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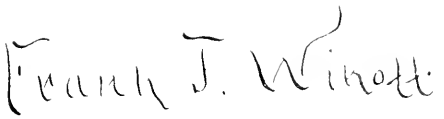
Frank J. Wilcott

A DIGEST

OF THE

LAW OF EVIDENCE

BY

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FOURTH ENGLISH EDITION

AMERICAN EDITION

WITH ANNOTATIONS AND REFERENCES TO AMERICAN CASES

BY

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EDITOR'S NOTE.

THE merits of "Stephen's Digest" are too well known to need repetition. It has been accepted in this country, as well as in England, as a standard treatise upon the subject of evidence. The editor has sought in this edition to increase its usefulness for American lawyers and students of law by fully annotating it, so as to exhibit the general principles of the American law of evidence in accordance with the latest and best decisions. The contents of the original work are preserved without change, except that, in a few instances, articles stating special provisions of English statutes have been transferred to the foot-notes or to the Appendix. These transfers are always clearly indicated wherever made. But no omissions have been made, and the editor's additions are always indicated by being enclosed between brackets. It will, therefore, be easy to distinguish between the original articles and notes and those of this edition. The extent of correspondence or difference between the English and the American law is thus made clearly manifest.

The American cases cited by the editor are considerably more numerous than the English citations of Mr. Stephen; this has seemed necessary in order that the book might satisfactorily exhibit the law of evidence for the different States and Territories, and thus be serviceable in all parts of the country.

A new and more complete index will be found in this edition.

G. C.

NEW YORK, October, 1885.

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PREFACE TO THE FOURTH EDITION.

I HAVE referred in this Edition to the cases decided and statutes passed since the publication of its predecessor and down to the end of March, 1881. The law has hardly been altered at all since the book was first published. Short as it is, I believe it will be found to contain practically the whole of the law on the subject. Many editions of it have been published in America.

J. STEPHEN.

32 DE VERE GARDENS,
May, 1881.

INTRODUCTION.

In the years 1870-1871 I drew what afterwards became the Indian Evidence Act (Act 1 of 1872). This Act began by repealing (with a few exceptions) the whole of the Law of Evidence then in force in India, and proceeded to re-enact it in the form of a code of 167 sections, which has been in operation in India since Sept. 1872. I am informed that it is generally understood, and has required little judicial commentary or exposition.

In the autumn of 1872 Lord Coleridge (then Attorney-General) employed me to draw a similar code for England. I did so in the course of the winter, and we settled it in frequent consultations. It was ready to be introduced early in the Session of 1873. Lord Coleridge made various attempts to bring it forward, but he could not succeed till the very last day of the Session. He said a few words on the subject on the 5th August, 1873, just before Parliament was prorogued. The Bill was thus never made public, though I believe it was ordered to be printed.

It was drawn on the model of the Indian Evidence Act, and contained a complete system of law upon the subject of Evidence.

The present work is founded upon this Bill, though it differs from it in various respects. Lord Coleridge's Bill proposed a variety of amendments of the existing law. These are omitted in the present work, which is intended to represent the existing law exactly as it stands. The Bill, of course, was in the ordinary form of an Act of Parliament. In the book I have allowed myself more freedom of expression, though I have spared no pains to make my statements precise and complete.

In December 1875, at the request of the Council of Legal Education, I undertook the duties of Professor of Common Law, at the Inns of Court, and I chose the Law of Evidence for the subject of my first course of lectures. It appeared to me that the draft Bill which I had prepared for Lord Coleridge supplied the materials for such a statement of the law as would enable students to obtain a precise and systematic acquaintance with it in a moderate space of time, and without a degree of labor disproportionate to its importance in relation to other branches of the law. No such work, so far as I know, exists; for all the existing books on the Law of Evidence are written on the usual model of English law-books, which, as a general rule, aim at being collections more or less complete of all the authorities upon a given subject, to which a judge would listen in an argument in court. Such works often become, under the hands of successive editors, the repositories of an extraordinary amount of research, but they seem to me to have the effect of making the attainment by direct study of a real knowledge of the law, or of any branch of it as a whole, almost impossible. The enormous mass of detail and illustration which they contain, and the habit into which their writers naturally fall, of introducing into them everything which has any sort of connection, however remote, with the main subject, make these books useless for purposes of study, though they may increase their utility as works of reference. The fifth edition of Mr. Taylor's work on Evidence contains 1797 royal 8vo pages. To judge from the table of cases, it must refer to about 9000 judicial decisions, and it cites nearly 750 Acts of Parliament. The 'Roscoe's Digest of the Law of Evidence on the Trial of Actions at Nisi Prius,' contains 1556 closely-printed pages. The table of cases cited consists of 77 pages, one of which contains the names of 152 cases, which would give a total of 11,704 cases referred to. There is, besides, a list of references to statutes which fills 21 pages more. 'Best's Principles of the Law of Evidence,' which disclaims the intention of adding to the number of practical works on the subject, and is said to be

intended to examine the principles on which the rules of evidence are founded, contains 908 pages, and refers to about 1400 cases. When we remember that the Law of Evidence forms only one branch of the Law of Procedure, and that the Substantive Law which regulates rights and duties ought to be treated independently of it, it becomes obvious that if a lawyer is to have anything better than a familiarity with indexes, he must gain his knowledge in some other way than from existing books. No doubt such knowledge is to be gained. Experience gives by degrees, in favorable cases, a comprehensive acquaintance with the principles of the law with which a practitioner is conversant. He gets to see that it is shorter and simpler than it looks, and to understand that the innumerable cases which at first sight appear to constitute the law, are really no more than illustrations of a comparatively small number of principles; but those who have gained knowledge of this kind have usually no opportunity to impart it to others. Moreover, they acquire it very slowly, and with needless labor themselves, and though knowledge so acquired is often specially vivid and well remembered, it is often fragmentary, and the possession of it not unfrequently renders those who have it sceptical as to the possibility, and even as to the expediency, of producing anything more systematic and complete.

The circumstances already mentioned led me to put into a systematic form such knowledge of the subject as I had acquired. This work is the result. The labor bestowed upon it has, I may say, been in an inverse ratio to its size.

