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FOREWORD TO THE TWENTY-FIRST EDITION

There can be little doubt that Phipson on Evidence is the best book now in print in England on the extremely important and practical subject with which it deals. Thus wrote Cecil A. Wright in 1942 in The Canadian Bar Review (Vol XX, p. 716), when reviewing the 8th edition by Roland Burrows, 30 years after Sidney L. Phipson published the 1st edition in 1892.

In greeting the 21st edition, we can echo Professor Wright's words, with the additional observation that Phipson on Evidence is indispensable to practitioners and the judiciary beyond the shores of Britain, and copies prized in many law libraries around the Common Law world.

Hodge Malek K.C. and his team are to be congratulated on shouldering the two-some responsibility, once again, of keeping the iconic name of Phipson burning brightly, and relevantly. The flywheel of the law is turning ever more quickly in the evidence arena, as we grapple with the post-digital age. The 21st edition (only four years after the last edition) is most welcome.

The new edition deals with three significant decisions in particular:

The decision in *Jardine Strategic Ltd v Oasis Investments II Master Fund Ltd* (No 2) [2025] UKPC 34, in which the Privy Council held that the longstanding principle of English law that companies generally cannot claim legal advice privilege against their shareholders "forms no part of the law of Bermuda, and that it ought not to continue to be recognised in England and Wales."

The decision in *ICB v G* [2024] EWCOP 13, which considered the application of the correct test for the admissibility of similar fact evidence in Court of Protection proceedings.

The decision in *Laidley v Metropolitan Housing Trust Ltd* [2025] EWCA Civ 448, in which the Court of Appeal considered the scope and use of expert assessors, appointed to assist the Court pursuant to CPR r.31.15.

The proposition whether "to admit or not to admit" is often the question for the court. As Professor Wright said, if the courts are to continue to command respect and preserve the integrity for which the courts exist, there should be no policy of illegal appeals. It is a matter of so fundamental importance as evidence. He added courage, common sense and sanity enough to retain the proved values of the past, recognising the practical needs of the present are essential. Time will prove whether of the law it can be said it gave too little or too late."

With the 21st edition of Phipson on Evidence to hand, practitioners and judges can safely navigate the next few years.

The Rt Hon. Lord Justice Haddon-Cave, Former Senior Presiding Judge for England & Wales

15 October 2025

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**(d) Objectives of evidential rules**

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The two key objectives of the rules of evidence are fairness and ascertaining the truth through accurate fact finding.<sup>9</sup> Whilst other objectives can be added, these two predominate. Many of the rules are flexible in the sense that there is a judicial discretion involved as to whether a certain piece of evidence may be admitted, but in applying their discretion courts are guided by these key objectives. Some rules of evidence have no inbuilt discretion or qualification, such as the privilege against self-incrimination and legal professional privilege, for good policy reasons.

1-09

Whilst distinctions are to be made between criminal and civil cases, evidence is also important for other types of processes. Disciplinary and other tribunals consider evidence, but are not necessarily bound by the strict rules of evidence. This gives them some latitude, but not the right to simply ignore all the basic principles of evidence altogether. Elementary fairness requires both tribunals, and to a lesser extent administrative bodies and decision makers, to have regard to the principles of evidence. After all, decisions should be made on the basis of facts which have been accurately ascertained. The stringency of the requirements as to evidence will depend on what fairness demands, which in turn will depend upon the nature of the proceeding and decision.

**2. DEFINITIONS AND CLASSIFICATION****(a) Definitions**

1-10

Evidence, as used in judicial proceedings, has several meanings.<sup>10</sup> The two main senses of the word are: first, the means, apart from argument and inference, whereby the court is informed as to the issues of fact as ascertained by the pleadings; secondly, the subject-matter of such means. The word is also used to denote that some fact may be admitted as proof and also in some cases that some fact has relevance to the issues of fact. In a real sense evidence is that which may be placed before the court in order that it may decide the issues of fact. There are also other shades of meaning that it is not necessary to discuss here. (For example, it was held that "evidence" in the Inheritance (Family Provision) Act 1938 covers all the material that persons outside a court of law take into consideration when deciding how to act.<sup>12</sup>) Evidence, in the first sense, means the testimony, whether oral, documentary or real, which may be legally received in order to prove or disprove some fact in dispute. In the second sense it means the content of that testimony.

**(b) Facts**

1-11

No satisfactory definition of the term "fact" has been or perhaps can be given. Broadly it applies to whatever is the subject of perception or consciousness. But

juridically it has generally to be distinguished from *law*,<sup>13</sup> sometimes from *opinion*<sup>14</sup> and sometimes from *testimony* and *documents*. It is not always possible to apply these distinctions consistently.

**(c) Types of evidence**

1-12

The subject of evidence is not one which lends itself readily either to definitions or divisions. Few of its terms have acquired settled or unambiguous meanings, and no two writers adopt the same classification. The following divisions or distinctions, however, which are commonly observed in practice or by writers, comprise all that are really essential to be noted.

**(i) Direct and indirect evidence**

Direct evidence means that the existence of a given thing or fact is proved either by its actual production, or by the testimony or admissible declaration of someone who has himself perceived it. Indirect or presumptive evidence means that other facts are thus proved, from which the existence of the given fact may be logically inferred.<sup>15</sup> The two forms are equally admissible, and the testimony, whether to the *factum probandum* or the *facta probantia*, is equally direct; but the superiority of the former is that whilst it contains fallibility of assertion and perception as sources of error, the latter has, in addition, fallibility of inference. Little is to be gained from a comparison of their weight, since, save in the case of actual production,<sup>16</sup> both forms admit of every degree of cogency from the lowest to the highest.

**(ii) Real evidence**

Material objects other than documents, produced for inspection of the court, are commonly called real evidence. This, when available, is probably the most satisfactory kind of all, since, save for identification or explanation, neither testimony nor inference is relied upon. Unless its genuineness is in dispute,<sup>17</sup> the thing speaks for itself.

Unfortunately, however, the term "real evidence" is itself both indefinite and ambiguous, having been used in three divergent senses:

- (1) *Evidence from things as distinct from persons*
- (2) *Material objects produced for the inspection of the court* This is the second and most widely accepted meaning of "real evidence". It must be borne in mind that there is a distinction between a document used as a record of a transaction, such as a conveyance, and a document as a thing. It depends on the circumstances in which classification it falls. On a charge of stealing a document, for example, the document is a thing.
- (3) *Perception by the court (or its result) as distinct from the facts perceived* Although the physical production of objects is a valuable factor in juridi-

<sup>9</sup> See Ch.45 on fact finding and the assessment of evidence.

<sup>10</sup> *Dunne v Governor of Cloverhill Prison* [2008] IEHC 16, High Court of Ireland, citing this analysis on the various meanings of evidence (appeal dismissed: [2009] IESC 43).

<sup>11</sup> Section 55(1) of the Evidence Act 1995 (Cth) provides that: "The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding."

<sup>12</sup> *Vrindt, Vrindt v Swain, Re* [1940] Ch. 920.

<sup>13</sup> See paras 1-35 to 1-44.

<sup>14</sup> See Ch.33.

<sup>15</sup> On the drawing of inferences and indirect evidence, see *Easteye Ltd v Malhotra Property Investments Ltd* [2020] EWHC 2606 (Ch) at [140]-[143].

<sup>16</sup> See para.1-14, "(ii) Real evidence".

