

make, execute and deliver, in the name of this state, a deed to such purchaser for the lands, tenements and hereditaments in the same certificate mentioned, granting and conveying an estate of inheritance in the said lands, tenements and hereditaments to such purchaser, and to his heirs and assigns forever; and, upon the production of such deed to the sheriff, he shall deliver the possession of the said lands, tenements and hereditaments to the purchaser thereof.

4. [Amended by Sec. 6, *post.*]

Injunction to
restrain waste, &c.

5. That it shall be the duty of the attorney-general, in case of any waste done or committed on any lands, tenements and hereditaments which have escheated or may escheat to this state, to apply to the court of chancery for an injunction to restrain all such waste; and further, that the person or persons committing any such waste or other trespass upon such property, shall be liable in damages for the same, to be sued for and recovered, in the name of the state, by action of trespass, in any court having cognizance thereof.

Supplement.

Passed June 1, 1886.

P. L. 1886, p. 394.

6. SEC. 1. That section four of the act to which this is a supplement be amended so as to read as follows:

Expenses of pro
ceedings and
debts, how paid.

[That jurors and witnesses in every case of escheat shall be entitled to the like compensation as is authorized by law for attending in causes commenced in the supreme court; and that the expenses of conducting the said proceedings shall be made out by the treasurer, and, when approved of by the comptroller, shall be paid by him; and any person or persons who have any claim or claims against the estate of any such intestate whose lands have so escheated to the state, may give notice thereof, under oath, to the treasurer of the state, who thereupon shall hold any moneys which may or shall come into his hands, derived from the sale of any lands of such intestate against whose estate claims have been filed with the treasurer, and whose lands have so escheated, for the space of one year, and no claim shall be received by the treasurer which shall not be filed with him within the year aforesaid; and when such claims shall be proven to the satisfaction of the treasurer and audited by the comptroller, they shall be paid by the treasurer; *provided*, said estate shall not prove to be insolvent, in which case the treasurer shall be empowered to pay the claims against said estate ratably.]

Proviso.

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6. Complainant competent to disprove answer.
7. Person whose name is forged competent.
8. Person indicted may testify.
9. Interest or conviction of crime may be proved by witness.
10. Witness, when excused from answering.
11. Testimony of parties may be taken by deposition.
12. Testimony of a deceased party at a former trial.

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13. Process. Penalty for disobeying.
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- 36. Party may receive and deliver it.
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- 38. Amended by section 66.
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- 51. Husband or wife may give evidence in criminal action against either to prove marriage.
- 52. Committee of common council may issue subpoenas and administer oaths. Obedience to subpoena, how enforced.
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- 55. Repealer.
- 56. Justice of supreme court may make order awarding process of subpoena for witness to appear before commissioner, &c.

- 57. Husband or wife of person indicted may testify.
- 58. Public records of any foreign state, &c., may be admitted in evidence.
- 59. Testimony of witnesses *de bene esse* may be taken by stenographer.
- 60. Transcripts of returns of deaths, &c., to local board of health shall be admitted in evidence.
- 61. How transcripts shall be made.
- 62. Repealer.
- 63. Notice required for taking testimony in foreign states or kingdoms.
- 64. Under what circumstances any party to a civil cause may be examined in his own behalf *de bene esse*.
- 65. Public statutes of foreign countries authorized to be published shall be received in evidence.
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- 68. Committees of either house of legislature may summon witnesses and employ secretaries and counsel. Expenses, how paid.
- 69. Copy of official record of notaries public in other states shall be admitted in evidence.
- 70. Legislative committees empowered to compel attendance of witnesses.
- 71. Obedience to summons, how enforced.
- 72. In actions on sealed instruments, seal only presumptive evidence of consideration.
- 73. Husband and wife may give evidence in proceedings for divorce on account of adultery.
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- 75. Witnesses before legislative committees to answer all questions.
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R. S. 957, 959, 964.

P. L. 1847, p. 146.

" 1849, p. 265.

" 1852, p. 155,

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" 1855, p. 668.

" 1859, p. 489.

" 1860, p. 260.

" 1862, p. 34,

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" 1865, p. 832.

" 1866, p. 709.

" 1870, p. 59, 62.

" 1871, p. 8, 12,

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" 1873, p. 73.

Conviction of crime, not to disqualify witness.

Party may be called by adverse party.

P. L. 1849, p. 265.

" 1852, p. 256,

§ 7.

Amended.

Disqualification for interest as party or otherwise abolished, except when other party disqualified, &c. P. L. 1859, p. 489. Amended.

I. Witnesses.

1. COMPETENCY AND EXAMINATION OF.

An act concerning evidence.

Revision—Approved March 27, 1874.

1. That no person offered as a witness in any action or proceeding of a civil or criminal nature shall be excluded by reason of his having been convicted of crime, but such conviction may be shown on the cross-examination of the witness, or, by the production of the record thereof, for the purpose of affecting his credit. (a)

2. That in all civil actions in any court of record in this state, the parties thereto shall be admitted to be sworn and give evidence therein, when called as witnesses by the adverse party in such action; and when any party is called as a witness by the opposite party, he shall be subject to the same rules as to examination and cross-examination as other witnesses; provided, that no party to a suit shall be compelled to be sworn or give evidence in any action brought to recover a penalty or to enforce a forfeiture; and provided also, that this section shall not apply to suits for divorce. (b)

3. That no person shall be disqualified as a witness in any suit or proceedings at law or in equity by reason of his or her interest in the event of the same as a party or otherwise, but such interest may be shown for the purpose of affecting his or her credit; (c) provided nevertheless, that no party shall be sworn in any case when the opposite party is prohibited by any

(a) A witness who has been convicted of a crime and, on cross-examination, denies it, cannot be contradicted by other witnesses to whom he may have admitted the crime. *Query*—Can he be contradicted by the production of the record of his conviction? *Pullen v. Pullen*, 18 *Stew.* 138

(b) Applies to all suits brought to trial after the act went into effect (July 4th, 1849). *Van Valkenberg v. Den, Railway Bank*, 3 *Zab.* 583. See, also, *Roehers v. Remhoff*, 26 *Vr.* 475. *McCurtin v. Trapnager*, 16 *Stew.* 333. *Daw v. Vreeland*, 3 *Stew.* 542. *Wood v. Chetwood*, 12 *C. E. Gr.* 313.

(c) Previous to the passage of this act a defendant was not a competent witness for the plaintiff, if called to prove a partnership or joint liability with his co-defendant. *Myers v. Hollingsworth*, 2 *Dutch.* 136. The fact that a party in a suit does not believe that God will punish perjury, does not render such party incompetent as a witness when offered in his own behalf. The statutory right to testify in his own behalf is a civil right, the enjoyment of which cannot, under our constitution, be denied to any person merely on account of his religious principles. *Percey v. Powers*, 22 *Vr.* 432.

legal disability^(a) from being sworn as a witness, or either of the parties in a cause sue or are sued in a representative capacity,^(b) except as hereinafter provided.

Party in a representative capacity.
P. L. 1866, p. 709.

Husband and wife competent.
P. L. 1870, p. 59.
Amended.

Except in certain actions.

But not compelled to disclose confidential communications.

Complainant competent to disprove answer.
P. L. 1855, p. 668,
§ 2.

Person whose name forged competent witness upon trial of indictment.
R. S. 937, § 6.

Person indicted may testify in his own behalf.
P. L. 1871, p. 12.

4. A party to a suit in a representative capacity may be admitted as a witness therein, and if called as a witness in his own behalf, and admitted; the opposite party may in like manner be admitted as a witness.^(c) [See Sec 53, *post.*]

5. In any trial or inquiry in any suit, action or proceeding in any court, or before any person having by law or consent of parties authority to examine witnesses or hear evidence, the husband or wife of any person interested therein as a party or otherwise, shall be competent and compellable to give evidence the same as other witnesses, on behalf of any party to such suit, action or proceeding; ^(d) *provided*, that nothing herein shall render any husband or wife competent or compellable to give evidence for or against the other in any criminal action or proceeding, ^(e) or in any action or proceeding for divorce on account of adultery, ^(g) except to prove the fact of marriage, or in any action for criminal conversation; nor shall any husband or wife be compellable to disclose any confidential communication made by one to the other during the marriage. [See Secs. 51, 54, 57 and 73, *post.*]

6. That the complainant or petitioner, in any action, or proceeding of an equitable nature in any court, shall be a competent witness to disprove so much of the defendant's answer as may be responsive to the allegations contained in the bill of complaint or petition, and any defendant in any such action or proceeding, shall be a competent witness for or against any other defendant not jointly interested with him in the matter in controversy. ^(h)

7. That upon the trial of any indictment for falsely making, altering, forging, or counterfeiting, or for uttering, or publishing as true any record, deed, or other instrument or writing, no person named in such record, deed, or other instrument or writing, or whose name, or any part of whose name, is, or purports to be written, or signed therein or thereto, shall on that account be deemed or taken to be an incompetent witness.

8. That upon the trial of any indictment, allegation, or accusation of any person charged with crime, the person indicted or accused shall be admitted to testify as a witness upon such trial, if he shall offer himself as a witness therein in his own behalf.

(a) Nor will such testimony be rendered competent by the subsequent offer and admission of such disqualified witnesses. *Yetman v. Dey*, 4 Vr. 32. See *Handlong v. Barnes*, 1 Vr. 69. If either party die before the testimony on either side is taken, the evidence of the survivor is inadmissible. *Lanning v. Lanning*, 2 C. E. Gr. 228. The operation of the proviso must be limited to the cases in which the parties were rendered competent by the enacting clause. *Ib.* Where the complainant was, by a decree in chancery, declared to be of unsound mind, and he appears in a suit by his guardian duly appointed, such complainant is the real party to the suit, being under a "legal disability," and the defendant is incompetent as a witness. *Demarest v. Vandenburg*, 12 Steu. 130, 13 Steu. 341.

