no justification of the Defendant, where it appeared to have been framed upon a different Statute from that of the Commitment. —

Trial – put off

Trial put off on account of a libel published with intention to influence the Jury – but shall not be again put off till after trial of an Information against the more pamphleteers. 1. Bur. Rep. 510. Rex. v. Martha Gray. –

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1. Chitty's Rep. p. 89. – Patterson v. Evans

Defendant put off the trial on terms that a witness going abroad should be examined on Interrogatories Held – that plaintiff having detained the Witness until the trial, after he had been examined on Interrogatories and cross-examined by the Defendant, was entitled to the Costs of the detention, but that Defendant was entitled to have his Costs of the cross-exam Interrogatories deducted. –

Trial.

1 Chitty's Reps. p. 89, on note (a) Patterson vs Evans

Depositions taken by consent on a witness going abroad, are only taken de bene esse, and cannot be given in evidence if at the time of the trial the witness happens to be in this Country Falconer, vs Hanson. 1 Camp. 172. — 2 Salk. 691. 12. Mod. 493. Bull. N.P. 239.—

Variance.

1. Barn; & Ald. 224. — Mountstephen & al. v. Brooke & al. — 3. — Declaration stated bill of exchange to be drawn upon and accepted by three persons — It was proved to have been drawn upon and accepted by the three jointly with a fourth. Held that this was no Variance. —

Where the Statement is larger than the proof, that constitutes a variance; but where the proof exceeds the statement, it is no variance. — Marryat. pro. Duo: cod. Cas.

Ld Ellenborough. Ch. J. Actions on promissory Notes where two jointly and severally promise, and one only is declared against, are of frequent occurrence, and in my experience I have never known an exception taken against that form of declaring, on the ground of variance — The pltff has stated enough to charge the persons sought to be charged in this form of action. It is sufficient for him that the bill was drawn upon and accepted by the three Defendants, and by proving that fact he satisfies the description stated in the Declaration.

Generally speaking all Joint obligors or Contractors ought to be made Defendants, and the plaintiff may be compelled to join them all, if advantage be taken of the omission in due time, and by a proper plea. — In this restrictive sense is to be understood the Rule which is laid down in general terms, "That the Plaintiff must join all the parties as Defendants". — For it seems to be now settled, that in all cases of a joint obligation or deed, or a joint contract

contract in writing or by parole, or ex quasi Contractu if one only be sued, he must plead the matter in abatement, and cannot take advantage of it afterwards upon any other plea, or in arrest of Judgment, or give it in evidence —

See. 1. Sand. Reps. 291. (b) note N° 4. —

See on same Note the case of actions brought by one of several who are entitled to join in bringing the same. 1.st with respect to Bonds or Deeds and 2°. With respect to contracts not under Seal.

With respect to the latter he says, — a distinction has been taken between actions of assumpsit, and actions of Tort. — In the former, if only one of several persons who ought to join, bring the action, the Defendant may take advantage of it on Non assumpsit, but in the latter he must plead it in abatement. 1 Show. 105. Boston v. Sandford & Holt. J.C. Skin. 640. Dockwray v. Dickenson. 2 Str. 820. Leglise v. Champante. 2. Term Reps. 282. Graham v. Robertson. —

And this distinction is universally adopted — However it may not be improper to observe as to assumpsit by one only, that at the time when most of the Cases upon this Subject were decided, the same rule extended as well to Defendants as to plaintiffs. The rule in both cases was founded upon the same reason that the Contract proved was not the same with that laid in the declaration. Skin. 640. 2. Str. 820. — But as soon as it was decided in the Case of Rice. v. Shute. 5. Burr. 2611 and the other cases which followed. — Abbot. v. Smith, 2. Black. 947. Rees. v. Abbot. Cowp. 832. that — leaving out one of the Joint Contractors did not vary

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the Contract, one would have thought that the same principle would have been applied to the Case of persons with whom the Contract was made. — If the Contract be still the same, notwithstanding one of the persons, who ought to be joined, is omitted, upon what principle is it, that the Contract is not the same, if one of the persons who ought to join, be omitted? — Perhaps it may be objected, that by this means the plaintiff and the Defendant are not upon equal terms; that in an action against one only, he necessarily knows all the parties liable; but in an action by one only, the Defendant may often not know, nor be able to know what persons ought to join — But in answer to this, it should always be remembered, that the rule is founded upon the supposed variance between the Contract proved and the Contract laid, and not upon any inconvenience or convenience to the parties. — As to the knowing of the persons, the Cases above referred to respecting Defendants have decided that this circumstance is immaterial — and as to convenience or inconvenience of the thing, it should seem more convenient, that the parties should after issue joined proceed upon the merits, than that the Defendant should be allowed to non-suit the plaintiff upon a mere matter of form - see Com. Dig. Abatement. (E. 12) — However the settled distinction is as I have before mentioned, and it must be left to the operation of time and the same good sense as at last prevailed in Rice. v. Shute, respecting Defendants, to do away a distinction which seems to me to have no principle for its foundation. —

Variance.

