

Of Written Proof.

SECTION 1.

1. Having treated of possession and witnesses, written proof is next propounded ; but a writing is of two descriptions, public and private. The nature of a public writing has already been explained ; a private writing is now treated of : this is of two descriptions,—prepared by the party himself, and prepared by others. That which is prepared by the party himself, requires no witnesses : that which is prepared by others, requires witnesses. The mode of proving these two depends on local and peculiar usages, as *Nāreda* has declared : “ Written evidence is declared to be of two sorts ; *the first*, in the handwriting of the party himself, which need not have subscribing witnesses ; and *the second*, in that of another person, which ought to be attested : the validity of both depends on the usage established in the country.”*

General definition of written proof.

2. Next is propounded the rule regarding a writing prepared by others : “ When any matter is mutually agreed upon voluntarily, a writing must be drawn out with respect to it, with the insertion [of the name] of the obligor, and duly attested.”† When any agreement is voluntarily entered into, or stipulation made mutually between the creditor and debtor, whether relating to gold or other *valuables*, then a writing must be executed, fixing the period of payment and the monthly rate of interest, for the purpose of establishing the fact on the expiration of such period ; and it must be attested by witnesses of the description already mentioned.

Rule respecting an instrument prepared by others.

* *Vivādatandava*, *Smritichandricā* and *Vyavahāramayūc'ha*.

† *Yājñyavalkya*, cited in the above authorities.

“With the insertion of the obligor,”—in which the obligor is mentioned, or in which the name of the obligor is mentioned in writing.

A contract may be binding without a writing.

3. Or else witnesses of the description before mentioned may be employed, as appears from the following text of the *Smṛiti*: “For the purpose of proving any act done by the party transacting it, witnesses may be relied upon in judicial proceedings. The act of a party may be good without a writing.”*

Distinguishing marks to be inserted in a writing.

4. Moreover, “The year, month, fortnight, day, name, tribe, family, scholastic title, the names of the parties’ fathers, &c., must be specified.”† *The year*,—twelvemonth. *The month*,—as Cheyt and the like. *The fortnight*,—the light or dark half of the month. *The day*,—the first or other day of the moon’s age. *The name*,—the name of the creditor and of the debtor. *The tribe*,—Brahminical or other. *The family*,—descended from *Vashistha* or other stock: with these, that is to say, with the year, &c., it must be distinguished; also with the *scholastic titles*, as the title of *Bukhobrichha* or *Kutha*, assigned as the mark of distinction for reading a portion of the *Vedas*. *The names of the parties’ fathers*,—that is, the names of the fathers of the creditor and debtor. By the term “&c.” is intended the nature of the subject-matter, the occupation [of the parties]. The meaning, connected with what went before,‡ is, that the writing should be distinguished by these characteristics.

The obligor should subscribe the writing.

5. An agreement having been executed, the debtor should sign his name with his own hand, and should add, “what is above written is agreed to by me the son of such a one.” A matter having been stipulated between the creditor and debtor, and the agreement having been determined and executed, the debtor, that is to say, the obligor, should subscribe his name with his own hand, and should

* *Vivádatandava*.

† *Yājñyavalkya*, cited in the *Smṛitichandrica*, and *Vyaváharamayūc’ha*, but uncertain in the *Vivádatandava*.

‡ Alluding to the text cited in verse 2.

moreover add or insert in the instrument, that what is above written is agreed to or approved by him the son of such a one.

6. "The witnesses also, being equal, should write with their own hands, specifying the names of their fathers, "I being such a one, am witness to this matter."* Those persons who are specified in the instrument as being witnesses should each, having specified his own and his father's name, individually write with his own hand, that he, such a one, *Devadutta* or the like, is a witness in the matter in question. Being equal, signifies equality in point of number and qualifications.

The witnesses also should subscribe.

7. If the debtor or the witnesses be ignorant of the art of writing, then the debtor and each of the witnesses by means of others, in presence of all the witnesses, must cause to be written their assent, as *Nāreda* has declared: "That debtor who is ignorant of the art of writing, shall cause to be written his assent; or if the witness is ignorant, by means of another witness, in presence of all the witnesses."† Moreover: "The scribe must enter this: being solicited by both parties, by me the son of such a one, this has been written."‡ The scribe, being solicited by both parties, that is to say, by the obligor and obligee, should write at the foot of the instrument: by me *Devadutta*, or other name, the son of *Vishnamitra*, or other name, the above has been written.