(b) In a suit by an executrix in her representative capacity, the defendant cannot testify for himself unless the complainant has first been sworn on her own behalf. *Shepherd v. McClain*, 3 C. E. Gr. 128. But the testimony of a defendant, unnecessarily made a party, is competent under such circumstances. *Harrison v. Johnson*, 3 C. E. Gr. 420. The complainant is not a competent witness where any of the defendants are sued in a representative capacity. *Force v. Dutcher*, 3 C. E. Gr. 401. *Sued v. Parker*, 7 C. E. Gr. 453. *Montgomery v. Simpson*, 4 Steu. 1. *Petty v. Petty*, 4 Steu. 8. The plaintiff in an action against executors of their own wrong, is not competent. *Parker v. Thompson*, 1 Vr. 311. Equity will not assume jurisdiction of a case where the only claim to relief is the death of the plaintiff at law after issue joined, and the consequent exclusion of the defendant's testimony and the loss of the plaintiff's. *Linn v. Neldon*, 8 C. E. Gr. 169. Where both parties appear on the record in a representative capacity, each is qualified as a witness in his own behalf by force of this section. *Haines v. Watts*, 26 Vr. 149. The competency of a witness depends entirely upon his qualifications at the time he is examined, and not on the condition of the suit as to parties at the time the hearing takes place. *Williams v. Vreeland's Executors*, 3 Steu. 576. *Joss v. Mohn*, 26 Vr. 409. (The cases referred to in this note must be read with section 53, *post*, and the cases referred to in note (a) under section 53.)

(c) The complainant must have been first sworn on his own behalf. *Shepherd v. McClain*, 3 C. E. Gr. 128. It must be upon his own offer; he cannot be called as a witness by the other

party. *Hartman v. Alden*, 5 Vr. 552. If the defendant is an executor and complainant offers himself as a witness and is examined without objection by defendant the subsequent examination of the defendant will not legalize such evidence, but defendant must move to suppress it, otherwise he will be deemed as not interposing any objection. *Walker v. Hill*, 7 C. E. Gr. 513.

(d) The relation of husband and wife will not protect her from making a discovery relating solely to her own conduct, and affecting only her own interests. *Metter v. Metter*, 3 C. E. Gr. 270. Under the act of April 17th, 1868, a wife was not a competent witness in a suit by or against her husband, but only in a suit by or against herself. *Van Houten v. Post*, 6 C. E. Gr. 355. A wife, who was a party to a fraudulent deed, is competent to testify what was her intent and purpose in making such deed. *Mulford v. Tunis*, 6 Vr. 257. As to the history of our legislation concerning testimony by a wife for or against her husband, see *Jackson v. Johnson*, 22 Vr. 459.

(e) A wife in a suit between others may not testify to any matter for which, if true, her husband may be indicted. *Den, Stewart v. Johnson*, 3 Har. 88. Nor can a husband, in a collateral proceeding, be a witness directly to charge his wife with an indictable offense. *State v. Wilson*, 2 Vr. 77. A husband or a wife, in a suit in which neither is a party, can be asked a question for the purpose of disgracing or discrediting the testimony of the other, when the matter inquired into is not indictable. *Ware v. State*, 6 Vr. 553. The testimony of a married woman illegally elicited before a grand jury, on a charge of bigamy against her husband, is not admissible against her on a question of property. *Wilson v. Hill*, 2 Beas. 143.

(f) *Ante*, p. 1274, note (b).

(h) The complainant may be a witness, under this section, even after the death of the defendant. *Lanning v. Lanning*, 2 C. E. Gr. 228. *Mariatt v. Warwick*, 4 C. E. Gr. 439. This section does not extend to the trial of an issue out of chancery. *Black v. Lamb*, 1 Beas. 110. This section only renders a complainant, otherwise incompetent, competent to a limited extent, and does not allow him to testify generally. His evidence must be limited to the disproof of so much of the defendant's answer as is responsive to the allegations of the complainant's bill. *Williams v. Vreeland's Executors*, 3 Steu. 576.

9. That the interest of a witness in the event of the action or proceeding, or his conviction of a crime, (a) may be proved by an examination of such witness or otherwise, and his answers upon such examination may be contradicted by other evidence.

10. That a witness shall not be excused from answering any questions relevant and material to the issue; *provided*, the answers will not expose him to a criminal prosecution or penalty, or to a forfeiture of his estate. (b)

11. That when a party to any civil action in any court of record in this state shall be entitled by law to be examined as a witness in his own behalf, or to examine as a witness any adverse party therein, it shall be lawful to obtain such testimony by commission or examination de bene esse, or in any other way that other witnesses may be examined in such suits, and the attendance of such party may be compelled by the same process as is authorized in the case of other witnesses; *provided*, that nothing in this section shall compel any party to be examined as a witness in any case where he cannot now be compelled by law to be so examined.

12. That in case of a new trial of any civil action wherein the parties have been examined as witnesses, if either party shall have died since the former trial, and the action shall have been duly revived, and proceeded with at the suit of, or against the legal representatives of such deceased party, the surviving party, and also such legal representative shall be competent witnesses on such new trial, and the testimony of such deceased party on the former trial of said action, may also be proved and admitted on the new trial thereof.

Interest or conviction of crime may be proved by witness.
P. L. 1855, p. 668.

Witness, when excused from answering.
Ib., § 4.

Testimony of parties may be taken by depositions.
P. L. 1852, p. 225.
§ 1.
Amended.

Testimony of a deceased party at a former trial.
P. L. 1871, p. 43.

2. PROCESS FOR. PRIVILEGE.

13. That if any person on whom lawful process shall have been duly served to testify, depose or give evidence concerning any cause or matter pending in any court of this state, and to whom shall have been paid or tendered at the time of such service, fifty cents, if he is to attend in the county, and one dollar, if he is to attend out of the county, shall not appear according to the command of said process, having no lawful or reasonable excuse for such default he shall, for every such offense, forfeit to the party aggrieved any sum not exceeding fifty dollars, to be ascertained and adjudged by the court in which he may be subpoenaed to attend, and shall also pay to the said party damages equivalent to the loss sustained by the want of his evidence, to be recovered by action of trespass on the case, with costs, and shall, in addition thereto, be punishable as for a contempt of the court out of which such process shall issue. (c)

14. Every circuit court, court of oyer and terminer and general jail delivery, court of common pleas, court of general quarter sessions of the peace, and orphans' court, is hereby authorized to issue process of subpoena requiring the attendance of a witness who resides in any part of this state, out of the jurisdiction of the said court, to give evidence in any cause or matter pending in the said court; and every person who shall be duly served with such subpoena, shall attend at the time and place therein mentioned, under the same penalties, and shall be liable to the same action which he would have incurred or have been liable to in case of non-attendance, if he had been within the jurisdiction of the said court at the time of the service of the said subpoena.

Process for witnesses.
R. S. 957, § 3.
Amended.

Penalty for disobeying.

Subpoena to run into every county of state.
Ib., § 4.

(a) Formerly a witness could not be asked whether he had been convicted and punished for petit larceny. *State v. Bailly*, *Pen.* *418 (c).

(b) A witness at common law could not be asked a question tending to disgrace herself. *Vaughn v. Perrine*, *Pen.* *728. *Fries v. Brugler*, 7 *Hal.* 80. A bill for discovery whether defendant since her marriage has not committed adultery with any person whatever, and with whom, and at what time and place and under what circumstances, is demurrable. A defendant is not bound to accuse herself of a crime, or to furnish any evidence whatever leading to such an accusation. *Marsh v. Marsh*, 1 *C. E. Gr.* 391. A juror falls within the statute, and may be examined to prove the alleged cause of challenge, although it tend to his own disgrace. *State v. Fox*, 1 *Dutch.* 568.

(c) An attachment was refused in a *certiorari*, where the subpoenas had been issued by the attorney. *State v. Newark, &c., Turnpike Co.*, *Pen.* *338. So, where a subpoena *duces tecum* was defective, commanding a party only to appear at a certain place and time named in the writ, and to bring with him a certain book, but omitting the direction to testify. *Murray v. Elston*, 8 *C. E. Gr.* 212. It must also appear clearly that the fee of the witness was tendered to him. *Ogden v. Gibbons*, 2 *South.* *582. And that the subpoena was served within the jurisdiction of the court, and the disobedience indicated an intention to contemn its process and authority. *State v. Trumbull*, 1 *South.* *139.

Privileged from arrest.
Ib., § 2.
Amended.

If privilege violated, court may discharge.

15. That every witness shall be privileged from arrest in all civil actions, and no other, during his necessary attendance at any court or other place where his attendance shall have been required by subpoena previously and duly served, and in going to and returning from the same, allowing one day for every thirty miles from his place of residence; any arrest made in violation of the privilege in this section shall be a contempt of the court out of which the subpoena issued, and the said court, or any judge thereof, may by an order, forthwith discharge such witness from arrest. (a)

II. Evidence in particular cases.

Fraud in consideration of sealed instrument.
P. L. 1871, p. 8.

16. That in any action upon any instrument in writing, under seal, the defendant in such action may plead and set up as a defense therein, fraud in the consideration (b) of the contract upon which recovery is sought, as fully and to all intents and purposes as if such instrument were not under seal.

Non-summons in action on foreign judgment.
P. L. 1852, p. 155.

17. That in any suit upon a foreign judgment, or a judgment of any court out of this state, the defendant, or person sought to be affected by such judgment, may show that the defendant therein was not summoned, did not appear, or was not within the jurisdiction of such foreign court, notwithstanding it may be recited in the record of such proceedings that he was summoned or did appear, or was within the jurisdiction of such court; and such recital shall not conclude said defendant, or estop him from proving that the same is not true. (c)

Recital of appearance not conclusive.

Omission to plead plene administravit.

18. That the omission to plead plene administravit or plene administravit prater by executors or administrators in actions brought against them in their representative capacity, shall not be held to be conclusive evidence of a devastavit; (d) and in any action brought against them upon any judgment suggesting a devastavit, where such judgment was to be made and levied of the goods and chattels of the testator or intestate, executors or administrators may show that they have not elogned, wasted and converted, and disposed of to their own use said goods and chattels, and that they duly administered the estate of their testator or intestate, notwithstanding the omission by them to plead either of said pleas in the original action against them; provided, that notice of their intention to offer such evidence be given to the plaintiff twenty days before the trial of the action upon such judgment.

Not conclusive evidence of a devastavit.
P. L. 1865, p. 833, § 1.

Comparison of handwriting.