3. Barn: & Ald. 579.
The King. v. Peace.

The Defendt. was indicted for an assault & battery, stated on the record to have been upon the person of Elizabeth Edwards. — Plea. Not Guilty. — at the trial it appeared, that there were two persons, a mother and a daughter both of that name, and that in point of fact the assault had been committed on the daughter — It was objected at the trial, that this proof varied from the Indictment, inasmuch as Elizabeth Edwards must be presumed to be the Elder — The objection was over-ruled and the defendant convicted — When the Defendant was brot. up for Judgment the objection was renewed and several authorities cited in support of it — But the Court again over-ruled the objection & gave Judgt. for the Crown. —

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4. Barn. & Ald. 435
Phillips. v. Straw

In assumpsit for not indemnifying the plaintiff in consequence of his having become bail for A. in an action at the suit of B. — it was stated that B. in Michaelmass Term 58. Geo. 3. recovered against plaintiff — The Judgt. given in evidence was in Hilary Term — Held that this was no variance, inasmuch as this was not matter of description, but an allegation in substance, that the Judgment had been obtained before the commencement of the action —

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9 East Rep. 157.
Purcel. v. Macnamara.

In an action on the case for a malicious prosecution, it is not material for the Plff to prove the exact day of his acquittal as laid in the declaration, so that it appear to have been before the action brought, and therefore a variance in that respect between the day laid, and the day stated

stated in the record which was produced to prove the acquittal, is not material — the day not being laid in the declaration as part of the description of such record of acquittal. —

Ld Ellenborough — "There are two sorts of "allegations — the one of matter of substance "which must be substantially proved, — the "other of description, which must be literally "proved" —

2. Chitty's Rep. 333.
Highmore v. Primrose

Where bill declared on, was for "value received of R. H.", and the one produced was for value received generally — Held a fatal variance. —

But see Grant v. DaCosta. 3 M. & S. 351. —

Gow's N. P. Rep. 21.
Wells. v. Girling.

In declaring on a promissory note payable by instalments, if any one of the days on which an instalment is made payable, be incorrectly stated, the variance is fatal. —

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1. Moore & Payne. Rep p. 346. —
Acked. v. Stocks & al

In an action against two Justices of the Peace for illegally convicting the plaintiff and issuing a warrant of distress against his goods, the notice of action stated the warrant to have been directed to A.B. and when produced at the trial it was found to have been directed to C.D. - Constable of H. Held a fatal variance — although A.B. executed the warrant. —

Vente d'Immeuble – sous Seing privé. –

Par Arret rendu le 23 Fev. 1779, il a été jugé, qu'une Vente d'Immeubles, faite par acte sous Seing privé, dans lequel il n'etoit pas fait mention que ledit acte avoit été fait double, etoit neanmoins bonne, et preferable à une vente publique posterieurement faite des mêmes Immeubles par l'heritiere du premier Vendeur. – Gaz. des Trib. Tom. 7. p. 183. Parl.t de Dauphiné. –

Promesse de Vente sous Seing privé, annullée, faute d'accomplissement des Conditions y portées.

Par acte sous Seing privé du 6 Decembre 1774 le Comte d'Anlezi promit aux Sieurs de la Graulière, et de St. Sardos de leur vendre ses terres de Castelnau Floriac &c.a moyennant 412,000 livres, dont moitié – payable au 25 Juin 1775, jour auquel se passeroit le Contrat de Vente, et l'autre moitié payable en 1777; Les Sieurs de la Graulière et de St. Sardos s'obligent de – rapporter au 25 Juin 1775, le cautionnement du Sieur de Bonal l'aîné, frere du Sieur de la Graulière. –

Par le même acte, les deux acquereurs demeurent solidaires pour l'execution des clauses et Conditions portées en la promesse de Vente. – Il fut de plus stipulé un dedit de 50,000.tt payable par celui qui – n'executeroit pas les conditions. –

Des difficultés se levent entre les deux Acquereurs au sujet du partage des Terres; elles ne peuvent être terminées au 25 Juin 1775, ce qui empêche a cet epoque l'execution pleine et entière de l'acte du 6 Decembre – alors le Comte d'Anlezi ~~a passé Contrat aux Sieurs de~~

&c.a

St Sardos d'executer faute par eux d'avoir rempli les clauses portées en la promesse, passe Contrat de vente, le 24. Novembre 1775 au Sieur de Bonal, frere du Sieur de la Graulière, apres une sommation faite aux Sieurs de la Graulière et de St Sardos d'executer dans vingt-quatre heures, la Convention. —

Sentence du Chatelet du 16 Avril 1776, qui condamne le Comte d'Anlezi à passer Contrat au Sieur de St Sardos seul, si mieux n'aime le Sieur de la Graulière executer dans tout son Contenu la promesse de Vente et qui condamne en outre le Sieur de la Graulière aux dommages-interets envers le Sieur St Sardos

Appel — et par arrêt du 12 Mai 1777, sur les Conclusions de Mr l'Avocat General Seguier, qui a annullé la promesse de Vente sous signature privée — a confirmé le Contrat de Vente fait par le Comte d'Anlezi au Sieur de Bonal. Sur la demande en dommages-interets pour l'inexecution de la promesse de vente, a mis les parties hors de Cours. — Gaz: des Trib. Tom. 3. p. 322. 323.