My object in it has been to separate the subject of evidence from other branches of the law with which it has commonly been mixed up; to reduce it into a compact systematic form, distributed according to the natural division of the subject-matter; and to compress into precise definite rules, illustrated, when necessary, by examples, such cases and statutes as properly relate to the subject-matter so limited and arranged. I have attempted, in short, to make a digest of the law, which,

if it were thought desirable, might be used in the preparation of a code, and which, at all events, will, I hope, be useful, not only to professional students, but to every one who takes an intelligent interest in a part of the law of his country bearing directly on every kind of investigation into questions of fact, as well as on every branch of litigation.

The Law of Evidence is composed of two elements, namely, first, an enormous number of cases, almost all of which have been decided in the course of the last 100 or 150 years, and which have already been collected and classified in various ways by a succession of text writers, the most recent of whom I have already named; secondly, a comparatively small number of Acts of Parliament which have been passed in the course of the last thirty or forty years, and have effected a highly beneficial revolution in the law as it was when it attracted the denunciations of Bentham. Writers on the Law of Evidence usually refer to statutes by the hundred, but the Acts of Parliament which really relate to the subject are but few. A detailed account of this matter will be found at the end of the volume, in Note XLVIII.

The arrangement of the book is the same as that of the Indian Evidence Act, and is based upon the distinction between relevancy and proof, that is, between the question What facts may be proved? and the question How must a fact be proved assuming that proof of it may be given? The neglect of this distinction, which is concealed by the ambiguity of the word evidence (a word which sometimes means testimony and at other times relevancy) has thrown the whole subject into confusion, and has made what is really plain enough appear almost incomprehensible.

In my Introduction to the Indian Evidence Act published in 1872, and in speeches made in the Indian Legislative Council, I entered fully upon this matter. It will be sufficient here to notice shortly the principle on which the arrangement of the subject is based, and the manner in which the book has been arranged in consequence.

The great bulk of the Law of Evidence consists of negative rules declaring what, as the expression runs, is not evidence.

The doctrine that all facts in issue and relevant to the issue, and no others, may be proved, is the unexpressed principle which forms the centre of and gives unity to all these express negative rules. To me these rules always appeared to form a hopeless mass of confusion, which might be remembered by a great effort, but could not be understood as a whole, or reduced to system, until it occurred to me to ask the question, What is this evidence which you tell me hearsay is not? The expression "hearsay is not evidence" seemed to assume that I knew by the light of nature what evidence was, but I perceived at last that that was just what I did not know. I found that I was in the position of a person who, having never seen a cat, is instructed about them in this fashion: "Lions are not cats in our sense of the word, nor are tigers nor leopards, though you might be inclined to think they were." Show me a cat to begin with, and I at once understand both what is meant by saying that a lion is not a cat, and why it is possible to call him one. Tell me what evidence is, and I shall be able to understand why you say this and that class of facts are not evidence. The question "What is evidence?" gradually disclosed the ambiguity of the word. To describe a matter of fact as "evidence" in the sense of testimony is obviously nonsense. No one wants to be told that hearsay, whatever else it is, is not testimony. What then does the word mean? The only possible answer is: It means that the one fact either is or else is not considered by the person using the expression to furnish a premiss or part of a premiss from which the existence of the other is a necessary or probable inference—in other words, that the one fact is or is not relevant to the other. When the inquiry is pushed further, and the nature of relevancy has to be considered in itself, and apart from legal rules about it, we are led to inductive logic, which shows that judicial evidence is only one case of the general problem of science —namely, inferring the unknown from the known. As far as

the logical theory of the matter is concerned, this is an ultimate answer. The logical theory was cleared up by Mr. Mill. Bentham and some other[1] writers had more or less discussed the connection of logic with the rules of evidence. But I am not aware that it occurred to any one before I published my 'Introduction to the Indian Evidence Act' to point out in detail the very close resemblance which exists between Mr. Mill's theory and the existing state of the law.

The law has been worked out by degrees by many generations of judges who perceived more or less distinctly the principle on which it ought to be founded. The rules established by them no doubt treat as relevant some facts which cannot perhaps be said to be so. More frequently they treat as irrelevant facts which are really relevant, but exceptions excepted, all their rules are reducible to the principle that facts in issue or relevant to the issue, and no others, may be proved.

The following outline of the contents of this work will show how I have applied this principle in arranging it.

All law may be divided into Substantive Law, by which rights, duties, and liabilities are defined, and the Law of Procedure by which the Substantive Law is applied to particular cases.

The Law of Evidence is that part of the Law of Procedure which, with a view to ascertain individual rights and liabilities in particular cases, decides :

I. What facts may, and what may not be proved in such cases ;

II. What sort of evidence must be given of a fact which may be proved ;

III. By whom and in what manner the evidence must be produced by which any fact is to be proved.

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[1] See, *e.g.*, that able and interesting book 'An Essay on Circumstantial Evidence,' by the late Mr. Wills, father of Mr. Alfred Wills, Q.C. Chief Baron Gilbert's work on the Law of Evidence is founded on Locke's 'Essay,' much as my work is founded on Mill's 'Logic.'

I. The facts which may be proved are facts in issue, or facts relevant to the issue.

Facts in issue are those facts upon the existence of which the right or liability to be ascertained in the proceeding depends.

Facts relevant to the issue are facts from the existence of which inferences as to the existence of the facts in issue may be drawn.

A fact is relevant to another fact when the existence of the one can be shown to be the cause or one of the causes, or the effect or one of the effects, of the existence of the other, or when the existence of the one, either alone or together with other facts, renders the existence of the other highly probable, or improbable, according to the common course of events.

Four classes of facts, which in common life would usually be regarded as falling within this definition of relevancy, are excluded from it by the Law of Evidence except in certain cases:

1. Facts similar to, but not specifically connected with, each other. (*Res inter alios actæ.*)

2. The fact that a person not called as a witness has asserted the existence of any fact. (*Hearsay.*)

3. The fact that any person is of opinion that a fact exists. (*Opinion.*)

4. The fact that a person's character is such as to render conduct imputed to him probable or improbable. (*Character.*)

To each of those four exclusive rules there are, however, important exceptions, which are defined by the Law of Evidence.