<sup>17</sup> See *Belt v Lawes, The Times*, 17 November 1882.

the power to grant the interim remedy of an order for the inspection of relevant property, as well as for the detention, custody and preservation of relevant property.<sup>29</sup> The inspection in this case is not by the court, but by the parties and their representatives. Where a party refuses to comply with an order, the court's usual sanctions may apply, including not only an adverse inference, but in extreme cases having the action dismissed or judgment entered against him as appropriate.<sup>30</sup> The power to order inspection is neither confined to the period after substantive proceedings have commenced, nor to property in the hands of the parties. Thus, before substantive proceedings have been launched, the court has the power to make an order providing for, inter alia, the inspection and photography of:

"property which appears to the Court to be property which may become the subject matter of subsequent proceedings in the [court], or as to which any question may arise in any such proceedings."<sup>31</sup>

The court also has the power under its inherent jurisdiction to order inspection of property under the search order (*Anton Piller*) jurisdiction.<sup>32</sup> The court has the statutory power to order the inspection of property neither belonging to nor in the possession of a party, which is the subject-matter of the proceedings or as to which any question arises in the proceedings.<sup>33</sup>

In arbitration, a power is given to arbitrators to give direction similar to those which may be ordered under CPR Pt 25 r.1, in relation to property.<sup>34</sup> This power may be exercised only in relation to property which is either the subject-matter of the reference or property as to which a question arises in the proceedings.<sup>35</sup> In addition, the power is limited to property which is owned by or is the possession of a party to the arbitration.<sup>36</sup> (The court has certain supplementary powers to achieve the same results where the matter is urgent or the arbitration powers are likely to be ineffective in practice.)<sup>37</sup>

Whilst the rules do not expressly provide for the inspection of property by the court,<sup>38</sup> there can be no doubt that the court has the power to inspect for the purposes of trial under the inherent jurisdiction. It not infrequently occurs in construction disputes that the judge and the parties view the property. In such cases, the view usually takes place after openings, but before the evidence is called. The matters viewed by the judge forms part of the evidence. Nothing said during the view to the judge has any evidential status, unless there has been an agreement or direction to that effect.<sup>39</sup>

Inspection has been defined as a substitution of the eye for the ear in the reception of evidence, and as a general rule is allowed whenever it is practicable and will

<sup>29</sup> CPR r.25.1(1)(c)(i) and (ii).

<sup>30</sup> *Charles Orford Ltd v Gonshaw Ltd* [1948] 2 All E.R. 229.

<sup>31</sup> Senior Courts Act 1981 s.33(1); County Courts Act 1984 s.52(1); CPR r.25.1(1)(i).

<sup>32</sup> CPR r.25.1(1)(h). Such orders can be highly intrusive and are not granted as a matter of course. Unless handled properly, serious complications can arise. See *Lock International Plc v Beswick* [1989] 1 W.L.R. 1268; [1989] 3 All E.R. 373; *TDB (Owen Holland) Ltd v Simons* [2020] EWCA Civ 1182; [2021] 1 W.L.R. 992.

<sup>33</sup> Senior Courts Act 1981 s.34(3); County Courts Act 1984 s.53(3)(a); CPR r.25.1(1)(j).

<sup>34</sup> Arbitration Act 1996 s.38(4).

<sup>35</sup> Arbitration Act 1996 s.38(4).

<sup>36</sup> Arbitration Act 1996 s.38(4).

<sup>37</sup> Arbitration Act 1996 s.44(2), (3), (5).

<sup>38</sup> The former rules specifically provided for this: RSC Ord.35 r.8.

<sup>39</sup> *Technology and Construction Court Guide*, (2022), para.15.8.

assist the tribunal in arriving at a decision. The practice dates back for some seven centuries to the old trials by inspection which were the appropriate means of determining certain questions, e.g. age, identity, the genuineness of records, mayhem, pregnancy, etc. At first some of these were tried by the court itself, but in doubtful cases reference was made to the jury, and gradually this became the usual rule.<sup>40</sup>

Valuable inferences are commonly derived through this channel from, e.g. the demeanour of witnesses under examination, the condition of premises in dispute in an action,<sup>41</sup> the appearance of the instruments used in committing a crime, or from verified models and plans. So, in an action for damages for the bite of a dog, the dog was produced in court so that the jury might judge of its disposition.<sup>42</sup> In cases of pirated trade marks or engravings, and the like,<sup>43</sup> direct comparison between the genuine and disputed specimens, made either by the tribunal itself or sometimes by witnesses and others out of court,<sup>44</sup> is not only allowable, but often a most efficacious test. In the inferior courts, questions of this nature are often decided upon a view by the court alone, without witnesses. In infringement and passing-off cases, mere comparison by the court has sometimes been held sufficient.<sup>45</sup> Lord Ashbourne once said: "I go on the evidence of my own eyes. Looking at the bottles and looking at the labels. I am unable to see any colourable imitation"; and Lord Macnaghten in the same case said: "The eye no doubt is the best test. Generally, but not always, the comparison is enough"<sup>46</sup>; but in *LGO v Lavell*<sup>47</sup> the court remarked that a view was not to be put in the place of evidence, but was to enable the tribunal to understand the questions raised and to follow and apply the evidence.<sup>48</sup> The Court of Criminal Appeal has held that juries should not be left to decide questions of disputed handwriting on their own, nor should they be asked to compare handwriting without the assistance of expert evidence.<sup>49</sup>

In criminal trials, the judge has an inherent jurisdiction to adjourn the court to enable the jury to view any place, premises, property or thing during the trial. Justices have a similar power to conduct a view themselves. In civil cases, judges were formerly empowered by RSC Ord.35 r.8 to "inspect any place or thing"; and this provision was construed as wide enough to justify an inspection of property outside the jurisdiction.<sup>50</sup> In a civil case tried with a jury, the judge who decides to hold a view might permit the jury to carry out the same inspection.<sup>51</sup> There does not appear to be a provision in the CPR corresponding to RSC Ord.35 r.8. It is submit-

<sup>40</sup> See, "Real evidence", para.1-14.

<sup>41</sup> *Penfold v Pearlberg* [1955] 1 W.L.R. 1068.

<sup>42</sup> *Line v Taylor* (1862) 3 F. & F. 731; cf. *Lewis v Hartley* (1835) 7 C. & P. 405.

<sup>43</sup> *Lucas v Williams* [1892] 2 Q.B. 113.

<sup>44</sup> *Lucas v Williams* [1892] 2 Q.B. 113; and cf. *Du Bost v Beresford* (1810) 2 Camp. 511.

<sup>45</sup> *Bourne v Swan* [1903] 1 Ch. 211, and cases cited; *Hennessy v Keating* [1908] 1 LR. 43 CA; 42 I.L.T.R. 169 HL; *Buckingham v Daily News Ltd* [1956] 2 Q.B. 534.

<sup>46</sup> *Hennessy v Keating* [1908] 1 I.R. 43 CA; 42 I.L.T.R. 169 HL.

<sup>47</sup> *LGO v Lavell* [1901] 1 Ch. 135 CA.

<sup>48</sup> cf. *Cole v United Dairies* [1941] 1 K.B. 100.

<sup>49</sup> *R. v Harvey* (1869) 11 Cox 546; *R. v Rickard* (1918) 12 Cr. App. R. 140; *R. v Day* (1940) 27 Cr. App. R. 168; *R. v Tilley* [1961] 1 W.L.R. 1309; *R. v Harden* [1936] 1 Q.B. 8; cf. Australian cases *Adami v R.* (1959) 108 C.L.R. 605; *Daley v R.* [1979] Tas. S.R. 75; *Grayden v R.* [1989] W.A.R. 208; *R. v Medina* (1990) 3 W.A.R. 21. As to expert evidence on handwriting, see para.33-91.

