AN EXPOSITION OF THE PRACTICE RELATIVE TO THE RIGHT TO BEGIN AND RIGHT TO REPLY IN TRIALS BY JURY, AND IN APPEALS AT QUARTER SESSIONS

Published @ 2017 Trieste Publishing Pty Ltd

ISBN 9780649506842

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Edited by Trieste Publishing Pty Ltd.
Cover @ 2017

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BY

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LONDON:
RICHARDS AND CO., LAW BOOKSELLERS,
194, FLEET STREET.
1837.

LONDON:
PRINTED BY C. ROWORTH AND SONS, BELL YARD,
TEMPLE BAR.

PREFACE.

If any apology be requisite for offering this treatise to the profession, it must be for the execution, and not for the design of it. Although the great practical importance of the subjects which it embraces is known to every professional man, there is, in point of fact, no work in existence which professes to treat of and explain them. In the able treatises on the Law of Evidence, by Messrs. Phillips and Starkie, they are but lightly touched on, and since the last editions of those authors, a number of most valuable cases have been decided which throw considerable light on the subjects of the Onus Probandi and the Right to begin; while this latter has been further most materially affected in some particular species of actions by a resolution entered into by the judges in July, 1833. With respect to the excel-

lent little works on evidence by the late Mr. Roscoe, not only does the first of the foregoing observations apply, namely, that many important decisions have been come to since the very latest editions of them; but it is to be remarked, that so far as the matters under consideration are concerned, they partake more of the nature of digests of cases than of regular and systematic treatises. Considering then the vast importance of the subjects in question, the absence of any work to illustrate them, and the neglect of others better qualified than himself to take the matter in hand, the author was induced to attempt this essay.

It consists of three chapters. The first treats of the Onus Probandi, or burden of proof generally; in which the principles by which it is regulated both when there is, and when there is not, a presumption of law in favour of the pleadings of one or both of the litigant parties, are explained and illustrated by select examples. And here it was the author's original intention to have entered fully into the important doctrine of Presumption, but finding that this would not only run to a

greater length than was consistent with the design of the work, but be in a great degree irrelevant to the object of illustrating the practice relative to the Right to begin, which is not at all affected by presumptions of *fact*; he deemed it more advisable to treat of the matter generally, and give some instances of the principal presumptions of *law*; by which alone that right is influenced.

The second chapter contains an exposition of the practice relative to the Right to begin, in trials by jury, both civil and criminal, and in appeals at Quarter Sessions. This part has been illustrated by a great majority (if not all) the cases to be found in the books on the subject; and as the decisions are by no means uniform, and recollecting the maxim—"judiciis posterioribus fides est adhibenda," it has been thought advisable, in most parts of the work, to give the date of each case, as well as the book from whence it is quoted.

The third chapter treats of the practice relative to the Right to reply in the three sorts of proceedings already mentioned.

The author is aware that about some of the points touched on in the course of this work considerable difference of opinion exists, while, not unfrequently, the advocates of the most opposite views are enabled to quote judicial authorities, and even regular decisions in their favour. When this has been the case, he has endeavoured fairly and impartially to give the arguments and authorities on both sides, and also the expression of his own opinion as to the side towards which the preponderance lies, in the confident hope that the conclusions to which he has thus arrived will be approved of by those in the profession who are best capable of judging and pronouncing upon them.

89, Chancery Lane,
July, 1837.

CONTENTS.

CHAPTER I.

OF THE ONUS PROBANDI.