Rule to be observed where the parties and their witnesses are ignorant of the art of writing.

A writing prepared by the party himself is now treated of. "But every document, which is in the handwriting of the party himself, is considered as sufficient evidence even without witnesses, unless obtained by force or fraud."§ That instrument which has been executed by the obligor with his own hand, has been declared by *Menu* and other

Of a writing executed by the party himself.

* *Vivādatandava*.

† *Vivādatandava*.

‡ *Yājñyavalkya*, cited in the *Vivādatandava*, *Smritichandricā*, and *Vyavahāramayūc'ha*.

§ *Yājñyavalkya*, cited in the *Vivādashangārṇava*, *Vivādatandava*, *Smritichandricā*, and *Vyavahāramayūc'ha*.

sages to constitute proof without witnesses, provided it were not obtained by means of force and lesion.* By *force*,—violence. By *lesion*,—that which is effected under the influence of fraud, avarice, anger, fear, intoxication, &c.—provided it was not obtained by these means. *Nāreda* also has declared: “That writing is not proof, which is executed by a person intoxicated, by one under duress, by a female, by a minor, and that which is effected by force, and by intimidation, and lesion.”†

Mode in
which it should
be drawn out.

9. And a writing executed by the party himself, or by means of another, should specify whether it is accompanied or unaccompanied by a pledge, should be drawn out according to peculiar local usages, and should not be deficient with respect to the import and language. This is all that is requisite. It is not necessary that its conditions should be expressed in classical or provincial language; as *Nāreda* has said: “That which is not adverse to peculiar local usages, and declaratory of the nature of the transaction of a pledge. That instrument is termed proof, which is connected in import and language.”‡ *Transaction* signifies making; the *transaction of a pledge*, the making a pledge: its *nature*, whether a simple deposit, or usufructuary, or for a specified period. Declaratory,—*making manifest*. Such is the meaning of the terms: declaratory of the nature of the transaction of a pledge. *Connected in import and language*: the import and the language—the terms in which these are preserved in due order. By this is meant “connected in import and language.”§ Such a writing is proof. Here

* Compulsion by illegal d restraint of liberty, or by intimidation of threats and penance of bodily harm, is duress. It vitiates a contract or obligation extorted by its means,—*Colebrooke on Obligations and Contracts*, Part I, p. 235. Lesion, presumptive of imposition or oppression, is a ground of rescinding any contract, executory or executed.—*Ibid.*, p. 234.

† *Vivādatandava*, but *Hareeta* cited in the *Smritichandricā*.

‡ *Vivādatandava* and *Smritichandricā*.

§ It is not practicable to render a faithful translation of the original in this place, the disquisition being intended to exemplify the rule for forming the Sanscrit compound designated *Buhobrihi*

it is not requisite, as in the case of a public and royal instrument, that it should be expressed in classical language.

10. In treating of the instrument, it may be mentioned, that the debt specified therein should be discharged by three persons: "A debt specified in writing must be paid by three persons alone:"* as in the case of a debt contracted in the presence of witnesses, it must be paid by three persons, so in the case of a bonded debt, it must be paid by the obligor, his son, and grandson, but not by the fourth in descent, or those after him. This is ordained.

A bonded debt claimable from the son and grandson of the obligor.

11. Should it be objected, that a text has already declared universally: "By sons and grandsons, a debt must be discharged,"† by which it is already provided, that a debt must be paid by three persons, it is admitted: but the above text has been propounded to preclude the supposition, that in the case of bonded debts, there is, in another text, any exception to the precept. Thus, having treated of the nature of a bond, it has been declared by *Cātyāyana*: "Such contracted by the ancestors must be discharged after the lapse of time."‡ *Such* alludes to the bonded debts. The debts of the ancestors must be discharged by their representatives, even though a long time may have elapsed. Here by the use of the plural number "ancestors," and the mention of the lapse of time, it might be inferred that the debts must be discharged by the fourth in descent, and those after them. Moreover, the text of *Hareeta*, "He will obtain payment who holds a bond."§ Here also it might be inferred, from the general mention respecting the payment of the debt to any person holding a bond, that by the fourth in descent, and those after them, payment should be made. To obviate such a supposition, the above text has been properly recited. The two last-mentioned texts must be reconciled to the junction of *Yogeeshwara*.

Objection answered.

The text has been recited to exonerate the fourth in descent.

12. He states an exception: "A pledge may be enjoyed

Case in which the fourth and others in descent may adjust the debt.