<sup>50</sup> *Tito v Waddell* [1975] 1 W.L.R. 1303 (where the property was about as far outside the jurisdiction as can be).

<sup>51</sup> RSC Ord.35 r.8(2). The wording of this sub-paragraph implied that there might be circumstances where the judge could conduct an inspection without the jury being permitted to do so. It is submit-

ted, however, that the inherent jurisdiction which, as mentioned earlier, is the foundation of the power to hold a view in a criminal case, must equally justify the continuation of the holding of views in civil cases. As this power is derived from the common law and not the CPR, there can be no objection to referring to earlier authorities in order to identify the principles on which the court will act.

The usual practice is that such a view should take place at some convenient time before the start of final speeches, although it has been held that a view is permissible even after the conclusion of the summing up.<sup>52</sup> The same rules apply to a view as to the reception of evidence in general; accordingly it is wrong to allow a view to take place after the jury have retired to consider their verdict.<sup>53</sup> For the same reason, the jury must not communicate with witnesses during a view, irrespective of the point in the trial at which it occurs; but the judge may, either of his own motion or at the request of counsel, ask witnesses to assist the court on relevant matters, such as the position in which they themselves or other persons or things had been at material times, provided that those witnesses are recalled to be cross-examined, if so required.<sup>54</sup> A view at which witnesses give demonstrations or answer questions is part of the trial and of the evidence in the case. It must therefore be held in the presence of the judge as well as the jury, and the absence of the judge will vitiate the trial.<sup>55</sup> A proper record of such evidence must be kept. That is a matter of decision so far as views where witnesses are present are concerned,<sup>56</sup> and the better opinion is that the same rule applies in cases where no witnesses are present.<sup>57</sup> One reason for this is that the judge has to sum up the evidence upon which the jury pass to reach their verdict; and it is thought that a view is evidence,<sup>58</sup> rather than merely material which assists in the understanding of the evidence.<sup>59</sup> A view must also take place in the presence of all members of the jury. When a question of the degree of illumination of a particular street arose, and the accused sought a view, the accused's subsequent conviction was quashed because the judge had instead directed that a juror living locally should investigate and report back to his fellow jurors.<sup>60</sup> The court said that this contravened the principle that the jury should remain together at all times when evidence is being received. So, suggesting to a jury that they might look at the locus in quo, if they thought it relevant on their way home, was held as fundamentally erroneous.<sup>61</sup> The fact-finding body must not participate in a reconstruction and go beyond the role of observer.<sup>62</sup>

It has been held that a trial judge, sitting alone, may have a private view, or "visit", without the parties being present.<sup>63</sup> Even though this decision was coupled with the requirement that the judge should inform the parties of his intention to take

ted that if this ever was a proper course, the repeal of the RSC has removed the foundation for such an unsatisfactory rule.

- <sup>52</sup> *R. v Martin and Webb* (1872) L.R. 1 C.C.R. 978. This must be an exceptional case.  
<sup>53</sup> *R. v Lawrence* [1968] 1 W.L.R. 341 CA; *R. v Nixon* [1968] 1 W.L.R. 577 CA.  
<sup>54</sup> *Karamat v R.* [1956] A.C. 256 PC; *Tameswar v R.* [1957] A.C. 476 PC; *Poole v R.* [1961] A.C. 223 PC.  
<sup>55</sup> *Tameswar v R.* [1957] A.C. 476 PC.  
<sup>56</sup> *R. v Hunter* [1985] 1 W.L.R. 613 CA.  
<sup>57</sup> *R. v Hunter* [1985] 1 W.L.R. 613 CA, disapproving dicta to the contrary effect in *Tameswar v R.* [1957] A.C. 476 PC.  
<sup>58</sup> See *Goold v Evans & Co* [1951] 2 T.L.R. 1189 CA at 1191, per Denning LJ.  
<sup>59</sup> *Goold v Evans & Co* [1951] 2 T.L.R. 1189 CA at 1192, per Hodson LJ.  
<sup>60</sup> *R. v Gurney* [1977] R.T.R. 211 CA.  
<sup>61</sup> *R. v Albarus and James* [1989] Crim. L.R. 905 CA.  
<sup>62</sup> *M v DPP* [2009] EWHC 752 (Admin); [2009] 2 Cr. App. R. 12 QBD.  
<sup>63</sup> *Salsbury v Woodland* [1970] 1 Q.B. 324 at 344.

this step,<sup>64</sup> the practice seems undesirable; and the authorities are inconsistent with its propriety.<sup>65</sup> It is clear that lay justices should not carry out a view or inspection without the parties being present.<sup>66</sup> It has been held also that a judge may insist on conducting an inspection, notwithstanding that all parties object.<sup>67</sup>

At a criminal trial the absence of the accused at a view (unless of his own choice or on the direction of the judge for good cause) is an irregularity which may, but does not necessarily, vitiate the trial.<sup>68</sup>

There is no restriction as to the county or area where a juror may be required to go for a view: see the Juries Act 1974 s.14.

## (b) Production

On charges of theft of movable objects, the stolen property, if found, is usually produced, unless it is of a perishable nature, or its exhibition would be inconvenient or offensive, or if the subject of an admission between the parties; but the production of "real" evidence is not compulsory.<sup>69</sup> Thus, on a charge of driving with excess alcohol in the blood, it is unnecessary to produce the Alcotest device used by the police, even if it becomes necessary to identify it.<sup>70</sup> Nor need the labelled bottle containing the urine sample taken for testing be put before the court.<sup>71</sup> Indeed, where the jury may be unduly affected or prejudiced by the production of the "real" evidence, or where production in itself cannot be informative, it may either be wholly refused,<sup>72</sup> or permitted only in conjunction with expert or other competent testimony, or subject to caution as to its dangers.<sup>73</sup> Thus, in an action for injury by a collision, Wright J refused, unless by consent, to allow the jury to view the injured limb in the absence of the doctor.<sup>74</sup>

## 4. LEX FORI

Unless otherwise provided by statute, questions of evidence are generally determined by the *lex fori* and not by the law governing the substantive issue

<sup>64</sup> *Salsbury v Woodland* [1970] 1 Q.B. 324 at 344.

<sup>65</sup> See para.1-23.

<sup>66</sup> *Parry v Boyle* (1986) 83 Cr. App. R. 310 DC.

<sup>67</sup> *Tito v Waddell* [1975] 1 W.L.R. 1313. Although this conclusion is at first sight surprising, it is consistent with the judge's power to call witnesses.

<sup>68</sup> *Poole v R.* [1961] A.C. 223; *Karamat v R.* 1956] A.C. 256 PC. See however, *Goold v Evans & Co.* when Denning LJ said that a view is part of the evidence, and that it is a fundamental principle that the evidence must be given in the presence of both parties. In *Karamat v R.*, the absent defendant's counsel was present at the view. It would seem that all parties must be present or at least represented at a view, except in the case of a criminal trial where a defendant has absconded and is not at the time of the view represented.

<sup>69</sup> *Hocking v Ahlquist* [1944] K.B. 120, where a number of cases were reviewed; *R. v Woods* (1922) 38 T.L.R. 493, where it was held that production of a genuine note was not essential on a charge of possessing paper resembling bank-note paper.

<sup>70</sup> *Miller v Howe* [1969] 3 All E.R. 451 DC. (See also *R. v Jones* (1969) 54 Cr. App. R. 63 CA, cited at para.3-03.) Such identification is necessary only if the defence makes it an issue in the case: *Cooper v Rowlands* [1971] R.T.R. 291 DC. The same principles doubtless apply to the equipment used under the legislation now in force.