II. As to the manner in which a fact in issue or relevant fact must be proved.

Some facts need not be proved at all, because the Court will take judicial notice of them, if they are relevant to the issue.

Every fact which requires proof must be proved either by oral or by documentary evidence.

Every fact, except (speaking generally) the contents of a document, must be proved by oral evidence. Oral evidence must in every case be direct, that is to say, it must consist of

an assertion by the person who gives it that he directly perceived the fact to the existence of which he testifies.

Documentary evidence is either primary or secondary. Primary evidence is the document itself produced in court for inspection.

Secondary evidence varies according to the nature of the document. In the case of private documents a copy of the document, or an oral account of its contents, is secondary evidence. In the case of some public documents, examined or certified copies, or exemplifications, must or may be produced in the absence of the documents themselves.

Whenever any public or private transaction has been reduced to a documentary form, the document in which it is recorded becomes exclusive evidence of that transaction, and its contents cannot, except in certain cases expressly defined, be varied by oral evidence, though secondary evidence may be given of the contents of the document.

III. As to the person by whom, and the manner in which the proof of a particular fact must be made.

When a fact is to be proved, evidence must be given of it by the person upon whom the burden of proving it is imposed, either by the nature of the issue or by any legal presumption, unless the fact is one which the party is estopped from proving by his own representations, or by his conduct, or by his relation to the opposite party.

The witnesses by whom a fact is to be proved must be competent. With very few exceptions, every one is now a competent witness in all cases. Competent witnesses, however, are not in all cases compelled or even permitted to testify.

The evidence must be given upon oath, or in certain excepted cases without oath. The witnesses must be first examined in chief, then cross-examined, and then re-examined. Their credit may be tested in certain ways, and the answers which they give to questions affecting their credit may be contradicted in certain cases and not in others.

This brief statement will show what I regard as constituting

the Law of Evidence properly so called. My view of it excludes many things which are often regarded as forming part of it. The principal subjects thus omitted are as follows:—

I regard the question, What may be proved under particular issues? (which many writers treat as part of the Law of Evidence) as belonging partly to the subject of pleading, and partly to each of the different branches into which the Substantive Law may be divided.

A is indicted for murder, and pleads Not Guilty. This plea puts in issue, amongst other things, the presence of any state of mind describable as malice aforethought, and all matters of justification or extenuation.

Starkie and Roscoe treat these subjects at full length, as supplying answers to the question, What can be proved under an issue of Not Guilty on an indictment for murder? Mr. Taylor does not go so far as this; but a great part of his book is based upon a similar principle of classification. Thus chapters i. and ii. of Part II. are rather a treatise on pleading than a treatise on evidence.

Again, I have dealt very shortly with the whole subject of presumptions. My reason is that they also appear to me to belong to different branches of the Substantive Law, and to be unintelligible, except in connection with them. Take for instance the presumption that every one knows the law. The real meaning of this is that, speaking generally, ignorance of the law is not taken as an excuse for breaking it. This rule cannot be properly appreciated if it is treated as a part of the Law of Evidence. It belongs to the Criminal Law. In the same way numerous presumptions as to rights of property (in particular easements and incorporeal hereditaments) belong not to the Law of Evidence but to the Law of Real Property. The only presumptions which, in my opinion, ought to find a place in the Law of Evidence, are those which relate to facts merely as facts, and apart from the particular rights which they constitute. Thus the rule, that a man not heard of for seven years is presumed to be dead, might be equally applicable

to a dispute as to the validity of a marriage, an action of ejectment by a reversioner against a tenant *pur auter vie*, the admissibility of a declaration against interest, and many other subjects. After careful consideration, I have put a few presumptions of this kind into a chapter on the subject, and have passed over the rest as belonging to different branches of the Substantive Law.

Practice, again, appears to me to differ in kind from the Law of Evidence. The rules which point out the manner in which the attendance of witnesses is to be procured, evidence is to be taken on commission, depositions are to be authenticated and forwarded to the proper officers, interrogatories are to be administered, &c., have little to do with the general principles which regulate the relevancy and proof of matters of fact. Their proper place would be found in codes of civil and criminal procedure. I have however noticed a few of the most important of these matters.

A similar remark applies to a great mass of provisions as to the proof of certain particulars. Under the head of "Public Documents," Mr. Taylor gives amongst other things a list of all, or most, of the statutory provisions which render certificates or certified copies admissible in particular cases.

To take an illustration at random, section 1458 begins thus: "The registration of medical practitioners under the Medical Act of 1858, may be proved by a copy of the 'Medical Register,' for the time being, purporting," &c. I do not wish for a moment to undervalue the practical utility of such information, or the industry displayed in collecting it; but such a provision as this appears to me to belong not to the Law of Evidence, but to the law relating to medical men. It is matter rather for an index or schedule than for a legal treatise, intended to be studied, understood, and borne in mind in practice.

On several other points the distinction between the Law of Evidence and other branches of the law is more difficult to trace. For instance, the law of estoppel, and the law relating to the interpretation of written instruments, both run into the

Law of Evidence. I have tried to draw the line by dealing in the case of estoppels with estoppels *in pais* only, to the exclusion of estoppels by deed and by matter of record, which must be pleaded as such ; and in regard to the law of written instruments by stating those rules only which seemed to me to bear directly on the question whether a document can be supplemented or explained by oral evidence.

The result is no doubt to make the statement of the law much shorter than is usual. I hope, however, that competent judges will find that, as far as it goes, the statement is both full and correct. As to brevity, I may say, in the words of Lord Mansfield :—"The law does not consist of particular cases, but of general principles which are illustrated and explained by those cases."[1]

Every one will express somewhat differently the principles which he draws from a number of illustrations, and this is one source of that quality of our law which those who dislike it describe as vagueness and uncertainty, and those who like it as elasticity. I dislike the quality in question, and I used to think that it would be an improvement if the law were once for all enacted in a distinct form by the Legislature, and were definitely altered from time to time as occasion required. For many years I did my utmost to get others to take the same view of the subject, but I am now convinced by experience that the unwillingness of the Legislature to undertake such an operation proceeds from a want of confidence in its power to deal with such subjects, which is neither unnatural nor unfounded. It would be as impossible to get in Parliament a really satisfactory discussion of a Bill codifying the Law of Evidence as to get a committee of the whole House to paint a picture. It would, I am equally well satisfied, be quite as difficult at present to get Parliament to delegate its powers to persons capable of exercising them properly. In the meantime the Courts can decide only upon cases as they actually oc-

[1] *R.* v. *Bembridge*, 3 Doug. 332.

cur, and generations may pass before a doubt is set at rest by a judicial decision expressly in point. Hence, if anything considerable is to be done towards the reduction of the law to a system, it must, at present at least, be done by private writers.