19. That in all cases where the genuineness of any signature or writing is in dispute, comparison of the disputed signature or writing with any writing proved to the satisfaction of the court to be genuine, shall be permitted to be made by witnesses; and such writings and the testimony of witnesses respecting the same, may be submitted to the court or jury as evidence of the genuineness or otherwise of the signature or writing in dis-

(a) The privilege is not extended to persons attending as witnesses, unless claimed under the protection of a subpoena "previously and duly served." *Rogers v. Bullock*, Pen. *516. A party to a suit in chancery, who resides in another state and comes here to give testimony in his own behalf before a master, is, while necessarily attending before the master and going to and returning from the place of examination, privileged from the service of a summons in a civil cause, without any subpoena *ad testificandum* being served. *Dungan* ads. *Miller*, 8 Vr. 182. *Parker v. Hochheiss*, 1 Wall. Jr. 269, overruling *Blight v. Fisher*, Pet. C. C. 41. Service of a summons upon a person non-resident in this state while going to, attending or returning from a trial here as a witness or party will be set aside. Service upon a resident witness or party is not a nullity, but will be controlled by the court in order to remedy any special disadvantage which such service entails upon the defendant. *Massey v. Colville*, 16 Vr. 119. Service of a summons against a foreign corporation upon its vice president, who comes into this state to give testimony as a witness for such corporation, will be set aside. *Mulhearn v. Press Publishing Co.*, 24 Vr. 153. A citizen of another state who comes into this state voluntarily to give evidence in a pending suit cannot be arrested while remaining here as a witness. *Jones v. Knouss*, 4 Slew 211.

(b) See *Den v. Moore*, 2 South. *475, note (a), and *Lord v. Brookfield*, 3 Vr. 552. A general allegation in pleading that a sealed instrument was obtained by fraud is not sufficient; the fraud must be set out. *Connor v. Dundee Chemical Works*, 21 Vr. 257. A lessee after accepting a lease and entering into possession of the premises, upon discovering a fraudulent representation by the lessor of a material fact, is not compelled to

give up the premises and rescind the lease, but in an action for the rent may set up his damages from such fraudulent representations. *Dennison v. Grove*, 23 Vr. 144.

(c) To an action upon a judgment recovered in another state, it is a good plea that the defendant was not served with process, that he did not appear in person or by attorney, and that he was not resident within the jurisdiction of the court at any time pending the suit, or when judgment was rendered therein. *Price* ads. *Ward*, 1 Dutch. 235. It is proper to plead *nil debet*, and to give notice that no summons had been served. *Beale v. Berryman*, 1 Vr. 216. Where a suit is brought against two defendants, one of them can plead a want of jurisdiction in the foreign court over his co-defendant. *Mackey* ads. *Gordon*, 5 Vr. 286. See *Moulin v. Trenton Insurance Co.*, 4 Zab. 222. If the record shows an appearance, the party must show that the attorney had no authority to enter such appearance. *Gifford v. Thorn*, 1 Stock. 703. *Nichols v. Nichols*, 10 C. E. Gr. 60. See *Hadden v. Hedden*, 6 C. E. Gr. 62. *Field v. Gibbs*, Pet. C. C. 155. *Harrison v. Rowan*, Pet. C. C. 489. A judgment rendered in another state, when sued on here, can be impeached only on the ground that the adjudging court did not have jurisdiction over the person of the defendant or the subject-matter. If the defendant was present in the foreign state when proceedings were begun, and process was served upon him, no irregularity in such service, unless such as deprived it of all citatory effect, can be set up against the judgment ensuing thereon in a suit on such judgment in this state. *Jardine v. Reichert*, 10 Vr. 165.

(d) That it was formerly such admission, see *Barcliff v. Griscom*, Cox 165. *Howell v. Potts*, Spen. 1. *Von Arx v. Wemple*, 16 Vr. 87, 89; reversed, 17 Vr. 531.

pute; *provided, nevertheless*, that where the handwriting of any person is sought to be disproved by comparison with other writings made by him, not admissible in evidence in the cause for any other purpose, such writings, before they can be compared with the signature or writing in dispute, must, if sought to be used before the court or jury by the party in whose handwriting they are, be proved to have been written before any dispute arose as to the genuineness of the signature or writing in controversy. (a)

Writings used by way of comparison must be proved to have been made before dispute arose.

20. That the certificate of a notary public of this state, or of any other state or territory of the United States, under his hand and official seal accompanying any bill of exchange or promissory note which has been protested by such notary for non-acceptance or non-payment, shall be received in all the courts of this state as competent and conclusive evidence of the official character of said notary, and also of the facts therein certified as to the presentment and dishonor of such bill or note and of the time and manner of giving or sending notice of dishonor to the parties to such bill or note; *provided*, that the party offering the same shall have annexed a copy of such certificate to his declaration, demand or other pleading; *provided nevertheless*, that if the opposite party shall give notice with his plea or other pleading or when the action is brought in the court for the trial of small causes, by filing a notice on the return day of the summons or the day after, that he intends to dispute the fact of due presentment or notice of dishonor, then such certificate shall not be made evidence by this section, but the facts necessary to fix the liability of such party shall be established by proof as heretofore. (b) [See Sec. 51, *post*.]

Certificate of notary conclusive evidence if copy is annexed to pleading. P. L. 1862, p. 34. Amended.

Proviso.

21. That in any prosecution for libel, either against the government of this state, or any of the officers thereof, or against any other person, it shall be lawful for the defendant, upon the trial of the cause, to give in evidence in his defense, the truth of the matter charged in the indictment, any law, usage or custom to the contrary notwithstanding. (c)

In prosecutions for libel, truth may be given in evidence. R. S. 964.

22. That the printed statute-books and pamphlet session laws of any of the United States, printed and published by the direction or authority of such state, shall be received as evidence of the public laws of such state, in any court of this state; and the court may determine whether any book or pamphlet, offered as such, was so printed or published, either from inspection, or the knowledge of the judge or judges, or from testimony; and no error shall be assigned for the rejection of any book or pamphlet, offered as such, unless it be proved on error that such book or pamphlet is received as a statute-book or pamphlet containing the session laws of said state, in the courts of such state whose statute-book or pamphlet containing the session laws, it purports to be; nor shall any error assigned for the admission of such book or pamphlet be sustained, unless it be shown in support thereof, that the statute offered in evidence or some material part thereof, was not in force in such state at the time of the transaction or matter to which it was offered as pertinent or material. (d)

Statutes of other states. P. L. 1847, p. 146.

23. That the reports of the judicial decisions of other states and countries may be judicially noticed by the courts of this state, as evidence of the common law of such states or countries and the judicial construction of the statutes, or laws thereof, and the usual printed books of such reports shall be plenary evidence of such decisions.

Report of judicial decisions of other states. P. L. 1880, p. 280.

(a) All doubts respecting the competency of the opinion of experts in handwriting, based upon mere comparison, as evidence, have been removed by this section, but it still must be esteemed proof of low degree. *Mutual Benefit Life Insurance Co. v. Brown*, 3 *Stew.* 201.

(b) If the certificate of a notary is defective in substance in not stating sufficient facts, the indorser may object to its competency as evidence, though he has not given notice with his plea that he intends to dispute the fact of presentment or notice of dishonor. *Bark v. Shreve*, 10 *Vr.* 215.

(c) The burden of proving that the occasion of publication of a libel was privileged is on the defendant. The occasion being privileged, the burden is then cast upon the plaintiff of showing that the words were published from an improper motive.

The publication by a mercantile agency of a notification sheet respecting the character and financial standing of a trader, which is sent to its subscribers irrespective of their interest in the trader's standing and credit, is not a privileged communication. *King v. Patterson*, 20 *Vr.* 417.

(d) The laws of other states can only be brought to the knowledge of this court by proof. *Uhlen v. Semple*, 5 *C. E. Gr.* 289. *Bull v. Franklinton Co.*, 3 *Vr.* 104. *Campion v. Kille*, 1 *McCart.* 229. Proof by an attorney of such state is not sufficient. *Van Buskirk v. Mulock*, 3 *Har.* 185, overruling *Hale v. Ross*, *Pen.* *807. But where a defendant in chancery was such attorney, his testimony in connection with printed copies of the laws of that state, was received. *Condit v. Blackwell*, 4 *C. E. Gr.* 196.

III. Inspection of property.

Inspection of premises or chattels by jury or witnesses.

May be ordered by the court or a judge.

Either before or during the trial.

24. That in any case in which it shall appear to the court or a judge, that an inspection or examination of any premises or chattels in the possession or under the control of either party, in respect of which, or some right in, or injury from or to which the action shall be brought, would aid in ascertaining the truth of any matter in dispute between the parties in the action, it shall be lawful for the court or a judge, to order that the party in whose possession, or under whose control such property shall be, shall permit an inspection and examination of the said premises or chattels, by the jury or by the opposite party, or by such persons as he shall name as witnesses, at such times and under such regulations as the court or judge may prescribe; which said inspection or examination may be ordered by the court or judge, either before or during the progress of the trial.

IV. Depositions.

1. OF WITNESSES WITHIN THE STATE.

May be taken before certain officers.
R. S. 959, § 6.
Amended.

Notice required.

Witness compelled to appear, &c.
Ib., §§ 12 and 13.

Compensation of.

How such deposition taken and filed.
Ib., § 8.

How transmitted to court.

25. That if any material witness in an action or suit of a civil nature (a) in any of the courts of this state, be in this state, (b) but is ancient or very infirm, or is sick, (c) or is about to go out of this state, (d) then the deposition of such witness may, at the option of either party, be taken *de bene esse* before any justice of the supreme court, or judge of the court of common pleas, or supreme court commissioner, or master in chancery; *provided*, that the officer before whom the deposition is to be taken, shall cause notice to be given to the adverse party (e) immediately, or at such short day as the case in the opinion of the said officer may require, to attend and be present at the taking thereof, and to put questions and cross-examine, if he shall think fit. (g)

26. That any material witness of the description aforesaid, being in this state, may be compelled to appear and be examined before any of the said officers, in the same manner and under the same penalties as if subpoenaed to appear and testify in the court wherein the said action is pending; and shall be allowed compensation for his time and attendance at the same rate as if had personally appeared and given testimony in the cause before the court in which it is pending. (h)

27. That every person deposing as aforesaid, shall be sworn or affirmed to testify the whole truth, (i) and shall subscribe the testimony by him given, after the same shall be reduced to writing, which shall be done only by the officer taking the deposition, or by the deponent in his presence; (k) and the deposition so taken shall be retained by such officer until he deliver the same, together with a certificate of the reasons of its being taken, and of the notice, if any was given, to the adverse party, with his own hand to a judge or the clerk of the court for which it is taken; (l) or the said

(a) Appeals from orders of removal in settlement cases and from orders of affiliation and maintenance, are included. *Hildreth v. Overseers of Hopewell*, 1 Gr. 5. And appeals before the common pleas. *Ramsey v. Dumars*, 4 Har. 66.