<sup>71</sup> *R. v Orrell* [1972] R.T.R. 14 CA.

<sup>72</sup> *Rost v Brooklyn Heights R.R. Co* (1896) 41 N.Y. Supp. 1069; *Golden Co v Buxton* (1899) 97 Fed. Rep. 415.

<sup>73</sup> *R. v Pictou* (1804) 30 How. St. Tr. 457 at 480; *R. v Ings* 33 How. St. Tr. 1088.

<sup>74</sup> *Curtler v London Tramway Co, The Times*, 13 February 1891.

does not have to find the facts.<sup>91</sup> Where the trial is by judge alone, it is undesirable that even judges should have to perform the mental gymnastics involved in ruling evidence inadmissible and then trying to ignore it any further than is necessary.<sup>92</sup> In trials with juries, the fact that it is almost impossible to discuss questions of admissibility without revealing the nature of the evidence objected to has led to the practice whereby the jury normally retires during the argument. It has been held that where the point can be decided without the risk of their hearing the nature of the disputed evidence, the jury must be present, as where a judge examines a witness on the voir dire to decide whether he or she understands the nature of an oath or the duty to tell the truth.<sup>93</sup> It may be that the explanation for that decision is that the jury's view of the witness's answers to these questions would also be relevant to their assessment of his or her credibility in case the judge ruled in favour of competence. At all events, where a pure question of law is to be ruled on, the correct course is to exclude the jury, irrespective of whether or not there will be any undesirable revelations in the course of the argument.<sup>94</sup>

Where there are issues as to the admissibility of evidence in criminal proceedings, it may be an abuse of process to bring civil or constitutional relief proceedings with a view to the court ruling that certain evidence was unlawfully obtained and hence inadmissible in any criminal proceedings. In general, issues of admissibility should be dealt with by the judge in the criminal proceedings who can exclude such evidence.<sup>95</sup> Of course this does not preclude a person from bringing judicial review proceedings challenging the evidence gathering process, such as a warrant and the way it has been executed, by way of judicial review. Judicial review may be the most appropriate means to make such a challenge where there is no criminal prosecution on foot. However once criminal proceedings have started then the most appropriate route to challenge improperly obtained evidence may be before the criminal court which can exclude evidence, including through s.78 of PACE. To make applications for judicial review can be abuse if the effect is to delay or disrupt the criminal proceedings.

Where there is a Police and Criminal Evidence Act 1984 (PACE) s.78 challenge to the evidence of statements made by an accused, it is normally desirable in the interests of justice for the court to hear the evidence sought to be excluded and to have canvassed in questioning any circumstances which it is said would render its admission unfair. Where, on such an application in summary proceedings justices resolve to exclude it, they should consider, after seeking the views of the parties

<sup>91</sup> In summing up to the jury, a judge will often have to be careful not to put before them material of which he is aware and they are not; but it seems pointless to increase his difficulties in this respect. It is also unreasonable to expect a judge to exercise his discretion to be unaffected by inadmissible material put before him, however dutifully he tries to hold an open mind. Roskill LJ in giving the judgment of the court in *R. v Sang* [1980] A.C. 402 CA said that the Court of Appeal had often reiterated the proposition that the judge should hear the disputed evidence before ruling on it. But he cited no authority for this proposition, and we know of none. The point did not arise on the appeal to the House of Lords.

<sup>92</sup> *Savings & Investment Bank v Ciasco BV* [1984] 1 W.L.R. 271 at 278.

<sup>93</sup> *R. v Reynolds* [1950] 1 K.B. 606; but see *R. v Deakin* [1995] 1 Cr. App. R. 471 CA (criticised by Birch [1995] Crim. L.R. 413).

<sup>94</sup> *R. v Goldstein* [1982] 1 W.L.R. 804 CA. See further, Ch.11.

<sup>95</sup> *Brandt v Commissioner of Police* [2021] UKPC 12; [2021] 1 W.L.R. 3125; [2021] 2 Cr. App. R. 11 (claim for constitutional relief). This does not mean that such proceedings may not be brought where there is good reason to do so and no abuse is involved.

whether the substantive hearing should be conducted by a differently constituted bench.<sup>96</sup>

There is no obligation on the accused to insist that the jury be excluded from the court when the admissibility of evidence is challenged, even if that challenge could properly have been heard on the voir dire.<sup>97</sup> In *F (An infant) v Chief Constable of Kent*,<sup>98</sup> it was said that there was no such thing as a trial within a trial in proceedings before justices. The effect of s.76(2) of PACE has been to make the issue of whether or not a confession is voluntary one which must be decided in a trial within a trial, even in such cases.<sup>99</sup> The effect of holding a voir dire can be nullified, even in a trial by jury, by a defence counsel determined to have the issue of voluntariness explored for the first time in front of the jury.<sup>100</sup> Not every issue of admissibility justifies the holding of a trial within a trial, even in jury trials. It will rarely be appropriate, for example, in relation to the admissibility of evidence of identification obtained from an identification parade.<sup>101</sup> Where a judge has ruled evidence as being inadmissible, it occasionally happens that such evidence is put before the jury in error. In such a case the judge should consider whether or not to discharge the jury and seek the views of the parties. Where prejudicial material has been put before the jury, the test is whether a fair-minded and informed observer would conclude that there was a real possibility, or real danger, that the jury would be prejudiced against a defendant by wrongly admitted prejudicial information.<sup>102</sup> The test is whether or not to continue the trial would or could result in an unsafe conviction by reason of the unfairly prejudicial material.<sup>103</sup>

The incidence and desirability of the trial of preliminary issues by the judge alone in the absence of the jury is discussed at paras 11-01 et seq. It appears that a judge has power to disallow questions in cross-examination, which though not strictly inadmissible, are in his opinion unfair.<sup>104</sup> Questions as to the credibility and weight of evidence are questions of fact, and in general belong to the jury.<sup>105</sup> It has, however, been held in a civil case that, where testimony is entirely unimpeached, a judge may act on it without leaving its credit to the jury.<sup>106</sup> Under the head of admissibility fall such questions as whether a declaration is part of the *res gestae*; a fact sufficiently "similar" to show knowledge or system,<sup>107</sup> a communication privileged<sup>108</sup>; a confession voluntary<sup>109</sup>; a declarant in a pedigree case legitimately connected with the family<sup>110</sup>; the issues on a plea of *res judicata* identical<sup>111</sup>; a wit-

<sup>96</sup> *DPP v Lawrence* [2007] EWHC 2154 (Admin); [2008] 1 Cr. App. R. 10.

<sup>97</sup> *R. v Airey* [1985] Crim. L.R. 305 CA.

<sup>98</sup> *F (An infant) v Chief Constable of Kent* [1982] Crim. L.R. 682 DC.

<sup>99</sup> *R. v Liverpool Justices, Ex p. R* (1987) 86 Cr. App. R. 1 DC.

<sup>100</sup> *R. v Millard* [1987] Crim. L.R. 196, where it was said that the defence counsel could refrain from putting his case or cross-examining on the voir dire. This is very unsatisfactory if correct. It depends on the doubtful assumption that s.76(2) cannot be waived by the defence.

<sup>101</sup> *R. v Beveridge* (1987) 85 Cr. App. R. 255 CA; *R. v Flemming* (1987) 86 Cr. App. R. 32 CA.

<sup>102</sup> *R. v Lawson (Michael)* [2005] EWCA Crim 84; [2007] 1 Cr. App. R. 20 at [64]; *R. v Brown* [2006] EWCA Crim 827.