Promesse de Vendre en brevet, sans minute ni double — declarée nulle. — Id. Tom. 12. p 325

Le Sieur Froget avoit en 1756, passé un bail de neuf ans au Duc de Grammont, de maisons et terreins vagues, pour le prix de 600th par an, et de Suite un autre bail de 9 années, pour assurer au preneur une jouissance de 18 ans. —

En 1759, les Gens d'affaires de M. Le Duc de Grammont alors mineur, se proposant de faire sur ce terrein differents batiments, et même d'y construire un Theatre, engagerent le Sieur Froget à passer à M,

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le Duc de Grammont par devant Notaire, une promesse de vente des objets énoncés dans le bail pour le prix de 600^{t}. de rente perpetuelle, si la vente avoit lieu presentement, ou pour le prix de douze mille livres à l'expiration des 18 ans — Cette promesse de vente a été passé en brevet sans minute, et sans être fait double. — Le Duc de Grammont a joui depuis en vertu de son bail, et a payé exactement les loyers sans passer l'acte de Vente projetté; il a pendant le tems de sa jouissance fait differens batimens et Construction à l'agrément sur les terreins dont il s'agit. —

Le Sieur Froget etant mort, et la jouissance de Mr le Duc de Grammont etant sur le point d'expirer, celui-ci a fait assigner les heritiers et representans Froget, pour lui passer chez un notaire l'acte de Vente des terreins en question, conformement à la promesse de Vente. —

Les Representants Froget ont soutenu que cette promesse de vente passée en brevet, sans double ni minute, n'etoit pas obligatoire, parcequ'elle ne formoit pas un acte Synallagm^{qe} pour l'execution duquel les deux parties n'avoient entre leurs mains de quoi contraindre l'autre à l'executer. —

Sentence du Chatelet a declaré la promesse de vente nulle et a ordonné que les lieux seroient vûs et visités par Experts, pour evaluer les dommages-interets qui pourroient être dus pour les changements faits à l'Etat des lieux, qui

ne

ne pourroient être rétablis dans leur premier état.

Arrêt du Jeudi 29 Nov. 1781. qui a confirmé la Sentence, et condamné M. le Duc de Grammont aux dépens. ——

Verbal promise.

3. Man: & Ryl. 444.
Thomas. v. W. Cooke.

A promise to indemnify a Co-surety need not be in writing. – not being within the Stat. of Frauds. –

With us this must be understood with us, cum grano salis – that is, it must either be in a mercantile transaction, or the sum in contest must not exceed an hundred livres. –

Verdict.

Verdict obtained by Stratagem set aside without Costs on either side. 1. Bur. Rep. 352. 353.

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2. Bl. Rep. 803. Vin. ab. Tit. Trial p. 483. pl. 12. — Wrong delivered by the foreman — may be amended 1. Bur. 384.

— Shall not be set aside for excessiveness of Damages in cases turning upon Circumstances which are strictly and properly within the province of the Jury — as for criminal conversation with the plaintiff's wife. 1. Bur. 609.

— Where the verdict is against evidence, or against the weight of it greatly preponderating, it shall. 1. Bur. 394.

— Set aside. — the antiquity of this practice — the rule of it. — the reasonableness of it. — ibid.

— are to be taken favourably not strictly, like pleadings, and if the Court can collect the clear meaning of the Jury, they will work it into form, and make it serve. 2. Bur. Rep. 699. 700.

— If right on one Covenant and wrong on another it must be set aside generally — and without Costs upon Circumstances. 2. Bur. 1224.

Verdict.

Where no injustice is done, it is a reason against setting aside a verdict. — 3. Bur. 1255.

Consent to be bound by a verdict in one Cause out of several upon the same question — means such a verdict as the Court shall think ought to stand. — Ibid. 1477.

A verdict for the defendant shall not be set-aside in a Criminal prosecution, or where a Criminal prosecution might follow from it. — 4. Bur. 2257.

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1 Raym. 138.
Rex. v. Keite

A special verdict on an Indictment for felony cannot be amended by the Judges notes.

On an Indictment for murder, if the Jury bring in a Special verdict, and find the killing in such a way, as to leave it uncertain whether the fact was murder or manslaughter, there shall be a *venire facias de novo*.

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3. Burr. 1696
Rex. v. Thirkell.

Jurors cannot express their disapprobation of a verdict after given.

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2 Raym. 1280
Colebeck. v. Peck.

If the Defendant dies after verdict agt. him and before the day in bank, the plaintiff may enter up Judgment in the Cause as if he were alive. — and scire facias thereon against his personal representative, may recite the Judgment as if it had been entered in his lifetime.

Verdict.

1 Wils. 302.
Earl. v. Brown

The plaintiff dies after verdict, and before the day in bank, although the Judgment be right yet a Scire facias must be awarded befor Execution.

1 Moore Rep. 455
Hindle. v. Birch

An affidavit tending to impeach a verdict through the misconduct of one of the Jurors, cannot be received after trial. a

11th Moore. Rep. 104.
Richardson v. Mellish.
Verdict amended.