Legislation proper is under favorable conditions the best way of making the law, but if that is not to be had, indirect legislation, the influence on the law of judges and legal writers who deduce, from a mass of precedents, such principles and rules as appear to them to be suggested by the great bulk of the authorities, and to be in themselves rational and convenient, is very much better than none at all. It has, indeed, special advantages, which this is not the place to insist upon. I do not think the law can be in a less creditable condition than that of an enormous mass of isolated decisions, and statutes assuming unstated principles; cases and statutes alike being accessible only by elaborate indexes. I insist upon this because I am well aware of the prejudice which exists against all attempts to state the law simply, and of the rooted belief which exists in the minds of many lawyers that all general propositions of law must be misleading, and delusive, and that law books are useless except as indexes. An ancient maxim says "*Omnis definitio in jure periculosa.*" Lord Coke wrote, "It is ever good to rely upon the books at large; for many times *compendia sunt dispendia*, and *Melius est petere fontes quam sectari rivulos.*" Mr. Smith chose this expression as the motto of his 'Leading Cases,' and the sentiment which it embodies has exercised immense influence over our law. It has not perhaps been sufficiently observed that when Coke wrote, the "books at large," namely the 'Year Books' and a very few more modern reports, contained probably about as much matter as two, or at most three, years of the reports published by the Council of Law Reporting; and that the *compendia* (such books, say, as Fitzherbert's 'Abridgment') were merely abridgments of the cases in the 'Year Books' classified in the roughest possible manner, and much inferior

both in extent and arrangement to such a book as Fisher's 'Digest.'[1]

In our own days it appears to me that the true *fontes* are not to be found in reported cases, but in the rules and principles which such cases imply, and that the cases themselves are the *rivuli*, the following of which is a *dispendium*. My attempt in this work has been emphatically *petere fontes*, to reduce an important branch of the law to the form of a connected system of intelligible rules and principles.

Should the undertaking be favorably received by the profession and the public, I hope to apply the same process to some other branches of the law; for the more I study and practise it, the more firmly am I convinced of the excellence of its substance and the defects of its form. Our earlier writers, from Coke to Blackstone, fell into the error of asserting the excellence of its substance in an exaggerated strain, whilst they showed much insensibility to defects, both of substance and form, which in their time were grievous and glaring. Bentham seems to me in many points to have fallen into the converse error. He was too keen and bitter a critic to recognise the substantial merits of the system which he attacked; and it is obvious to me that he had not that mastery of the law itself which is unattainable by mere theoretical study, even if the student is, as Bentham certainly was, a man of talent, approaching closely to genius.

During the last twenty-five years Bentham's influence has to some extent declined, partly because some of his books are like exploded shells, buried under the ruins which they have made, and partly because under the influence of some of the

[1] Since the beginning of 1865 the Council has published eighty-six volumes of Reports. The Year Books from 1307-1535, 228 years, would fill not more than twenty-five such volumes. There are also ten volumes of Statutes since 1865 (May 1876). There are now (Feb. 1877) at least ninety-three volumes of Reports and eleven volumes of Statutes. I have not counted the exact number in existence in 1881, but the ninety-three volumes must have grown to 120 or more.

most distinguished of living authors, great attention has been directed to legal history, and in particular to the study of Roman Law. It would be difficult to exaggerate the value of these studies, but their nature and use is liable to be misunderstood. The history of the Roman Law no doubt throws great light on the history of our own law; and the comparison of the two great bodies of law, under one or the other of which the laws of the civilised world may be classified, cannot fail to be instructive; but the history of bygone institutions is valuable mainly because it enables us to understand, and so to improve existing institutions. It would be a complete mistake to suppose either that the Roman Law is in substance wiser than our own, or that in point of arrangement and method the Institutes and the Digest are anything but warnings. The pseudo-philosophy of the Institutes, and the confusion of the Digest, are, to my mind, infinitely more objectionable than the absence of arrangement and of all general theories, good or bad, which distinguish the Law of England.

However this may be, I trust the present work will show that the law of England on the subject to which it refers is full of sagacity and practical experience, and is capable of being thrown into a form at once plain, short, and systematic.

I wish in conclusion, to direct attention to the manner in which I have dealt with such parts of the Statute Law as are embodied in this work. I have given, not the very words of the enactments referred to, but what I understand to be their effect, though in doing so I have deviated as little as possible from the actual words employed. I have done this in order to make it easier to study the subject as a whole. Every Act of Parliament which relates to the Law of Evidence assumes the existence of the unwritten law. It cannot, therefore, be fully understood, nor can its relation to other parts of the law be appreciated, till the unwritten law has been written down so that the provisions of particular statutes may take their places as parts of it. When this is done, the Statute Law itself admits of, and even requires, very great abridgment. In many cases

the result of a number of separate enactments may be stated in a line or two. For instance, the old Common Law as to the incompetency of certain classes of witnesses was removed by parts of six different Acts of Parliament—the net result of which is given in five short articles (106–110).

So, too, the doctrine of incompetency for peculiar or defective religious belief has been removed by many different enactments the effect of which is shown in one article (123).

The various enactments relating to documentary evidence (see chap x.) appear to me to become easy to follow and to appreciate when they are put in their proper places in a general scheme of the law, and arranged according to their subject-matter. By rejecting every part of an Act of Parliament except the actual operative words which constitute its addition to the law, and by setting it (so to speak) in a definite statement of the unwritten law of which it assumes the existence, it is possible to combine brevity with substantial accuracy and fulness of statement to an extent which would surprise those who are acquainted with Acts of Parliament only as they stand in the Statute Book.[1] At the same time I should warn any one who may use this book for the purposes of actual practice in or out of court, that he would do well to refer to the very words of the statutes embodied in it. It is very possible that, in stating their effect instead of their actual words, I may have given in some particulars a mistaken view of their meaning.