<sup>103</sup> *R. v Matthews* [2012] EWCA Crim. 1254.

<sup>104</sup> See *Stirland v DPP* [1944] A.C. 315 at 324.

<sup>105</sup> *Metropolitan Ry v Jackson* (1877) 3 App. Cas. 193.

<sup>106</sup> *Davis v Hardy* (1827) 6 B. & C. 225.

<sup>107</sup> See paras 19-03 et seq.

<sup>108</sup> See Chs 23-26.

<sup>109</sup> See Ch.36.

<sup>110</sup> See Ch.32.

ness competent,<sup>112</sup> privileged to refuse to answer,<sup>113</sup> so hostile as to allow cross-examination by the party calling him,<sup>114</sup> or sufficiently ill for his deposition to be read<sup>115</sup>; or a document duly executed, stamped or produced from proper custody or after sufficient search.

**Disputed facts** Moreover, where the question of admissibility depends on the proof of some preliminary but disputed fact, it must in general be decided by the judge alone, since as the jury are only sworn to try the issue, it is not practicable to take an interlocutory verdict, or receive evidence *de bene esse*, leaving it to be decided at the end of the case whether it should have been received or not<sup>116</sup>; and this is so, even where the given fact happens to be also in issue in the action and ultimately determinable by the jury (though Stephen, art.7, denies the judge's right in this case). Thus, in pedigree cases, the judge may decide to receive a declaration, though the relationship of the declarant is the very point in issue<sup>117</sup>; and, if a prima facie case is made out, he is not bound to hear evidence on the *voir dire* to rebut the fact<sup>118</sup>; and the same is said to apply to proof of handwriting, in order to admit entries in a register, and of agency in order to admit the declarations of the agent.<sup>119</sup> So, in an action of contract, where the defendant, on notice, produced a document which the plaintiff denied to be the contract, Byles J held the determination of this point to be for him, though, by consent, he took the opinion of a jury thereon as an interlocutory issue.<sup>120</sup> Where a plaintiff had denied, in chief, that the contract on which he sued was in *writing*, this was treated as a question for the judge on which evidence *contra* could, at the option of the defendant, be either at once interposed or postponed.<sup>121</sup> On the other hand, in an action on a policy, where the defendant, on notice to produce, denied the existence of any policy, the judge was held to have acted rightly in admitting the plaintiff's copy and leaving the question of the existence of an original to the jury, Bramwell B remarking that:

"where the objection to the copy concedes that there was primary evidence in existence, but defective in some collateral matter, e.g. as to the stamp, the judge must, before he admits the copy, hear and determine the objection. But where it goes to the very foundation of the action he should not decide the matter, but receive the copy and leave the main question to the jury."<sup>122</sup>

If a legal rule requires a fact to be proved, the law operates a binary system.<sup>123</sup> So where it is necessary to prove a fact for the purpose of a rule governing the admissibility of evidence, there are only two possibilities: either the evidence is admissible or it is not, which depends on whether the fact has been proved or not.

<sup>111</sup> See Ch.44.

<sup>112</sup> See Ch.9.

<sup>113</sup> See Ch.23.

<sup>114</sup> See Ch.12.

<sup>115</sup> See Ch.30.

<sup>116</sup> *Bennison v Jewison* (1848) 12 Jur. 485; *Bartlett v Smith* (1843) 11 M. & W. 483; *Lewis v Marshall* (1844) 7 M. & G. 743-744; *Cleave v Jones* (1852) 7 Ex. 421; *Boyle v Wiseman* (1855) 11 Ex. 360.

<sup>117</sup> *Doe d. Jenkins v Davies* (1847) 10 Q.B. 314; *Perton, Re* (1886) 53 L.T. 707 at 709.

<sup>118</sup> *Hitchins v Eardley* (1871) L.R. 2 P. & D. 248.

<sup>119</sup> *Doe d. Jenkins v Davies* (1847) 10 Q.B. 314.

<sup>120</sup> *Froude v Hobbs* (1859) 1 F. & F. 612.

<sup>121</sup> *Cox v Couveless* (1860) 2 F. & F. 139.

<sup>122</sup> *Stowe v Querner* (1870) L.R. 5 Ex. 155.

<sup>123</sup> *B (Children) (Care Proceedings; Standard of Proof) (CAFCASS intervening), Re* [2008] UKHL 35 [2009] A.C. 11 at [2] (Lord Hoffman).

There is no room for a finding that the fact might have happened. Not all legal rules require relevant facts to be proved in this binary way. The rules governing the assessment of the weight to be given to hearsay in civil proceedings does not as s.4(1) of the Civil Evidence Act 1995 requires the court to have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence, and such circumstances are not limited to facts which have been proved to the civil standard of proof.<sup>124</sup>

Evidence to prove or disprove facts of this nature should, however, in general, be interposed when the question arises, and not postponed.<sup>125</sup>

It was formerly thought that in deciding such questions, the judge was not confined to evidence which was admissible in law, but might rely on, for example, affidavit evidence.<sup>126</sup> It is thought that in the absence of agreement of the parties the courts would not today approach the question with such a degree of informality, certainly not in a criminal trial, and possibly not in a civil action tried with a jury.<sup>127</sup> Where the issue to be decided by the judge as a condition of admissibility is the very same as that which has to be decided by the jury, it is thought that all that is required is prima facie evidence of the fact relied on by the proponent of the evidence<sup>128</sup>; this is certainly the most convenient course. Where, however, the question of fact to be decided by the judge is different from the one which the jury has to decide (a distinction not always easy to identify), the matter must be fully proved in the ordinary way.<sup>129</sup> The standard of proof required of the proponent would appear to be that which is normal in the class of case being tried.<sup>130</sup>

Where the issues for judge and jury *are* the same, the judge's prima facie assessment is open to review on appeal.<sup>131</sup>

As to the inspection of a document by the judge to determine a claim for exclusion on the ground of public policy or privilege, see Chs 23-26.

In the usual case of a trial within a trial the issue raised is essentially one of admissibility. Only very rarely will a judge be justified in undertaking his own investigation into the weight of evidence, but this may arise where issues of admissibility and weight overlay each other. Such was the case in *R. v Ali and Hussain*.<sup>132</sup> Where an objection is taken which involves the hearing of evidence, as in the case of a confession alleged not to be voluntary, the decision of the judge to admit the evidence merely decides its admissibility. But it is essential that the judge should rule on the admissibility of the alleged confession, and that only when he has so ruled in favour of admissibility should the jury hear the evidence about it.<sup>133</sup> If the

<sup>124</sup> *Shagang Shipping Co Ltd v HNA Group Co Ltd* [2020] UKSC 34; [2020] 1 W.L.R. 3549 at [96].

<sup>125</sup> *Boyle v Wiseman* (1855) 11 Ex. 360; *Cox v Couveless* (1860) 2 F. & F. 139.

<sup>126</sup> *Knight v Campbell* (1848), per Pollock CB, cited Tay, s.517; *Duke of Beaufort v Crawshay* (1866) L.R. 1 C.P. 699.

<sup>127</sup> The actual decision in *Duke of Beaufort v Crawshay* (1866) L.R. 1 C.P. 699 need not be different, because the Civil Evidence Act 1995 could be invoked.

<sup>128</sup> *Hitchins v Eardley* (1871) L.R. 2 P. & D. 248; *Stowe v Querner* (1870) L.R. 5 Ex. 155; but cf. *Doe d. Jenkins v Davies* (1847) 10 Q.B. 314.

<sup>129</sup> *Boyle v Wiseman* (1855) 11 Ex. 360.