In assumpsit for the breach of an agreement the declaration contained four Counts, some of which were bad in law, and the Jury found a general verdict for the plaintiff. — The evidence applied to the first Count. — After writ of error brought, and after argument in the Court of Kings Bench, this Court ordered the postea to be amended, by entering the verdict for the plaintiff on the first Count, and for the Defendt on the others — And they also ordered the Judgment-roll to be amended by the amended postea, after the Judgt of this Court (C.P.) had been reversed and entered of record in the Court of error. —

(C.P.)

Verdict.—

4 Barn: & Adolph. 684.
Everett. v. Youells.—

The delivery of food to a Juryman, after the Jury were shut up to consider of their verdict, is no ground for setting the verdict aside, if it do not appear that such refreshment was supplied by a party to the Cause, or that it was delivered to a Juryman whose holding out decided the event.—

Affidavits of Jurymen are admissible as to matters which pass openly in Court, but where there is a Judge's report on the same points, that is conclusive.—

Vestry-meetings.

3. Barn: & Ald. Rep p. 284. The minister of the parish has a right to preside at Vestry meetings.

Vol — restitution.

1 arrets du Bardet p. 17. — Le propriétaire vendique sa chose derobée sans restitution de prix. —

Id. p. 494. ch. 130

Vote — Election. &c

2 Raym. 938.
Ashby. v. Whitehead

A man who has a right to vote at an Election for members of parliament may maintain an action agt. the Returning officer for refusing to receive his vote — Though this right was never determined in Parliament — and though the persons for whom he offered to vote were elected

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Id — 1379.
The King. v Plympton

It is Criminal money for his vote to any man who has a vote in the election of the Members of a Corporation. Vid. 1 Burr. 2494. 8. Mod. 180. —

Upon a prosecution for the Offence, it is sufficient to alledge generally that the party to whom the promise was made, had a right to vote; it is not necessary to set out the clauses of the Corporation Charter which enables him to do so.

Usury.

2. Starkie. 237.
Preston v. Jackson

A party cannot recover on a new instrument which operates as a Security for any usurious interest, although it is founded upon a new Settlement of the account between the borrower and the lender and the original Securities have been cancelled.

Jacobs Rep. in Ch. p. 144.
Féreday v. Hordern

Deed by which A. B. & C. partners in trade, in consideration of £4000 paid to them by D. in augmentation of their Capital, agree to admit him into partnership with them for a term. — It was agreed that D. should receive in lieu of profits, a clear sum of £550, per annum, and all the property of the Concern was charged with the payment of this sum quarterly, and of the £4000 at the determination of the partnership. — A. B. & C. were to pay rent, taxes, wages, and the other outgoings of the trade, which was to be carried on by them and in their names only, and D. was not to be required to attend to it. — D. was at liberty to retire on giving twelve months notice, and on his retiring, or at the end of the term, the £4000 and the arrears, if any, of the £550. p an. were to be paid to him by A. B. & C. by instalments, to be secured by their bonds, and they were to indemnify him from the debts of the Partnership. — Held that this deed was not usurious.

Wager

Ryan & Moodie's N. P. C. p. 213.

Egerton v. Furzman

A Wager was deposited with a Stake holder on the event of a Dogfight, to be paid over to the Winner after the event was determined. The money was not demanded of the Stake holder till after the event was determined.— The Judge discharged the Jury from giving any verdict.—

It has been determined in England by a series of Cases, that money deposited in the hands of a Stake holder, on a wager, illegal in its nature, may be recovered back from the Stake holder after the event is decided, if demanded before it has been paid over.
see Cotton. v Thurland. 5. T. Rep. 405.
Smith. v Bickmore. 4. Taunt. 474
Bate. v Cartwright. 7 Price. 540

And at all events whether the wager is illegal or not, either party demanding his deposit before the wager is won, has a right to have it returned to him, and on refusal may maintain an action against the Stake holder.
Eltham. v Kingsman. 1 Barn. & Ald. 683.
Taylor. v Lendey — 9 East. 49.—

In Robinson. v. Mears*. 6. Dowl. & Ryl. 26 L. Ch. J. — Abbot said, "the Case of Egerton v Furzman was presented "to me at the trial, as a Case in which I was to be called "upon to decide the question of which dog won, and on "that ground alone I refused to try the Cause"—

* ex relatione Barnwell & Alderson

That a Judge is justified in striking causes out of the paper, where the attention of the Court would be occupied in deciding upon foolish wagers to the prejudice of more important business - see
Brown. v. Leeson. 2. H. Bl. 43.— Squires. v Whisken. 3 Camp. 140.
Ditchburn v. Goldsmith. 4 Camp. 152. Eltham. v. Kingsman. 1 B & A. 683.
Rex. v. Deacon. Ry: & Mood: N.P.C. 27.—

But

But it would seem, after the Case of Cotton. vs Thurland, above cited, that it is not in the discretion of a Judge to refuse to try an action brought to recover a deposit from a Stake holder, however frivolous or illegal the wager may be.— The Court of Exchequer in Bate. vs Cartwright, set aside a Non-suit in an action against the Stake holder, where the Judge had non-suited on the ground of an action of that nature being a waste of time, and a hindrance of the business of other Suitors —