(b) Not necessary that he be an inhabitant of the state. *Smith v. Ruesscastle*, 2 Hal. 381.

(c) That a witness is sick is not sufficient ground to issue a commission after the plaintiff has rested his evidence. The commission must be applied for, executed and returned before the trial. *Ogden v. Robertson*, 3 Gr. 124. Since the decision in *Ogden v. Robertson*, the statute has been altered so that now the deposition of a witness who is in this state, but is ancient or infirm or sick, or is about to go out of the state, may be taken, on notice, under the twenty-fifth section above, during the trial of the cause. *Johnson v. Armbrine*, 13 Vr. 452. Where a deposition *de bene esse* has been taken upon short notice under this section, the reasons for the taking of the same and the requirement of the commissioner in respect to the notice, together with a copy of the notice itself, can appear only by the certificate of the commissioner and not by oral proofs. *Case v. Garretson*, 25 Vr. 42.

(d) If "about to go out of the state," the deposition may be taken by the justice before whom the cause is pending. *Burley v. Mitchell*, *Spen*, 305.

(e) Notice to the attorney, it seems, is sufficient. *Ludlam v. Broderick*, 3 Gr. 289. But see *Middleton v. Taylor*, *Coxe* 445, and *Arnold v. Renshaw*, 6 Hal. 317. See Sec. 31, *post*.

(f) If no notice be given of the time and place of examination, the depositions must be suppressed. *Parker v. Hayes*, 3 C. E. Gr. 186.

(g) The commissioner has no power to adjourn the examination, but must continue it from day to day. *Parker v. Hayes*, 3 C. E. Gr. 186.

(h) A certificate of a master in chancery that the witness was duly sworn is sufficient. *New Jersey Express Co. v. Nichols*, 3 Vr. 166, 4 Vr. 434. The cautioning need not appear on the face of the depositions. *Ludlam v. Broderick*, 3 Gr. 289. *Burley v. Mitchell*, *Spen*, 305. But see *Stewart v. Bourne*, Pen. *960.

(i) The statute does not require the magistrate to certify to this, however prudent it may be to do so. *Sayre v. Sayre*, 2 Gr. 437. See *Den*, *Crowther v. Lloyd*, 2 Vr. 395. The caption may be drawn subsequently. *Ib.* But when drawn, in a deposition from the supreme court, cannot be altered by a judge at the circuit. *Emmett v. Briggs*, 1 Zab. 53.

(l) It is necessary that the certificate of the commissioner should set forth the reasons for taking the deposition and of the notice given to the adverse party. *Case v. Garretson*, 25 Vr. 42.

deposition and certificate shall be by the said officer sealed up, directed and transmitted either by mail or private messenger, to such judge or clerk, who shall open and immediately file the same, in the office of the said clerk, there to remain as of record.

28. That the person by whom such deposition shall be transmitted to the judge or clerk, as authorized in the preceding section, shall make oath or affirmation that he received the same sealed up from the hands of the officer by whom it was taken, designating the time and place, when and where received, and that the same has not been opened or altered since he so received it. (a)

Oath in such case.—
Ib., § 3.

2. OF WITNESSES RESIDING OUT OF THE STATE.

29. That if a material witness in any action or proceeding of a civil nature (b) in any of the courts of this state reside out of this state, (c) it shall be lawful for the court in which such action or proceeding is pending, or for any judge thereof, in term or vacation, on affidavit or proof thereof to the satisfaction of the said court or judge, and on such terms as the court or judge may direct, to award and issue, under the seal of the court, a commission to such person or persons, as the court or judge may think fit, authorizing such person or persons, or any two or more of such persons, to examine de bene esse the said witness on oath or affirmation.

Commission, when and by whom issued. R. S. 959, § 1. Amended.

30. That the name of every witness, to be examined by virtue of such commission, shall be inserted in the said commission; and the interrogatories for the examination of such witness shall be drawn and signed by the parties or their attorneys, or counsel in the cause in which the testimony is to be used, (d) or such of them as shall request the said commission, and be approved of by the court or one of the judges thereof, and shall be annexed to the commission; and each party shall be at liberty, with the approbation (e) of the said court or judge, to insert in the said interrogatories such questions as he or she may think proper or necessary.

Name of witness to be inserted in commission. Ib., § 1.

Interrogatories to be approved and annexed.

31. That a party intending to apply for a commission to examine a witness or witnesses in any cause, shall give eight days' notice of such application, and of the name or names of the witness or witnesses to be examined, and of the place of his, her or their residence, and also of the name or names of the person or persons whom the party applying intends to nominate as commissioner or commissioners, and shall serve therewith a copy of the interrogatories intended to be annexed to the said commission, in order that the adverse party may examine the same and submit cross-interrogatories if he think proper; (g) the notice mentioned in this section shall be served on the attorney or solicitor, when the party appears by attorney or solicitor. (h)

Notice of application for.

Copy of proposed interrogatories to be served therewith.

Notice, how served.

32. That the issuing of the commission may be ordered and the interrogatories may be approved upon shorter notice than is directed by the foregoing section, by consent of parties, or upon matter being made to appear to the said court or judge to excuse the want of full notice, and that shorter notice is necessary to prevent delay.

Commission may be issued on shorter notice.

(a) The statute is satisfied when, upon the commission produced by the clerk and appearing duly filed, is indorsed a certificate by one of the justices of the court from and by whom and when he received it, with his name subscribed thereto, and annexed is an affidavit made on the same day in the terms of the statute, although the justice does not certify in the indorsement that he had opened it and delivered it to the clerk of the court. *Hildreth v. Overseers of Hopewell*, 1 Gr. 5.

(b) Depositions taken when no suit is pending, are inadmissible. *Den, Bickham v. Pissant, Coxe* 220. A deposition regularly taken in a former cause between the same parties is not of itself evidence in a subsequent action between them. *Trimmer v. Larrison*, 3 Hal. 56. It may be made competent by proof that the suit was between the same parties and related to the same matter, and by producing a compared or duly-certified copy. *Camden and Amboy Railroad Co. v. Stewart*, 4 C. E. Gr. 248, 6 C. E. Gr. 484. The deposition of a deceased witness, taken in the prerogative court, on a caveat against the will, may be read in an ejectment, where the plaintiff in ejectment claims title under the person who was executor of the will and

the defendant was one of the caveators. *Turner v. Hand*, 3 Wall. 77, 83.

(c) Non-residence alone of a material witness is sufficient ground for a commission. *Leonard v. Sutphen*, 3 Hal. Ch. 545.

(d) Interrogatories must be signed by the parties or their counsel. *Graham v. Whitely*, 2 Dutch. 254. *Ludlam v. Broderick*, 3 Gr. 269.

(e) The "approbation" merely extends to the discretion and judgment which the court must exercise as to the legality and admissibility of the questions proposed. *Wilson v. Cornell*, 1 South. *118.

(g) Notice of the application was always necessary. 1 *Wilson v. Cornell*, 1 South. *117. *Den v. Parley*, 1 South. *124. *Ogden v. Robertson*, 3 Gr. 124. *Ludlam v. Broderick*, 3 Gr. 269. But the affidavit to show that the witness lives out of the state need not be taken on notice. *Den v. Wood*, 5 Hal. 62. Such affidavit must be produced. *Hendrick v. Craig*, 2 South. *568. The affidavit and notice are filed. *Den, Whitenack v. Voorhees*, 2 Har. 24.

(h) *Ante*, Sec. 25, note (e).

Oath of
commissioner.
Ib., § 2.
Amended.

33. That the commissioner or commissioners appointed under this act, or under the general power or authority of the court of chancery, or such of them as shall act, shall, before they enter upon their duties, take an oath or affirmation faithfully, fairly and impartially to execute the said commission, which oath or affirmation may be taken before any person lawfully authorized to administer an oath or affirmation in the state, territory or kingdom, where the said commissioner or commissioners reside or may be at the time. (a)

How examination
taken.
Ib., § 2.

34. That the said commissioner or commissioners shall and may examine every witness named in the said commission, or such as can be met with, upon the interrogatories annexed to the said commission, on oath or affirmation, to be administered to each and every witness by the said commissioner or commissioners, and cause the examination of each witness to be reduced to writing and signed by such witness; and the said commissioner or commissioners shall also sign the same. (b)

How commission
returned.
Ib., § 2.

35. That the said commissioner or commissioners shall annex such examination to the said commission, and close the same up under the hand and seal of the said commissioner, or under the hands and seals of the said commissioners, or any two of them, and direct the same to the chancellor or judges of the court out of which the same issued, at the place of holding the said court; and may place the same in any post-office, certifying thereon the time when, and the post-office in which the same may be so placed; and the chancellor, or any one of the judges of the court out of which the said commission issued, or the clerk of the said court, may take the same out of the post-office in which it may be found in this state, and open the same, and indorse thereon when and how he received it; and the said chancellor, judge or clerk shall immediately file the said commission and return in the office of the clerk of the court out of which the said commission issued, there to remain as a record. (c)

Indorsement by
Judge or clerk.

36. That if it shall be more convenient for the party in the said commission, his attorney or agent to receive the said commission and return closed up and directed as aforesaid, from the hands of the said commissioner or commissioners, (d) it shall be lawful for him so to do, and he shall thereupon deliver the same to the chancellor, or one of the judges or the clerk of the court, out of which the same issued, making oath or affirmation that he received the same sealed up from the hands of the said commissioner or commissioners, designating the time and place when and where received, and that the same has not been opened or altered since he received it; and the said chancellor, judge or clerk shall thereupon indorse and file the said commission and return, and the said affidavit, as directed in the preceding section of this act.

