# EVIDENCE ACT 1928.

An Act to consolidate the Law of Evidence.

19 GEORGE V. No. 3674.

[12th *February*, 1929.]

BE it enacted by the King's Most Excellent Majesty by and with the advice and consent of the Legislative Council and the Legislative Assembly of Victoria in this present Parliament assembled and by the authority of the same as follows (that is to say) :— *Evidence Act* 1915.

**1.** This Act may be cited as the *Evidence Act* 1928, and shall come into operation on a day to be fixed by proclamation of the Governor in Council published in the *Government Gazette*, and is divided into Parts and Divisions as follows :— Short title commencement and division.


PART I. — The Means of obtaining Evidence.
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PART IV.—Oaths Affirmations Affidavits Declarations.
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- Division 5.—Courts and Officers ss. 103–104.
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- Division 8.—Commissioners for taking Declarations and Affidavits ss. 111–114.
- Division 9.—Affidavits in Victoria s. 115.
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PART VI.—Shorthand Writers ss. 122–132.

PART VII.—Offences. Perjury Forgery False Certificates etc. ss. 133–137.

PART VIII.—Miscellaneous ss. 138–143.

Repeal. First Schedule.

**2.** The Acts mentioned in the First Schedule to this Act to the extent thereby expressed to be repealed are hereby repealed. Such repeal shall not affect any application examination deposition declaration affidavit rule regulation or order made, or any writ subpœna summons or other process issued, or any commission granted, or any certificate or notice given, or any signature published, or any interrogatories administered under the said Acts or any of them before the commencement of this Act.

Interpretation. *Ib. s. 3.*

**3.** In this Act unless inconsistent with the context or subject-matter—

"Document" includes any book plan paper parchment or other material whatever on which is any writing or printing or which is marked with any letters or marks denoting words or any other signs capable of carrying a definite meaning to persons conversant with them.

"Person acting judicially" includes any court judge chairman of general sessions justice arbitrator and any person having by law or by consent of parties authority to hear receive and examine evidence and any officer in any public department having in the discharge of his duties authority to examine evidence.

"Legal proceeding" includes any civil criminal or mixed proceeding and any inquiry in which evidence is or may be given before any court or person acting judicially.

## Part I.—The Means of obtaining Evidence.

### Division 1.—Orders and commissions to examine witnesses.

*Evidence Act 1915 s. 4.*

Order or commission to examine witnesses.

1 Will. IV. c. 22 s. 4.

**4.** It shall be lawful for the Supreme Court or any judge thereof in any action or suit depending in such Supreme Court or in any county court[a] or court of mines upon the application of any of the parties to such action or suit to order the examination on oath upon interrogatories or otherwise before some person to be named in such order of any witnesses within Victoria or its dependencies;[b] or to order a commission[c] or letters of request to issue for the examination of witnesses on oath at any place or places out of Victoria and its dependencies by

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(*a*) Applications for leave to examine witnesses *de bene esse* in county court actions must be made on summons.—*Irvine* v. *Birtchnell*, 1 A.L.R., 20.

(*b*) Where a commission issued to examine a certain witness within the jurisdiction: *Held*, the evidence given under it was admissible, since the commission was based on an order which complied substantially with the requirements of this section.—*Hatt* v. *Hatt*, 3 V.L.R. (E.), 227.

Upon an application for an order to examine a witness *de bene esse*, the affidavit stated that the witness was "a material and necessary witness for the plaintiff in this action," and further stated that in the opinion of the solicitor the plaintiff could not safely proceed to trial without his evidence.

*Held*, that the affidavit should state generally what the witness was going to prove so as to satisfy the court that he was a material witness, and that it was not sufficient merely to state that he was a material witness.—*Bleasby* v. *Romney*, 24 V.L.R., 201.

(*c*) On an application by a party for a commission to examine a witness out of the jurisdiction it was *held* by the High Court in a New South Wales case that if it is shown to the satisfaction of the court that the witness is out of the jurisdiction, that his evidence is material, that the court has no power to enforce his attendance, and that the party applying cannot procure it, the court is bound in the exercise of its discretion to order the commission to issue, unless the other party can satisfy the court that the witness can and will attend.

This principle applied to the case of an application by two of three co-defendants to have the evidence of the third defendant taken on commission in South Africa.

In considering whether a commission should or should not issue, the court should not speculate as to whether one party or the other is likely to succeed at the trial, and should attend to the nature of the case and the pleadings so far only as to see whether there is really any question to be tried.—*Willis* v. *Trequair*, 3 C.L.R., 912.

A commission will not be granted under this section to examine a witness whose attendance at the trial can be enforced under the provisions of the Service and Execution of Process Acts.

The principle enunciated in *Willis* v. *Trequair* (*supra*) applied; *The National Mutual Life Association of Australasia Limited* v. *The Australian Widows' Fund Life Assurance Society Limited*, 1910 V.L.R., 411.

The granting of a commission under this section is a matter within the discretion of the judge to whom the application for it is made. Ordinarily, where the application is made *bonâ fide*, the application is readily granted, but it is not a matter of right, still less a matter of course. Where a discretion is vested in a judge by a Statute which does not declare his discretion to be final an appeal will lie; but the appellate court will not overrule the exercise of the judge's discretion unless (1) There is no evidence to support his decision or (2) He has been misled by false evidence, or (3) Injustice will be done through the mistaken exercise of his discretion. Where the person whom defendant desired to examine on commission was a most important witness for the defence, and no other witness could serve as a substitute for him upon certain questions upon which the defence mainly rested, and no means existed by which he could be compelled to come to Victoria and submit himself for examination there: *Held*, that the case came within exception (3), and order refusing a commission reversed on appeal, notwithstanding that a former commission obtained by co-defendant, for whom the same solicitor acted, had been allowed to expire without the evidence being taken under it.—*Merry* v. *The Queen*, 10 V.L.R. (E.), 135.

On application for a commission to examine witnesses abroad, a judge has a discretion to refuse it, if it will not conduce to the due administration of justice. Proof of any legal defence, however, ought, in the absence of any special circumstances, to be regarded as so conducive.—*De Saxe* v. *Schlesinger*, 7 V.L.R. (L.), 127.

Where a plaintiff did not join in the application for a commission it was held that he should be allowed to have a clause inserted in the long order entitling him if he should think proper to use at the trial the evidence taken on commission.—*Hele* v. *McIlwraith, McEacharn, and Co.*, 2 A.L.R., 40.

The section formerly in force was held not to authorize a judge of the Supreme Court to order the issue of a letter of request, in a county court action, for the examination of witnesses abroad.—*Smyth* v. *Brunning*, 1913 V.L.R., 280; but the words "letters of request" have now been added.

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interrogatories or otherwise ;[a] and by the same or any subsequent order or orders to give all such directions touching the time place and manner of such examination[b] as well within Victoria and its dependencies as without and all other matters and circumstances[c] connected with such examinations as appear reasonable and just ;[d] and it shall be lawful for every person authorized to take the examination of witnesses by any rule order writ or commission or letters of request made or issued in pursuance of this Division to take all such examinations and if within Victoria he is hereby required to take the same.

Witnesses may be ordered to attend for examination.
*Ib. s. 5.*
See 1 Will. IV. c. 22 s. 4.

5. When any rule or order is made for the examination of witnesses within Victoria or its dependencies by authority of this Act, it shall be lawful for the Supreme Court or any judge thereof in and by the first rule or order to be made in the matter or any subsequent rule or order to command the attendance of any person to be named in such rule or order for the purpose of being examined or of producing any documents to be mentioned in such rule or order, or for the purpose of being examined and of producing documents so mentioned and to direct the attendance of any such person at his own place of abode or elsewhere if necessary or convenient so to do; and the wilful disobedience of any such rule or order shall be deemed a contempt of the Supreme Court, and proceedings may be thereupon had by attachment (the judge's order being made a rule of court before or at the time of the application for an attachment) if in addition to the service of the rule or order an appointment of the time and place of attendance in obedience thereto signed by the person or persons appointed to take the examination or by one or more of such persons is also served together with or after the service of such rule or order: Provided always that every person whose attendance is so required shall be entitled to the like conduct money and payment for expenses and loss of time as upon attendance at a trial: Provided also that no person

(*a*) There is no jurisdiction under this section to make an order for the examination of witnesses *de bene esse* after judgment has been entered and pending an application for a new trial.—*Wilkie* v. *Melbourne Motor Bus Co.*, 1916 V.L.R., 211.

When a witness is permanently residing in another State, and his attendance would be very inconvenient for business reasons, the court will, where the evidence sought does not involve personal credibility and turns largely on the production of documents, grant a commission under this section to take the evidence notwithstanding that the witness's attendance might be compelled under section 16 of the *Service and Execution of Process Act* 1901-1912.—*Burnside* v. *Melbourne Fire Office Ltd. (No. 2)*, 1918 V.L.R., 639 ; see *In re Matthews*, *infra*.

(*b*) A petitioner, a theatrical manager, seeking divorce on the ground of adultery, but having no personal knowledge of the adultery alleged, was about to leave the jurisdiction for an indefinite time on a business tour. Upon an application to take the petitioner's evidence on commission before his departure: *Held*, that the application should be granted subject to the court desiring at the trial to hear the petitioner in person.—*Goodchild* v. *Goodchild*, 1919 V.L.R., 13.

(*c*) Where the order provided that the signatures of witnesses should be attached, which was not done: *Held*, such a provision was merely directory, and that the proper time for taking such an objection was at the taking of the evidence, and not at the hearing. Where copies of letters were put in evidence before a commissioner, the originals having been called for on a notice to produce and not produced, but no notice to produce was then put in or proved: *Held*, that an objection at the hearing that this correspondence was inadmissible was too late; it should have been taken before the commissioner at the time. —*Hall* v. *Hall*, 3 V.L.R. (E.), 227.

It is the duty of a commissioner to use his own discretion as to the competency of witnesses examined by him, and to certify to the court his opinion.—*White* v. *Hoddle*, 6 V.L.R. (E.), at page 87.

The rules of practice on taking evidence under a commission are the same as those acted on in a court.—*Bell* v. *Clarke*, 10 V.L.R. (E.), 284.

(*d*) The power to grant a commission to examine a witness *de bene esse* under this section is discretionary. The test to be applied is whether it is necessary for the purposes of justice that a commission should issue, and the circumstances of each particular case must be considered.—*In re Matthews*, 1919 V.L.R., 733.

shall be compelled to produce under any such rule or order any document that he would not be compellable to produce at the trial of the cause. *Evidence Act* 1915.

Examiners may report as to conduct or absence of witness.

6. It shall be lawful for the judge prothonotary or other person or persons to be named in any such rule or order as aforesaid for taking any examination in pursuance thereof, and if within Victoria he and they are hereby required to make (if need be) a special report to the court wherein the action is depending touching such examination and the conduct or absence of any witness or other person thereon or relating thereto; and the Supreme Court is hereby authorized to institute such proceedings and make such order and orders upon such report as justice requires, and as may be instituted and made in any case of contempt of that court. *Ib. s.* 6. 17 & 18 Vict. c. 125 s. 56.

Costs of order and commission.

7. The costs of every application for any rule or order to be made for the examination of witnesses or production of documents or for both such examination and production under any commission or otherwise by virtue of this Division and of the rule or order and proceedings thereupon shall be costs in the cause, unless otherwise directed either by the judge making such rule or order or by the judge before whom the trial or inquiry of the cause may be had or by the court wherein the action is depending.[a] *Ib. s.* 7. Ib. s. 57.

Depositions to be returned to the prothonotary.

8. Whenever by virtue of this Division an examination of any witness has been taken or any documents have been produced before a judge of the Supreme Court or before the prothonotary thereof or any other person or persons as aforesaid, the depositions taken down by such examiner and such documents or if that is not possible copies thereof shall be returned to and filed and kept in the office of the prothonotary: and office copies of such depositions documents and copies may be given out to either party. *Ib. s.* 8. Ib. s. 55.

Depositions not to be read without proof of absence death or sickness.

9. No examination or deposition to be taken by virtue of this Division shall be read in evidence without the consent of the party against whom the same is offered, unless it appears to the satisfaction of the court or person having by law or consent of parties authority to hear receive and examine evidence that the person examined or deponent is such party or is beyond the jurisdiction of the Supreme Court or dead or unable from permanent sickness or other permanent infirmity to attend;[b] in all or any of which cases the examinations and depositions, certified under the hand of the commissioners prothonotary *Ib. s.* 9. 1 Will. IV. c. 22 s. 10.

(a) A commission to examine witnesses in Hamburg, in which the plaintiff and defendant joined, lapsed by reason of the law there not permitting oaths to be administered except by the court. An injunction had been granted against the defendant until the hearing or further order. Upon application by the plaintiff for a new commission, the primary judge in chambers refused it except upon the terms of dissolving the injunction. Upon appeal the order for a new commission was made upon the terms of the plaintiff paying the costs of the abortive commission and giving an undertaking to answer damages to the defendant if the injunction were dissolved at the hearing.—*Wolfe* v. *Hart*, 5 V.L.R. (E.), 52.

Where the evidence taken under a commission relates mainly to issues on which the unsuccessful party prevails, he is entitled to his whole costs in respect of the commission.—*Urquhart* v. *Macpherson*, 3 V.L.R. (L.), 159.

(b) Where a witness was in an advanced state of pregnancy, and medical evidence was adduced showing that she was exceedingly nervous, and had miscarried in her previous pregnancy, and that her attendance in the witness box would be very likely to occasion another miscarriage, but that she was not otherwise ill, the court refused to admit her evidence taken under a commission.—*Fisher* v. *Fisher*, 3 V.L.R. (I.), 64.

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or other person taking the same may without proof of the signature to such certificate be admitted and read in evidence, saving all just exceptions.

DIVISION 2—SUBPŒNAS, ETC., AND EXAMINATION WITHOUT SUBPŒNA.

Subpœna and summonses to witnesses.
*Ib. s.* 10.

**10.** It shall not be necessary to issue a separate writ of subpœna *ad testificandum* or a separate summons for every four witnesses, and any number of witnesses may hereafter be inserted in any such writ or summons for the same party in the same matter; and no subpœna *duces tecum* or summons for the production of an original record shall be issued out of any court unless a rule of court or the order of a judge is produced to the proper officer of such court and filed with him, and unless the writ or summons is made conformable to the description of the document mentioned in such rule or order.

Persons present may be examined without a subpœna.
*Ib. s.* 11.

**11.** On the trial of any issue joined or of any matter or question or on an inquiry arising in any suit action or proceeding in any court or before any person having by law or by consent of parties authority to hear receive and examine evidence, any person who happens to be present and who is competent to give evidence may be called and required to give evidence or to produce any document or to give evidence and produce any document; and if any such person when called and required as aforesaid does not appear and give evidence or (if then able so to do) produce the document, he shall except where other provision is expressly made be subject to the same proceedings and liabilities as if he had been duly served with a writ of subpœna *ad testificandum* or *duces tecum* or a summons or other process, and had received his conduct money and payment for expenses and loss of time.

DIVISION 3.—PRISONERS.

Prisoner may be brought before court to give evidence without writ of *habeas*.
*Ib. s.* 12.
Second Schedule.

**12.** Any person in custody in any gaol police gaol prison hulk or penal establishment for any cause or in the custody of the sheriff his deputy or any of his officers for any cause may upon an order in writing (in the form or to the effect in the Second Schedule) made as hereinafter provided be brought before any court judge justice or person acting judicially or person authorized to take the examination of witnesses under Division one of this Part to give evidence in or upon any legal proceedings without a writ of *habeas corpus*; and every such person shall be deemed to be in the legal custody of the gaoler or other officer having the temporary custody of such person and acting under such order, and such officer shall in due course return such person into the custody from which he was brought.