8. Barn. & Cress. 221.—
Hastelow. vs Jackson.

Where A & B. deposited money in the hands of a Stake holder to abide the event of a boxing match between them; and after the battle A. claimed the whole sum from the Stake holder, and threatened him with an action if he paid it over to B, which he nevertheless did by the direction of the Umpire — Held that A. was entitled to recover from him his own Stake, as money had and received to his use.—

☞ The Case of Kantz. vs Edwards & al' was differently determined in K. B. Montreal — Febr. 1827 — There the Defendts who were the Stewards at a Horse Course, had decided agt. the Plff, but held the money as Stake holders when the action was brought — The Court there were of opinion, that where parties contrive amusements and agree upon rules upon which they are to be regulated, it is beneath the dignity of the Court to set and determine whether those rules have been infringed in the decision of any contest between the parties — they did not consider the wager touching the horse-race to be an illegal contract, but to be of a nature too light and frivolous to be brought before a Court of Justice — The principle of the English decisions appears to be, that as these wagers are illegal, if a party

dissents

dissents therefrom before the money is paid by the Stake holder, he can recover back his Stake, as for money had and received to his use — a distinction however is made between a Stake holder and a party to the Contract — for where the one party has paid his money to the other, he can in no case recover it back. —

Wife..

1. Barn. & Ald. 165. — Crooks & al. vs Fry & Lavinia his wife —

A married woman, arrested on mesne process, is entitled to be discharged out of custody, on filing common bail, — although her husband had absconded, and the debt had been incurred by her while a feme sole. —

Witness

arrested when attending a Trial. —

The proper course in vacation, in order to obtain his discharge is to bring him before a Judge at Chambers by writ of Hab. Corpus. —
1 Starkie's N. P. Rep. 470. - Ex parte Tillotson.

See Aylett's Case. 1 T. Rep. 63. — Spence v. Stuart. 3 East. 89. — Lightfoot. v. Cameron. Bl. 113. — Hatch. v. Blisset. 2 Str. 986. —

1 Holt's Rep. 239
Corsten. v. Dubois

Upon a Subpona, duces tecum, a witness is bound to produce, a paper which he has in his — actual custody, though the legal right and property to such paper belong to another. — The Court — however in all such Cases, will exercise their discretion in deciding what papers shall be produced, and under what qualifications as respects the interest of the witness. —

Such witness is bound to produce them, — though there be a regular way prescribed by law for obtaining such documents. —

The Court must judge of the validity of the excuse offered by a witness for not producing a paper, on a Subpona duces tecum.
9 East. 472. Amey. v. Long.

An action will lie against a party who refuses to produce a paper in his actual possession and it is no defence that the legal title to such paper is in another person. — 1. Camp. N. P. 14.

Witness.—

1. Holl: Rep. 275. Davis. v. Living & al

In an action of tort against several, if there be evidence against some only, and none against others, it is discretionary with the Judge at *nisi prius*, whether he will direct the acquital of such defendants against whom there is no evidence, at the close of the plaintiffs case, for the purpose of making them Witnesses for the Co-defendants.— But such an intermediate acquittal, is not a matter which the Defendants Counsel can claim of right.—

Id. — p. 314 Beeching & al. v. Gower

When a witness after his examination has been dismissed from the bar, his competency is not to be questioned—

See also case Ogle. v. Paleski — 1 Holt. 485. where wit was examined & cross-examined on Interrogatories, and objection after wards taken to his competency at the trial. —

Id. — p. 541. Sharp. v. Scoging

When a witness's character is attacked in a Court of Justice, the questions should be confined to his general conduct, and should not point at specific charges. —

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3. Taunt. R. 424. Cates. v. Hardacre

A witness may object to answer a question which he thinks will tend to his crimination though the answer would not lead to an immediate conclusion of guilt.—

Witness.

Leading question

L^d. Ellenborough. I wish that objections to questions as leading, might be a little better considered before they are made. It is necessary to a certain extent to lead the mind of the witness to the subject of inquiry. If questions are asked to which the answer yes, or no, would be conclusive, they would certainly be objectionable, but in general, no objections are more frivolous than those which are made to questions as leading ones.

1 Starkie. Rep. 81.

Interest

The Joint-acceptor of a bill of exchange is not competent to prove a sett-off, in an action by the holder agt. the drawer, because interested to lessen the sum for which he is answerable.

1 Starkie. R. 83.

Attesting

Where the attesting witness resided in Ireland, his hand writing admitted to be proved, although no steps had been taken to procure his personal attendance.

Id. p. 90.

and see. Prince. v. Blackburn. 2. East. 250. where it is laid down, that evidence of the hand writing of a subscribing witness is admissible where the witness resides beyond the jurisdiction of the Court.

Agent

In an action for goods sold a person who entered into a Contract for the purchase of the goods in his own name, is not a competent witness to prove that he purchased them, as the agent of the Defendant

3 Camp. Rps. 317. M^cBrain. v. Fortune & al.

and see Case. Wright. v. Wardle. 2 Camp. 200 - where it was held, that in an action for the value of goods furnished to a third person, on the credit of the Defend^t

Defendant, such third person is not a competent witness for the plaintiff without a release.