<sup>130</sup> *R. v Thompson* [1893] 2 Q.B. 12 (voluntariness of confession must be proved beyond reasonable doubt).

<sup>131</sup> *Cleave v Jones*, 7 Ex. 421.

<sup>132</sup> *R. v Ali and Hussain* [1966] 1 Q.B. 688.

<sup>133</sup> See para.36-15.

facts also affect the weight, they can be used as a basis for cross-examination intended to induce the jury to attach no importance to the evidence admitted.<sup>134</sup>

In the context of a civil trial, how and in what order questions concerning the admissibility and weight of evidence are dealt with, is very much a matter for the trial judge.<sup>135</sup> Where there is an issue whether important hearsay evidence is admissible, it is a logical but not mandatory approach to decide that issue first before going on, if the evidence is held to be admissible, to consider its weight and evidential impact on the substantive issues to be determined.<sup>136</sup> In many cases issues of admissibility can be dealt with by admitting the evidence *de bene esse*. Unless the evidence turns out to be critical to the issues to be reached, the issue of admissibility may never need to be determined.<sup>137</sup> Often, if not usually, the issue of admissibility may be straightforward and can be dealt with as and when it arises either before or during the course of the trial without any disruption to the process.

### (b) Production and effect

It is the duty of the judge to explain, and of the jury to observe, any legal rules which regulate the production or effect of evidence, e.g. which side has the burden of proof; what presumptions apply; when corroboration is required or ought to be given (in the latter case the judge must warn the jury against accepting uncorroborated evidence); when statements are evidence, and for what purpose and against whom; and when documents are conclusive or when merely *prima facie* evidence. The judge may also advise the jury to give more credence to oral evidence than to affidavits or witness statements, and to direct and positive testimony rather than to the speculative opinion of experts. This duty applies to each issue including damages.<sup>138</sup> Moreover, the judge may and should assist the jury with his advice when the testimony is conflicting. He may even state his view as to the general merits of the case. Thus, though he is not justified in directing that they *must* find the facts in a particular way, he may state his views, e.g. that a defendant's story is a remarkable one, or that it differs from other accounts he has given of the same matter.<sup>139</sup> So, in a murder trial, though inadvisable, it is not necessarily improper for him to suggest further theories of the cause of death than those presented by the prosecution or defence.<sup>140</sup> He ought not to go into matters on which there is no evidence and which cannot be inferred from the evidence.<sup>141</sup> Moreover, he should make it plain that they, and not he, are the judges of fact, and that they should disregard any views he may express unless they agree with them.<sup>142</sup>

<sup>134</sup> *R. v Murray* [1951] 1 K.B. 391.

<sup>135</sup> *Shagang Shipping Co Ltd v HNA Group Ltd* [2020] UKSC 34; [2020] 1 W.L.R. 3549.

<sup>136</sup> *Shagang* at [57].

<sup>137</sup> *Shagang* at [59].

<sup>138</sup> *Bey v Abdeni* [1951] 2 K.B. 405.

<sup>139</sup> *R. v O'Donnell* 12 Cr. App. R. 219.

<sup>140</sup> *R. v Smith* (1915) 84 L.J. K.B. 2153; *R. v Isaac* [1965] Crim. L.R. 174 CCA. However, before doing so, the judge should canvas this with the parties prior to the summing up.

<sup>141</sup> *Mancini v DPP* [1942] A.C. 1 at 12.

<sup>142</sup> *R. v Hulusi* (1974) 58 Cr. App. R. 378 at 382. This is reflected in the sample direction contained in *The Crown Court Compendium: Part I: Jury and Trial Management and Summing Up* (Judicial College, 2020), Ch.4.

### (c) Case for the jury

Whether or not there is evidence fit to be left to the jury at the close of the case for the prosecution<sup>143</sup> or plaintiff is a matter of law for the judge. The test to be applied is that set out by Lord Lane CJ, giving judgment in *R. v Galbraith*.<sup>144</sup> If there is no evidence that the crime alleged has been committed by the defendant, the judge must stop the case. If there is some evidence but it is of a tenuous character, then if the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, then it is the duty of the judge to accede to a submission of no case to answer and stop the case.<sup>145</sup> Where, however, the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury, and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury.<sup>146</sup> While Lord Lane CJ stated that issues of witness credibility should usually be left to the jury,<sup>147</sup> there may be exceptional cases where a prosecution depends on the evidence of a single witness whose evidence has been so completely undermined that any reasonable jury would be forced to find that the witness is untruthful. In such a case, and in the absence of any other evidence supporting the prosecution case, the judge should withdraw the case from the jury.<sup>148</sup> It has been held that where the defendant makes a submission of no case to answer following a case dependent upon circumstantial evidence, the judge ought to look at the case in the round and ask whether there is a case of which a jury properly directed could convict,<sup>149</sup> or infer guilt.<sup>150</sup> Where a key issue in the submission of no case is whether there is sufficient evidence on which a reasonable jury could be entitled to draw an adverse inference against, from a combination of factual circumstances based upon evidence adduced by the prosecution, the exercising of deciding that there is a case to answer does involve the rejection of all realistic possibilities consistent with innocence.<sup>151</sup>

The approach to be taken on an application to dismiss on the grounds of an abuse

<sup>143</sup> As to power to direct an acquittal prior to conclusion of Crown's evidence, see *R. v N Ltd* [2008] 1 W.L.R. 2684 CA.

<sup>144</sup> *R. v Galbraith* [1981] 1 W.L.R. 1039 CA.

<sup>145</sup> e.g. *R. v Michael Belau* [2004] EWCA Crim 2229, where the only evidence as to a particular crime was a defendant's own evidence of contact with the complainant, and such evidence did not go far to support the prosecution case, it was not material that could enable a jury properly to convict, and any conclusion to that effect would comprise an illegitimate process of reasoning.

<sup>146</sup> *R. v Michael Belau* [2004] EWCA Crim 2229 at 1042. Matters such as the reliability of evidence and resolution of disputed evidence are generally matters for the jury: *Haw Tua Tau v Public Prosecutor* [1982] A.C. 136 PC at 151.

<sup>147</sup> To similar effect see *Brooks v DPP* [1994] 1 A.C. 568 PC at 581.

<sup>148</sup> *R. v Shippey* [1988] Crim. L.P. 767.

<sup>149</sup> *R. v P* [2007] EWCA Crim 3216; [2008] 2 Cr. App. R. 6; see also *DPP (British Virgin Islands) v Varlack* [2008] UKPC 56; [2008] All E.R. (D) 71 (Dec), which considers the authorities on case for the jury where the case is based on the drawing of inferences.