Such are the means by which I have endeavored to make a statement of the Law of Evidence which will enable not only students of law, but I hope any intelligent person who cares enough about the subject to study attentively what I have written, to obtain from it a knowledge of that subject at once comprehensive and exact—a knowledge which would enable

[1] Twenty articles of this work represent all that is material in the ten Acts of Parliament, containing sixty-six sections, which have been passed on the subject to which it refers. For the detailed proof of this, see Note XLVIII.

him to follow in an intelligent manner the proceedings of Courts of Justice, and which would enable him to study cases and use text-books of the common kind with readiness and ease. I do not say more than this. I have not attempted to follow the matter out into its minute ramifications, and I have avoided reference to what after all are little more than matters of curiosity. I think, however, that any one who makes himself thoroughly acquainted with the contents of this book, will know fully and accurately all the leading principles and rules of evidence which occur in actual practice.

If I am entitled to generalise at all from my own experience, I think that even those who are already well acquainted with the subject will find that they understand the relations of its different parts, and therefore the parts themselves more completely than they otherwise would, by being enabled to take them in at one view, and to consider them in their relation to each other.

TABLE OF CASES CITED.

A

	PAGE
Abbath *v.* Railway Co.	177
Abbott *v.* People	14
" *v.* Rose	160
Abeel *v.* Van Gelder	42
Abercrombie *v.* Sheldon	23
Abington *v.* Duxbury	184
Abouloff *v.* Oppenheimer, 100,	262
Acklen's Exer. *v.* Hickman. 68,	239
Adae *v.* Zangs	238, 239
Adair *v.* England	160
Adams *v.* Davidson	43
" *v.* Greenwich Ins. Co.	234
" *v.* H. & St. J. R. Co	7
" *v.* Lloyd	206
" *v.* Merritt	219
" *v.* O'Connor	133
" *v.* People	15, 101
" *v.* Pittsburg Ins. Co.	13, 213
" *v.* Porter	207
" *v.* Wheeler	230
Adee *v.* Howe	47
Adie *v.* Clark	168
A. G. *v.* Bryant	200
A. G. *v.* Hitchcock	227, 228
Agan *v.* Hey	199
Agricultural Ins. Co. *v.* Keeler	48
Ahern *v.* Goodspeed	49
Aikin *v.* Martin	140, 221
Akers *v.* Demond	219
Alabama, etc. R. Co. *v.* Hawk.	7
Albert *v.* Nor. Central R. Co.	27

	PAGE
Alden *v.* Goddard	203
Alderson *v.* Bell	119
Aldous *v.* Cornwell	158, 160
Alexander *v.* Cauldwell	45
" *v.* Chamberlain	75
" *v.* Comm	14
Alger *v.* Andrews	43
Alison *v.* Comm	61
Alivon *v.* Furnival	137
Allan *v.* Dundas	85
Allen *v.* Furbish	163
" *v.* Killinger	51
" *v.* Pink	166
" *v.* Sowerby	163
Alley *v.* Nott	87
Allgood *v.* Blake	268
Alner *v.* George	256
Alpin *v.* Morton	31
Alston *v.* State	58
Alter *v.* Berghaus	64
American Bible Soc. *v.* Pratt	168
American Life Ins. Co. *v.* Rosenagle	74, 76, 104, 136, 143
American Nat. Bk. *v.* Bushey	119
Amer. Underwriters' Ass'n *v.* George	130
Ames *v.* Colburn	160
Amherst Bk. *v.* Root	109
Amidon *v.* Hosley	233
Amoskeag Co. *v.* Head	5
Anderson *v.* Edwards	64
" *v.* Rome, etc. R. Co.	45

PAGE
Anderson *v.* State..... 58
" *v.* Weston 154
Andrews *v.* Ætna Ins. Co..... 188
" *v.* Knox Co..... 124
" *v.* Ohio, etc. R. Co... 208
" *v.* Townshend 207
Angell *v.* Duke 166
Angle *v.* Life Ins. Co.....157, 160
Angus *v.* Dalton.....185, 186
Annesly *v.* Anglesea..... 205
Anon..... 208
Anonymous..... 217
Anthony *v.* Harrison.....154, 162
Appel *v.* Byers..... ... 171
Appleton *v.* Braybrook..... 266
Armour *v.* Mich. Cent. R. Co. 193
Armoury *v.* Delamirie..... ... 180
Arms *v.* Middleton..... 63
Armstrong *v.* People..... 211
" *v.* U. S.....80, 121
Arnd *v.* Amling..... 195
Arthur *v.* James 52
Artz *v.* Railroad Co..... 230
Ashcraft *v.* Chapman..... 121
Ashland *v.* Marlborough 32
Atchison, etc. R. Co. *v.* Stanford..27, 222
" " " *v.* Thul. 128
Atlantic Ins. Co. *v.* Fitzpatrick. 219
Atwell *v.* Miller..... 141
Atwood *v.* Dearborn..... 234
" *v.* Impson..... 233
Audubon *v.* Excelsior Ins. Co.. 87
Augusta *v.* Winslow..... 63
Aurora *v.* Brown..... 26
" *v.* Cobb..... 223
Austin *v.* Holland.....37, 188, 189
" *v.* State..... 223
" *v.* Thompson 240
Aveson *v.* Lord Kinniard..... 32
Ayers *v.* Hewett..... 133
" *v.* Weed..... 169