Party may re-
ceive and de-
liver it.
Ib., § 3.

Oath in such case.

37. That where a commission issued by virtue of this act shall be executed in any foreign state, nation or kingdom, such commission and the return thereto, closed up and directed as aforesaid, may be transmitted to the party on whose application such commission issued, his agent or attorney in the United States; and the person to whom the packet containing the said commission and return shall be transmitted as aforesaid, may deliver the same to the chancellor, or one of the judges, or the clerk of the court, out of which the commission issued, making oath or affirmation, when and how he received it, and that the same has not been opened or altered since he received it, and that he verily believes that it has not

Of the return of
foreign com-
missions.
Ib., § 4.

Oath in such case.

(a) An oath "faithfully" to execute, &c., omitting the other terms, is insufficient. *Den, Perry v. Thompson*, 1 Har. 72. So, "truly, faithfully and without partiality, to take the examinations and depositions," &c., is bad. *Lawrence v. Finch*, 2 C. E. Gr. 235. Such oath taken before a person who styles himself "one of the peace of the county," is good, if the commissioner certifies that he had taken the oath prescribed, before a person authorized to administer an oath at the place of his residence. *Ludlam v. Broderick*, 3 Gr. 269. So, if the *jurat* be signed "A. B., justice of the supreme court of N. S.," the court will intend that he had power to administer an oath, although it be nowhere averred in the proceeding. *Den, Saltar v. Applegate*, 3 Zab. 115. It is not necessary that the return show that such officer had authority to administer the oath, but the court must be satisfied by competent evidence that he had. *Lawrence v. Finch*, 2 C. E. Gr. 235. It is sufficient if, on the *jurat* affixed to the oath of a commissioner named in a commission sent to the state of Ohio,

the notary public before whom the oath is taken, certifies under his official seal that he "was lawfully authorized to administer an oath in the said state of Ohio." *McNeal v. Braun*, 24 Vr. 618.

(b) See Sec. 27, *ante*, note (k).
(c) The commission may be opened by a judge in vacation. *Den v. Wood*, 5 Hal. 62. When to be filed with the clerk of the court. *Emmett v. Briggs*, 1 Zab. 53. As to the acts to be done by the judge and clerk, the statute is only *directory*, and any omission on their part, as if the judge neglects to file it or the clerk permits it to be taken from his files, will not deprive the party of the benefit of it. *Moran v. Green*, 1 Zab. 562.

(d) A deposition handed by the magistrate to A., and by A. to B., by whom it was kept for some time and then returned to the magistrate and by him transmitted to the court, with his affidavit that it did not appear to have been tampered with, cannot be read. *Sayre v. Sayre*, 2 Gr. 487.

been opened or altered since it was closed up and sealed as aforesaid ; and the said chancellor, judge or clerk, being satisfied that it has not been opened or altered since it was closed up and sealed as aforesaid, shall open the same, and indorse thereon when and how he received it, and shall immediately file the said commission and return, and the said affidavit, in the office of the clerk of the court out of which the said commission issued, there to remain as a record.

38. [Amended by Sec. 66, *post.*]

39. That the provisions of this act in relation to the examination of witnesses by depositions shall apply to any proceeding in the court of chancery, supreme court, circuit court, court of common pleas, or orphans' court, wherein the testimony of witnesses may be required as the basis of judicial action by virtue of any statute or other law of this state.

To what court statute applicable. P. L. 1873, p. 73. Amended.

3. MISCELLANEOUS PROVISIONS.

40. That documentary evidence exhibited before any officer, commissioner or commissioners, taking any deposition or exhibits proved by any witness may be annexed to, and returned with the depositions of the witnesses so taken ; or the said officer, commissioner or commissioners, shall, if requested by the party exhibiting such documentary evidence or producing such exhibit, mark it as an exhibit in the suit, and return it to the party offering the same, and the same shall be received in evidence in all respects as if annexed to and returned with the said depositions.

Exhibits may be annexed to depositions or marked as exhibits. P. L. 1870, p. 12. R. S. 959, § 2.

41. That depositions taken by virtue of this act, in any cause in the supreme court, may be transmitted to the judge holding the circuit court of the county in which the venue is laid, or to the clerk of such circuit court, to be by him filed, instead of being filed in the office of the clerk of the supreme court.

If taken in supreme court may be sent to and filed with clerk of the circuit.

42. That the examination of any witness by commission or deposition taken, returned and filed, as provided for in this act, or a duly-certified copy thereof, (*a*) shall be as competent evidence in the cause in which it shall be taken, as if such witness had been examined in open court, on the hearing or trial thereof, proof being first made to the satisfaction of the court that such witness resides, or is out of this state, or is dead, or by reason of age, sickness, or bodily infirmity, is unable to attend the said court, and if the testimony be taken under the thirty-eighth section of this act, proof being made that notice of the taking thereof was given as therein prescribed. (*b*)

Examination to be read in evidence. R. S. 959, § 10. P. L. 1862, p. 225, § 4. Amended.

43. That any deposition or examination taken under this act, shall be subject to be excluded or overruled, wholly or in part, according to the opinion of the court, upon any objection taken to the competency of the witness, the materiality or competency of the evidence given, or the regularity of the questions put ; but shall not be excluded for any irregularity or informality in taking or returning the same, if the court in which the same is offered shall be satisfied that the testimony of the witness has been fairly and truly taken and returned ; and if such deposition or examination shall be admitted in evidence by the court, no exception shall be taken to the admission thereof, on the ground of any irregularity or informality in taking or returning the same.

Deposition shall be subject to objections as to competency, &c.

But shall not be excluded for informality.

No exception on ground of informality.

44. That the party requiring such examination or deposition shall be at the sole expense thereof, and shall not have any allowance for the same in the taxation of costs. (*c*)

To be at expense of party taking such examination. R. S. 959, § 12.

(a) The old practice was to serve a subpoena *duces tecum* on the clerk, who would attend in person, send his under clerk or depute the attorney in the cause to take charge of the commission. *Tupper v. Weston*, 1 Zab. 572, note.

(b) It is necessary to the admissibility of the deposition to show that all the requirements of the statute have been complied with. *Lawrence v. Finch*, 2 C. E. Gr. 285. If the evidence

was competent when given, the death of the witness or of the other party before the trial will not exclude it. *Id.* *Ramsay v. Dumars*, 4 Har. 86. *Mariatt v. Warwick*, 3 C. E. Gr. 108, 4 C. E. Gr. 439.

(c) The expense paid for the commission and to counsel on executing the commission was disallowed in *Main v. Main*, 5 Dick. 712.

Parties may have copies.
Ib., § 9.

45. That the parties to the action shall, at their respective costs and charges, be entitled to copies of such deposition, as soon as the same is filed in the clerk's office.

Taking out a commission not a stay of proceedings.

46. That the taking out of a commission for the examination of witnesses shall not be a stay of proceedings in the action. (a)

V. Examinations before committees.

Fees of witnesses.
Ib., § 3.

47. [Amended by Sec. 52, *post.*]

48. That witnesses subpoenaed by virtue of the preceding section, shall be entitled to the fees of witnesses in civil actions, to be paid out of the city treasury upon certificate of such committee.

VI. Commissions out of courts of other states.

Process for, how obtained.
R. S. 959, § 14.

49. That in case a commission issued out of any court of the United States, or of any state or territory in the United States, shall be directed to any person or persons in this state, authorizing such person or persons to examine or take the deposition of any witness named in such commission, and the person to be examined under such commission shall refuse to attend and give testimony before such commissioner or commissioners, any justice of the supreme court of this state, may upon application made to him by or on behalf of such commissioner or commissioners, and upon proof being made of such refusal, make an order awarding process of subpoena out of the said court for such witness to appear and testify before such commissioner or commissioners; and, upon filing such order in the clerk's office of the said supreme court, it shall be the duty of the said clerk to issue process of subpoena under the seal of the said court, requiring such witness to appear and testify before such commissioner or commissioners.

How served.
Ib., § 15.

50. That the process of subpoena authorized in the last preceding section, shall be served in the same manner, and be of the same force and effect as like process in any other case; and any person attending in pursuance of such subpoena, shall be entitled to the same fees as witnesses in other cases; and any witnesses disobeying such process shall be subject to the same penalties as are provided for in cases pending in the supreme court of this state.

Penalty for refusal to attend.

VII. Supplements.

P. L. 1877, p. 173.

Supplement.

Approved March 9, 1877.

WHEREAS, Doubts have arisen as to the construction of the fifth section of the above-mentioned act,

Husband or wife may give evidence in criminal action against either to prove marriage.

51. SEC. 1. That the said fifth section of an act entitled "An act concerning evidence," approved March twenty-seventh, one thousand eight hundred and seventy-four, be construed to authorize husband or wife in any criminal action against either, to give evidence to prove the fact of marriage.

P. L. 1877, p. 180.

Supplement.

Approved March 9, 1877.

52. SEC. 1. That section forty-seven of "An act concerning evidence" [Revision], approved March twenty-seventh, eighteen hundred and seventy-four, and which reads as follows [see Sec. 47, *supra*], be and the same is hereby amended so as to read as follows:

(a) The cause may be noticed for trial, and if the judge thinks there has been ample time for the return of the commission, he may order on the trial, unless good cause is shown for delay.

Stokes v. Garr, 2 Har. 451. See *Den v. Wood*, 5 Hal. 62. *Den v. Farley*, 1 South. *124.