<sup>150</sup> *R. v Sardar (Anis Abid)* [2016] EWCA Crim 1616; [2017] 1 W.L.R. 917; [2017] 1 Cr. App. R. 15 at [18]; *R. v SA* [2019] EWCA Crim 144; [2019] 4 W.L.R. 142; [2020] 1 Cr. App. R. 5 at [63]

<sup>151</sup> *R. v G.* [2012] EWCA Crim 1756 at [36].

of process (such as for delay) is quite separate from deciding whether there is no case to answer at the conclusion of the prosecution case.<sup>152</sup>

## 6. LAW AND FACT

1-35 Generally speaking, in jury trials matters of law are determinable by the judge and matters of fact by the jury; *ad quaestionem facti non respondent iudices, ad quaestionem juris non respondent juratores*.<sup>153</sup> In certain exceptional cases, however, matters of fact are determined by the judge; and incidentally, matters of law are often determined by the jury since, where their verdict is general, i.e. for plaintiff or defendant, or guilty or not guilty, it is compounded both of the facts and the law applicable thereto. But though they have a right to find such general verdicts, the jury may, if in doubt as to the law or its application, find the facts specially, leaving the court to pronounce judgment on the whole matter. In all events, the court may not leave a question of law to the jury.<sup>154</sup> There are no circumstances in which a judge is entitled to direct a jury to return a verdict of guilty.<sup>155</sup>

1-36 *Matter of law* in this connection, usually means some duty, or standard, which it is the province of the court to apply and enforce; and *matter of fact* means some issue of fact which is raised on the pleadings.<sup>156</sup> But this distinction is not always reliable.<sup>157</sup> Thus, in English courts, although the existence of English law is a question of law to be determined by authorities and argument, the existence of Scots, colonial or foreign law is treated as a question of fact to be determined by evidence; so that, in the Supreme Court or Privy Council, what was a question of fact in the court below, to be established by evidence, may become on appeal a question of law to be judicially noticed.<sup>158</sup> Again, what is "reasonable" is sometimes treated as a question of law and sometimes as one of fact. Indeed, the decision of the point often depends, not on any inherent distinction, but merely on the construction of some particular statute. In *British Launderers Association v Hendon Rating Authority*,<sup>159</sup> Denning LJ stated the distinction between law and fact in these words:

"Primary facts are facts which are observed by witnesses and proved by oral testimony or facts proved by the production of a thing itself, such as original documents. Their determination is essentially a question of fact for the tribunal of fact, and the only question of law that can arise on them is whether there was any evidence to support the finding. The conclusions from primary facts are, however, inferences deduced by a process of reasoning from them. If, and in so far as, those conclusions can as well be drawn by a layman (properly instructed on the law) as by a lawyer, they are conclusions of fact for the tribunal of fact: and the only questions of law that can arise on them are whether there was a proper direction in point of law; and whether the conclusion is one that could reasonably be drawn from the primary facts. If ..., and in so far ... as the correct conclusion to be drawn from the primary facts requires, for its correctness, determination by a trained lawyer, ... the conclusion is a conclusion of law."

<sup>152</sup> *R. v F.* [2011] EWCA Crim 1844.

<sup>153</sup> See *Mechanical and General Inventions Co Ltd v Austin* [1935] A.C. 346.

<sup>154</sup> *Ward v Chief Constable of West Midlands Police*, *The Times*, 15 December 1997 CA.

<sup>155</sup> *R. v Wang* [2005] UKHL 9; [2005] 1 W.L.R. 661; see also *R. v Jones (Iorwerth)* [2006] EWCA Crim 1611; [2007] 1 Cr. App. R. 13; *R. v Caley-Knowles* [2006] EWCA Crim 1611; [2006] 1 W.L.R. 3181.

<sup>156</sup> *Bartlett v Smith*, 11 M. & W. 483; *Bennison v Jewison* 12 Jur. 485.

<sup>157</sup> See Mureinik, "The Application of Rules: Law or Fact" (1982) 98 L.Q.R. 587.

<sup>158</sup> See para.3-07.

<sup>159</sup> *British Launderers Association v Hendon Rating Authority* [1949] 1 K.B. 462 at 471-472.

It may be doubted whether this was intended to be an exhaustive statement of the criteria which determine whether a question is one of law or of fact. In civil cases the objection that a given matter is for the judge or jury respectively should be raised at the trial, and is too late on appeal<sup>160</sup>; but in a criminal trial the judge has no power to draw inferences from the finding of the jury; and where the latter had stated in answer to the judge that they believed the evidence for the prosecution, and he thereupon entered a verdict of guilty, the conviction was quashed.<sup>161</sup>

### (a) Law

1-37 The following questions, inter alia, are deemed to be matters of law, and determinable by the judge; whether an article is so dangerous as to impose a special duty on the user<sup>162</sup>; whether a custom<sup>163</sup> or a covenant in restraint of trade<sup>164</sup> is reasonable; whether there is want of reasonable and probable cause<sup>165</sup>; whether, on a charge of perjury, the matter sworn to is "material",<sup>166</sup> or whether a particular game was unlawful.<sup>167</sup> The construction of documents, e.g. records, deeds, wills, or ordinary correspondence, is usually held to be matter of law and not of fact<sup>168</sup>; but in either case it is for the court and not the jury. Thus, it is for the judge to say whether a writing constitutes a sufficient acknowledgment under the Statutes of Limitation,<sup>169</sup> or whether a sum payable on a breach of contract is a penalty or liquidated damages.<sup>170</sup> Although the question of "parcel or no parcel" is for the jury, the judge must direct them as to any documents affecting that question.<sup>171</sup> It is for him, also, to construe a contract or a patent specification after the meaning of any peculiar terms, or the existence of the surrounding circumstances, if disputed, has been ascertained by the jury; it being the duty of the latter to take the construction from the court, either absolutely, if there be no such terms or circumstances to be ascertained, or conditionally, if there be such.<sup>172</sup> So, as to the construction of policies; although, if the question whether they cover particular goods depends on a latent ambiguity requiring resort to parol evidence, it is for the jury.<sup>173</sup> The construction of foreign contracts is for the judge, after proof of translation and of the local meaning of the terms,<sup>174</sup> as also is that of lost documents whose contents have been proved by secondary evidence.<sup>175</sup> The inspection of a record is likewise the peculiar

<sup>160</sup> *Maskelyne v Stollery* (1849) 16 T.L.R. 97 HL.

<sup>161</sup> *R. v Farnborough* [1895] 2 Q.B. 484.

<sup>162</sup> *Blacker v Lake* (1912) 106 L.T. 533.

<sup>163</sup> *Bradburn v Foley* (1878) 3 C.P.D. 129 at 131.

<sup>164</sup> *United Shoe Co v Brunet* [1909] A.C. 330 at 341.

<sup>165</sup> See para.1-42.

<sup>166</sup> Perjury Act 1911 s.1(6); cf. *R. v Baker* [1895] 1 Q.B. 797.

<sup>167</sup> *R. v Davies* [1897] 2 Q.B. 199.

<sup>168</sup> *Lyle v Richards* (1866) L.R. 1 H.L. 222 at 241; *Morrell v Frith* (1838) 3 M. & W. 402; *Hutchison v Bowker* (1839) 9 L.J. Ex. 240; see Ch.42.

<sup>169</sup> *Morrell v Frith* (1838) 3 M. & W. 402; *Routledge v Ramsay* (1838) 8 A. & E. 221.

<sup>170</sup> *Wilson v Love* [1896] 1 Q.B. 626 CA.

<sup>171</sup> *Lyle v Richards* (1866) L.R. 1 H.L. 222.

<sup>172</sup> *Neilson v Harford* (1841) 8 M. & W. 806; *Hitchin v Groom* (1848) 5 C.B. 515; *Bowes v Shand* (1877) 2 App. Cas. 455 at 462.

<sup>173</sup> *Hordern v Commercial Union* (1887) 56 L.T. 240.

<sup>174</sup> *Chatenay v Brazilian Co* [1891] 1 Q.B. 79; *Copin v Adamson* (1875) 31 L.T. 242 at 258; see Ch.33, as to foreign law, see paras 1-41 et seq.