Attesting.

A person who sees an instrument executed, but is not desired by the parties to attest it, cannot, by afterwards putting his name to it, prove it as an attesting witness. 3 Camp. 232. M'Craw. v Gentry.

Sickness.

It is no sufficient ground for receiving evidence of the handwriting of a witness which would be receivable, if he were dead, that he is unable to attend the trial from indisposition and lies without hope of recovery. 3. Camp. 457. Harrison. v. Blades.

Agent has an interest

A person who is employed to sell goods, and is to have for himself whatever money he can procure for them beyond a stated price, is a competent witness to prove the Contract between the Seller and the buyer. 2. H. Bl. 590. Benjamin. v. Porteous.

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uncertificated Bankrupt.

An uncertificated bankrupt may be a witness to decrease, but not to encrease his fund. 1 Coup. Rep. 70.

Ca. temp. Hardwicke & Lee. p. 313. Wakefield's Case.

Delivery of a Subpond to a Servant, who said he had delivered it to his master, who declared he would attend, not sufficient to ground an attachment against the master. On moving for an attachment for not obeying a Subpona, an affidavit, as well of tendering the shilling, as of reasonable charges, is necessary. cks. 2 Str. 1054.

So

So when the witness from no ill motive, or from negligence, absents himself, it is no contempt for which an attachment will be granted. 5. Taunt. 260. — 1 Marshall Rep. 8. — It appears that the Court of Common Pleas leans against the remedy by attachment against a Witness — see Pr. Reg. 435. — 1 H. Bl. 49 — 13 East. 16. (a) — But it should seem from the last note, that it is a rule in the Court of C. P. never to grant an attachment against a Witness — See also. 2. Tidd. 8th ed. where it is said, it lies not. — but see. 35. 36 — where it is said the Court declared, that in some cases, they would grant attachments against Witnesses, though hitherto the same had not been done. — see. Ca. temp. Hardwicke. p. 180. note (3). —

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5. M. & Selwyn. 71
Yorke & anr. v. Blott

Stra. 35.

One joint maker of a promissory note, is a witness to prove the signature of the other. a

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One of Defendts
8 Taunt. 139.
Mant. vs. Mainwaring & al.

In an action on a Joint Contract against several partners, one of the Defendants having suffered Judgment to go by default, is not admissible as a witness to prove the partnership of himself and the other Defendants without their consent, although the proposed Witness is released, as to all other actions save that on which he is called to give evidence. —

Dallas. J. Generally a party to the record cannot be called as a witness, nor can he be called without the consent of his Co-Defendts — cited. Brown. v Brown. 4 Taunt. 752. Brown. v Fox. Ph. on Ev. Chapman. v Graves. 2 Camp. 333. note.

Witness.

1. Dowl: & Ryland Rep. p. 361. — Horn. v. Swinford

A Witness attending to give evidence in a Court of Justice, who absconded from his bail, may be retaken by the bail in Court, and he is not protected by his Subpoena. —

5 Moore Rep. 319. Morris. v. Daubigny

Joint trespasser

In trespass, a person who commits the trespass, but is not sued, is a competent witness for the plaintiff against his — Cotrespassers, without being released by the Pltff

7 Moore Rep. 36. Sells. v Hoare & al

Jew.

Where a witness was sworn on the Gospels at the trial, and it was afterwards — discovered that he was a Jew, and had been sworn in a false name. — Held, that any — objection as to his testimony was too late after verdict, and that the oath as taken by the Witness was binding on him, as it would subject him to the penalties of perjury, if he had sworn falsely

5. Barn: & Cress. 385. Blackett. v. Weir

Interest

8. Dowl: & Ryl. Rep. 142, same case.

Where in assumpsit for goods sold & deliv. to which the general issue was pleaded a Witness called by the plaintiff to — prove the Defendants liability, admitted, on the voir dire, that he the Witness was jointly liable — Held that this did not render him incompetent. —

Ryan & Moodie's N. P. C. p. 77. — Edmonds. v. Rowe

Mode of swearing

A Witness who declines swearing on the new testament, although he professes Christianity may be allowed to swear on the Old Testament, if he considers that mode binding on his Conscience. —

Witness.

Ryan & Moodie's N. P. C. p. 128.

Wright. v. Paulin & anr.

Co-Defendant.

A Codefendant against whom the pltff has given no evidence, has no right to an acquittal to be made a Witness, until all the other evidence for the Defendants is finished.

see Pbell: on Ev. 2 vol. 304.

1 Car. & Payne's. N. P. Rep. 17.

Martin v. Jackson

Interested

Whether in an action for work and labor, the party who actually did the work, is a competent witness to prove, that he and not the plaintiff, is the person to be paid? — The case of Bland. v. Ainsly. 2. N. Rep. 331 was relied on, as in favor of the position — but J. Park, although he admitted the witness, said he knew that Case had been questioned. —

The case of Bland. v. Ainsly, was an action of trespass, for taking the plaintiffs goods under an execution against a person named Aubray — it was sought to call Aubray on the part of the Defendant to prove that the goods were his, and not the Defendts. but the Court held Aubray incompetent, for that it was his interest to make out the goods to be his own, as then the execution against him was satisfied, and a debt he owed paid. —

8. Dowl: & Ryl: Rep. 65.

Cornish v. Pugh.