[Whenever the common council of any city within this state shall have appointed a committee of members of their body upon any subject or matter within the jurisdiction of such common council, or to examine any officer of the city or member of said council in relation to the discharge of his official duties or conduct, or concerning the possession or disposition by him, in his official capacity, of any property belonging to the said city, or to inspect or examine any book account, voucher or document in the possession or under his control as such officer, relating to the affairs or interest of such city, such committee is hereby authorized to issue a subpoena ad testificandum, or subpoena duces tecum, to any person within this state to appear before them to give testimony or information required for the purpose above mentioned; and any member of such committee is hereby authorized to administer oaths to all such witnesses as may appear or be brought before them; the subpoenas herein provided for may be served by any police officer or constable of the said city; and in case any person summoned shall refuse to obey such subpoena, or to give testimony, or to answer questions as required, or to produce any books, papers or documents as required, any justice of the supreme court of this state may, upon application made to him and upon proof being made of such refusal, make an order awarding process of subpoena, or subpoena duces tecum, out of the said court for such witness to appear and testify before such committee, and may make an order or orders that any party give testimony and answer questions as required, and to produce books, papers or documents as required, and upon filing such order in the clerk's office of the said supreme court, it shall be the duty of the said clerk, under the seal of said court, to issue process of subpoena to appear before said committee at a time and place named therein, and so from day to day until the examination of such person shall be completed; and said subpoena may contain a direction that such witness bring with him to such examination any books, papers or documents therein mentioned, and it shall also be the duty of said clerk to issue, under the seal of said court, such other or further order in reference to the examination, appearance, production of books, papers or documents before said committee as said justice shall direct; and in case any person so summoned by subpoena issued by said clerk as aforesaid shall refuse to obey such subpoena or any direction therein, or to give testimony, or to answer questions as required, or to produce any books, papers or documents as required; or in case any person shall refuse to obey any order made by said justice as aforesaid, it shall be lawful for such committee upon affidavits proving the facts, to apply to said justice of the supreme court for an attachment against such person as for a contempt; and it shall be the duty of such judge to hear such application, and if satisfactory proof be made of such refusal, to issue an attachment, directed to any constable or police officer of such city, for the arrest of such person, and, upon his being brought before him, to proceed to a hearing of the case; and the said judge shall have power to enforce, by imprisonment in the county jail, obedience to such subpoena, and the answering of any question that may be proper, or the production of any book, paper or document that the witness would be compelled to produce in a court of law, and also to compel such witness to pay the costs of the said proceeding, to be taxed by the judge; and any person who shall willfully and corruptly testify falsely to any material matter, upon oath or affirmation administered by any member of such committee, upon such investigation or inquiry, shall, upon conviction thereof, be subject to the penalties of perjury.]

Committee of common council authorized to issue subpoenas and administer oaths.

In case of failure to obey subpoena, writ to issue out of supreme court.

Proceedings to enforce obedience to writ.

Supplement.

Approved February 25, 1880.

P. L. 1880, p. 52.

53. SEC. 1. That in all civil actions in any court of law or equity of this state, any party thereto may be sworn and examined as a witness, notwithstanding any party thereto may sue or be sued in a representative capacity;

Party suing or being sued in a representative capacity may be a witness.

Proviso.

provided, nevertheless, that this supplement shall not extend so as to permit testimony to be given as to any transaction with or statement by any testator or intestate represented in said action. (a)

P. L. 1881, p. 16.

Husband or wife of person charged with murder or manslaughter may testify as witness.

Repealer.

54. SEC. 1. That upon any trial hereafter had, of any indictment of any person charged with the crime of murder or manslaughter, the husband or wife of the person so charged shall be admitted to testify as a witness upon such trial, if he or she offer himself or herself as a witness therein on behalf of the person so charged.

55. SEC. 2. That all acts and parts of acts inconsistent with the provisions of this act be and the same are hereby repealed.

Supplement.

Approved February 5, 1881.

P. L. 1881, p. 25.

Justice of supreme court may make an order awarding process of subpoena for witnesses to appear and testify.

Clerk to issue process, &c.

56. SEC. 1. That in case of notice given or other proceeding taken for the purpose of examining or taking the deposition of any witness within this state, pursuant to the laws of the United States, to be used in any civil action or proceeding pending in any court of the United States, or pursuant to the laws of any other state or territory, to be used in any civil action or proceeding pending in any court of such state or territory, any justice of the supreme court of this state may, upon application made to him with proof by affidavit that the testimony of such witness is material to the applicant, make an order awarding process of subpoena out of the said court, for such witness to appear and testify in pursuance of such notice or other proceeding, and before such commissioner or person as shall be named in such order, and upon filing such order in the office of the clerk of the supreme court, it shall be the duty of the said clerk to issue process of subpoena, under the seal of the said court, requiring such witness to

Supplement.

Approved February 16, 1881.

(a) On exceptions to an executor's account, the executor is not a competent witness, when he offers himself as a witness in his own behalf, to testify as to any transactions between himself and his testator. *Smith v. Burnell*, 7 *Stew.* 219. *S. C.* affirmed, 8 *Stew.* 314. See, also, *Claussen v. Riley*, 7 *Stew.* 348. *Ellcott v. Chamberlin*, 10 *Stew.* 473. *Easting's Administrator v. Bray*, 11 *Stew.* 400. *Cuming v. Robins*, 12 *Stew.* 48. *Sherman v. Lavier*, 12 *Stew.* 253. *Schick v. Grote*, 15 *Stew.* 352. *Osborne v. O'Reilly*, 15 *Stew.* 471. *Woolberton v. Van Syckel*, 28 *Vr.* 393. *Fountain v. Linn*, 28 *Vr.* In a suit for an account by a surviving partner against the executor of his deceased partner, the survivor is competent to prove that the decedent applied partnership funds to his own use, but statements of personal transactions of the survivor with the decedent must be excluded. *Besson v. Cox*, 3 *Stew.* 87. Neither the proponent nor the caveator, in a contest over the admission of a will to probate, is, as such, in any way limited in his testimony by the fact that he is a party to the proceedings. Such proceedings are not a suit, but a judicial inquiry whether the instrument before the court is the last will and testament of the deceased. *Mackin v. Mackin*, 10 *Stew.* 534. The act does not exclude a party from testifying with respect to a contract made by him with the deceased executor of the represented testator. *Palmateer v. Tilton*, 13 *Stew.* 555; overruling 12 *Stew.* 40. Where, in a suit brought by the representatives of a deceased person, the testimony of the living defendant concerning conversations and transactions had with the decedent is admitted without objection, it is not in the power of the court afterward to strike it out because its admission is opposed to the statute. The court can strike out testimony so admitted only when its exclusion is demanded by some consideration of public policy. *Rowland v. Rowland*, 13 *Stew.* 281, overruling *Mouniford's Administrator v. Rowland*, 13 *Stew.* 181. In a suit brought by the guardians of a lunatic, the lunatic is the real party; the guardians are not considered as plaintiffs suing in a representative capacity, and the lunatic being under a "legal disability," the opposite party cannot be sworn. *Demarest v. Vandenburg*, 12 *Stew.* 130. *S. C.* affirmed, 13 *Stew.* 341. In replevin, when the plea of *non cepit* is pleaded, and property in the defendant as administrator, the defendant is not sued in a representative capacity, and therefore the plaintiff is a full witness in the case. *Hodge v. Corbett*, 15 *Vr.* 456. *S. C.* affirmed, 17 *Vr.* 354. Where neither party to an action represents a testator or intestate, although one of the parties to the transaction out of which the suit grows is dead, the living party is competent to speak as a witness as to what was said and done by the other. *Lehigh Coal and Navigation Co. v. Central Railroad Co.*, 14 *Stew.* 167. But his evidence, in order to be worthy of full credit, should either be corroborated on material points, or be so full and convincing as to persuade the court of its entire truth. *Ib.* Heirs-at-law are within the purview of the statute excluding parties as witnesses where any party to the suit sues or is sued "in a representative capacity." *Colfax v. Colfax*, 5 *Stew.* 206, decided in 1880, prior to the passage of the above act. In *Crim-*

mins v. Crimmins, 16 *Stew.* 86, decided in 1887, the court of chancery held that since the passage of the act of 1880, a widow in a suit against the heirs-at-law of her deceased husband was a competent witness to testify as to transactions with and statements made by her husband. In *Smith v. Smith*, 23 *Vr.* 207, decided in 1889, a widow in an action for dower gave the only direct proof in the case of an actual marriage. The defendants were devisees under the will of her alleged husband. The court of errors said "demandant was a competent witness to testify against these defendants, for they are sued as devisees having title to the land under the will, and not as executors and legal representatives." But in *Joss v. Mohn*, 26 *Vr.* 407, decided in 1893, the supreme court, in an action brought by Joss against the devisees of Fredericka Mohn, the plaintiff was permitted to testify, under objection, to her transactions with the devisee, and to statements made by him. The court held that the testimony should have been excluded, saying "it seems entirely undeniable that in actions like the present, the heir or devisee stands instead of, and so represents, the deceased debtor." The view of the supreme court seems to have been taken by the court of chancery in *Greenwood v. Henry*, 7 *Dick.* 450, decided in 1894. In *Tichenor v. Tichenor*, 16 *Stew.* 163, it was held that where a devisee and legatee is also an executor, and excepts to his co-executor's account, in his capacity as devisee and legatee, his testifying as a witness does not remove the statutory bar that prevents his co-executor from being a witness in his own behalf to establish his individual claim against the estate at the hearing of the exceptions to his account. This case was affirmed by the court of errors and appeals, but without determining whether the accounting executor was competent to testify to transactions with or statements by the testator. See *Tichenor v. Tichenor*, 16 *Stew.* 303. If the representative offers himself as a witness on his own behalf, and testifies to any transaction with or statement by his testator or intestate, the other party may be a witness on his own behalf as to all transactions with or statements by such testator or intestate which are pertinent to his case; but if the representative offers himself on his own behalf, and does not testify to any such transaction with or statement by his testator or intestate, the other party is excluded from testifying with regard to any such transaction or statement. *McCartin v. McCartin*, 18 *Stew.* 266, affirming *McCartin v. Traphagen*, 16 *Stew.* 323. The testimony of officers or directors of a corporation, called as witnesses in its behalf in an action in which it is a party, is not testimony given by the corporation, and consequently is not rendered incompetent by the proviso of the act of 1880. *New Jersey Trust and Safe Deposit Co., Executor, &c. v. Camden Safe Deposit and Trust Co., November Term, 1895.* A party to a suit is not a competent witness, under the act of 1880, to testify adversely to another party suing in a representative capacity, as to a transaction of the deceased with a person other than the witness, in which the witness and such person are interested, although such interests are divisible. *Matthews v. Hoagland*, 3 *Dick.* 456.

appear and testify accordingly, which shall be served in the same manner and be of the same force and effect as like process in any other case, and any person attending in pursuance of such subpoena shall be entitled to the same fees as witnesses in other cases, and any witness disobeying such process shall be subject to the same penalties as are provided for in cases pending in the supreme court of this state.