Where such proceedings are to take place before any court of which there is a judge appointed and commonly known by that name then such order shall be made by a judge of such court.

Where such proceedings are to take place before a court of general sessions then such order shall be made by a chairman of a court of general sessions.

Where such proceedings are to take place before a special referee arbitrator or umpire or before any person authorized under Division one of this Part to take any examination within Victoria such order shall be made by the Supreme Court or a judge thereof; and

In all other cases such order shall be made by a judge of the Supreme Court or a police magistrate.

Nothing in this section shall limit the effect of the provisions of the *Coroners Act* 1928 relating to the attendance of prisoners at inquests. *Evidence Act* 1915.

DIVISION 4.—INSPECTION OF PROPERTY.

**13.** Either party to any action or suit depending in the Supreme Court or in any county court or court of mines shall be at liberty to apply to the court or a judge for a rule or order for the inspection by himself or by his witnesses of any real or personal property the inspection of which may be material to the proper determination of the question in dispute; and it shall be lawful for the court or a judge if it or he thinks fit to make such rule or order upon such terms as to costs and otherwise as such court or judge may direct. Party may be ordered to allow inspection of realty or personalty. *Ib. s.* 13. 17 & 18 Vict. c. 125 s. 58.

DIVISION 5.—BOARDS APPOINTED AND COMMISSIONS ISSUED BY THE GOVERNOR IN COUNCIL.

**14.** It shall be lawful for any board appointed or to be appointed by the Governor in Council to summon by writing under the hand of the chairman thereof any person whose evidence in the judgment of the said board or of any member thereof is material to the subject-matter of inquiry to be made by such board, to attend the said board at such place and at such reasonable time from the date of such summons as is therein specified; and such person may be required by such summons to bring before such board any documents in his custody possession or control material to the subject-matter of inquiry. Such summons may be served either by delivering the same to the person required to attend or by leaving the same at his usual place of abode.(a) Power to send for persons and papers. *Ib. s.* 14.

**15.** Any member of the board may administer an oath to and may examine upon oath any person so summoned or who happens to be present before the board and may call upon any such person to give evidence or to produce any specified documents or to give evidence and produce such documents.(b) Power to examine upon oath. *Ib. s.* 15.

**16.** Every person who— Penalty for non-attendance or refusing to give evidence &c. *Ib. s.* 16.

(*a*) being served as aforesaid with a summons to attend the board fails without reasonable excuse to attend as required or to produce any documents in his custody possession or control which he is required by the summons to produce;

(*b*) happening to be present before the board and being required so to do refuses to be sworn or without lawful excuse refuses or fails to answer any question touching the subject-matter of inquiry or to produce any document,

shall be liable to a penalty of not more than Twenty pounds to be recovered by any person authorized by the board before a court of petty sessions.(c)

(*a*) A summons, purporting to be under section 12 of the *Evidence Act* 1890, corresponding with this section, was directed to the defendant in the following terms:—"It appearing in the judgment of me, A.B., being a member and the chairman of the Royal Commission, that your evidence is material . . . . Now therefore I summon you to attend, &c." (Signed) "A.B." The Commission had in fact authorized the issue of the summons. The defendant attended the Commission, but refused to be sworn, and upon an information against him, under section 13 of the *Evidence Act* 1890 corresponding to section 16, that "being duly summoned before such Commission, he did refuse to be sworn," he was fined £15.

*Held*, that the decision was right.—*Barry* v. *Cullen*, 1906 V.L.R., 393.

(*b*) See section 30.

(*c*) See *Barry* v. *Cullen*, *supra*.

*Evidence Act 1915 s. 17.*
**Power to send for witnesses and documents.**

**17.** Where a commission has been heretofore or is hereafter issued by the Governor in Council to any persons to make any inquiry the president or chairman of the commission or the sole commissioner (as the case may be) may by writing under his hand summon any person to attend the commission at a time and place named in the summons, and then and there to give evidence or to produce any document in his custody possession or control material to the subject-matter of inquiry or to give evidence and produce any such document: Provided that no person shall be compelled to answer any question or to produce any document that he would not be compellable to answer or produce at the trial of an action in the Supreme Court. Such summons may be served by delivering the same to the person required to attend or by leaving the same at his usual place of abode.

**Power to examine upon oath &c.**
*Ib. s. 18.*

**18.** Any commissioner may administer an oath to and may examine upon oath any person so summoned or who happens to be present before the commission and may call upon any such person to give evidence or to produce any specified documents or to give evidence and produce such documents.(a)

**Penalty for non-attendance refusing to give evidence &c.**
*Ib. s. 19.*

**19.** Every person who—

(*a*) being served as aforesaid with a summons to attend the commission fails without reasonable excuse to attend or to produce any documents in his custody possession or control which he is required by the summons to produce ; or

(*b*) happening to be present before the commission and being required so to do refuses to be sworn or without lawful excuse refuses or fails to answer any question touching the subject-matter of inquiry or to produce any document,

shall be guilty of an offence and shall be liable to the penalties imposed in the next succeeding section.

**Chairman to report to law officer if witness fails to attend etc.**
*Ib. s. 20.*

**20.** (1) Whenever in the opinion of the commission any person has been guilty of an offence under the last preceding section the president or chairman of the commission or the sole commissioner (as the case may be) may by writing under his hand certify the facts to a law officer.

**Power of law officer to take proceedings before Supreme Court or judge thereof.**

(2) Upon receipt of such certificate the law officer may apply or cause an application to be made to the Supreme Court or a judge thereof for an order calling upon such person to show cause why he should not be dealt with for an offence against this Act which order such court or judge is hereby empowered to make.

**Powers of the Supreme Court or judge thereof.**

(3) Upon the return of such order if the Supreme Court or a judge thereof is satisfied that such person has been guilty of an offence against this Act such person may for such offence be by such court or judge (as the case may be) fined a sum of not more than Fifty pounds or imprisoned for a term of not more than three months.

**Rules of court.**

(4) The Supreme Court may pursuant to the *Supreme Court Act* 1928 make any rules and orders which such court considers necessary for carrying the purposes of this section into effect and for regulating the times form and mode of procedure and generally the practice to be observed in the matters to which this section relates.

(*a*) See section 30.

*Evidence Act 1915 s. 21.*
Allowances to witnesses.

**21.** (1) The Governor in Council may make regulations prescribing a scale of allowances to be paid to any witness or person required to produce documents summoned under this Division for his travelling expenses and maintenance while absent from his usual place of abode.

(2) The claim to allowance of any such witness or person upon such scale as aforesaid if certified by the chairman of the board or the president or chairman of the commission or by the sole commissioner (as the case may be) shall be paid by the Treasurer out of any moneys to be provided by Parliament for the purposes of the board or commission.

## PART II.—WITNESSES.

### DIVISION 1.—WHO MAY TESTIFY.

Witness not to be incapacitated by crime or interest.
*Ib. s. 22.*
6 & 7 Vict. c. 85 s. 1.

**22.** No person offered as a witness shall hereafter be excluded by reason of incapacity from crime or interest from giving evidence either in person or by deposition according to the practice of the court on the trial of any issue joined or of any matter or question or on any inquiry arising in any suit action or proceeding in any court or before any person having by law or by consent of parties authority to hear receive and examine evidence. But every person so offered may and shall be admitted to give evidence, notwithstanding that such person has an interest in the matter in question or in the event of the trial of any issue matter question or inquiry or of the suit action or proceeding in which he is offered as a witness, and notwithstanding that such person offered as a witness has been previously convicted of any crime or offence.

Aboriginal natives and infants may be witnesses.
*Ib. s. 23.*

**23.** On the trial of any issue joined or of any matter or question or on any inquiry arising in any suit action or proceeding in any court or before any person having by law or by consent of parties authority to hear receive and examine evidence, it shall be lawful for such court or person to receive the evidence of any aboriginal or half-caste native, or of any person brought up and abiding with any tribe of aboriginal natives of Victoria or of any of the countries adjacent thereto on the continent of Australia or of any infant under the age of seven years, notwithstanding he has no knowledge of God or any belief in religion or in a future state of rewards and punishments: Provided always that the evidence of such native or other person or infant shall be given upon his affirmation or declaration to tell the truth the whole truth and nothing but the truth or in such other form as may be approved of and allowed by such court or person as first aforesaid, and after he has been cautioned by such court or person that he will incur and be liable to punishment if he does not tell the truth: Provided also that no such evidence shall in any case be admitted unless it is proved to the satisfaction of such court or person that such native or other person or such infant perfectly understands the nature and object of such affirmation or declaration as aforesaid and the purpose for which his testimony if required.(a)

*Statute Law Revision Act 1916 s. 2.*

(a) Where a child under the age of seven years, a proposed witness, was withdrawn on the ground of her having been found wholly incapable of understanding the nature and object of a declaration or affirmation of the purpose for which her testimony was required, the fact of her having made a statement to another person, or the particulars of such statement, cannot be received in evidence.—*Reg.* v. *Mullan*, 9 A.L.T., 179.

At the trial of a prisoner for assaulting a child under the age of twelve, a child of eight was placed in the witness-box. Before she was sworn, the judge asked her whether she understood the nature of an oath, to which the child replied in the negative; but upon further questions being put by the judge, she said that she believed if she told

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Nothing in this section shall limit or affect the provisions of the *Crimes Act* 1928 as to the reception of evidence not on oath.[a]

Parties and husbands and wives may be witnesses.
*Ib. s.* 24.
14 & 15 Vict. c. 99 s. 2.
16 & 17 Vict. c. 83 s. 1.
32 & 33 Vict. c. 68 s. 3.

**24.** On the trial of any issue joined or of any matter or question or on any inquiry arising in any suit action or proceeding in any court or before any person having by law or by consent of parties authority to hear receive and examine evidence, the parties thereto, and the persons in whose behalf any such suit action or proceeding is brought or defended, and the husbands and wives of such parties and persons respectively, shall (except as hereinafter excepted) be competent and compellable[b] to give evidence either in person or by deposition according to the practice of the court on behalf of either or any of the parties to the said suit action or proceeding.

Person charged with offence may make a statement.
*Ib. s.* 25.

**25.** It shall be lawful for any person who in any criminal proceeding is charged with the commission of any indictable offence or any offence punishable on summary conviction (whether such person does or does not make his answer or defence thereto by counsel or solicitor) to make a statement of facts (without oath) in lieu of or in addition to any evidence on his behalf.[c]

DIVISION 2.—PRIVILEGES DISABILITIES AND OBLIGATIONS OF WITNESSES.

Exceptions as to criminal cases.
*Ib. s.* 26.
14 & 15 Vict. c. 99 s. 3.
16 & 17 Vict. c. 83 s. 2.

**26.** Nothing herein contained shall render any person who in any criminal proceeding is charged with the commission of any indictable offence or any offence punishable on summary conviction[d] competent or compellable[b] to give evidence for or against himself; or (except as hereinafter mentioned) shall render any person compellable to answer

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an untruth she "would go into everlasting fire." Counsel for the prisoner then sought to cross-examine her as to her competency to give evidence, but upon objection being taken the judge refused to allow such cross-examination. After the examination in chief of the child had closed, counsel for the prisoner put the following question:—"Do you understand the nature of an oath?" *Held*, that it was the duty of the judge to determine whether a child is competent to give evidence, and counsel has no right to cross-examine a witness before she is sworn in order to test her competency to give evidence.—*Reg.* v. *Lyons*, 15 V.L.R., 15.

In all cases of the nature provided for in section 435 of the *Crimes Act* 1928 the testimony admitted by virtue of that section must, notwithstanding this section, be corroborated by some other material evidence in support thereof implicating the accused, and such implication should be by evidence of some direct kind, which would show that he was more probably than any other person the man who committed the offence charged.

*Per a'Beckett, J.*—A judge or justice may in such cases, if the provisions of section 435 of the *Crimes Act* 1928 are fulfilled, disregard the requirements of this section.—*The King* v. *O'Brien*, 1912 V.L.R., 133.

(*a*) See *Crimes Act*, 1928, sections 432 (*g*) and 449.

(*b*) A defendant who has failed to comply with a maintenance order made under Part III. of the *Marriage Act* 1915 (see now *Maintenance Act* 1928, Part I.) is neither a person who in a criminal proceeding was charged with an indictable offence nor a person charged with an offence punishable on summary conviction within the meaning of section 26 of this Act, and accordingly a husband defendant on an information laid under section 91 of the *Marriage Act* 1915 (see new section 12 of the *Maintenance Act* 1928) is both competent and compellable to give evidence on behalf of informant.—*Folwell* v. *Folwell*, 1921 V.L.R., 229. But see this decision questioned in *Cook* v. *Cook* (1923), 33 C.L.R., 369.

(*c*) See *Crimes Act* 1928, sections 432 (*g*) and 449.

Counsel for a prisoner may open to the jury the facts which the prisoner intends to include in his statement to the jury under this section, but counsel must not open such facts to the jury as the evidence which he proposes to adduce at the trial, if such evidence has been ruled to be inadmissible. The prisoner is not limited by the ordinary rules of evidence as to the facts he states.—*Reg.* v. *McMahon*, 17 V.L.R., 335.

When a prisoner makes a statement of facts under this section the jury should be directed to consider it with the sworn evidence, giving it such weight as it appears to be entitled to.—*Peacock* v. *The King*, 13 C.L.R., 619.

(*d*) A person charged under section 186 of the *Marine Act* 1928 is a competent witness to give evidence on his own behalf.—*In re Bell*, 18 V.L.R., 55, 432.

any question tending to criminate himself, or shall in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband :[a] Provided that nothing in this section shall affect or limit the provisions of the *Crimes Act* 1928 whereby in the circumstances there set out a person charged or his wife or her husband (as the case may be) may be called as a witness in a criminal proceeding.[b] *Evidence Act* 1915.

**27.** No husband shall be compellable to disclose any communication made to him by his wife during the marriage; and no wife shall be compellable to disclose any communication made to her by her husband during the marriage.[c] Communications to husband or wife privileged. *Ib. s.* 27. 16 & 17 Vict. c. 83 s. 3.

**28.** No clergyman of any church or religious denomination shall without the consent of the person making the confession divulge in any suit action or proceeding whether civil or criminal any confession made to him in his professional character according to the usage of the church or religious denomination to which he belongs. Confessions to clergymen and medical men. *Ib. s.* 28.

No physician or surgeon shall without the consent of his patient divulge in any civil suit action or proceeding (unless the sanity of the patient is the matter in dispute) any information which he has acquired in attending the patient and which was necessary to enable him to prescribe or act for the patient.[d]

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(*a*) Where the evidence of a wife is admissible against her husband *ex necessitate* to prove the fact of an assault upon her, her evidence is also admissible to prove all facts relevant to the case. —*Reg.* v. *Kenny*, 12 V.L.R., 816. See *Riddle* v. *The King*, (1911) 12 C.L.R., 622

On a trial of an aboriginal for murder it was *held*, under a former Act, that the unsworn evidence of an aboriginal woman is receivable though she describe herself as the prisoner's "lubra" and as "married" to him, if there be no other evidence that she was his wife.—*Reg.* v. *Neddy Monkey*, 1 W. & W. (L.), 40.

On the hearing of a charge against a husband of deserting his wife and going to reside beyond Victoria, the wife is a competent witness. On the hearing of a charge against a husband of wilfully neglecting to comply with an order for maintenance, the wife is not a competent witness. —*Rex* v. *Jacono*, 1911 V.L.R., 326. See sections 21 and 22 of the *Maintenance Act* 1928.