Wife of Bail.

The wife of bail is incompetent to give evidence for the Defendant on whose behalf her husband became bail. —

Witness

4 Bing. Rep. 610.
Bathews. v. Galindo

Kept Mistress. –

A kept Mistress is not incompetent to give evidence for her protector, although she has passed by his name, and has appeared in the world as his wife. –
S. C. 3 Carrington & Payne's. N. P. Rep. 238. –

Gows. N. P. C. 175.
Boxer. v. Rabett.

Attesting Witness

Where the attesting witness to a bond, on being called to prove its execution, denies having seen it executed it may be proved by evidence of the hand writing of the party. –
see. Fitzgerald v. Elsee. 2 Camp. 635. –
Lemon. v. Dean. – Ibid. 636 –
Talbot. v. Hodgson. 2 Marsh. 527. –
and 7 Taunt. 251. –

So proof of the handwriting of the party to the deed is sufficient, where the subscribing witness is interested in the suit. Swire v. Bell. 5 T. Rep. 371. Cunliffe. v. Sefton 2 East. 183. – Or where the name of a fictitious person has been subscribed as a witness, by the party himself who executed the deed. – Fasset. v. Brown Peake's N. P. C. 23. –

Or where the party putting his name as a subscribing witness is a mere volunteer and did so without being desired by the parties to attest the instrument – M'Craw. v. Gentry. 3 Camp. 232. –

In cases where the deed or instrument is attested, and the attesting witness, either from death, or from being beyond the jurisdiction of the Court, or from other circumstances is incapable of being examined, it has been the constant practice to admit proof of the hand writing of the witness, as evidence of the instrument having been executed by the person whose name it bears – But it seems doubtful, whether that alone, without proof of the handwriting of the party be sufficient, since the proof of the hand writing of the attesting witness only, does not establish the identity of the person by whom the deed or instrument purports to have been executed. – see. Nelson. v. Whittal. 1 Barn. & ald. 19. – Wallis v. Delaney. 7 T. Rep. 266. (n) –

Witness.—

3. Carrington & Payne N. P. Cases. p. 127.
Morrison val. v Lennard
Deaf & Dumb.—

Though the mode of examining a deaf & dumb witness by means of signs made with the fingers is a mode receivable even in Capital cases, yet where the Witness can write, semble, that it would be better to make him write his answers to the questions put to him.—

3. Carr: & Payne's Rep. 555.
Kay & al: v. Brookman & al
Absence of — & proof thereon —

To dispense with the necessity of calling the subscribing witness to a deed, it is sufficient to shew that he expressed an intention of leaving the Country, that he had reason for doing so to avoid a Criminal charge, and that his relations have not seen him since he expressed his intention of going.—

It is not necessary in the absence of the subscribing witness, to prove the handwriting of the party executing the deed, it is enough to prove the handwriting of the Witness.—

Id — p. 560
Bailey. v. Hole —
Interested rendered Competent.—

If at a trial, it be discovered that a witness for the defence, is one of the bail, and therefore incompetent, the Judge at the trial will on the Defendants depositing a sufficient sum with the associate, make an order for striking the name of the Witness out of the Bail piece so as to render him a competent witness.— The amount to be deposited must be the sum sworn to, and a further sum for Costs.—

5 Bingh^m Rep. 493.—
Hovill v. Stephenson.
Interested

Where the plaintiff in an action on a charter party had communicated to the attesting witness an interest in the adventure subsequently to the execution of the instrument— Held that evidence of his hand writing was inadmissible.—

It was considered that in this case the plaintiff had disqualified his witness by his own act, and therefore that the Case did not fall within any of the exceptions which

which permit examination of an interested Witness, or proof of his handwriting — as where subsequently to the execution of the instrument, the Witness becomes interested by operation of law, as by becoming Executor, Tutor &c. — Goss. v Tracy. 1 P. Wms 287. and Godfrey v Norris. 1 Str. 34 — and even where Plaintiff had married the Witness Buckley. v Smith. 2 Esp. 697.

5 J. Rep. 372. — In Swire v Bell, where the witness was interested as well at the time of the execution of the bond as at the time of trial, he could neither be examined as a Witness, nor could evidence of his handwriting be received —

9 Barn. & Cress. 646.
Hall. v. Cuzon & others

In an action brought to charge A. as a partner to a trading Company, a witness, who by other evidence than his own, appeared to be a Share holder in the company, was held to be competent to prove that A was a partner. —

Note (a) 648. — see also York. v. Blott. 5. M. & S. 71. — In a plea in abatement, a party who according to the plea ought to be joined, is a competent witness for the plaintiff. (Cosham v Goldney. 2 Starkie 414 — Hudson. v Robinson. 4 M. & S. 475.) but not for the Defendant (Evans. v Yeathard. 2 Bing. 133 Simons. v Smith. 1 Ry. & Moody. 29)

12. Moore's Rep. 55.
Ripley. v. Thompson & al

In an action of assumpsit for goods sold and delivered, it appeared, that the goods were sold by the plaintiff to A. who gave promissory notes for their value, which were dishonoured and A afterwards became insolvent — It appeared also that A was in partnership with the Defendants, and it was proposed to call him as a Witness for the plaintiff — but his

evidence

evidence was objected to by the defendants without a release from them, and was rejected. — Held — That A's evidence was properly rejected, on the ground of his being interested in procuring a Verdict against the defendants, as in that case he would be liable only for a proportion of the debt. —

2. Mr. Bl. Reps. 590
Benjamin v. Porteus

Agent — interest.