Supplement.

Approved March 3, 1881.

P. L. 1881, p. 69.

57. SEC. 1. That upon the trial of any indictment, allegation or accusation of any person charged with crime, the wife or husband of the person indicted or accused shall be admitted to testify as a witness in behalf of such person upon such trial, if he or she shall be offered and produced as a witness therein by the person so indicted or accused.

Husband or wife of person indicted to be admitted to testify as witness.

Supplement.

Approved March 24, 1881.

P. L. 1881, p. 210.

58. SEC. 1. That any public record of any foreign state, county or city, or of any court therein, or any copy thereof, which is admissible in such state, county or city, or in any court therein, to prove the facts therein contained, shall be admitted in evidence in the courts of this state, and shall be evidence of the facts therein contained to the same extent as though the original papers, of which the record thereof is a copy, had been produced and proved; *provided*, that wherever a copy of any such record shall be offered in evidence, the same shall not be admitted, unless the same shall have been first exemplified according to the laws of the United States of America.

Public records of any foreign state, &c., to be admitted in evidence.

Proviso.

Supplement.

Approved April 8, 1887.

P. L. 1887, p. 146.

59. SEC. 1. That in all cases where the testimony of a witness de bene esse is taken upon notice, pursuant to the thirty-eighth section of the act to which this is a supplement, it shall be lawful for the same to be taken by a stenographer, in presence of the judge or commissioner named in the notice; *provided*, that before the taking of the same the stenographer shall be sworn by the said judge or commissioner to carefully, faithfully and impartially take said evidence and to make a true and correct transcript thereof, which oath shall be in writing and shall be attached to and be a part of the return of the judge or commissioner. [See Sec. 66, *post*.]

Testimony of witnesses de bene esse may be taken by stenographer.

Supplement.

Approved March 21, 1888.

P. L. 1888, p. 182.

60. SEC. 1. That all transcripts of returns of deaths, marriages and births made by any physician, clergyman or other person, according to law, to any county board of health or local board of health of any municipality in this state, empowered by law to receive such returns, or transcripts of the record of such return recorded by such board, and made as hereinafter directed, shall be received as legal evidence in any court of law or equity in this state.

Transcripts of returns of deaths, &c., to county or local board of health, legal evidence.

61. SEC. 2. That said transcripts shall be a copy of the return as originally made, or a copy of the record thereof as recorded by the clerk or registrar of said board, and shall be signed by said clerk or registrar and by him certified to be a true copy of said return or record, and that thereupon such certified transcript shall be received as prima facie evidence of the matters and facts therein stated.

What transcript to be, and by whom certified.

62. SEC. 3. That all acts and parts of acts inconsistent with the provisions of this act be and the same are hereby repealed.

Repealer.

Supplement.

Approved April 8, 1892.

P. L. 1892, p. 422.

Notice required for taking testimony in foreign states or kingdoms.

63. SEC. 1. That it shall not be lawful for any party in a civil cause to take the testimony of any witness de bene esse residing in any foreign state or kingdom upon less than forty days' notice in writing of the time and place of such examination, and of the names of the witnesses to be examined to the adverse party, his attorney or solicitor, that he may be present and put interrogatories, if he shall see fit.

Under what circumstances any party to a civil cause may be examined in his own behalf de bene esse.

64. SEC. 2. That no party to any civil cause shall be examined in his own behalf de bene esse under the provisions of the act to which this is a supplement, except upon the written consent of the attorneys of all the parties thereto, unless the court in which the action shall be pending or any judge thereof at chambers, shall upon the petition of the party applying therefor, upon notice to the other side, order in his discretion the examination of such party, nor shall any testimony of such party taken or to be taken de bene esse be used or read at the trial of said cause, unless taken upon such order. [See Sec. 67, *post.*]

Supplement.

Approved March 1, 1893.

P. L. 1893, p. 85.

Public statutes or laws of foreign countries authorized to be published received as evidence in all courts of this state.

Court may determine as to authenticity.

65. SEC. 1. That the printed statute-books and pamphlet session laws or other laws of any foreign country or of any province or subdivision thereof, printed and published by the direction or authority of such foreign country, province or subdivision thereof shall be received as evidence of the public statutes or laws of such foreign country, province or subdivision thereof in any and all courts of this state, and the court may determine whether any such book or pamphlet offered in evidence was so printed or published, either from the inspection of such book, or the knowledge of the court, or from testimony in support thereof, and no error shall be assigned for the rejection of any such book or pamphlet so offered, unless it be proven on error that such book or pamphlet offered as such in evidence is what it purports to be; nor shall any error assigned for the admission of such book or pamphlet be sustained unless it be shown in support thereof that the statute or law offered in evidence or some material part thereof was not in force in such foreign country, province, or subdivision thereof at the time of the transaction or matter to which it was offered as pertinent or material.

Supplement.

Approved March 10, 1893.

P. L. 1893, p. 185.

Regulations for taking testimony of witnesses residing out of state.

66. SEC. 1. That the thirty-eighth section of the act to which this is a supplement be and the same is hereby amended so that the same shall read and be in the words following, to wit:

[That any party in a civil cause desiring the testimony of any witness who resides out of this state may, instead of taking his testimony by commission take the testimony of such witness de bene esse before any judge of any supreme, circuit or district court, or court of common pleas, of the state where such witness is, or before any commissioner of deeds appointed by the governor of this state, resident in the state where such witness is, or before a commissioner specially appointed for that purpose by the court in which such action is pending, or any judge thereof, or before a master in chancery of this state; *provided*, that notice in writing of the time and place of such examination, and of the names of the witnesses to be examined shall be given to the adverse party, his attorney or solicitor, that he may be present and put interrogatories if he shall see fit, which notice shall be served, allowing time for attendance after service not less than at the rate of one day (Sundays excluded), for every fifty miles of travel; *provided also*, that in all cases at least ten days' notice, exclusive of Sundays, shall be given; *and provided further*, that in cases where such testimony is desired to be taken of wit-

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nesses residing in any foreign state or kingdom, or in any state or territory of the United States, situate upon the Pacific ocean, so many days' notice shall be given as shall be directed by the court in which said cause shall be pending, or any judge thereof, at chambers; the officer taking such testimony shall first take an oath or affirmation fairly and impartially to take the same, before some person authorized to administer an oath in the state, territory or kingdom where he shall reside; the testimony of such witness shall be taken on oath or affirmation, administered according to the law of this state, upon interrogatories to be then and there put by the parties, or any of them, or any person authorized in their behalf, and such interrogatories and the answers thereto shall be reduced to writing by the officer taking such testimony; and shall be subscribed in his presence by the deponent; and thereupon the same shall be certified, sealed up, indorsed, directed and forwarded, as is required in case of depositions taken under the twenty-ninth section of this act, or if the testimony of such witness be taken before a master in chancery, such testimony may be certified and delivered by the master taking the same to the clerk of the court in which such action is pending, or to any judge thereof.] (a) [See Sec. 59, *ante*.]

Supplement.

Approved March 13, 1893.

P. L. 1893, p. 249.

67. SEC. 1. That the deposition of any party to any action in any of the courts of this state, who resides out of the state while such action is pending, may be taken by commission or upon notice in the same manner and upon the same terms as provided in case of witnesses residing out of the state; and that such deposition may be read and used upon the trial of such cause; it being the intention of this amendment to give the parties to actions who reside out of the state the same privilege to have their depositions taken out of the state as to other witnesses in such actions residing out of the state.

Deposition of non-resident party to any action may be taken by commission.

VIII. Miscellaneous acts.

An act concerning fees.

Approved March 19, 1874.

P. L. 1874, p. 54.

68. SEC. 1. That any joint committee of the legislature, any standing committee of either house, or any special committee which shall have been, by resolution, directed to enter upon any investigation or inquiry, the pursuit of which shall necessitate sending for persons and papers and the examination of witnesses, shall have power to summon before them such persons as they may deem necessary and proper to testify in the matter under investigation, and shall also be authorized to employ such legal and clerical assistance as they may deem necessary, and the persons so testifying shall be entitled to receive the like witness fees and mileage as are now allowed to persons summoned to testify in the courts of this state; and the treasurer of this state is hereby authorized and directed to pay upon the warrant of the comptroller, such fees and compensations for the above-named purposes as shall be certified to have been correct and necessary by the chairman of the committee under whose authority and by whose order such expenses shall have been incurred, and approved by the governor.

Committees of either house of the legislature do have power to summon witnesses and employ secretaries and counsel.

Witness fees.

Chairman of committees to certify bills, and state treasurer shall pay them.

(a) Where a deposition was taken in another state, under the authority of this section and section 39, *ante*, on behalf of the complainant, it was suppressed because the witness, who was the defendant, refused to answer some of the complainant's questions, though they were proper. *Fulton v. Golden*, 1 *Stew.*

37. The court of chancery may, in proceedings for contempt, order the evidence of witnesses resident in foreign jurisdictions taken by commission or otherwise, and use the evidence so taken on the hearing. *Una v. Dodd*, 11 *Stew.* 460. See, also, *Dodd v. Una*, 13 *Stew.* 673.

An act concerning the records of notaries public of other states and territories.

P. L. 1874, p. 57.

Approved March 21, 1874.

A duly-proven copy of the official record of notaries public of other states shall be received as evidence in the courts of this state.