* *Cātyāyana*, cited in the *Vivādatandava*.

† *Ratnācara*.

‡ *Vivādatandava*.

§ *Veeramitrodāya*.

until the debt is repaid."* This text has been recited, lest it should be supposed, from the number being limited to three, that in the case of a bonded debt accompanied by a pledge, he who is exempt from the payment is also not entitled to redeem the pledge; and it implies, that until the debt is discharged by the fourth or fifth in descent, the pledge may be enjoyed: it follows, that the fourth, or those after him in descent, are entitled to adjust a debt accompanied by a pledge. Should it be objected, that this exception is superfluous, from the occurrence of a former text, "An usufructuary pledge† is not forfeited,"‡ it is replied, that were it not for this exception, that text might be considered to extend to three persons only. All this is irrefragable.

A new instrument may be executed in certain cases, by the consent of the parties.

13. Having disposed of incidental topics, the original subject is now reverted to. "An instrument being in another country, or badly written, or destroyed, or effaced, or stolen, or torn, or burnt, or divided, he shall cause another to be executed."§ By this text it is directed, that he shall execute another when the *original* instrument is insufficient to prove the transaction; and its insufficiency to prove the transaction consists, as declared, in its being in another country, or in its being badly written, &c. *Badly written*, signifies, when the writing is bad, in consequence of the words or characters being written in a corrupt, equivocal, or unintelligible manner. *Destroyed*,—by lapse of time. *Effaced*,—in consequence of the ink having become pale, or by other means, when the writing is rubbed out. *Stolen*,—by thieves or others. *Torn*,—pulled to pieces. *Burnt*,—by fire. *Divided*,—split into two; and this holds good by the consent of the plaintiff and defendant.

Mode of proceeding when the parties object to the execution of a new instrument.

14. "But if they disagree, and the instrument be in a country remote from the scene of litigation, a period of time

* *Cātyāyana*, cited in the *Vivādatandava*.

† Cited in the Chapter on Pledges.

‡ A part of the last stanza of the above text.

§ *Yājñavalkya*, cited in the *Smritichandricā* but *Cātyāyana* in the *Vivādatandava*.

calculated with reference to the distance must be allowed for its production : or if the instrument be in a distant country, or destroyed, the case may be decided by having recourse to witnesses, as *Náreda* has declared : " In the case of an instrument being deposited in another country, or destroyed, or badly written, or stolen. Should it be in existence, time *must be allowed* : should it not be in existence, ocular evidence must be resorted to."* A period of time must be allowed for the purpose of producing an instrument which is in another country, in existence, and forthcoming. But should it not be in existence, and not forthcoming, the case must be decided by having recourse to the ocular evidence of such witnesses as have formerly seen it. But where there are no such witnesses, the decision must be according to a divine test ; as appears from the text, " Recourse must be had to a divine test, in a case where there is no writing or witnesses."†

15. And this relates to a private document ; the same rule is applicable to an official document, but there is this distinction : " In all cases, that is termed an official document, which is signed with the king's hand, and sealed with his seal in witness thereof."‡

What is termed an official document.

16. Another species of official document has been defined by *Vridhha Vasistha* : " That is termed a decree, which comprises the matter adduced to be proved, the answer, the pleadings, and the decision, sealed with the royal seal, and signed by the chief judge and others."§ The subject-matter being proved, he shall give the decree to the hands, that they, being sons of such and such persons, approve the judgment ; from the following text of *Menu* : " Those assessors who are there present, conversant in the holy texts, shall give their signature under their own

Of a favourable decree.

* *Vivádatandava* and *Vyavaháramayūc'ha*.

† *Vivádatandava*, but *Cátyáyana* cited in the *Vyavaháramayūc'ha*.

‡ *Vasistha*, cited in the *Vivádatandava*, but *Náreda*, in the *Smritichandricá*.

§ *Vivádatandava* and *Smritichandricá*.

hands, according to the rule for writings."* The case is not divested of embarrassment, unless all the assessors are unanimous, as *Náreda* has declared: "Where all the assessors are unanimous in opinion that [such a decision] is right, the case is divested of embarrassment; otherwise, it remains embarrassed."† This applies to a suit consisting of four divisions, from the text: "That which establishes the thing to be proved, which consists of four divisions, and which bears the royal seal, is termed a decree *pro*."‡

Of an unfavourable decree.