B

PAGE
Babcock *v.* Babcock 224
Baccigalupo *v.* Comm..... 179
Baccio *v.* People..... 17
Bacon *v.* Chesney..... 50
" *v.* Frisbie 202
Bagley *v.* McMickle 136
Bailey *v.* Bidwell..... 133
" *v.* Corliss..... 48
" *v.* Danforth..... 68
" *v.* Johnson..... 137
" *v.* Kalamazoo Pub'g Co. 123
" *v.* Woods..... 78
Baird *v.* Daly..... 28
" *v.* Gillett..... 22
" *v.* U. S. 86
Baker *v.* Fehr.....176, 177
" *v.* Gansin 7
" *v.* Mygatt..... 119
" *v.* Pike.....139, 140
" *v.* Stackpole 46
Balbo *v.* People..... 55
Baldwin *v.* Bricker..... 83
" *v.* Dow..... 162
Bales *v.* State 82
Balliett *v.* Fink 133
Ballinger *v.* Davis 131
Baltimore *v.* State..... 123
B. & O. R. Co. *v.* Campbell... 48
Banfield *v.* Whipple 14
Bank *v.* Fordyce..... 170
" *v.* Kennedy..... 165
Bank of Brighton *v.* Smith 48
Bank of Hindustan, Alison's Case 88
Bank of Ireland *v.* Evans..... 272
Bank of Monroe *v.* Culver..... 64
Bank of Owego *v.* Babcock.... 94
Bank of U. S. *v.* Dandridge... 36
Bank of Utica *v.* Hillard 208
" " *v.* Mersereau... 203
Bannon *v.* People..... 98

	PAGE
Barber *v.* Merriam	32
Barker *v.* Bininger	41
" *v.* Blount	221
" *v.* Cleveland	87
" *v.* Haskell	65
" *v.* Kuhn	205
Barnard *v.* Campbell	189
" *v.* Kellogg	164
Barnes *v.* Harris	204
Barnett *v.* Abbott	162
Barnum *v.* Barnum....75, 111,	219
Baron de Bode's Case	103
Barrett *v.* Long	30
Barrows *v.* Downs	104
Barrs *v.* Jackson	88
Barry *v.* Ryan	130
Bartholomew *v.* Farwell	64
Bartlett *v.* Boston Gas Co	93
" *v.* Tarbox	52
Barton *v.* Dawes	165
" *v.* Kane	141
Batdorff *v.* Farmers' Nat. Bk..	226
Bateman *v.* Bailey	18
Bates *v.* Barber	234
" *v.* Spooner	86
Bathriek *v.* Detroit Post Co....	115
Battles *v.* Laudenslager	115
Bauer *v.* Indianapolis	26
Bauerman *v.* Radenius	256
Baughman *v.* Baughman	101
Baulec *v.* N. Y., etc. R. Co.. 26,	34
Baxendale *v.* Bennett	190
Baxter *v.* Abbott	38
" *v.* New Eng. Ins. Co...	91
Bayliss *v.* A. G.	171
" *v.* Cockcroft	127
Beal *v.* Nichols	221
Beall *v.* Pearre	92
Beaman *v.* Russell	159
Bean *v.* Green	198
Beatson *v.* Skene	200
Beattie *v.* Hilliard	137
Beckwith *v.* Phalen	187
Bedford (Duke of) *v.* Lopes...	12
Beeston's Case	79
Beggarly *v.* State	55
Behrens *v.* Germania Ins. Co..	176
Belfast Bank *v.* Harriman	160
Bell *v.* Kennedy	160
" *v.* McGuiness	176
" *v.* Morrison	46
Bellefontaine, etc. R. Co. *v.* Bailey	105
Benedict *v.* Cowden	157
Benjamin *v.* Smith	41
Bennett *v.* Clemence	102
" *v.* Edwards	218
Benson *v.* Lundy	43
" *v.* Titcomb	181
Benstine *v.* State	236
Bergen *v.* State	77
Berkeley Peerage Case.....75,	260
Berney *v.* Mitchell	77
Berry *v.* Raddin.....12,	156
Berryhill *v.* Kirchner	110
Best *v.* Hammond	168
Bethlehem *v.* Watertown	88
Bickford *v.* Cooper	86
Biddle *v.* Bond	192
Biesching *v.* St. Louis Gas Co.	181
Bigelow *v.* Foss	41
" *v.* Gillott	159
" *v.* Hall	238
" *v.* Stilphens	158
Bigler *v.* Reyher	205
Bigley *v.* Williams	6
Binck *v.* Wood	89
Bird *v.* Bird	136
" *v.* Comm	118
" *v.* Hueston	67
Birmingham *v.* Anderson	71
Birt *v.* Barlow	111
Bischoff *v.* Wetherel	100
Bissell *v.* Adams	46

PAGE

Bissell *v.* Campbell.....13, 213
" *v.* Cornell..... 234
" *v.* Hamblin..... 80
" *v.* Kellogg..... 93
" *v.* Saxton..... 48
" *v.* Starr..... 226
" *v.* West..... 102
Black *v.* Bachelder..... 161
" *v.* Lamb..... 46
" *v.* Woodrow..... 78
Blackburn *v.* Crawfords..66, 75, 203
" *v.* State..... 53
Blackett *v.* Royal Exchange Co. 170
Blackington *v.* Johnson..... 221
" *v.* Rockland..... 128
Blaeser *v.* Milwaukee Ins. Co. 176
Blair *v.* Bartlett..... 89
" *v.* Blair..... 92
" *v.* Ellsworth..... 78
" *v.* Pelham..... 128
" *v.* Seaver..... 195
Blaisdell *v.* Pray..... 98
Blake *v.* Albion Life Assurance Soc.....35, 37
" *v.* People..... 127
" *v.* Sawin..... 132
Blanchard *v.* Hodgkins..... 18
" *v.* Steamboat Co... 26
Bleecker *v.* Johnston..... 220
Bliss *v.* Brainerd..... 181
" *v.* Nichols..... 40
Board of Trustees *v.* Nusenheimer..... 108
Boardman *v.* Woodman....38, 115
Bob *v.* State..... 53
Bock *v.* Weigant..... 229
Bodman *v.* Amer. Tract Soc... 169
Bogardus *v.* Trinity Church..12, 81
Boggs *v.* Taylor..... 168
Bogle's Exers. *v.* Kreitzer..... 233
Bond *v.* Fitzpatrick.....43, 44
" *v.* State..... 179