<sup>175</sup> *Berwick v Horsfall* (1858) 4 C.B. N.S. 540.

province of the court<sup>176</sup>; e.g. where a judge considered that a certain word was "Mrs" (i.e. Mary), he excluded evidence that it was "Mrs", and refused to leave the question to the jury.<sup>177</sup> So, where the question was whether a deed was delivered as an escrow and the facts were contained in an accompanying letter, its construction was held for the judge alone.<sup>178</sup>

### (b) Construction of statutes

Although the construction of a statute or statutory instrument is a matter of law for the judge, the meaning of ordinary words used therein is not a matter of law unless the context shows that the words are used in an unusual sense. In that event the judge will determine that unusual meaning. This exceptional situation apart, the House of Lords held in *Brutus v Cozens*<sup>179</sup> that it is for the jury to consider as a fact whether in the whole circumstances the words of the statute do or do not apply to the facts proved as a matter of ordinary usage of the English language.

This general statement of principle must not, however, be read too widely<sup>180</sup>, and considerable inroads have been made into it since *Brutus v Cozens*<sup>181</sup> was decided.

First, a jury verdict may always be attacked on the ground of perversity; and it follows that a judge would not exceed his powers if he directed the jury not to adopt a meaning of a word used in a statute which could lead to a verdict which might be attacked on appeal on this ground.<sup>183</sup>

Secondly, it is thought that the principle in *Brutus v Cozens*<sup>184</sup> is primarily of relevance where the word to be construed is one which involves the application of the standards of the community which the jury personifies. Such concepts as "dishonesty" and "obscenity" fall into this category. In many other cases, however, uniformity is much more important than the impulses of a particular jury. Thus, decisions by justices (who for these purposes may be treated as analogous to juries) have been reversed on findings of fact as to what amounts to pitching a stall within the Highways Act 1980 ss.137(1), 148(c),<sup>185</sup> and as to whether a particular gun is an "antique firearm" within the Firearms Act 1968 s.58(2),<sup>186</sup> and a "firearm" within the Licensing Act 1872 s.12.<sup>187</sup> Similarly, it has been held that the meaning of the expression "structural alteration" is a question of law.<sup>188</sup>

Although, apart from the last, these cases may be explained on the basis of the rule that a finding contrary to the weight of the evidence is the sort of decision on

<sup>176</sup> *R. v Hucks* (1816) 1 Stark. 521.

<sup>177</sup> *Remon v Haywood* (1832) 2 A. & E. 666.

<sup>178</sup> *Furness v Meek* (1857) 27 L.J. Ex. 34; see Ch.42.

<sup>179</sup> *Brutus v Cozens* [1973] A.C. 854 HL at 861, per Lord Reid; applied in *R. v Feely* (1973) 57 Cr. App. R. 312 at 318. See para.1-41.

<sup>180</sup> In addition to the matters discussed here, certain other general considerations are offered in para.1-43.

<sup>181</sup> *Brutus v Cozens* [1973] A.C. 854 HL.

<sup>182</sup> D. W. Elliott, "Brutus v Cozens: Decline and Fall" [1989] Crim. L.R. 323.

<sup>183</sup> An acquittal could not be assailed on this ground. But it is not obvious that an accused should have the benefit of a perverse jury verdict in his favour any more than he should suffer from a perverse conviction.

<sup>184</sup> *Brutus v Cozens* [1973] A.C. 854 HL.

<sup>185</sup> *Waltham Forest BC v Mills* [1980] R.T.R. 201.

<sup>186</sup> *Bennett v Brown* (1980) 71 Cr. App. R. 109 DC. See also *Richards v Curwen* (1977) 65 Cr. App. R. 95 DC.

<sup>187</sup> *Seamark v Prouse* [1980] 1 W.L.R. 698.

<sup>188</sup> *Pearlman v Governors of Harrow School* [1979] Q.B. 56 CA.

a point of fact that an appellate court may review, it is submitted that the better view is that these questions of construction are all questions of law. The core of the meaning is a legal question, even though the penumbra may be within the discretion of the jury.<sup>189</sup> It is suggested that the difference between these cases and such cases as *Brutus v Cozens*<sup>190</sup> is that the expression to be construed in the latter was essentially a concept with varying content, dependent on subjective standards, whereas in the case of these other highly precise enactments, specific sets of facts are made to attract criminal penalties.<sup>191</sup>

Thirdly, even where trials are conducted by judges without juries, the distinction between fact and law is still important, because evidence of fact is not admissible to assist in the resolution of an issue of pure law. It is also probably true that appellate courts are less reluctant to reverse the reasoned finding of fact of a legal or other tribunal than the general verdict of a jury.<sup>192</sup> An example of this is *ACT Construction v Customs & Excise Commissioners*.<sup>193</sup> There, the issue was whether certain works were "building work" and thus zero-rated for VAT, or were "maintenance" so as to attract VAT at the full rate. It was held that the question was one of fact—but that that did not dispose of the matter. The Commissioners had offered a definition of "maintenance" before applying it to the circumstances. Their definition was held to be inadequate and their decision thus became open to review.<sup>194</sup> On the other hand, where a contract is wholly oral,<sup>195</sup> or partly oral and partly written,<sup>196</sup> or perhaps consists of a series of informal documents,<sup>197</sup> the question is for the jury. Where the question was whether the defendant had adopted the acceptance of a bill, the construction of a letter written by him, taken in connection with his subsequent conduct, was held to be for them.<sup>198</sup> In cases of libel, whether in civil or criminal proceedings,<sup>199</sup> written threats,<sup>200</sup> incitements,<sup>201</sup> or false

<sup>189</sup> A good example of the distinction is to be found in *Bennett v Brown* (1980) 71 Cr. App. R. 109 DC, where the justices held three guns to fall into the category of "antique firearms". The Divisional Court reversed their finding in two cases, but, and with reluctance and expressions of personal dissent, left the third finding untouched.

<sup>190</sup> *Brutus v Cozens* [1973] A.C. 854 HL.

<sup>191</sup> This is consistent with the approach of the courts to certain precise offences, where it was held that the meaning of "supply" (*R. v Maginnis* [1987] A.C. 303 HL), "administer" (*R. v Gillard* [1988] Crim. L.R. 531 CA) and "discharge" (*Flack v Baldry* [1988] 1 All E.R. 673 HL) are matters of law. On the other hand, the concept of "recklessness" which might be thought to be one of those with a variable content has also been treated as a matter of law: *R. v Caldwell* [1982] A.C. 341 HL.

<sup>192</sup> Hence, no doubt, the vulnerability of the decisions in *Goold v Evans & Co* [1951] 2 T.L.R. 1189 CA at 1191 and *R. v Gurney* [1977] R.T.R. 211 CA (at para.1-23), where magistrates were compelled to give reasons.

<sup>193</sup> *ACT Construction v Customs & Excise Commissioners* [1981] 1 W.L.R. 49 CA; [1981] 1 W.L.R. 1542 HL.

<sup>194</sup> If the Commissioners had not attempted a generalisation, their decision might well not have been impeachable. The whole area of judicial control, not only of administrative tribunals but also of inferior courts and of juries, is riddled with uncertainty because of the lack of necessity for the reasoning behind every finding of fact to be made explicit.

<sup>195</sup> *Maskelyne v Stollery* (1849) 16 T.L.R. 97 HL.

<sup>196</sup> *Bolckow v Symour* (1864) 17 C.B. N.S. 107; *Moore v Garwood* 4 Ex. 681.

<sup>197</sup> *Stoddard v Watchmakers' Alliance, The Times*, 14 December 1901 CA; *contra, Key v Cotesworth* (1852) 7 Ex. 595.

<sup>198</sup> *Wilkinson v Stoney* (1839) 1 Jebb. & Sym. 509.

<sup>199</sup> *Nevill v Fine Art Co* [1897] A.C. 68.

<sup>200</sup> *R. v Coady* (1882) 15 Cox 89.

<sup>201</sup> *R. v Fox* (1870) 19 W.R. 109.