(*b*) The provisions here referred to are chiefly those of the *Crimes Act* 1928, section 432.

(*c*) A written communication by a prisoner to his wife is admissible in evidence against him when produced by a third person into whose hands it has not unlawfully come.—*Reg.* v. *Dowling*, 9 V.L.R. (*L.*), 79.

(*d*) The word "information" includes not only communications made by the patient, but also knowledge acquired by the physician or surgeon by his professional observation and examination.— *Warnecke* v. *The Equitable Life Assurance Society of the United States*, 1906 V.L.R., 482.

The prohibition in this section extends to anything which comes to the knowledge of the physician or surgeon with regard to the health or physical condition of the patient, as well as anything said by the patient to him, while the relationship of medical adviser and patient continues, provided that it was reasonably necessary for the purpose stated.—*Warnecke* v. *Equitable Life Assurance Society of the United States* (*supra*) approved.

*Held*, further (*by Barton, O'Connor, Isaacs, and Higgins, JJ.*), that the prohibition does not cease upon a prescription being given or an operation being undertaken, but extends at least to all information acquired until the professional attendance on the patient is at an end, provided the information is material to proper treatment.

*Held, by Griffith, C.J.*, that it does not extend to mere physical facts ascertainable by observation only, irrespective of confidential communications, ascertained by such observations after the necessity for treatment is at an end.

This section is applicable in every case where the evidence is offered in Victoria notwithstanding that the events or facts sought to be proved occurred elsewhere.

The operation of the section is not limited to the life-time of the patient.

*Quære*, whether the executor of a deceased patient can consent to the information being divulged.

*Quære, per Higgins, J.*, whether the section makes it incumbent on the court to ignore the evidence if, through inadvertence or otherwise, it has been given in fact.—*National Mutual Life Association of Australasia Limited* v. *Godrich*, 10 C.L.R., 1.

The privilege as between a physician or surgeon and his patient given by this section extends to the patient of a member of the honorary medical staff at a public hospital.—*Long* v. *Commercial Travellers' Association*, 1917 V.L.R., 453.

*Evidence Act* 1915 *s.* 29.
Where witness must answer questions which disgrace or criminate.

**29.** No witness shall on the trial of any issue joined or of any matter or question or on any inquiry arising in any suit action or proceeding whether civil or criminal be permitted to refuse to answer any question which is relevant and material to the matter in issue on the ground that the answer may expose him to any penalty or forfeiture or may disgrace or criminate himself, unless the court or person having by law or by consent of parties authority to hear receive and examine evidence is of opinion that the answer will tend to subject such witness to punishment for treason felony or misdemeanour.(a)

Statements made by witness before board or commission not to be used against him.
*Ib. s.* 30.

**30.** No statement made by any person in answer to any question before any board or commission empowered under the provisions of this Act or other like body or person empowered under any other Act to summon witnesses shall (except in case of a charge against such person for perjury committed by him in making such statement) be admissible in evidence in any proceedings civil or criminal against him, nor be made the ground of any prosecution action or suit against him; and a certificate signed by the chairman of such board or commission or body or by the sole commissioner or by such person that such statement was made in answer to any such question or in the course of any inquiry before such board commission body or person shall be conclusive evidence that the same was so made.

## DIVISION 3.—EXAMINATION AND CROSS-EXAMINATION OF WITNESSES.

Witness may be questioned as to previous conviction.
*Ib. s.* 31.
17 & 18 Vict. c. 125 s. 25.
28 & 29 Vict. c. 18 s. 16.

**31.** Except as hereinafter provided a witness may be questioned as to whether he has been convicted of any indictable or other offence; and upon being so questioned if he either denies the fact or refuses to answer, it shall be lawful for the party so questioning to prove such conviction.

Adverse witness may be contradicted by party calling him.
*Ib. s.* 32.
17 & 18 Vict. c. 125. s. 22.

**32.** A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character; but may contradict him by other evidence, or (in case the witness in the opinion of the court proves adverse) may by leave of such court prove that he has made at other times a statement inconsistent with his present testimony.

(a) Where a witness in a criminal trial refuses to answer a question which may have a tendency to incriminate him, the court, if satisfied that his objection is taken honestly for his own protection and not by way of collusion with the prisoner, will not compel him to answer.—*R.* v. *Wilson*, 5 A.L.R., 267.

The right of a party in an action in the Supreme Court to refuse to answer an interrogatory on the ground that his answer might tend to criminate him is not governed by the provisions of this section. A party for whose examination interrogatories are delivered is not a "witness" within the meaning of this section.—*Smith* v. *Powell* (*infra*) discussed; *Hughes* v. *Watson*, 1917 V.L.R., 398.

An objection to interrogatories on the ground that the answer might criminate the person interrogated will not be allowed unless the party himself makes an affidavit to that effect. *Per Higinbotham, J.* (*diss. Stawell, C.J., and Holroyd, J.*).—"A defendant may be compelled to answer an interrogatory which, in his opinion stated on oath, will tend to criminate himself if it seems to the court or judge to be reasonably probable that the answer will not lead to his prosecution, or in the event of a prosecution being instituted, will not materially tend to his conviction."—*Smith* v. *Powell*, 10 V.L.R. (L.), 79. The effect of this section discussed.—*Ib.*

*Per Holroyd, J.* (*in chambers*).—"The judge must, when an objection is taken that to answer an interrogatory would tend to criminate a person answering, decide whether in his opinion the question may have such a tendency."—*Roper* v. *Williams*, 6 A.L.T., 65.

*Per Higinbotham, J.* (*in chambers*).—"Where a party objects to answering an interrogatory, on the ground that it may tend to criminate him, he must take the objection on oath."—*Paterson* v. *Luke*, 6 A.L.T., 86.

In general in divorce proceedings witnesses and parties are not liable to be asked or bound to answer questions tending to show that they have been guilty of adultery. See *Marriage Act* 1928, section 119.

But before such last-mentioned proof can be given, the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness; and he must be asked whether or not he has made such statement. *Evidence Act 1915.* 28 & 29 Vict. c. 18 s. 3.

**33.** If a witness upon cross-examination as to a former statement[a] made by him relative to the subject-matter of the cause or prosecution and inconsistent with his present testimony does not distinctly admit that he has made such statement, proof may be given that he did in fact make it. But before such proof can be given, the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness and he must be asked whether or not he has made such statement. Evidence of previous statement of witness. *Ib. s.* 33. 17 & 18 Vict. c. 125 s. 23. 28 & 29 Vict. c. 18 s. 4.

**34.** A witness may be cross-examined as to previous statements made by him in writing or reduced into writing relative to the subject-matter of the cause or prosecution without such writing being shown to him. But if it is intended to contradict such witness by the writing, his attention must before such contradictory proof can be given be called to those parts of the writing which are to be used for the purpose of so contradicting him: Provided always that it shall be competent for the court at any time during the trial or inquiry to require the production of the writing for inspection and the court may thereupon make such use of it for the purposes of the trial or inquiry as the court thinks fit. Witness may be cross-examined as to written statements without producing them. *Ib. s.* 34. 17 & 18 Vict. c. 125 s. 24. 28 & 29 Vict. c. 18 s. 5.

**35.** If any question put to a witness upon cross-examination relates to a matter not relevant to the suit or proceeding except in so far as it affects the credit of the witness by injuring his character it shall be the duty of the court to decide whether or not the witness shall be compelled to answer it, and the court may if it thinks fit warn the witness that he is not obliged to answer it.[b] Cross-examination as to credit. *Ib. s.* 35.

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(*a*) A witness for the plaintiff gave evidence as to what took place at the making of the agreement upon which the action was brought. A witness for the defendant, having sworn that he was present at the making of the agreement, was asked in his examination in chief as to a conversation he had had with the plaintiff's witness on that occasion. In her cross-examination, the plaintiff's witness had not been questioned in reference to such conversation, nor did she refer to it in her examination in chief. The plaintiff having objected to the admission of evidence as to such conversation on the ground that it was a "former statement" within the meaning of this section, the evidence was rejected and the question disallowed. On appeal to the Full Court: *Held*, that evidence as to such conversation ought to have been admitted, inasmuch as this section does not apply where one party gives his version of the transaction and the other seeks to give another version of the transaction, and a party may give his version of the transaction without having previously cross-examined the opposite party as to the accuracy of such version.—*Johnstone, O'Shannessy, and Co. Limited* v. *Smith*, 19 V.L.R., 18.

On the trial of a prisoner for carnally knowing a girl under the age of sixteen years the girl herself gave evidence that she said to the prisoner that she had told a police constable everything. She was not cross-examined upon this evidence. The constable was afterwards called, and said she had made a statement to him. The jury asked what that statement was. The judge allowed the question, but upon conviction of the prisoner stated a case for the opinion of the court. *Held*, that the evidence was not admissible.—*Regina* v. *James* (1884, 10 V.L.R. (L.), 193) discussed and distinguished; *Rex* v. *Coleman*, 27 V.L.R., 153.

(*b*) The defendants were tried and convicted of conspiracy to defraud. During the trial, counsel for the defence desired to cross-examine a witness for the prosecution as to credit by questions put to show that the witness had prepared the case for the prosecution, or had prepared a statement in anticipation of cross-examination. The presiding judge held that, apart from this section, he would have prevented this cross-examination, but held under the provisions of this Act he was compelled to do so. *Held*, that the refusal to allow the questions to be put in cross-examination was not justified by either section 35 or 38, but that the judge had not exceeded his discretionary power in disallowing the cross-examination.—*Reg.* v. *Taylor*, 18 V.L.R., 497.

*Evidence Act* 1915.
Indian Evidence Act s. 148
When such questions are proper.

In exercising this discretion the court shall have regard to the following considerations :—

(*a*) Such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the court as to the credibility of the witness on the matter to which he testifies.

When improper.

(*b*) Such questions are improper if the imputation which they convey relates to matters so remote in time or of such a character that the truth of the imputation would not affect or would affect in a slight degree only the opinion of the court as to the credibility of the witness on the matter to which he testifies.

Unnecessary imputations improper.

(*c*) Such questions are improper if there is a great disproportion between the importance of the imputation made against the witness' character and the importance of his evidence.

Saving existing rights.
*Ib.* s. 36.

**36.** Nothing in this Division contained shall be deemed to make any witness compellable to give evidence upon any matter which he is by law now protected against disclosing.

Indecent or scandalous questions.
*Ib.* s. 37.
Indian Evidence Act s. 151.

**37.** The court shall forbid any questions or inquiries which it regards as indecent or scandalous, although such questions or inquiries may have some bearing on the questions before the court, unless they relate to facts in issue or to matters necessary to be known in order to determine whether or not the facts in issue existed.

Questions intended to insult or annoy.
*Ib.* s. 38.
Ib. s. 152.

**38.** The court shall forbid or disallow any question which appears to it to be intended to insult or annoy, or which though proper in itself appears to the court needlessly offensive in form.

Prohibited questions not to be published.
*Ib.* s. 39.

**39.** It shall not be lawful for any person to print or publish any question or inquiry which has been forbidden or disallowed by the court, or in respect to which the court has warned the witness that he is not obliged to answer, and which the court has further ordered shall not be published.

Interpretation.
*Ib.* s. 40.

**40.** In this Division the word "court" includes all judges justices arbitrators and all persons having by law or by the consent of parties authority to hear receive and examine evidence.

## PART III.—PROOF OF DOCUMENTS AND OF FACTS BY DOCUMENTS.

### DIVISION I.—INTRODUCTORY.

Provisions to be additional.
*Ib.* s. 41.

**41.** Any provision of this Part as to proving documents and as to proving facts by documents shall be in addition to and not in derogation of any power of proving documents or of proving facts by documents given by any other provision of this or any other Act or existing at common law.

Provisions relating to evidence apply to all persons acting judicially.
*Ib.* s. 42.

**42.** Whenever by this Act it is provided in effect that evidence or *primâ facie* evidence may be given or may or shall be admissible such evidence or *primâ facie* evidence may be given and shall be admissible before all courts and persons acting judicially.

*Evidence Act 1915 s. 43.*

Copies admissible without further proof of sealing signing &c.

**43.** Whenever by this Act it is provided in effect that any certificate or any certified authenticated sealed stamped or signed copy may be given or shall or may be admissible in evidence the document purporting to be such certificate or copy except so far as is otherwise expressly provided may be given and shall be admissible in evidence without further proof and in particular without any proof of the judicial or official or other specified character of the person purporting to have attached or appended any seal stamp or signature and without any proof relating to any such seal stamp or signature or any combination thereof or relating to the handwriting of any person.

Effect of copies same as original.

*Ib. s. 44.*

**44.** Whenever by this Act it is provided in effect that in lieu of an original document or book a copy or transcript of or extract from any document or book may be given or shall or may be admissible in evidence such copy transcript or extract may be in print or in writing or partly in print and partly in writing and may on compliance with the conditions (if any) prescribed be given and shall be admissible in evidence in the same circumstances to the same extent and for the like purposes as the original would be if produced and proved in due course of law and until it is proved not to be a true copy extract or transcript shall be of equal validity with the original without any proof of the truth of such copy transcript or extract. In the case of an extract all courts and persons acting judicially shall without further evidence be entitled to take into consideration the character of the original document or book from which such extract purports to be taken.

No proof necessary that document printed by government printer.

*Ib. s. 45.*

**45.** Whenever by this Act it is provided in effect that a document printed by any government printer whether in Victoria or elsewhere may be given or shall or may be admissible in evidence such document if purporting to be printed by any such government printer may be given and shall be admissible in evidence without any proof that it was so printed.

DIVISION 2.—GENERAL.

British and foreign treaties may be proved by copies.

*Ib. s. 46.*

14 & 15 Vict. c. 99 s. 7.

31 & 32 Vict. c. 37 s. 3.

**46.** *Primâ facie* evidence of all proclamations treaties and other Acts of State of any part of His Majesty's dominions or of any foreign State may be given by an examined copy or by a copy sealed with the seal of that part of His Majesty's dominions or of the foreign State to which the original document belongs.

British and foreign wills judgments &c. may be proved by copies.

*Ib. s. 47.*

**47.** *Primâ facie* evidence of all judgments decrees orders and other judicial proceedings[a] of any court of justice in any part of such dominions or in any foreign State and all affidavits pleadings and other legal documents wills and codicils filed or deposited in any such court may be given by an examined copy or by a copy sealed with the seal of such court or (in case such court has no seal) signed by the judge or (if there are more judges than one) by any one of the judges of such

(a) Under a corresponding section of a previous Act, proceedings in New Zealand before magistrates sitting in petty sessions merely to commit for trial, and not to hear and determine, acting ministerially only and not judicially, were held to be within the meaning of that section, and might be proved in Victorian courts by copies authenticated in the way pointed out therein.—*Eastwood* v. *Bullock*, 1 W.W. & a'B. (L.), 92.

A judgment of the Supreme Court might be proved in any court in Victoria by the production of an instrument purporting to be the judgment, sealed either on the face or on the back with the official seal of the court, *i.e.*, the working seal used by the prothonotary as distinguished from the seal of the Supreme Court of the Colony of Victoria mentioned in the *Supreme Court Act* 1928, section 14.—*In re Merry*, 14 V.L.R., 181.

*Evidence Act 1915.*

court having thereon or attached thereto a statement in writing signed by such judge that the court whereof he is a judge has no seal without any proof of the truth of such statement.(a)

**Mode of proving Royal proclamations orders of Privy Council or rules &c. of His Majesty's Imperial Government.**

*Ib. s.* 48.

See N.Z. Act No. 15 of 1888 s. 18.