69. SEC. 1. That whenever the register or other book of any notary public appointed and qualified under the laws of any state or territory of the United States containing a record of the official acts of such notary public by him done in pursuance of his office shall have been, or shall hereafter be, in pursuance of the law of such state or territory, by reason of the death, removal or other disability of such notary public, deposited in the office of the clerk, prothonotary or recorder of deeds of the city or county in which the said notary public resided at the time of his acting as such notary public, a copy of such record or of any part thereof respecting the protesting of any note or bill of exchange protested by such notary public, and the time when, place where and upon whom demand of acceptance or payment was made, with a copy of the notice of non-acceptance or non-payment (if a copy of such notice shall appear on said record), how the notice of non-acceptance or non-payment was served, and time when, or if sent, in what manner, and the time when, and to whom, duly certified under the hand and seal of such clerk, prothonotary or recorder of deeds, or otherwise proved to be truly taken from said record, shall be held and received in all the courts of this state as conclusive evidence of the facts therein recited, and also of the official character of said notary public; and whenever it shall appear from such record that the said note or bill of exchange had been protested for want of acceptance or payment thereof, and that the said notary public making such protest had duly notified the drawer or indorsers, by mail, of the demand or payment or acceptance and refusal thereof, without specifying the names or the post-office address of such drawer or indorsers, the copy of such record certified or proved as aforesaid, shall be held and received in all the courts of this state as conclusive evidence that the drawer and indorsers of such note or bill of exchange were duly notified of such demand and refusal; *provided*, that the party offering the same shall have annexed a copy of such record to his declaration or other pleading, or shall, at least twenty days before the trial of any cause where such record is to be offered in evidence, serve upon the opposite party or his attorney a notice that he intends to offer in evidence upon said trial such record or a copy thereof, setting forth the cause; *and provided further*, that any party may contradict by other evidence any of the matters appearing upon the said record in all cases where such party shall give notice of his intention so to do within five days after a service of the notice mentioned in the first proviso of this section.

Proviso.

An act to define the powers of legislative committees of investigation.

P. L. 1875, p. 26.

Approved March 11, 1875.

Legislative committees empowered to compel attendance of witnesses.

70. SEC. 1. That any joint committee of the legislature, any standing committee of either house, or any special committee which shall have been or may be by resolution, directed to enter upon any investigation or inquiry, the pursuit of which shall necessitate sending for persons and papers and examination of witnesses, shall have power to compel the attendance before them of such person or persons as they may deem necessary and proper, to testify in the matter under investigation, and any member of said committee may swear any person who shall come to testify before said committee; and any person who shall have been so sworn, and who shall swear falsely shall be guilty of perjury; and said committee shall be authorized to employ such legal and clerical assistance as they may deem necessary; and the treasurer of this state is hereby authorized and directed to pay, upon the warrant of the comptroller, such fees and compensation for the above-named purposes, and for the expenses of the sergeant-at-arms in the execution of the warrant mentioned in section two of this act, as shall be certified to as correct and necessary by the chairman

Expenses, how paid.

of the committee, under whose authority and by whose order such expenses shall have been incurred ; *provided*, such certificate be first approved by the governor.

Proviso.

71. SEC. 2. That if any person or persons shall be summoned in writing, by order of any such committee, to testify before it and shall refuse or neglect to obey said summons, it shall be lawful for the speaker of the house of assembly or the president of the senate, upon application to him, by warrant under his hand, to order the sergeant-at-arms of the house over which he shall preside to arrest such person or persons and bring him, her, or them before said committee ; and it shall be the duty of the sergeant-at-arms to whom such warrant shall be directed to execute the same.

Obedience to summons, how enforced.

An act concerning sealed instruments.

Approved April 6, 1875.

P. L. 1875, p. 56.

72. SEC. 1. That in every action upon a sealed instrument, or where a set-off is founded upon a sealed instrument, the seal thereof shall be only presumptive evidence of a sufficient consideration, which may be rebutted as if such instrument was not sealed ; and that all instruments executed with a scroll, or other device by way of a scroll, shall be deemed a sealed instrument. (a)

In actions on sealed instruments, seal only presumptive evidence of consideration.

An act providing that any husband or wife may give evidence in their own behalf, or for or against each other, in proceedings for divorce on account of adultery.

Approved February 16, 1881.

P. L. 1881, p. 24.

73. SEC. 1. That any husband or wife may give evidence on their own behalf, or for or against each other, in any proceedings in this state for divorce on account of adultery, any law of this state to the contrary notwithstanding ; *provided*, this act shall not apply to any proceedings for divorce commenced before the passage of this act. (b)

Husband and wife may give evidence in proceedings for divorce on account of adultery.

Proviso.

74. SEC. 2. That all acts or parts of acts inconsistent with the provisions of this act be and the same are hereby repealed, and that this shall be a public act and take effect immediately.

Repealer.

An act respecting the examination of witnesses before legislative committees and providing for the punishment of witnesses refusing or neglecting to appear or give evidence before such committees.

Approved March 5, 1895.

P. L. 1895, p. 162.

75. SEC. 1. That in any investigation or inquiry by any joint committee of the legislature, any standing committee of either house, or any special committee which shall have been or may be by resolution directed to enter upon such investigation or inquiry, all witnesses sworn or affirmed before such committee shall truly answer all questions put to them which the committee shall decide to be proper and pertinent to such investigation or inquiry ; and no witness shall be excused from answering any such question on the ground that to answer the same might or would incriminate him, or tend to criminate him ; but no answer made by any witness to any such question shall be used or admitted in evidence in any proceeding against him, except in case of a criminal proceeding for perjury in respect

Witnesses before legislative committees to answer all questions.

Evidence given shall not be used against witness unless in case of perjury.

(a) This section, together with section 16, *ante*, puts contracts under seal on the same footing as contracts not under seal, with respect to the method of making the defense of an infirmity in the consideration, except that there cannot be recoupment in actions on sealed instruments. *Wakeman v. Illingsworth*, 11 Vr. 441, decided in 1878. Recoupments of damages are, however, now extended to actions on contracts under seal by rule 83 of the supreme court, promulgated in 1885. The above section and section 16, *ante*, establish new rules of evidence, but were not intended to abolish all distinction between simple contracts and specialties. It is not a good defense to a promise in writing, *under seal*, to pay a sum of money, for value received, that it was voluntary. *Aller v. Aller*, 11 Vr. 446. The act of 1875 (section 72 above) was not intended to invalidate instruments

where the consideration intended to pass by the parties was paid ; nor does it apply to a release under seal. *Braden v. Ward*, 13 Vr. 518. *Wain v. Wain*, 24 Vr. 429. A release, executed in Pennsylvania, with a scroll in place of a seal, will be regarded as a simple contract in this state, the law of the former state not being shown. *Id.* The act of 1875 does not of itself avoid a voluntary conveyance. *Campbell v. Tompkins*, 5 Stew. 170 ; affirmed, 6 Stew. 362. (b) Prior to the passage of this act neither husband nor wife, in a suit for divorce for adultery, was a competent witness to prove or disprove the charge. *Marsh v. Marsh*, 2 Stew. 286. *Doughty v. Doughty*, 5 Stew. 82. *Franz v. Franz*, 5 Stew. 483. *Wells v. Wells*, 6 Stew. 4.

to his answer to such questions; and if any such witness shall refuse to answer any question so decided to be proper and pertinent he shall be deemed guilty of a misdemeanor.

Penalty for refusal to answer.

76. SEC. 2. That if any witness summoned to appear before any such committee shall willfully neglect or refuse to appear in obedience to the summons, or shall refuse to be sworn or affirmed, he shall be deemed guilty of a misdemeanor.

Executions.

I. FORM OF AND RECORDING.

1. Form of writ against goods and lands.
2. Execution against lands to be recorded.

II. WHAT MAY BE LEVIED ON.

3. Money.
4. Notes, stock, &c.
5. Clerk or cashier of company to give certificate.
6. Proceedings when clerk, cashier, &c., of joint stock company is non-resident.
7. Such clerk, &c., to return statement and certificate.
8. How proprietary rights levied on and sold.
9. Repealed.

III. PROPERTY EXEMPT FROM.

10. Amended by section 35.
11. Sheriff to make inventory and appoint appraisers.
12. Duty of appraisers.
13. Fees of sheriff and appraisers.
14. Exemption where executions issue into different counties.
15. By whom selection to be made if defendant absent.
16. Selection, how made if defendant die.
17. Section 9 of act of 1846 repealed.

IV. FROM WHAT TIME BINDS PROPERTY.

18. Goods bound from delivery of writ, time to be indorsed.
19. Priority as to lands.
20. When purchase of goods before levy, good.

V. WHERE PRISONER FOR DEBT ESCAPES OR DIES.

21. If debtor escape, plaintiff to have new execution.
22. If he die, plaintiff may have execution against estate.

VI. DISCOVERY IN AID OF.

23. Amended by sections 39 and 41.
24. Amended by section 40.
25. Amended by section 37.
26. Examination to be certified to judge. Receiver.
27. Dismissal of petition.
28. Penalty for disobeying subpoena.
29. Filing of papers and *certiorari*.
30. Fees of commissioner.

VII. SALE UNDER.

31. Advertisement of sale of goods.

VIII. PROCEEDINGS ON CLAIM OF PROPERTY.

32. Adjournment by sheriff. Application to and trial by judge.
33. Verdict protects sheriff.

IX. SUPPLEMENTS.

34. Execution against municipal corporation or township, how served.
35. What property exempt from seizure under execution.
36. Execution against school district, how served.
37. Witnesses required to testify on discovery proceedings. Defendant may have counsel.
38. Repealer.
39. Amended by section 41.
40. Proceedings to obtain order for discovery.
41. Order for discovery may be made if execution is returned unsatisfied.
42. Certain household goods and furniture exempted from seizure in attachment proceedings.
43. When provisions of act to apply to income of property held in trust for debtor.
44. When execution is satisfied clerk shall cancel the judgment.
45. Clerk's fee on cancelling judgment.
46. Clerk required to cancel judgment on request of interested party.

I. Form of and recording.

An act respecting any execution.

Revision—Approved March 27, 1874.

I. That in every writ of execution, which shall be issued against lands, tenements, hereditaments and real estate, the sheriff or other officer to whom the said writ may be directed, shall be commanded, that of the goods and chattels in his county, of the party against whom such execution issues, he cause to be made the debt, damages and costs or sum of money mentioned in the said execution; and if sufficient goods and chattels of the said party cannot be found in his county, that then he cause the whole or the residue, as the case may require, of the said debt, damages and costs or sum of money, to be made of the lands, tenements, hereditaments and real estate, whereof the said party was seized on the day when the said lands, tenements, hereditaments and real estate became liable to such debt, damages and costs or sum of money, specifying the day particularly, or at any time afterwards, in whose hands soever the same may

R. S. 335, 660, 976,
978.

P. L. 1850, p. 301.
" 1851, p. 278.
" 1852, p. 36.
" 1854, p. 108.
" 1855, p. 283.
" 1858, p. 409.
" 1863, p. 31.
" 1869, p. 498.

Form of the writ
against goods and
lands.

R. S. 660, § 4.