A person who is employed to sell goods, and is to have for himself whatever money he can procure for them beyond a stated price, is a competent witness to prove the Contract between the Seller and the buyer. —

7. Bing. Reps. 395.
Worral vs. Jones & al

A party to the record is a competent witness, provided he be disinterested

1 Moody & Malkins N. P. Ca. p. 47. —
East. v. Chapman

If a witness answers any question on a matter rendering him liable to forfeiture or punishment, he cannot afterwards claim his priviledge, but must answer throughout

The counsel in a Cause have no right to object in favor of a witness, that the answer to a particular question, renders him liable to punishment or forfeiture. Such objection belongs to the witness only. —

1 Moody & Malkin's N. P. Ca. p. 108.
Cundell v. Pratt & al'

Questions tending to degrade a witness without exposing him to punishment, may be put on cross-examination. —

Witness.

1 Moody & Malkin N.P. Ca. 430.- Duke. v. Pownall.

Several persons having agreed to bear equally the expences of a joint undertaking, in an action brought against one of them, another of the Contractors is a competent Witness for the Defendant if released by him, — though the rest do not join in the release. +

8 Bingh:. Reps. 57. Bradley. v. Ricardo

Where a party being surprised by a statement of his own Witness, calls other Witnesses to contradict him as to a particular fact — the whole of the testimony of the Contradicted Witness, is not therefore to be repudiated by the Judge.—

The rule as laid down by Mr Justice Buller is intelligible and clear, that a party shall not be permitted to throw general discredit on his own Witness but it would be monstrous, if the whole of his testimony were to be struck out, because a subsequent Witness sets him right as to a single fact, which he may have stated incorrectly. — ff Alderson. J. —

4. Moore & Payne. 59. Taylor. v. Willans

To render a Witness liable to an attachment for not attending on a Subpona, it is incumbent on the party applying, to state, that he was a material and necessary Witness for him. —

9 Bing. Rep. 350. Morgan. v. Morgan

Where an attesting Witness could not be found after sufficient enquiry — Held - that evidence of his — handwriting was admissible, although a letter not disclosing his retreat, had been received from him a few days before the trial. —

5. Carr: & Payne. 356
Hill & another. v. Phillips

If the subscribing witness to the acceptance of a bill of exchange, being one of the acceptor's family cannot be served with a subpoena in consequence of the conduct of that family, the bill may be read without his evidence. —

But quere — ought there not to be proof of the acceptors handwriting by some other witness — see the preceding case — and also. 1. Taunt. 364 — and 1 Camps. 303 —

Writ of Assistants.

A Writ of Assistants is granted in the Colonies under St. 7 Geo. 3d. ch. 46. s. 10. —

Howard on Excise p. 286. 7.

This writ being general and directed to all the Kings subjects, requiring them to aid and assist in the collection of the Kings duties, leaving every part of the execution of it to the ~~discretion~~ discretion of the officer, whoever enters under such a Writ is justified only in the event of finding the goods searched for, and if none are found, he is a trespasser ab initio. —

In the Case of Cooper & al. v. Booth. 3 Esp. Rep. p. 135. it is said by L. Mansfield — The writ of assistance is not applicable here — it is no warrant, it is general, and leaves all and every part of the execution of it to the discretion of the Custom House officers; and there is a positive clause which is material in the act of Car. II. and which makes the justification depend upon the event of finding the goods (suppose a warrant in the case of stolen goods) and the justification to depend on the event of finding them. — It is a positive condition to prevent abuses, that the procurer shall run the risk of the secret, and it was introduced with a political view to prevent improper conduct in the officers, and not a consequence drawn from principles." —

Gilbert's Exchequer p. 239.

Officers of the Customs, authorised by writ of

of Assistance out of the Exchequer Court, may with a Constable in the day-time, enter any house &c. and in case of resistance, break open doors &c. to seize any kind of prohibited and uncustomed goods, and bring them to the ware house.—

Jomlin's Law. Dic. Vo. Writ of assistance

Writ of assistance, is a writ issuing out of the Exchequer, to authorise any person to take a Constable or other public officer, to seize goods or merchandise prohibited and uncustomed.—

and. Cun. Dic. co. verb.—

3. Esp. 145.—

Ld Mansfield— The writ of assistance, is no warrant, it is general, and leaves all and every part of the execution of it to the discretion of the Custom House Officers— and there is a positive clause which is material in the act of 12 Ch. 2. ch. 19. and which makes the justification depend upon the event of finding the goods.—

see to same effect. 1 Barn: & Adolph. Repts 166 The King. v. Robert Watts &al.—