48. *Primâ facie* evidence of any Royal Proclamation Order of His Majesty's Privy Council order regulation despatch or any instrument whatsoever made or issued before or after the commencement of this Act by His Majesty or by His Majesty's Privy Council or by or under the authority of any of His Majesty's secretaries of state or of any department of His Majesty's Government in the United Kingdom may be given before all courts and persons acting judicially within Victoria by the production of a paper purporting to be a copy of the *London Gazette* or of the *Government Gazette* purporting to contain a reprint of such proclamation order of the Privy Council order regulation despatch or other instrument as an extract from the *London Gazette*. In this section (but without affecting the generality of the expression when used elsewhere) the expression "His Majesty" includes any predecessors of His Majesty.

**Documents admissible in England Wales or Ireland without proof to be equally admissible in Victoria.**

*Ib. s.* 49.

14 & 15 Vict. c. 99 s. 11.

49. Every document which by any law now in force or hereafter to be in force is admissible in evidence of any particular in any court of justice in England or Wales or Ireland without proof of the seal or stamp or signature authenticating the same or of the judicial or official character of the person appearing to have signed the same shall be admissible in evidence to the same extent and for the same purposes before all courts and persons acting judicially, without proof of the seal or stamp or signature authenticating the same or of the judicial or official character of the person appearing to have signed the same.

**Register of vessels to be proved by original or copy.**

*Ib. s.* 50.

Ib. s. 12.

50. Every register of a vessel kept under any of the Acts now or hereafter to be in force relating to the registry of British vessels may be proved in any court or before any person acting judicially either by the production of the original or by an examined copy thereof, or by a copy thereof purporting to be certified under the hand of the person having the charge of the original. And every such register or such copy of a register, and also every certificate of registry granted under any of such Acts and purporting to be signed as required by law, shall be, in any court or before any person acting judicially, *primâ facie* evidence of all the matters contained or recited in such register when the register or such copy thereof as aforesaid is produced, and of all the matters contained or recited in or indorsed on such certificate of registry when the said certificate is produced. Any person having charge of the original of the register is hereby required to furnish such certified copy to any person applying at a reasonable time for the same upon the payment of the sum of One shilling.

*Statute Law Revision Act 1916 s.* 2.

A copy of a ship's articles and of the signatures thereto may be proved in any court or before any person acting judicially either by the production of the original or by an examined copy thereof and every such original or copy shall in any court or before any person acting judicially be *primâ facie* evidence of all the matters contained or recited therein and of the signatures thereto.

(a) It was held that sections previously in force analogous to this section and section 60 applied only to cases where evidence was being received and where the person authorized to receive it had to determine whether it was admissible, and not where a person is sitting in a purely appellate jurisdiction and is not receiving evidence.—*In re Portch*, 7 V.L.R. (I.), 126.

*Evidence Act 1915 s. 51.*

Machine copies to be evidence.

**51.** When any writing whatsoever has been copied by means of any machine or press which produces a fac-simile impression or copy of such writing, such impression or copy shall, upon proof to the satisfaction of the court or person acting judicially that the same was taken or made from the original writing by means of such machine or press as aforesaid, be admissible as *primâ facie* evidence of such writing, without any proof that such impression or copy was compared with the said original thereof and without any notice to produce such original.(a)

DIVISION 3.—FURTHER PROVISIONS RELATING TO AUSTRALASIAN DOCUMENTS.

Interpretation of terms.

*Ib. s. 52.*

**52.** In this Division and Division five of this Part unless inconsistent with the context or subject-matter—

"Act" includes any Act of Council and Ordinance of the Legislature of any Australasian State;

"Australasian State" includes the Commonwealth of Australia and its dependencies and the States Dominions Colonies or Provinces (including their respective dependencies) of Fiji New South Wales New Zealand Queensland South Australia Tasmania Victoria and Western Australia by whatever name such as State Dominion Colony or Province any of them was or is for the time being called and also includes any British possession which may at any time be created in His Majesty's possessions in Australasia and also includes any part of New Zealand during such time as such part constituted a separate Colony or Province;

"*Government Gazette*" means the *Government Gazette*, *Royal Gazette*, or other official gazette of any Australasian State;

"Government printer" means and includes any printer purporting to have been or to be the printer authorized to print the Statutes Ordinances Acts of Council Acts of State or other public Acts of the Legislature of any Australasian State or otherwise to be the government printer of such State;

"Governor" means the person for the time being administering the Government of any Australasian State; and

"Votes and proceedings" include any papers printed or purporting to be printed by the authority of and laid before or purporting to be laid at any time before any House or Houses of Legislature of any Australasian State.

Votes and proceedings of Legislature of any Australasian State proved by copy.

*Ib. s. 53.*

**53.** All documents, whether made before or after the commencement of this Act, purporting to be copies of the votes and proceedings of any House of the Legislature of any Australasian State printed

(a) This section makes a press copy evidence, without comparison, and dispenses with notice to produce, but does not relate to documents in the hands of third parties which should be produced on subpœna, or the loss, &c., proved.—*Harrison* v. *Smith*, 6 W.W. & a'B. (E.), 182.

In an action to set aside a mortgage made by an insolvent within three months of sequestration as a fraudulent preference, press copies of original letters written by creditors are not admissible to show the pressure being brought upon the insolvent without proof of comparison with the originals.—*Harrison* v. *Smith* followed; *Grieve* v. *Bodey*, 20 V.L.R., 269.

It is not necessary by precise and direct evidence to prove that the press copy of a letter produced was taken from the original letter, and it is for the judge to say whether the evidence produced at the trial satisfied him that the press copy was taken from the original writing by means of a machine or press.—*Reg.* v. *Ryan*, 1 A.J.R., 27.

*Evidence Act 1915.*

by the government printer of the State to which they belong or relate shall on the mere production of the same be admissible as evidence thereof before all courts and persons acting judicially within Victoria.

Royal proclamation in Australasian State proved by copy.
*Ib. s. 54.*

**54.** All documents whether made before or after the commencement of this Act purporting to be copies of Royal proclamations printed by the government printer of any Australasian State shall on the mere production of the same be admissible before all courts and persons acting judicially within Victoria as evidence of such proclamation having on the date (if any) therein indicated been made in and in relation to such State.

Proof of *Government Gazette.*
*Ib. s. 55.*

**55.** (1) The mere production of a paper purporting to be the *Government Gazette* of any Australasian State shall be *primâ facie* evidence that such paper is such *Government Gazette* and that it was published in such State on the day on which the same bears date.[a]

Proof of documents printed for Government.

(2) The mere production of a paper purporting to be printed by the government printer of any Australasian State or by the authority of the Government of any such State shall be *primâ facie* evidence that such paper was printed by such government printer or by such authority.

Mode of proving proclamations orders in council rules &c. of Governor or Ministers of the Crown of Australasian State.
*Ib. s. 56.*
31 & 32 Vict. c. 37 s. 2.
N.Z. Act No. 15 of 1888 s. 17.

**56.** *Primâ facie* evidence of any proclamation order in council order regulation or other instrument whatsoever made or issued before or after the commencement of this Act by the Governor or by the Governor in Council of any Australasian State, also of any order regulation or instrument whatsoever made or issued before or after the commencement of this Act by or under the authority of any responsible Minister of the Crown or of any public commission or board in any such State may be given in all or any of the modes hereinafter mentioned (that is to say) :—

(*a*) by the production of a copy of the *Government Gazette* of such State purporting to contain such proclamation order in council order regulation or other instrument.

(*b*) by the production of a document purporting to be a copy of such proclamation order in council order regulation or other instrument printed by the government printer of such State.

(*c*) by the production in the case of any proclamation order in council order regulation or instrument whatsoever made or issued by the Governor or by the Governor in Council of any Australasian State of a copy or extract certified to be true by the clerk of the Executive Council of such State, and in the case of any order regulation or instrument whatsoever made or issued by or under the authority of any responsible Minister of the Crown by the production of a copy or extract certified to be true by the aforesaid Minister or any other responsible Minister of the Crown in such State.

(*a*) For a case in which a *Government Gazette* was admitted on its production, see *Fallshaw Brothers v. Ryan*, 28 V.L.R., 279.

*Evidence Act 1915 s. 57.*
*Gazette to be evidence of acts of Governor Ministers &c.*

**57.** Where by any law at any time in force in any Australasian State the Governor or the Governor in Council or any responsible Minister of the Crown in any such State was or is authorized[a] or empowered to do any act whatsoever any *Government Gazette* purporting to contain a copy or notification of any such act shall be *primâ facie* evidence of any such act having been duly done,[b] and if any such *Gazette* purports to contain any order rule regulation by-law matter or thing allowed confirmed cancelled approved of consented to or certified by the Governor or by the Governor in Council or by any such responsible Minister in accordance with any such law shall also be *primâ facie* evidence of the purport and due making of such order rule regulation by-law matter or thing.

*Proof of certain public and corporation documents.*
*Ib. s. 58.*

**58** (1) Where by any Act of any Australasian State at any time in force—

(*a*) any certificate official or public document; or

(*b*) any record required by law to be kept of any public document or proceeding; or

(*c*) any document or proceeding of any corporation or company; or

(*d*) any certified copy of any document or by-law or entry in any register[c] or any other book or of any other proceeding

is admissible in evidence of any particular under such Act in the particular State the same shall respectively be admissible in evidence to the same extent and for the same purposes before all courts and persons acting judicially within Victoria provided they respectively purport to be sealed or impressed with a stamp or sealed and signed or impressed with a stamp and signed or signed alone

(*a*) On the 6th September, 1922, the Governor in Council, acting under the authority contained in section 10 (1) of the *Poisons Act* 1920, made, on the recommendation of the Pharmacy Board of Victoria, regulations, entitled the Dangerous Drugs Regulations 1922, for the purposes set forth in that section. The regulations provided for their coming into force on the 1st January, 1923.

On the 4th October, 1922, the Governor in Council acting under the said authority and on the recommendation of the Board, made regulations entitled the Poisons Regulations 1923, which contained a clause rescinding, as from the 1st January, 1923, all regulations made under the *Poisons Act* 1915 and any Act amending the same.

Upon the hearing of an information laid under the Dangerous Drugs Regulations 1922, a page of the *Government Gazette*, dated the 29th November, 1922, was produced by the prosecution, which purported to contain a regulation in the form of a direction by the Governor in Council that the Poisons Regulations 1923 be amended by excepting from the operation of the rescinding clause thereof the Dangerous Drugs Regulations 1922. It did not appear by the *Gazette* that this regulation was made on the recommendation of the Board, nor was any evidence adduced to prove that fact.

The defendant was convicted of the offence charged.

*Held*, (1) That, there being no notification in the *Gazette* of the making of the regulation on the prescribed recommendation, this section was insufficient to make the *Gazette* evidence of an act "authorized" within the section.

(2) That the maxim *Omnia praesumuntur rite esse acta* did not apply, because the regulation in question, as published in the *Gazette*, did not, on its face, appear to be regularly and duly made.

(3) That the due exercise of the power to make the regulation not having been proved, the conviction must be set aside.—*Murphy* v. *Matlock*, 1926 V.L.R., 170.

(*b*) On the construction of the section formerly in force and differently worded, see *McDowall* v. *Myles*, 6 W.W. & a'B. (L.), 16; *Tomkins* v. *Fleming*, N.C., 13.

(*c*) Where a certified copy of an entry relating to a marriage in the marriage register was made evidence as to the marriage by the Registration of Births Deaths and Marriages Act, and there was some defect of proof as to the original marriage certificate, which was also put in evidence, it was held that this defect was immaterial as the material particulars were given in the certified copy of the entry and corresponded with those given in the marriage certificate.—*R.* v. *Reid*, 22 V.L.R., 395.

*Evidence Act* 1915.

as directed by such Act of the particular Australasian State without any proof of such seal stamp or signature or of the official character of the person appearing to have signed the same and without any further proof thereof.

By-laws and regulations.

(2) Where by any Act of any Australasian State at any time in force power to make by-laws or regulations is conferred upon any person or body any printed paper purporting to contain or to be a copy of such by-laws or regulations and to be printed by the government printer of such State or by the authority of the government of such State shall be *primâ facie* evidence—

(*a*) that by-laws or regulations in the words printed in such paper were duly made by such person or body; and

(*b*) that such by-laws or regulations have been approved of or confirmed by the Governor or Governor in Council of such State if such approval or confirmation is necessary and they appear by such paper to have been so approved of or confirmed.

Documents admissible in Australasian States without proof to be equally admissible in Victoria.

*Ib. s.* 59.

See 14 & 15 Vict. c. 99 s. 11.

**59.** Every document which by any law at any time in force in any Australasian State other than Victoria is admissible in evidence of any particular in any court of justice in such first-mentioned State without proof of the seal or stamp or signature authenticating the same or of the judicial or official character of the person appearing to have signed the same shall be admissible in evidence to the same extent and for the same purposes before all courts and persons acting judicially within Victoria without proof of the seal or stamp or signature authenticating the same or of the judicial or official character of the person appearing to have signed the same.

Documents of Australasian State which if Victorian admissible on mere production provable by certified copy.

*Ib. s.* 60.

See Ib. s. 14.

**60.** Whenever any book or document is of such a public nature that being a Victorian book or document it is admissible in evidence on its mere production from the proper custody or that being a book or document of some Australasian State other than Victoria it would if it were a Victorian book be admissible in evidence on its mere production from the proper custody any copy thereof or extract therefrom shall be admissible in evidence before all courts and persons acting judicially within Victoria provided it is proved to be an examined copy or extract or purports to be signed and certified as a true copy or extract by some officer of the State in question, who further purports to certify thereto that he is the officer to whose custody the original is intrusted.[a] Any such officer in Victoria is hereby required to

(*a*) *Semble*, an affidavit is not a book or document of such a public nature as to be admissible on its mere production from the proper custody.—*In re Portch*, 7 V.L.R. (I.), 141.

A poundkeeper's book kept in pursuance of the Pounds Act is a document of such a public nature that entries in it may be proved by a certified extract giving the essential particulars.

*Per Barry, J.*—"'An extract from' means not the whole of the entry, but a quotation or citation from it, or an abstract of the material portions."—*Jones* v. *Falvey*, 5 V.L.R. (L.), 230. See now section 44.

An extract from the register kept by justices certified by the officer having the custody thereof was held to be sufficient evidence of an order made by justices not sitting as a court of petty sessions.—*Wynne* v. *McMullan*, 3 A.L.R., 41

See *Justices Act* 1928, sections 83, 88 (15), and 109.

A register of the county court is a public document within this section, and, therefore, an extract from it purporting to set out a decision of justices on an interpleader summons, and purporting to be certified under the hand of the registrar of the county court to be such an extract, is evidence of such decision. *Semble*, a statement in an affidavit of the effect of that decision is evidence of that decision.—*Wynne* v. *McMullan*, 22 V.L.R., 623

A certified copy of a certificate of registration of birth is admissible in evidence, and is *primâ facie* evidence of all the contents which are

furnish such certified copy or extract to any person applying at a reasonable time for the same upon payment of a sum for the same not exceeding Sixpence[a] for every folio of seventy-two words, or (in the case of a book or document in the custody of the Registrar-General) Five shillings for each such certified copy or extract not exceeding five folios of seventy-two words to the folio and Ninepence for each additional folio of seventy-two words after the first five folios. *Evidence Act* 1915. *Registrar-General's Fees Act* 1917 *s.* 5. *Registrar-General's Fees Act* 1927 *s.* 7.