17. But where there is a loss [of the suit], "as in the five cases, One who contradicts, a prevaricator, one who does not attend, one who stands mute, and one who being summoned absconds;"§ in such cases there is not a favourable decree, but a decree *contra*. This is [awarded] for the purpose of adjudging amercement at a future period.|| But a decree *pro* is for the purpose of establishing a plea of former judgment. This is the distinction.

Mode of clearing up doubt from a contested document.

18. He next treats of the means of clearing up doubt from a document. "In a disputed case, the document must be proved by the handwriting of the party or the like, by reasonable inference, by evidence of the contract which the instrument records, by a peculiar mark, by connexion and dealings of the party, by the contents of the document, or by previous recourse to measures for recovery."¶ The ascertainment of the fact, whether a document is genuine or fabricated, may be by those who wrote it. The meaning is,

* Cited as the text of *Cátyáyana* in the *Veeramitrodāya* and *Smritichandricá*.

† *Vivádatandava*.

‡ *Vivádatandava*, but cited as the text of *Vrihaspati* in the *Smritichandricá*

§ *Vivádatandava*.

|| It was before laid down in Chap. ii, Sec. 1, §§ 8, that one who is non-suited is to be fined; but he does not therefore forfeit all claim to the subject-matter, and the text here merely means that a judgment of non-suit is to be recorded, with the view of amercing the party in default.

¶ Uncertain in the *Vivádatandava*, but *Yájnyawalkya* cited in the *Vivádashangárnava*, *Smritichandricá*, and *Vyavaháramayúc'ha*.

that a document may be proved by means of another document written by the same person, and if the writing assimilates, this is one method of [clearing up.] From the term "or the like" must be understood the comparison of the handwriting of the attesting witnesses and the scribe, by means of other documents. *Reconcilement* to means of probability, is the meaning of the term "*reasonable inference*;" reconcilement of the relation between the property, and the time, place, and persons, that at such a time, and in such a place, such a person is likely to have possessed so much property. This is what constitutes *reasonable inference*. *By evidence*, means, that of the attesting witnesses. *By a peculiar mark*, some distinguishing mark, such as *sri*, &c. *By connexion*,—that is, the former relation of money transactions between the parties on account of mutual winning party." The assessors also shall give it under their confidence; and by inference is also implied the consideration as to the probability of the receipt of so much property from such a person. These are the means, and the import is, that by these means doubt attaching to a document may be cleared up. But where the doubt as to a writing cannot be cleared up, there recourse must be had to witnesses for the purpose of decision, as *Cátyáyana* has declared: "Where a document is impugned, the claimant must adduce the witnesses named therein."* This text relates to a case where the witnesses are forthcoming. But where they are not forthcoming, the text of *Hareeta* applies: "Having impugned a document, by saying, This document was not executed by me, but has been fabricated by him, the decision must be by divine test."†

19. In answer to the question, what is to be done after the doubt has been cleared up, and payment caused to be made of the debt, if the debtor should not be able to discharge the whole debt, he replies: "The debtor, having paid by degrees, shall record [the payments] on the back of the document, and the creditor shall write with his own hand

Mode of proceeding where the debtor is unable to discharge the whole debt at once.

* *Vivádatandava*.

† *Vivádatandava*.

the amount of the receipts."* If the debtor is unable to discharge the whole amount of the debt, then, having paid by degrees, according to his ability, he shall record on the back of the original document, So much has been paid by me; or the creditor shall account, on the back of the original document, for the sums realized or received by him, and record that so much has been repaid to him. In what manner? By a record of his own hand, or under his own handwriting; or the creditor should give to the debtor a written receipt for what has been repaid, drawn up in his own handwriting.

What is to be done after the discharge of the debt.

20. He next proceeds to declare how the document should be disposed of, the whole debt being discharged. "Having discharged the whole debt, he should tear up the writing, or cause another to be executed for acquittance."† Having discharged the debt, whether by degrees or all at once, he should tear up the original writing. But if such writing be in an inaccessible country, or be destroyed, then, for acquittance or putting an end to the debtorship, the debtor should cause the creditor to execute another writing, and in like manner the creditor should give to the debtor a deed of acquittance. This is the meaning. He next declares what is to be done on the discharge of a debt attested by witnesses. "The repayment of an attested debt should be attested."‡ One should repay an attested debt in the presence of its former witnesses. Thus ends the Chapter of documentary evidence.

Those who witnessed the loan should witness repayment also.

* *Vivādatandava*.

† *Yājñyavalkya*, cited in the *Vivādatandava*.

‡ The last stanza of the above text.