PAGE

Bond's Appeal..... 168
Bonelli, Goods of..... 105
Bonesteel *v.* Lynde...140, 141, 207
Bonney *v.* Morrill..... 163
Bonynge *v.* Field..... 26
Boomer *v.* Laine..... 199
Booth *v.* Cleveland Mill Co.... 107
" *v.* Powers.....157, 160
" *v.* Robinson..... 162
Boree *v.* Danville..... 181
Borst *v.* Empire..... 130
Borum *v.* Fonts..... 204
Boston *v.* Richardson...12, 156, 250
" *v.* Worthington..... 94
Boston, etc. Co. *v.* Hanlon...72, 82
B. & A. R. Co. *v.* Shanly..... 177
B. & W. R. Co. *v.* Dana..... 138
Boswell *v.* State..... 179
Bosworth *v.* Vandewalker..... 98
Bottomley *v.* U. S..... 28
Bouldin *v.* Alexander..... 85
Bound *v.* Lathrop..... 46
Bourne *v.* Buffington..... 140
Bowen *v.* Chase..... 42
Bower *v.* Hoffman..... 165
Bowling *v.* Hax..... 132
Bowyer *v.* Schofield..... 92
Boyce *v.* Cheshire R. Co..... 27
Boylan *v.* Meeker..... 38
Boyle *v.* State..... 82
Boynton *v.* Boynton..... 141
Boyse *v.* Rossborough..... 21
Brachmann *v.* Hall..... 109
Brackett *v.* Barney..... 163
Bradford *v.* Randall..... 155
Bradley *v.* James..... 68
" *v.* Mirick.....78, 79, 222
Bradshaw *v.* Combs..... 163
Bradstreet *v.* Rich..... 163
Brague *v.* Lord..... 194
Brain *v.* Preece..... 66
Brainard *v.* Fowler..... 149

	PAGE
Brake *v.* Kimball	49
Brandt *v.* Klein	136
Branson *v.* Caruthers	199
Brassington *v.* Brassington	207
Brawley *v.* U. S	168
Breton *v.* Cope	131
Brewster *v.* Doane	64
Brick *v.* Brick	164
Bridgeport Ins. Co. *v.* Wilson	95
Bridgewater *v.* Plymouth	201
Brierly *v.* Miles	27
Briggs *v.* Briggs	206
" *v.* Rafferty	64
" *v.* Smith	199
Brigham *v.* Palmer	132
Bright *v.* Young	133
Bristow *v.* Sequeville	105
Brittain *v.* Kinniard	97
Britton *v.* Lorenz	204
Broad *v.* Pitt	276
Brobston *v.* Cahill	110
Brodhead *v.* Wiltsee	82
Brogy *v.* Comm.	77
Brolley *v.* Lapham	155
Bronner *v.* Frauenthal	20
" *v.* Loomis	110
Bronson *v.* Gleason	122
Brooks *v.* Goss	42
Brotherton *v.* Brotherton	218
" *v.* People	61
Brough *v.* Lord Scarsdale	13
Brower *v.* Callender	43
" *v.* Bowers	171
Brown, *Ex parte*	140, 208
Brown *v.* Barnes	30
" *v.* Brown	170
" *v.* Cambridge	173
" *v.* Campbell	234
" *v.* Cole	201
" *v.* Comm. 16, 25, 60, 77,	258
" *v.* Evans	115
" *v.* Everhard	164
Brown *v.* Foster	205
" *v.* Gallaudet	87
" *v.* Jewett	203
" *v.* Kimball	131
" *v.* Littlefield	139
" *v.* Mailler	41, 50
" *v.* Mooers	234
" *v.* Piper	120
" *v.* Powell Co.	192
Browne *v.* Schofield	122
Brownell *v.* Palmer	187
Brubaker's Adm'r *v.* Taylor	230
Bruce *v.* Nicolopulo	137
" *v.* Priest	115
" *v.* Westcott	160
Brunsden *v.* Humphrey	86
Bryan *v.* Forsyth	151
Bryce *v.* Lorillard Ins. Co.	165, 169
Buffum *v.* Ramsdell	98
Bull *v.* Loveland	207, 210
Bullard *v.* Creditors	176
" *v.* Pearsall	231
Bunnell *v.* Butler	234
Burdick *v.* Hunt	202
" *v.* Norwich	93
Burger *v.* Farmers' Ins. Co.	164
Burgess *v.* Langley	201
Burgwin *v.* Bishop	158
Burke *v.* Miltenberger	121
Burlen *v.* Shannon	85, 93, 96
Burnell *v.* Weld	147
Burnett *v.* Smith	87
Burney *v.* Russell	137
Burnham *v.* Allen	178
" *v.* Brennan	43
" *v.* Dorr	162, 173
" *v.* Roberts	203
" *v.* Morrissey	207
Burns *v.* State	60
" *v.* Thompson	173
Burress' Case	110
Burt *v.* Panjaud	180

	PAGE
Burt *v.* Place	85
" *v.* Saxton	164
" *v.* State	17
" *v.* Winona, etc. R. Co.	118
Burton *v.* Driggs	137, 138, 142
Bush *v.* Comm	195
" *v.* Stowell	46
Bussom *v.* Forsyth	76
Buswell *v.* Lincks	19
Butler *v.* Gale	170
" *v.* Millett	41
" *v.* Moore	275
" *v.* St. Louis Ins. Co.	66
" *v.* Watkins	28
Button *v.* Amer. Tract Soc.	169
Buxton *v.* Edwards	46
" *v.* Somerset Works	103
Byass *v.* Sullivan	207

C

Caddy *v.* Barlow	85
Caermarthen R. C. *v.* Manchester R. C.	50
Cagger *v.* Lansing	12, 86
Cahen v. Continental Ins. Co.	136
Cahill *v.* Palmer	156
Caldwell *v.* Murphy	32
" *v.* Sigourney	46
Calkins *v.* Hartford	26
Call *v.* Dunning	132
Callender *v.* Callender	52
Calvert *v.* Flower	240
" *v.* Friebus	199
Calypso, The	95
Camerlin *v.* Palmer Co.	51
Cameron *v.* Blackman	118, 238
" *v.* Peck	138
Cames *v.* Crandall	75
Campan *v.* Dubois	52
Campbell *v.* Chace	198
Campbell *v.* Comm	211
" *v.* Hall	90
" *v.* Johnston	140
" *v.* Patterson	213
" *v.* People	14
" *v.* Rankin	86
Canal Co. *v.* Ray	164
" *v.* Templeton	121
Cancemi *v.* People	113
Carey *v.* Bright	170
" *v.* White	204
Carland *v.* Bieme	136
" *v.* Cunningham	142
Carlton *v.* Hescox	26
Carnes *v.* Platt	205
" *v.* White	50
Carpenter *v.* Cohoes	82
" *v.* Dame	138
" *v.* Dexter	118
" *v.* Eastern Trans. Co.	105
" *v.* G. T. R. Co.	104
" *v.* Welden	47
Carr *v.* Dooley	166
" *v.* Gale	240
" *v.* L. & N. W. Railway	272
" *v.* Moore	26
Carroll *v.* Carroll	96
" *v.* M. & R. R. Corp.	188
" *v.* Peake	128
" *v.* Sprague	203
Carson's Appeal	131
Carter *v.* Boehm	103
" *v.* Carter	235
" *v.* Fishing Co.	185
" *v.* Montgomery	75
" *v.* State	194
" *v.* Thurston	102
Cartwright *v.* Green	209
Case *v.* Marks	115
Casoni *v.* Jerome	160
Cass *v.* B. & L. R. Co.	34