**61.** *Primâ facie* evidence of the incorporation of a company incorporated or registered in any Australasian State other than Victoria either before or after the commencement of this Act may be given by a certificate of the incorporation or registration thereof which purports to be signed by the registrar or an assistant or deputy registrar of companies in that State or which purports to be signed by a person whose authority to give the same purports to be verified by a statutory declaration made before any judge or justice of the peace of such State and the date of incorporation or registration mentioned in such certificate shall be *primâ facie* evidence of the date on which the company was incorporated or registered. Incorporation of any company how authenticated. *Evidence Act* 1915 *s.* 61. Comp. N.Z. Act No. 14 of 1885 s. 6.

**62.** Any document purporting to be a copy of or extract from any document kept and registered at the office for the registration of companies in any Australasian State if certified under the hand of the registrar or an assistant or a deputy-registrar shall be admissible in evidence in all cases in which the original document is admissible in evidence and for the same purposes and to the same extent. Copies of documents relating to companies. *Ib. s.* 62.

### DIVISION 4.—FURTHER PROVISIONS RELATING TO VICTORIAN DOCUMENTS.

**63.** *Primâ facie* evidence of any proclamation order or regulation issued before or after the commencement of this Act by or under the authority of the Board of Land and Works may be given in all or any of the modes hereinafter mentioned, that is to say:— Mode of proving proclamations orders and regulations of Board of Land and Works. *Ib. s.* 63. 31 & 32 Vict. c. 37 s. 2.

(i.) By the production of a copy of the *Government Gazette* purporting to contain such proclamation order or regulation:

(ii.) By the production of a document purporting to be a copy of such proclamation order or regulation printed by the government printer:

(iii.) By the production of a copy thereof or extract therefrom purporting to be under the seal of the Board and to be attested by the President or Vice-President of the Board.

**64.** Where by any law at any time in force the Board of Land and Works was or is authorized or empowered to do any act whatsoever any *Government Gazette* purporting to contain a copy or notification of any such act shall be *primâ facie* evidence of such act having been duly done. *Gazette* to be evidence of acts of Board of Land and Works. *Ib. s.* 64. Ib. s. 2.

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required by law to be stated in such certificate and therefore of the date of the birth.

*Jones v. Falvey* (*supra*) cited with approval; *Rex* v. *Coleman* (No. 2), 27 V.L.R., 294.

The certificates of death and burial containing the age of a deceased person are *primâ facie* evidence of the date of birth.

*R.* v. *Coleman* (*supra*) followed as to the effect of certificates of birth, baptism, death, and burial; *Re Osmand: Bennett* v. *Booty*, 1906 V.L.R., 455.

(*a*) A sum less than Sixpence may be approved under the *Registrar-General's Fees Act* 1928, section 4.

*Evidence Act* 1915 *s.* 65. Certified copies of maps and documents in custody of Board of Land and Works to be *primâ facie* evidence.

**65.** All maps plans documents or papers certified under the seal of the Board of Land and Works to be copies of original maps plans documents or papers in the custody of the Board of Land and Works shall be admissible in evidence in any court of justice or before any person acting judicially and shall be *primâ facie* evidence for the same purposes and to the same extent as the originals thereof if they had been produced. And all such maps and plans shall if certified as aforesaid to have been made from actual survey be presumed *primâ facie* to have been so made by a competent surveyor; and all courts and persons acting judicially shall take judicial notice of the seal of the Board of Land and Works affixed to any such certificate and that such seal was properly affixed thereto.

Proof of Crown grants. *Ib. s.* 66.

**66.** In any legal proceeding whatsoever in order to prove any grant of land from the Crown, it shall not be necessary to produce the original or the enrolment of such grant; but a certificate purporting to contain a transcript either of such enrolment or of a copy of such enrolment and of the indorsements thereon respectively (if any) and signed by the registrar-general (for which certificate a fee[a] of One pound and no more shall be demanded or taken) shall be sufficient evidence of such grant and of the enrolment thereof at the time (if any) stated in or upon such transcript.[b]

*Registrar-General's Fees Act* 1927 *s.* 7.

Proof of will and death. *Evidence Act* 1915 *s.* 67.

**67.** The probate of a will or codicil or letters of administration with the will or codicil annexed (obtained or having operation within Victoria) shall in all cases whatsoever and whether relating to real or personal estate or both real and personal estate be evidence of the original will or codicil and of the contents thereof. And every probate or letters of administration shall in all cases be *primâ facie* evidence of the death and the date of the death of the testator or intestate.

Signature of clerks of courts to be evidence. *Ib. s.* 68.

**68.** The words "clerk of the peace" or "clerk of petty sessions" accompanying any signature to any act or document which such clerk was at the time they purport to have been written by or under any Act authorized to do or sign shall be *primâ facie* evidence that the person whose signature it purports to be was such clerk having authority to do such act or sign such document and that the signature is his and was made at the time aforesaid.

### DIVISION 5.—JUDICIAL NOTICE.

Acts of the Parliament of the United Kingdom to be judicially noticed. *Ib. s.* 69.

**69.** All courts and persons acting judicially within Victoria shall take judicial and official notice of all Acts of Parliament of the United Kingdom of Great Britain and Ireland or of the United Kingdom of Great Britain and Northern Ireland whether passed before or after the commencement of this Act and of the date of the coming into operation of any such Act.[c]

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(a) A fee less than One pound may be approved under the *Registrar-General's Fees Act* 1928, section 4.

(b) Copy of the entry or copy of a deed of grant from the Crown of land within the district of Port Phillip certified by the chief clerk of the Supreme Court and the registrar of deeds at Sydney has been held to be sufficient evidence of a grant from the Crown.—*Halfpenny* v. *Kinnelly*, 1 V.L.T., 52.

(c) See *Thomas* v. *Thomas*, 1926 V.L.R., 188, noted to section 116.

*Evidence Act* 1915 *s.* 70. Australasian States and their Acts to be judicially noticed.

**70.** All courts and persons acting judicially within Victoria shall take judicial and official notice of every Australasian State and the extent of its territories at any time and of the House or Houses of Legislature at any time existing therein and also of all Acts of Parliament of any Australasian State whether passed before or after the commencement of this Act and of the date of the coming into operation of any such Act.(a)

Public seals of States. *Ib. s.* 71. Comp. N.Z. No. 20 of 1860 s. 2.

**71.** All courts and persons acting judicially within Victoria shall take judicial and official notice of the impression of the public seal of any Australasian State without evidence of such seal having been impressed or any other evidence relating thereto.

Certain signatures to be judicially noticed. *Ib. s.* 72. *Evidence Act* 1927 *s.* 2.

**72.** All courts and persons acting judicially within Victoria shall take judicial and official notice of the signature of every person who is for the time being or has at any time been Governor responsible Minister of the Crown judge of the Supreme Court prothonotary master registrar or chief clerk of the Supreme Court commissioner of titles registrar of titles assistant or deputy registrar of titles registrar-general assistant or deputy registrar-general government statist or assistant or deputy government statist curator of intestate estates judge or presiding magistrate of any county court or district or local court or court of mines chairman of any court of general or quarter sessions judge or commissioner of any court of bankruptcy or insolvency or police or stipendiary magistrate or justice of the peace in any of the Australasian States and of any person holding in any Australasian State any office corresponding to any of the aforesaid offices and of any person holding in any such State any office to which the Governor in Council may at any time by order published in the *Government Gazette* declare this section to apply, and of the seal of every such court or person if such signature or seal purports to be attached or appended to any decree order certificate affidavit writ warrant summons or other judicial or official document and of the fact that such person holds or has held such office.(b)

(a) It is not necessary to prove by extrinsic evidence that a conviction at quarter sessions in New South Wales for stealing and receiving is a conviction upon indictment for an indictable offence. The court informed itself as to the law in New South Wales upon the subject.—*R.* v. *McKeown*, 1923 V.L.R., 577.

(b) Judicial notice of the signature of a judge of a district mining court will be taken where he has merely signed his name at the foot of a winding-up order without describing himself as a judge.—*Walker* v. *Jenkins*, 1 V.R. (L.), 9.

In proof of the incorporation of a company, the *Government Gazette* was put in evidence, purporting to be a certificate that the company had been registered by the subscriber, "Henry Krone, Acting Registrar-General." *Held*, the Court could take judicial notice of such signature under a section providing for judicial notice being taken of the signature of the registrar-general.—*Union Finance, &c., Co.* v. *Woolcott*, 15 V.L.R., 504.

A signature of a public officer may be proved by a person whose knowledge of it is derived from seeing it on many official documents, which he has known to be genuine, though he may never have seen such officer write.—*Kozminsky* v. *Schurmann*, 7 V.L.R. (L.), 474.

See also the Commonwealth Evidence Act (No. 4 of 1905) as to taking judicial notice of the signatures of Commonwealth Authorities.

As to signatures of members of the Indeterminate Sentences Board, see *Crimes Act* 1928, section 531 (8).

As to reformatory schools and the signatures of the Minister, secretary, inspector, and of officers thereof, see *Crimes Act* 1928, section 335.

As to the signatures of the Minister, the secretary, the inspector, and of officers holding office under the *Children's Welfare Act* 1928, see section 17 of that Act.

As to the signatures of the chairman or secretary of the Commission of Public Health and of the chairman or municipal clerk of any municipality under the *Health Act* 1928, see section 401 of that Act.

As to signatures of the Minister, the Chief Inspector or Assistant Chief Inspector of Factories and Shops under the *Factories and Shops Act* 1928, see section 227 of that Act.

*Evidence Act* 1915 s. 73.
All persons acting judicially to take judicial notice.

**73.** Where by or under any Act it is provided in effect that all courts or all courts of justice shall or may take judicial notice of any seal stamp or signature or any other matter or thing then all courts and persons acting judicially shall or may take judicial and official notice of such seal stamp signature or other matter or thing.

Effect of judicial notice of seal or signature in certain cases.
*Ib.* s. 74.

**74.** Where under this or any other Part of this Act (including cases falling under the last preceding section) any court or person acting judicially has taken judicial or official notice of any seal or signature attached or appended on or to any document if according to the law in Victoria or elsewhere of which the court or person acting judicially has judicial or official notice or proof such seal or signature might properly have been attached or appended on or to such document, such court or person shall in the absence of any evidence matter or thing suggesting the contrary presume that such seal or signature was properly attached or appended at the time and place (if any) purporting to be the time and place at which it was so attached or appended and that there was jurisdiction or authority to sign or seal such document at such time and place and that such document is what on its construction it purports to be and is a valid and subsisting document.

DIVISION 6.—BY-LAWS AND MINUTES.

Interpretation.
*Ib.* s. 75.
"By-laws."
"Corporation."

**75.** In this Division—

"By-laws" include articles of association regulations and rules; and

"Corporation" includes the Board of Land and Works and every corporation howsoever created and whether the same exists for municipal trading mining charitable or other purposes.

Proof of by-laws.
*Ib.* s. 76.
36 & 37 Vict. c. 33 s. 2.

**76.** The production of a document purporting to be a written or printed copy of any by-laws made by or on behalf of any corporation under any general or local Act of Parliament or any Act of a local or personal nature authenticated as hereinafter mentioned shall be *primâ facie* evidence of the due making and existence of such by-laws and of the time at which the same by-laws came into force without further proof of the making of such by-laws or of the performance of any condition the doing of any act or the lapse of any time respectively necessary to give them validity.

Form of certificate.
*Ib.* s. 77.
Third Schedule.

**77.** For the purpose of such authentication a certificate in the form contained in the Third Schedule to this Act or to the like effect written or printed on any such copy as aforesaid shall be sealed with the common seal of the corporation, which in the case of the Board of Land and Works shall be affixed in the manner by law required,[a] and in the case of any municipal corporation shall be affixed in the presence of and attested by the president and secretary or the mayor and town clerk (as the case may be), and in the case of any other corporation shall be affixed in the presence of and attested by any two of the board of directors or managing or governing body by whatsoever designation or title they may be called or known.

(a) See *Public Works Act* 1928, section 8.

*Evidence Act 1915 s. 78.*
Technical proof unnecessary.

**78.** It shall not be necessary to give any proof of the common seal when purporting to be attached to any such certificate nor shall it be necessary to prove by the attesting witnesses or otherwise that such seal was affixed in their presence, or that the persons signing filled the offices or characters set opposite to their names respectively, but on proof by admission or otherwise of the handwriting of such attesting witnesses it shall be presumed until the contrary is proved that such seal was affixed as it purports to have been and that they filled the offices or characters represented.

Proof of proceedings of councils committee &c.
*Ib. s. 79.*
36 & 37 Vict. c. 33 s. 3.

**79.** Any minute of proceedings at meetings of the Board of Land and Works or of any municipal council or of any board of directors[a] or of any managing or governing body by whatsoever designation or title they are called or known or of committees of any municipal council if signed by any person purporting to be the president or vice-president of the Board of Land and Works or the president of a shire or the mayor of a borough or the chairman of a meeting of a municipal council or of a board of directors or of a managing or governing body or of a committee of a municipal council and purporting to be so signed either at the meeting at which such proceedings took place or at the next ensuing meeting of the body whose proceedings are recorded, shall be admissible in evidence in all legal proceedings without further proof, and until the contrary is proved every meeting in respect of the proceedings of which the minutes have been so made shall be deemed to have been duly convened and held and all the members thereof to have been duly qualified and when such proceedings are proceedings of committees until the contrary is proved such committees shall be deemed to have been duly and regularly constituted and to have had power to deal with the matters referred to in such proceedings.

### DIVISION 7.—CONVICTIONS AND ACQUITTALS.

Proof of trial or conviction or acquittal for an indictable offence by certified copy.
*Ib. s. 80.*

**80.** In any legal proceeding whatsoever in order to prove the trial or conviction or acquittal in Victoria of any person charged with any indictable offence, it shall not be necessary to produce the record of the conviction or acquittal of such person or a copy thereof; but a certificate purporting to contain the substance and effect only (omitting the formal part) of the presentment indictment or information or of the conviction or of the acquittal (as the case may be) of or for such offence purporting to be signed by the officer having the custody of the records of the court where such first-mentioned person was tried convicted or acquitted or by the deputy of such officer or by the officer for the time being acting in such first-mentioned capacity (for which certificate a fee of Five shillings and no more shall be demanded or taken) shall be sufficient evidence of the said trial or conviction or acquittal without proof of the signature or official character of the person appearing to have signed the same or of the fact that he has the custody of such records; and the conviction shall be deemed to be unappealed against and otherwise unaffected unless the contrary is proved.

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(a) Minutes of a meeting of directors of a company are evidence against the directors personally in criminal proceedings for being concerned in the issue of a false report and balance-sheet with intent to defraud.—*Reg.* v. *Staples*, 19 V.L.R., 47.

*Evidence Act 1915.*

No fee shall be demanded or taken for any such certificate if the same is applied for by any prosecutor for the King or person acting on his behalf or by any person acting under the direction of a law officer or by any person acting for the prisoner.

Mode of proving previous convictions in other countries.
*Ib. s. 81.*

**81.** In any legal proceeding whatsoever in order to prove a conviction in the Commonwealth of Australia or its dependencies or in any of the States of the Commonwealth of Australia (other than Victoria) or in England Scotland Ireland Canada South Africa New Zealand Fiji British New Guinea or New Hebrides of any person a certificate purporting to contain the substance and effect only (omitting the formal part) of the conviction purporting to be signed by the officer having the custody of the records of the court where the offender was convicted or by the deputy of such officer or by the officer for the time being acting in such first-mentioned capacity and purporting to be attested by a justice of the peace or notary public of or for such part of His Majesty's dominions shall be sufficient evidence of such conviction without proof of the signature or official character of the persons signing or attesting such certificate and without any further proof as to the custody of such records; and the conviction shall be deemed to be unappealed against and otherwise unaffected unless the contrary is proved.

Evidence of previous summary conviction.
*Ib. s. 82.*

**82.** In any legal proceeding whatsoever in order to prove a previous summary conviction before a court of petty sessions or a justice or justices[a]—

(*a*) a document purporting to be a copy of any such conviction purporting to be certified by the proper officer of the court to which such conviction has been returned;

(*b*) a document proved to be a true copy of such conviction;

(*c*) the register kept in pursuance of the provisions of the *Justices Act* 1928 or any corresponding previous enactment or a certificate purporting to contain an extract from such register of such conviction purporting to be signed by the clerk or acting clerk or assistant clerk of the court at which such register is kept,

shall notwithstanding anything in any Act of Parliament contained be sufficient evidence of such conviction without proof of the signature or official character of the person appearing to have signed any such document or certificate or of the statement that the register is kept at such court; and the conviction shall be deemed to be unappealed against and otherwise unaffected unless the contrary is proved.

## DIVISION 8.—BANKERS' BOOKS.

Interpretation of "bank" "banker" and "bankers' books."
*Ib. s. 83.*
42 Vict. c. 11 ss. 9 & 10.

**83.** (1) In this Division the expressions "bank" and "banker" mean any company lawfully carrying on the business of bankers and also any savings bank established or continued under the *State Savings Bank Act* 1928.

(2) Expressions in this Division relating to "bankers' books" include ledgers, day books, cash books, account books, and all other books used in the ordinary business of the bank.

(*a*) See *Justices Act* 1928, sections 83 and 88(15).

(*b*) This Division does not apply to books out of the jurisdiction of the court.—*Bank of Australasia* v. *Pollard*, 8 V.L.R. (L.), 66.

(3) In this Division "court" means the court judge justice arbitrator persons or person before whom a legal proceeding is held or taken. The chairman of any court of general sessions may with respect to any legal proceeding in such court exercise all or any of the powers of a court under this Division. *Evidence Act* 1915.

**84.** Subject to the provisions of this Division a copy of any entry in a banker's book shall in all legal proceedings be admissible as *prima facie* evidence of such entry and of the matters transactions and accounts therein recorded.[a] Mode of proof of entries in bankers' books. *Ib. s.* 84. 42 Vict. c. 11 s. 4.

**85.** Where any bank is a party to any legal proceeding the other party or parties thereto shall be at liberty to inspect and make copies of or extracts from the original entries and the accounts of which such entries form a part and the cheques bills promissory notes orders for payment of money and other vouchers in respect of which such entries were made. Proviso as to proceedings where bank is a party. *Ib. s.* 85.

**86.** (1) A copy of an entry in a banker's book shall not be admissible in evidence under this Division unless it is first proved that the book was at the time of the making of the entry one of the ordinary books of the bank and that the entry was made in the usual and ordinary course of business and that the book is in the custody or control of the bank. Proof that book is a banker's book. *Ib. s.* 86. Ib. s. 4.

(2) Such proof may be given by a director or officer of the bank and may be given orally or by an affidavit sworn or by a declaration made before any commissioner or person authorized to take affidavits or statutory declarations.

**87.** (1) A copy of an entry in a banker's book shall not be admissible in evidence under this Division unless it is further proved that the copy has been examined with the original entry and is correct. Verification of copy. *Ib. s.* 87. Ib. s. 5.

(2) Such proof shall be given by some person who has examined the copy with the original entry and may be given either orally or by an affidavit sworn or by a declaration made before any commissioner or person authorized to take affidavits or statutory declarations.

**88.** A banker or officer of a bank shall not in any legal proceeding to which the bank is not a party be compellable to produce any banker's book the contents of which can be proved under this Division or to appear as a witness to prove the matters transactions and accounts therein recorded unless by order of a court or judge made for special cause. Case in which banker &c. not compellable to produce book &c. *Ib. s.* 88. Ib. s. 6.

**89.** On the application of any party to a legal proceeding a court or judge may order that such party be at liberty to inspect[b] and take copies of any entries in a banker's book for any of the purposes of such proceeding and may order that the bank shall free of charge for the first Court or judge may order inspection &c. *Ib. s.* 89. Ib. s. 7.

(a) It was held that a defendant bank might under a section analogous to this section prove the entries in books by secondary evidence of the copies, and need not produce the originals.—*Oriental Bank Corporation* v. *Smith*, 1 A.L.T., 76.

(b) It was held that where a judgment creditor can get the information by discovery he is not entitled to an order under this section.—*Chaleyer* v. *Smith*, 1920 V.L.R., 40.

As to discovery in probate matters, see *In the will of Taylor*, 1922 V.L.R., 280.

*Evidence Act 1915.*

ten folios and on payment of Sixpence for each additional folio prepare and deliver to such party a duly verified copy of such entries as may be required for evidence in such legal proceeding. An order under this section may be made either with or without summoning the bank or any other party and shall be served on the bank three clear days before the same is to be obeyed unless the court or judge otherwise directs.

Costs.
*Ib. s. 90.*
42 Vict. c. 11 s. 8.

**90.** The costs of any application to a court or judge under or for the purposes of this Division and the costs of anything done or to be done under an order of a court or judge made under or for the purposes of this Division shall be in the discretion of the court or judge who may order the same or any part thereof to be paid to any party by the bank where the same have been occasioned by any default or delay on the part of the bank. Any such order against a bank may be enforced as if the bank was a party to the proceeding.

Computation of time.
*Ib. s. 91.*
Ib. s. 11.

**91.** Sunday, Christmas Day, Good Friday, and any bank holiday shall be excluded from the computation of time under this Division.

## PART IV.—OATHS AFFIRMATIONS AFFIDAVITS DECLARATIONS.

### DIVISION 1.—INTRODUCTORY.

Meaning of affidavit.
*Ib. s. 92.*

**92.** In Division five and the subsequent Divisions of this Part "affidavit" includes affirmation and declaration.

### DIVISION 2.—OATHS AND AFFIRMATIONS.

Manner of administration of oaths.
*Ib. s. 93.*
9 Edw VII. c. 39 s. 2

**93.** (1) Any oath may be administered and taken in the form and manner following:—The person taking the oath shall hold the Bible or the New Testament or the Old Testament in his uplifted hand and shall repeat after the officer administering the oath or otherwise say the words "I swear by Almighty God that . . ." followed (with any necessary modifications) by the words of the oath prescribed or allowed by law without any further words of adjuration imprecation or calling to witness.

Alternative form of oath in the case of two or more persons.

(2) Any oath may be administered to and taken by two or more persons at the same time in the form and manner aforesaid or in the form and manner following:—

> Each of the persons taking the oath shall hold the Bible or the New Testament or the Old Testament in his uplifted hand and the officer administering the oath shall say—"You and each of you swear by Almighty God that . . . . . ." followed (with any necessary modifications) by the words of the oath prescribed or allowed by law without any further words of adjuration imprecation or calling to witness, and forthwith after the officer has said the words referred to, each of the persons taking the oath shall say—"I swear by Almighty God so to do."

Validity.

3) Any oath taken as aforesaid shall for all purposes be deemed to be as valid and effectual as if administered and taken in the manner prescribed or allowed by statute or otherwise.

(4) Any oath may be administered in any manner which is now lawful. *Evidence Act 1915.*

(5) The officer shall without question—

(*a*) unless the person or any of the persons about to be sworn voluntarily objects so to take the oath or is physically incapable of so taking the oath; or **Saving.**

(*b*) unless the officer or in the case of judicial proceedings unless the court, justice, or person acting judicially, has reason to think or does think that the form of the oath prescribed by sub-section (1) or sub-section (2) would not be binding on the conscience of the person about to be sworn, **Duty of officer administering oath.**

administer the oath in the form and manner set out in the said sub-section (1) or sub-section (2) as the case may be:

Provided that no oath shall be deemed illegal or invalid by reason of any breach of the provisions of this sub-section.

(6) In this section "officer" includes any and every person duly authorized to administer oaths and any and every person administering oaths under the direction of any court justice or person acting judicially. **Definition of "officer."**

(7) This section shall apply notwithstanding that in any Act whether passed before or after the commencement of this Act a form of oath is prescribed which has introductory words other than the words "I swear by Almighty God," or which includes words such as the words "So help me God" or other words of adjuration imprecation or calling to witness. And whenever in any Act there is, in effect, a provision for subscribing the form of oath prescribed by such Act such provision shall be deemed to be complied with if the form of oath allowed by this section is subscribed in lieu of such prescribed form. **This section to apply even where other Acts prescribe a different form of oath.** *Statute Law Revision Act 1916 s. 2.*

**94.** If any person to whom an oath is administered desires to swear with uplifted hand, in the form and manner in which an oath is usually administered in Scotland, he shall be permitted so to do, and the oath shall be administered to him in such form and manner without further question. **Swearing with uplifted hand.** *Evidence Act 1916 s. 94.* 51 & 52 Vict. c. 46 s. 5.

**95.** Every person upon objecting to being sworn, and stating as the ground of such objection either that he has no religious belief or that the taking of an oath is contrary to his religious belief, shall be permitted to make his solemn affirmation instead of taking an oath in all places and for all purposes where an oath is required by law, which affirmation shall be of the same force and effect as if he had taken the oath.[a] **When affirmation may be made instead of oath.** *Ib. s. 95.* Ib. s. 1.

**96.** (1) Every oral affirmation shall commence:—"I, A.B., do solemnly, sincerely, and truly declare and affirm," and then proceed with the words of the oath prescribed or allowed by law, omitting any words of adjuration imprecation or calling to witness. **Form of oral affirmation.** *Ib. s. 96.* b. s. 2.

(2) Every affirmation in writing shall commence—"I, of , do solemnly and sincerely affirm," and the form in lieu of jurat shall be "Affirmed at , this day of 19 , before me." **Form of affirmation in writing.** Ib. s. 5.

(*a*) A statutory declaration need not show that the declarant has conscientious scruples against taking an oath.—*Reg.* v. *Mollison ex parte Warne*, 1 V.L.R. (L.), 17.

*Evidence Act* 1915 *s.* 97. Validity of oath not affected by absence of religious belief.

**97.** When an oath has been duly administered and taken, the fact that the person to whom the same was administered had at the time of taking such oath no religious belief shall not for any purpose affect the validity of such oath.

DIVISION 3.—DECLARATIONS IN PUBLIC DEPARTMENTS.

51 & 52 Vict. c. 46 *s.* 3. Declarations may be substituted for oaths and affidavits. *Ib. s.* 98. 5 & 6 Will. IV. c. 62 *ss.* 2, 6, 7.

**98.** In any case where by any statute law or ordinance made or to be made relating to any of the public revenues of Victoria or any of the public offices or public departments or by any official regulation in any department any oath or affidavit might but for this Act be required to be taken or made by any person on the doing of any act matter or thing or for the purpose of verifying any book entry or return or for any other purpose whatsoever, it shall be lawful for the Governor in Council to substitute a declaration in the form contained in the Fourth Schedule to this Act to the same effect as the oath or affidavit which but for this Act might be required to be taken or made. But no substitution as aforesaid shall be made for the oath of allegiance in any case, or for any oath or affidavit which now is or hereafter may be made or taken or be required to be made or taken in any judicial proceeding in any court of justice, or in any proceeding for or by way of summary conviction before any justice.

Fourth Schedule.

Such substitution to be notified in *Gazette*. *Ib. s.* 99. Ib *ss.* 3 and 4.

**99.** When the Governor in Council in any such case as aforesaid has substituted a declaration in lieu of an oath or affidavit, the same shall be notified in the *Government Gazette;* and from and after the expiration of twenty-one days next following the day of the date of the *Government Gazette* wherein such notification has been first published the provisions of this Act shall extend and apply to each and every case office or department specified in such notification. And the person who might under the Act imposing the same have been required to take or make such oath or affidavit shall in the presence of the officer or person empowered by such Act to administer such oath or affidavit make and subscribe such declaration; and every such officer or person is hereby empowered and required to administer the same accordingly. And it shall not be lawful for any officer or other person to administer or cause to be administered or receive or cause to be received any oath or affidavit in lieu of which such declaration as aforesaid has been directed to be substituted.

DIVISION 4.—VOLUNTARY STATUTORY DECLARATIONS.

Voluntary declarations may be made. *Ib. s.* 100. *Statute Law Revision Act* 1916 *s.* 2. Fourth Schedule.

**100.** It shall be lawful for any justice of the peace notary public or other officer by law authorized to administer an oath or to take or receive a statutory declaration or solemn declaration to take and receive the voluntary declaration of any person making and subscribing the same before him in the form in the Fourth Schedule to this Act, or to the like effect.[a]

(*a*) See note to section 95. A written application to bring land under the operation of the *Transfer of Land Act* 1915 made in the form prescribed in Part I. of the Second Schedule to that Act was lodged at the Office of Titles. The document had been made and subscribed before a justice of the peace, who was a clerk to the applicant's solicitors. The Registrar of Titles, objecting to the mode in which the application had been so made and subscribed, directed that the application should be stayed until a substituted application should be lodged. *Held*, that the Registrar could not treat the application as a nullity.—*Makower, McBeath and Co.* v. *Registrar of Titles*, 1927 V.L.R., 215.

As to declarations, etc., taken before a notary public, being a solicitor, in a matter in which he is interested, see *ibid.*, p. 218.

**101.** In any proceeding or prosecution which may hereafter be instituted against any person or persons for making any false declaration, whether the same is voluntary or otherwise, no objection shall be taken or allowed by reason only that such declaration did not relate to any fact matter or thing required or authorized by any law at the time in force to be verified or otherwise assured or ascertained by or upon the oath affirmation declaration or affidavit of some or any person.

*Evidence Act* 1915 *s.* 101.
Objection that matter is not one requiring verification not to be taken.

**102.** Whenever any voluntary declaration is made and subscribed by any person under or in pursuance of the provisions of this Act, such fee as would have been due and payable on the taking or making any legal oath or affidavit shall be in like manner due and payable upon making and subscribing such declaration.

Fees payable.
*Ib. s.* 102.
6 & 6 Will. IV. c. 62 s. 19.

DIVISION 5.—COURTS AND OFFICERS.

**103.** All courts and persons having by law or by consent of parties authority to hear receive and examine evidence are hereby empowered to administer oaths to all such witnesses as are legally called before them respectively.[a]

Courts &c. may administer oaths to witnesses.
*Ib. s.* 103.
17 & 18 Vict. c. 125 s. 20.

**104.** Every person who being an officer of or performing duties in relation to any court is for the time being so authorized by a judge of the court or justice or by or in pursuance of any rules or orders regulating the procedure of the court and every person directed to take an examination in any cause matter or proceeding in any court shall have authority to administer an oath or take an affidavit for any purpose connected with his duties.

Power of certain officers of courts &c. to administer oaths.
*Ib. s.* 104.
52 Vict. c. 10 s. 2.

DIVISION 6.—GAOLERS.

**105.** Any affidavit of any prisoner in any prison or gaol in Victoria whether such affidavit is in a proceeding in the Supreme Court or not may be sworn before the keeper of such prison or gaol and every such keeper is hereby required and authorized to administer the oath upon and take such affidavit without fee or reward, and all courts and persons acting judicially shall take judicial and official notice of the seal or signature of any such gaoler attached to any such affidavit.

Affidavits of prisoners.
*Ib. s.* 105.

DIVISION 7.—COMMISSIONERS OF THE SUPREME COURT FOR TAKING AFFIDAVITS.

**106** (1) The chief justice and any one or more of the judges of the Supreme Court may by a commission or commissions under the seal of the court from time to time empower and authorize so many persons as are thought fit and necessary for any place or places in Victoria or elsewhere to take and receive such affidavits (including affirmations and declarations) as any person or person is or

Power to appoint commissioners for taking affidavits.
*Ib. s.* 106.
29 Car. II. cap. 5.

(a) In proceedings before a court of petty sessions the oath may be administered to witnesses by any justice or by the clerk or any acting clerk of petty sessions or by any other suitable person directed to do so by the court. The administration of the oath is in all cases the act of the court.—*Rex* v. *Shuttleworth*, 1909 V.L.R., 431.

*Evidence Act 1915.*

are desirous of making before any of the persons so empowered and authorized in or concerning any cause matter or thing depending or thereafter to be depending in or any wise concerning any of the proceedings in the Supreme Court.

Duration of commissions.

(2) Any such commission shall remain in force for such time as is stated or indicated or until it is revoked.

Effect of commissions heretofore issued.

(3) Every commission of a similar nature heretofore issued or purporting to have been issued by the chief justice for the time being or by the chief justice and any one or more of the judges of the Supreme Court for the time being shall be deemed to have been validly issued and while in force to have conferred on the person or persons therein named the same powers and authorities as are conferred by a commission under this Act; and every commission so issued or purporting to have been issued shall if in force at the commencement of this Act continue in force until its expiry or revocation and while in force shall confer on the person or persons therein named the same powers and authorities as are conferred by a commission under this Act.

Judicial notice of signature.

(4) All courts and persons acting judicially shall take judicial and official notice of the signature of every such commissioner attached to any affidavit declaration or other document and of the place or places for or in which he is empowered and authorized to act.

Fees.

(5) Notwithstanding anything contained in any Act the judges of the Supreme Court shall have and shall be deemed to have had power to fix the scale of fees to be paid to such commissioners.

Powers of commissioners to take affidavits.

*Ib. s.* 107.

52 Vict. c. 10 s. 1 (2).

**107.** All affidavits to be used for any purpose whatsoever may in any place in which he is empowered and authorized to act be sworn and taken before any such commissioner and he is hereby empowered and authorized to take and receive the same. This section shall apply notwithstanding that it is enacted by or under any Act that such affidavit shall or may be sworn or taken before some named specified or indicated officer or other person. Any such commissioner may in such place unless and until other provision is made to the contrary administer any oath or take any affidavit.

Declarations which may be taken before a justice may be taken before commissioner

*Ib. s.* 108.

**108.** Where by any Act or by any order in council regulation rule or by-law made pursuant to any Act any person is required authorized or permitted to make or subscribe a declaration before a justice, such person instead of making or subscribing such declaration before a justice may make or subscribe the same before any such commissioner and every such commissioner is hereby authorized to take and receive any declaration as fully and effectually as a justice is by law empowered to take and receive the same, and every declaration made or subscribed before any such commissioner shall be in or of the like form or effect and shall be as good valid and effectual and shall be of like force and effect to all intents and purposes as if such declaration had been made or subscribed before a justice.

Declarations before commissioner of the same force and effect as if before a justice.

Commissioner not to act if interested.

*Ib. s.* 109.

**109.** No such commissioner shall exercise any of the powers or authorities given by this Act in any proceeding or matter or in relation to any instrument or document in or as to which he is barrister and

solicitor or barrister or solicitor to any of the parties to the proceeding matter or instrument or clerk to any such barrister and solicitor or barrister or solicitor or in which he is interested.(a)

*Evidence Act 1915.* Supreme Court Rules, Order 38 rr. 16 & 17.

**110.** Notwithstanding anything hereinbefore contained any such commissioner shall be deemed not to have any power or authority to act in respect of any matter or thing except in the place or places mentioned in his commission.

52 Vict. c. 10 s. 1 (3). Commissioner to act only in places for which he is authorized. *Ib.* s. 110.

DIVISION 8.—COMMISSIONERS FOR TAKING DECLARATIONS AND AFFIDAVITS.

**111.** The Governor in Council may from time to time appoint such persons residing within Victoria as he thinks fit to be commissioners for taking declarations and affidavits, and may at any time remove any such commissioner.

Power to appoint commissioners for taking declarations and affidavits. *Ib.* s. 111.

Notice of every such appointment or removal shall be published in the *Government Gazette*.

All courts and persons acting judicially shall take judicial and official notice of the signature of every such commissioner attached to any declaration affidavit or other document.

Judicial notice of signature.

**112.** All affidavits to be used for any purpose whatever (except in any proceeding in the Supreme Court) may be sworn before a commissioner for taking declarations and affidavits, who is hereby authorized to take and receive the same.

Power of commissioner to take affidavits. *Ib.* s. 112.

This section shall apply notwithstanding that it is enacted by or under any Act that such affidavit shall or may be sworn or taken by or before some named specified or indicated officer or other person.

Sections one hundred and eight and one hundred and nine shall be deemed to apply as if re-enacted in this Division.

**113.** Notwithstanding anything hereinbefore contained a commissioner for taking declarations and affidavits shall be deemed not to have power or authority to act outside Victoria in respect of any matter or thing.

No power to act outside Victoria. *Ib.* s. 113.

**114.** The Governor in Council may make regulations fixing the scale of fees to be paid to commissioners under this Division for taking and receiving declarations or affidavits pursuant to the provisions of this Act; but no fee shall be taken by such commissioner for attesting any instrument other than a declaration or an affidavit.

Regulations as to fees. *Ib.* s. 114.

Such regulations when published in the *Government Gazette* shall have the full force of law.

DIVISION 9.—AFFIDAVITS IN VICTORIA.

**115.** (1) Affidavits in Victoria for use in the Supreme Court shall and may be sworn and taken before a judge, master-in-equity, commissioner of the Supreme Court for taking affidavits, or officer empowered under any Act or under the rules of the Supreme Court to take affidavits for use in the Supreme Court.

Affidavits in Victoria how sworn and taken. *Ib.* s. 115. Supreme Court Rules, Order 38 r. 4.

(a) A violation of the provision in this section does not result in the document purporting to be a declaration being deemed to be not a declaration.—*R.* v. *Linehan*, 1921 V.L.R., 582. See note (a) to section 100.

*Evidence Act 1915.*
*Statute Law Revision Act 1916 s. 2.*

(2) Affidavits in Victoria for use in any court other than the Supreme Court or for any purpose or in any way whatsoever authorized by law whether by or under Act of Parliament or by custom or otherwise may be sworn and taken—

(*a*) before a commissioner of the Supreme Court for taking affidavits in any place in which he is authorized and empowered to act;

(*b*) before a commissioner for taking declarations and affidavits;

(*c*) before any judge justice clerk of court officer or other person required empowered authorized or permitted by Act of Parliament or by order in council order regulation rule or by-law pursuant to any Act to take affidavits in relation to the matter in question in Victoria or in the particular part of Victoria in which the affidavit is sworn and taken.

(3) The provisions mentioned in sub-sections 2 (*a*) and 2 (*b*) shall apply notwithstanding that a justice officer person or persons is or are named specified or indicated as the person or persons before whom such affidavit shall or may be sworn and taken.

Judicial notice.

(4) All courts and persons acting judicially shall take judicial and official notice of the seal or signature of any of the persons mentioned in this section attached or appended to any such affidavit.

DIVISION 10.—AFFIDAVITS IN PLACES OUT OF VICTORIA.

Taking oaths out of Victoria.
*Evidence Act 1915 s. 116.*
Supreme Court Rules, Order 38 r. 6.
52 Vict. c. 10 ss. 3 & 6.

**116.** (1) Affidavits for use in any court or for any purpose or in any way whatsoever authorized by law whether by or under Act of Parliament or by custom or otherwise may be sworn and taken in any place out of Victoria—

(*a*) Before a commissioner of the Supreme Court for taking affidavits empowered and authorized to act in such place.[a]

(*b*) Before a British ambassador envoy Minister *chargé d' affaires* secretary of embassy or legation consul-general consul vice-consul acting consul pro-consul or consular agent exercising his function in such place.

(*c*) Before any person having authority to administer an oath in that place.[b]

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(a) Where an affidavit purported to be sworn in England before one F., who subscribed himself "a commissioner for oaths of the Supreme Court of Victoria," and such person, though not in fact holding a commission for taking affidavits in the Supreme Court of Victoria, was in fact a commissioner for oaths in England, the court, upon the filing of an affidavit setting out the fact that F. held such office in England and the circumstances under which he inaccurately described himself in the jurat, allowed the affidavit to be filed.—*McEwen* v. *Levy Bros.*, 1915 V.L.R., 276.

(*b*) An affidavit sworn in South Australia before a person purporting to be a justice of the peace of that State, and to be a person lawfully authorized to administer oaths in that State, is receivable in support of an application to the Supreme Court of Victoria in its probate jurisdiction, although it does not appear whether or not the justice had authority to administer oaths in the Supreme Court of South Australia.—*In re Hart*, 1917 V.L.R., 247.

An affidavit purporting to be sworn in England before a person describing himself as a "Commissioner for Oaths" may, by virtue of this section, and section 69, be received in evidence of the facts deposed to therein in proof of service of the petition and citation in a divorce suit.—*Thomas* v. *Thomas*, 1926 V.L.R., 188.

The execution of a power of attorney in a probate matter was attested in England by a commissioner of the Supreme Court of Victoria for taking affidavits. *Held*, that the execution was sufficiently authenticated and verification of the signature of the commissioner was unnecessary.—*Re Balderson*, 1918 V.L.R., 257.

See also *In re Trade Mark of Ryan, Lewis, and Co. Pty. Ltd., ex parte Autotone Co.*, 24 C.L.R., 460.

(2) In the case of a person purporting to have such authority otherwise than by the law of a foreign country not under the dominion of His Majesty all courts and persons acting judicially shall take judicial and official notice of the seal or signature of any such person attached or appended to any such affidavit and for the purpose of this section judicial and official notice may also be taken as to what places are and what places are not under the dominion of His Majesty. *Evidence Act 1915.* Judicial notice.

(3) In the case of a person purporting to have such authority by the law of a foreign country not under the dominion of His Majesty such authority may be verified by any of the persons mentioned in sub-section (1) (*a*) or (1) (*b*) of this section or by the certificate of the superior court of such place and if such authority purports so to be verified such affidavit shall be admissible for all purposes without further proof of the seal or signature or of the judicial official or other character of such first mentioned person. Verification of authority.

(4) The provisions mentioned in the preceding sub-sections of this section shall apply notwithstanding that any person or persons is or are named specified or indicated as the person or persons before whom such affidavit shall or may be sworn or taken.

(5) Where by or under any Act any person or persons is or are named specified or indicated as the person or persons before whom such affidavit shall or may be sworn or taken all courts and persons acting judicially shall take judicial and official notice of the seal or signature of any such person attached or appended to any such affidavit.

**117.** Where by any Act[a] or by an order in council rule regulation or by-law made pursuant to any Act any affidavit or declaration is required authorized or permitted to be administered or taken before a justice of the peace it shall be sufficient for all purposes if such affidavit or declaration is taken before a justice of the peace for that part of His Majesty's dominions in which such affidavit or declaration is taken. Affidavits and declarations required to be made before a justice sufficient if made before a justice elsewhere. *Ib.* s. 117.

All courts and persons acting judicially shall take judicial and official notice of the signature of any justice of the peace in any part of His Majesty's dominions when such signature is attached or appended to any such affidavit or declaration and the place where such signature was so attached or appended purports to be shown and for the purposes of this section judicial and official notice may be taken as to what places are under the dominion of His Majesty.

## DIVISION 11.—JURAT.

**118.** Every commissioner and person authorized by or under this Act to take affidavits before whom any affidavit is sworn or taken shall state truly in the jurat or attestation at what place and on what date the affidavit was sworn. Jurat to state where and when oath is taken. *Ib.* s. 118. 52 Vict. c. 10 s. 5.

(*a*) An affidavit of service purporting to be made before "N. Simons, J.P., one of His Majesty's Justices of the Peace in and for South Australia," was held sufficient.—*Fallshaw Brothers* v. *Ryan*, 28 V.L.R., 279; as to affidavits before a notary, see *In the estate of Orr Edwards*, 25 V.L.R., 612.

(*b*) See section 96.

## PART V.—ATTESTATIONS VERIFICATIONS ACKNOWLEDGMENTS NOTARIAL ACTS ETC.[a]

*Evidence Act 1915 s. 119.* Provision of Part IV. extended to attestations notarial acts &c. See 52 Vict. c. 10 ss. 6 & 11.

**119.** (1) The provisions of Divisions six seven eight nine and ten of Part IV. shall as far as applicable extend to the taking of all recognisances of bail attestations verifications acknowledgments and signatures in relation to any documents required authorized or permitted by or under any Act or by custom or otherwise to be attested verified acknowledged or signed and to the doing of all notarial acts as if such provisions had been re-enacted in this Part excluding words relating to the administration of oaths and the taking of affidavits and substituting therefor words relating to the taking and doing of such first mentioned matters and things.

(2) The provisions of sub-section (1) shall not apply to any matter or thing specially required to be attested verified acknowledged or signed before a court or a judge or before a justice sitting in any criminal or civil proceeding but except where a contrary intention can be gathered shall apply in all cases whatsoever and notwithstanding that it is enacted that any such matter or thing shall or may be taken or done before some named specified or indicated officer or other person.

(3) In this section the expression "notarial acts" includes all acts matters and things which in Victoria or elsewhere a notary public can attest or verify or otherwise do by or under any Act of Parliament custom or otherwise for the purpose of being used in Victoria.

Attestations &c. before a justice. *Ib. s.* 120.

**120.** Where by any Act or by any order in council regulation rule or by-law made pursuant to any Act any document is required authorized or permitted to be attested verified by or signed or acknowledged before a justice of the peace it shall be sufficient for all purposes if such document is attested or verified or signed or acknowledged in any part of His Majesty's dominions by or before a justice of the peace for that part or within Victoria by or before a commissioner for taking declarations and affidavits or in any place in Victoria or elsewhere by or before a commissioner of the Supreme Court for taking affidavits in that place.

All courts and persons acting judicially shall take judicial and official notice of the signature of any justice of the peace in any part of His Majesty's dominions when such signature is attached or appended to any such document and the place where such signature was so attached or appended purports to be shown.

Attestations &c. before a commissioner. *Ib. s.* 121.

**121.** Where by any Act or by any order in council regulation rule or by-law made pursuant to any Act any document (other than a document relating to any proceeding in the Supreme Court) is required authorized or permitted to be attested or verified by or signed or acknowledged by or before a commissioner of the Supreme Court for taking affidavits it shall be sufficient for all purposes if such document is within Victoria attested or verified by or signed or acknowledged by or before a commissioner for taking declarations and affidavits.

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(a) For cases of authentication by notaries, see *In re Vickerman*, 21 V.L.R., 236; *Re Hannah Sutherland*, 1910 V.L.R., 118; *Re Balderson*, 1918 V.L.R., 257.

It was *held* by *Hood, J.*, that a statutory declaration made before the Lord Mayor of London could not be received in support of an application in the probate jurisdiction.—*In the will of Baker*, 21 A.L.R., 367; 1915 V.L.R., 535.

See also note (a) to section 100.

## Part VI.—Shorthand Writers.

*Evidence Act 1915 s. 122.*
Examiners of shorthand writers to be appointed by Governor in Council.

**122.** The Governor in Council may appoint as many fit persons as may be required to be examiners to conduct the examinations of applicants for license as shorthand writers subject to regulations made as herein provided.

Shorthand writers to be licensed.
*Ib. s. 123.*

**123.** The chief justice of the Supreme Court may from time to time license fit and proper persons to be shorthand writers for the purpose of taking down in shorthand and transcribing or causing to be transcribed any evidence as hereinafter provided and may cancel the licence of any such person.

Shorthand writers to be sworn.
*Ib. s. 124.*

**124.** Every person licensed as a shorthand writer before entering upon the duties of his office shall take before a judge of the Supreme Court the following oath—"I swear by Almighty God that I will faithfully take down and transcribe or cause to be transcribed the evidence I am required by law to take down in any cause or matter," and every judge of the Supreme Court is hereby authorized to administer or cause to be administered such oath to every such person and every person authorized by law to make an affirmation instead of making an oath may make such affirmation instead of making such oath.

Judge or chairman of courts or justices &c. may direct evidence to be taken down in shorthand in certain cases.
*Ib. s. 125.*
*Statute Law Revision Act 1916 s. 2.*

**125.** Any judge of the Supreme Court without any application may and the judge or chairman or justices of any court and any person now or hereafter having by law or by consent of parties authority to hear receive and examine evidence may at his or their discretion on the application of any party to any cause matter inquiry or proceeding either civil or criminal depending before him or them and shall upon the application of all the parties to any such cause matter inquiry or proceeding direct that the evidence to be given in such cause matter inquiry or proceeding and any ruling direction or summing up be taken down in shorthand by a shorthand writer licensed as aforesaid provided a shorthand writer is then available for that purpose and provided that if all the parties agree they may select any licensed shorthand writer. In any such case in which a licensed shorthand writer is so employed the judge chairman or justices may decide in his or their discretion by whom the costs of taking down and transcribing such evidence ruling direction or summing up shall be paid.(a)

Shorthand writer to be officer of court whilst in performance of duty.
*Evidence Act 1915 s. 126.*

**126.** Every shorthand writer licensed as aforesaid shall for the time being be an officer of any court in or for which he is required to take down evidence and shall be under the direction of the said court with regard to the performance of his duty in taking down and transcribing or causing to be transcribed such evidence ruling direction or summing up.

Transcript of notes to be received as evidence *primâ facie*.
*Ib. s. 127.*

**127.** The shorthand writer's shorthand notes and also the transcript thereof either by writing printing or type-writing when certified to as correct by a shorthand writer licensed as aforesaid shall be received by every court as *primâ facie* evidence of the evidence ruling direction or summing up so taken down.

(a) Where an arbitrator appoints a shorthand writer to take notes of the evidence upon the application of one of the parties, the other party, if unsuccessful, is not chargeable with the costs of such shorthand writer unless the application was made in the presence of that other party.—*Portland Freezing Co.* v. *Austral Otis Co.*, 23 V.L.R., 462.

*Evidence Act* 1915 *s.* 128. Witness may sign either shorthand notes or transcript of evidence.

**128.** Any witness may at his option sign either the shorthand notes or the transcript of any deposition or evidence taken down in shorthand under this Part if such deposition or evidence is required by law to be put into writing and signed by the witness.

Penalty for wrongly taking evidence &c. *Ib. s.* 129.

**129.** If any shorthand writer licensed as aforesaid wilfully wrongly takes down any such evidence ruling direction or summing up or tampers with or alters or falsifies or permits any one to tamper with alter or falsify his shorthand notes of any such evidence ruling direction or summing up or the transcript thereof or if he wilfully certifies as correct any shorthand notes or transcript of such evidence which falsely purports to be correct he shall be guilty of felony and on conviction thereof shall be liable to imprisonment with or without hard labour for a term not more than five years.

Regulations. *Ib. s.* 130.

**130.** The Public Service Commissioner shall make regulations which shall have full force and effect as soon as approved of by the Governor in Council for determining the nature or character standard and requirements of the examinations or tests to be applied to applicants for license as shorthand writers and which such applicants shall undergo.

Registration. *Ib. s.* 131.

**131.** All applicants qualified for license shall be registered in the manner provided for persons who have qualified for appointment to the clerical division under the *Public Service Act* 1928, and all persons licensed as shorthand writers shall be selected from such register.

Governor in Council to regulate fees. *Ib. s.* 132.

**132.** The Governor in Council may from time to time make regulations prescribing the fees payable to any shorthand writer licensed as aforesaid for his services and for a transcript of his notes.

## PART VII.—OFFENCES. PERJURY FORGERY FALSE CERTIFICATES ETC.

Persons making wilful false statements on oath declaration &c. guilty of perjury. *Ib. s.* 133.

**133.** Any person who upon or in any oath examination affidavit affirmation or declaration whatsoever which is mentioned or referred to or which is required authorized or permitted in or by or under any provision of this Act wilfully and corruptly makes any false statement whether oral or in writing shall be deemed to be guilty of wilful and corrupt perjury. This section shall apply notwithstanding that such oath examination affidavit affirmation or declaration may be required authorized or permitted by or under any other Act whether passed before or after the commencement of this Act.(a)

Forgery using &c. false documents felony. *Ib. s.* 134.

**134.** Any person who—

(*a*) forges or counterfeits any seal or stamp or the impression of any seal or stamp whatsoever purporting to be a seal or stamp such as is mentioned or referred to in any provision of this Act ;

(*a*) To sustain a conviction for making a false declaration it is not necessary to show that the declaration was read over to the declarant (even though he be illiterate) in the presence of the commissioner before whom it was made; it is sufficient that the latter satisfied himself that it had been read over to the declarant and that he was aware of its contents.—*Reg.* v. *Thornton*, 6 V.L.R. (L.), 427; and see *R.* v. *Pearce*, 1 W. & W. (L.), 248.

H. was convicted for perjury upon a voluntary declaration. A declaration was in the form given by Act No. 343 (re-enacted in this and preceding sections, see Fourth Schedule hereto), and the word "declared" was in the memorandum at the foot instead of the word "sworn in" in the jurat of an affidavit, but the prisoner was sworn to the truth of the declaration. *Held*, that the superaddition of the oath did not make the declaration less a declaration.—*R.* v. *Hickey*, 5 A.J.R., 104.

(*b*) forges or counterfeits any signature whatsoever purporting to be a signature such as is mentioned or referred to in any provision of this Act ; *Evidence Act 1915.*

(*c*) fraudulently alters any document whatsoever purporting to be a document such as is mentioned or referred to in any provision of this Act or any seal stamp or signature thereon or thereto ;

(*d*) affixes any such seal stamp or signature to any such document knowing such document to be untrue ;

(*e*) except for some lawful purpose drafts engrosses copies or prepares any such document knowing the same to be untrue ;

(*f*) without full disclosure tenders in evidence or otherwise uses any such document knowing that the seal or stamp or the impression of the seal or stamp or the signature thereon or thereto has been forged or counterfeited or is false or that such document is untrue or has become wholly or partially invalid or that such document or the seal stamp or the impression of the seal or stamp or the signature thereon or thereto has been fraudulently altered

shall be guilty of felony and be liable to imprisonment with or without hard labour for a term of not more than five years.

**135.** Any person who prints any document whatsoever which falsely purports to be a document such as is mentioned or referred to in any provision of this Act as a document which might or should be printed by a government printer or as a document which might or would be admitted in evidence if printed by a government printer or who without full disclosure tenders in evidence or otherwise uses any such document knowing the same is not printed as it falsely purports to be shall be guilty of felony and be liable to imprisonment with or without hard labour for a term of not more than five years. *Printing or using documents falsely purporting to be printed by government printer felony. Ib. s. 135.*

**136.** Any officer or person authorized required or permitted by any provision of this Act to furnish any copies extracts or transcripts who wilfully certifies or delivers any document as being a true copy extract or transcript knowing that the same is not a true copy extract or transcript (as the case may be) shall be guilty of a misdemeanour and be liable to imprisonment with or without hard labour for a term of not more than two years. *Giving false certificates a misdemeanour. Ib. s. 136.*

**137.** In order to ascertain for the purposes of this Part the meaning of any provision in any other Part any enactment relating to interpretation applicable to such provision in such other Part shall be taken to apply. *Interpretation provisions to apply to this Part. Ib. s. 137.*

## Part VIII.—Miscellaneous.

**138.** Whenever any document has been or is tendered or produced before any court or person acting judicially such court or person if it or he thinks it desirable in the interests of justice so to do may direct that such document shall be impounded and kept in the custody of some officer or other proper person for such period either definite or indefinite and subject to such conditions as to such court or person seem meet: Provided that if such direction is given by any single *Impounding documents. Ib. s. 138.*

*Evidence Act 1915.*

judge of the Supreme Court sitting in court or in chambers it shall be subject to appeal to the Full Court and if such direction is given by any other court or person it may be set aside on application to a judge of the Supreme Court who may direct on whom notice of such application shall be served and make such order as to costs as he deems just.

Attesting witness.
*Ib. s.* 139.
17 & 18 Vict. c. 125 s. 26.
28 & 29 Vict. c. 18 s. 7.

**139.** It shall not be necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite; and such instrument may be proved by admission or otherwise as if there had been no attesting witness thereto.

Comparison of handwriting.
*Ib. s.* 140.
17 & 18 Vict. c. 125 s. 27.
28 & 29 Vict. c. 18 s. 8.

**140.** Comparison of a disputed writing with any writing proved to the satisfaction of the court or person having by law or by consent of parties authority to hear receive and examine evidence to be genuine shall be permitted to be made by witnesses; and such writings and the evidence of witnesses respecting the same may be submitted to such court or person and the jury or assessors (if any) as evidence of the genuineness or otherwise of the writing in dispute.

Confession after promise or threat or purporting to be on oath.
*Ib. s.* 141.

**141.** No confession which is tendered in evidence shall be rejected on the ground that a promise or threat has been held out to the person confessing, unless the judge or other presiding officer is of opinion that the inducement was really calculated to cause an untrue admission of guilt to be made;(a) nor shall any confession which is tendered in evidence be rejected on the ground that it was made or purports to have been made on oath.

Penalty on witness neglecting to attend £10 and recompense to party grieved.
*Ib. s.* 142.
*Imperial Acts Application Act* 1922. Part II. Div. 25.
5 Elizabeth c. lx. s. 6.

**142.** Every person upon whom any process out of the Supreme Court is served to testify concerning any cause or matter pending in the said court and to whom there has been paid or tendered according to his calling such reasonable sum of money for his costs and charges as having regard to the distance between the places is necessary to be allowed in that behalf who without a lawful and reasonable excuse does not appear according to the tenor of the said process shall be liable to forfeit and pay the sum of Ten pounds and in addition to yield such further recompense to the party grieved according to the loss and hindrance which the party who procured the process sustained by reason of such non-appearance of the witness. Such several sums may be recovered in an action of debt in any court of competent jurisdiction.

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(a) Confessions and admissions of facts relevant to the issue of guilty or not guilty are admissible in evidence against the accused although they have been elicited by questions put to him, unless the judge be of the opinion that the mode by which they have been elicited was calculated to cause an untrue confession or admission to be made.—*Reg.* v. *Walker*, 13 V.L.R., 469; *Reg.* v. *Brown*, 13 V.L.R., 472; and see *R.* v. *Douthwaite*, A.R., 23 Nov., 1858; *R.* v. *Coates*, 2 V.L.T., 225.

A written statement made by an accused person in reference to a charge against him, and admitting the commission by him of a crime similar to that with which he is charged under almost identical circumstances, is admissible in evidence as rebutting the possible defence that under the circumstances it was impossible for the prisoner to have committed the crime with which he is charged without having been detected.—*R.* v. *Bechaz*, 20 A.L.T., 168.

In cases of homicide, a confessional statement of the prisoner, taken in connexion with the other facts of the case, may be sent to the jury.—*Reg.* v. *Waines*, A.R., 7th July, 1860.

The Full Court declined to interfere with the decision of the trial judge under this section as to the admissibility of a confession made by the accused to a constable.—*R.* v. *Kelly*, 1921 V.L.R., 489.

*Evidence Act 1915 s. 143. Abolition of extra-judicial oaths. 5 & 6 Will. IV. c. 62 s. 13.*

**143.** It shall not be lawful for any justice or other person to administer or cause or allow to be received any oath or affidavit touching any matter or thing whereof such justice or other person hath not jurisdiction or cognisance by or under some Statute Act or ordinance in force.(a) But nothing in this section shall be construed to extend to any oath solemn affirmation or affidavit before any justice in any matter or thing touching the preservation of the peace, or the prosecution trial or punishment of offences; or touching any inquiry held before any justice in the nature of coroners' inquests respecting sudden deaths; or touching any proceedings before the Legislative Council or Assembly or any committee thereof; nor to any oath or affidavit which may be required by the laws of any foreign or other country out of Victoria to give validity to instruments in writing designed to be used in foreign or other countries respectively.

## SCHEDULES.

### FIRST SCHEDULE.

Section 2.

PART I.

| Number of Act. | Title of Act. | Extent of Repeal. |
|---|---|---|
| 2647 ... ... | *Evidence Act* 1915 ... ... | The whole. |
| 3528 ... | *Evidence Act* 1927 ... ... ... | The whole. |

PART II.

| Act. | Extent of Repeal. |
|---|---|
| 5 Elizabeth c. ix. s. 6 ... | The whole Act so far as in force in Victoria and the reference thereto in the First Schedule and Part II. of the *Imperial Acts Application Act* 1922 (No. 3270). |

### SECOND SCHEDULE.

Section 12.

To the governor of the gaol at [*or as the case may be*] and to all members of the police force in the State of Victoria:

It is hereby ordered under the provisions of the *Evidence Act* 1928, that [*here insert name of prisoner*], a person now in your custody at [*here insert name of place of detention*], be brought before the [*here insert name of court, &c.*] at [*insert place where court, &c., is to be holden*] on the day of 19 then and there to testify what he knows concerning the matters then to be inquired of in the hearing of [*here specify name of cause or matter*], and the said [*here repeat name of prisoner*] is to remain in the custody of the officers local gaolers and members of the police force acting under this order until the said [*name of prisoner*] is in due course returned to the governor of the gaol at [*or as the case may be*].

Dated this day of

Signature and description of Judge, Chairman of a Court of General Sessions of the Peace [*or as the case may be*].

(a) A justice of the peace has under the Justices Act jurisdiction to administer an oath to a proposed surety for a person under arrest.—*R. v. Merrick*, 1916 V.L.R., 195.

Section 77.

THIRD SCHEDULE.

This is to certify that the matter above written [*or* printed *as the case may be*] contained on [two] sheets [*or* pages] of paper is a true copy of a [by-law] of "The ," and that we have informed ourselves of the legislative requirements necessary to the giving validity to such by-law and as to their observance and believe that such requirements have been fulfilled, and we further certify that such [by-law] came into force on the day of in the year of our Lord One thousand nine hundred and

Sealed in our presence(a) this day of in the year of our Lord One thousand nine hundred and (L.S.)

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Sections 98 & 100.

*Statute Law Revision Act* 1915 *s.* 2.

FOURTH SCHEDULE.

I A.B. of do solemnly and sincerely declare that &c. and I make this solemn declaration conscientiously believing the same to be true and by virtue of the provisions of an Act of the Parliament of Victoria rendering persons making a false declaration punishable for wilful and corrupt perjury.

(Signed) A.B.

Declared at this day of 19 before me,

C.D.,

A Justice of the Peace for the Bailiwick of the State of Victoria [*or as the case may be*].

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(a) The method of affixing the seal and of attesting thereto differs according as the by-law is a by-law of (i.) the Board of Land and Works; (ii.) a municipal corporation; (iii.) any other corporation. See section 77 and note thereto.

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# EXECUTION OF INSTRUMENTS.

[*See Transfer of Land Act* 1928.]

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# EXECUTION OF TRUSTS.

[*See Trustee Act* 1928.]

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# EXHIBITIONS.

[*See Exhibitions Act* 1890.]