	PAGE
Cassady *v.* Trustees	77
Castner *v.* Sliker	7, 101
Castrique *v.* Imrie	90, 95, 99, 103, 262
Catherwood *v.* Caslon	111
Cattison *v.* Cattison	19
Caujollé *v.* Ferrié	75, 88
Caulkins *v.* Whisler	189
Cavanaugh *v.* Austin	30
" *v.* Smith	98
Caw *v.* Robertson	131
Caylus *v.* N. Y., etc. R. Co.	90
Central Bank *v.* Allen	141
Central Bridge Corp. *v.* Butler	178
Chadsey *v.* Green	51
Chadwick *v.* Fonner	42
" *v.* U. S.	141
Chaffee *v.* Taylor	108
" *v.* U. S.	63, 64, 66
Chamberlain *v.* Ball	145
" *v.* Enfield	34
" *v.* Hugnenot Co.	135
" *v.* People	184
" *v.* Sands	238
" *v.* State	84
" *v.* Vance	30
Chamberlin *v.* Ossipee	237
Chambers *v.* Bernasconi	66
" *v.* Hunt	219
" *v.* People	196
" *v.* State	226
" *v.* Watson	168
Champlin *v.* Stoddart	207
Chandler *v.* Jamaica, etc. Corporation	26
" *v.* Le Barron	110
Chapin *v.* Dobson	166
Chapman, *In re*	203
Chapman *v.* Chapman	75
" *v.* Edwards	42
" *v.* Rodgers	131
" *v.* Rose	189
" *v.* Twitchell	51, 72
Chapman *v.* Wilber	112
Chapman Township *v.* Herrold	165
Charles *v.* Huber	159
Charlton *v.* Coombes	203
Charter *v.* Charter	268
Chase *v.* People	179
" *v.* Smith	67
" *v.* Springvale Mills Co.	77, 78
" *v.* Sycamore, etc. Ins. Co	81
" *v.* Winans	101
Chasemore *v.* Richards	186
Chatfield *v.* Wilson	186
Cheeney *v.* Arnold	132
Chelmsford Co. *v.* Demarest	48
Chenango Bridge Co. *v.* Lewis	63
" " " *v.* Paige.	66
Cherry *v.* Baker	119
" *v.* State	74
Chicago, etc. R. Co. *v.* Adler	227
" " " *v.* Clark	34
" " " *v.* Klauber.	117
" " " *v.* Packet Co.	95
Childs *v.* Jordan	41
Chilton *v.* People	155
Christmas *v.* Russell	100
Chubb *v.* Gsell	115
" *v.* Salomons	200
Church *v.* Howard	42, 47
" *v.* Hubbart	121
Chute *v.* State	239
Cincinnati *v.* Cameron	218
City Bank *v.* Dearborn	94
City of Phila. *v.* Gilmartin	101
City of Rochester *v.* Montgomery	94
Claflin *v.* Meyer	178, 181
Clanton *v.* State	202
Clark, *In re*	50
Clark *v.* Bond	234
" *v.* Boyd	131
" *v.* Brown	116

	PAGE
Clark *v.* Burn..	46, 68
" *v.* Clark.....	128
" *v.* Freeman	108
" *v.* Houghton.....	131, 135
" *v.* Life Ins. Co	82
" *v.* Little.....	98
" *v.* Miller	180
" *v.* Morrison	47
" *v.* Owens.....73,	76, 156
" *v.* Vorce.....78,	223
Clay *v.* Langslow.....	256
Clayes *v.* Ferris	224
Clayton *v.* Lord Nugent	171
Clegg *v.* Lemessurier	155
Clement *v.* Spear..	201
Cleveland *v.* Newson	7
Cleveland, etc. R. Co. *v.* Ball..	102
" " " " *v.* Mara	7
" " " " *v.* Perkins	128
Cleverly *v.* Cleverly	168
Clews *v.* Kehr	44
Clifford *v.* Burton.....	49
" *v.* Drake 237,	238
Clifton *v.* Litchfield.....	165
Clink *v.* Thurston.....	92
Clinton *v.* State.....	195
Cliquot's Champagne.....	83
Clodfelter *v.* Hulett.....	98
Closmadeuc *v.* Carrel.....	154
Clough *v.* McDaniel	68
Cloyes *v.* Thayer	209
Coan *v.* Clow.....	98
Coates *v.* Burlington, etc. R. Co....	83
Coburn *v.* Odell	209
Cochrane *v.* Libby.....	76
Codman *v.* Caldwell	64
Coe *v.* Hobby	164
Coffin *v.* Buckman.....	68
" *v.* Vincent	238
Cohen *v.* Teller.....	110
Cohn *v.* Goldman.....	51
Coit *v.* Haven.....	98
" *v.* Howe	43
" *v.* Milliken	120
" *v.* Patchen	21
Cokely *v.* State	223
Cole *v.* Hills.....	159
" *v.* Jessup.....	238
" *v.* Sherard	123
" *v.* State	229
Coleman *v.* Comm.....	194
" *v.* Dobbins.....	118
" *v.* Manhattan Co	168
" *v.* People.....24,	29
Coleman's Appeal	93
Collender *v.* Dinsmore.....	167
Collins *v.* Bayntun.....	133
" *v.* Collins	111
" *v.* Comm.....	77
" *v.* Dorchester	26
" *v.* Stephenson.....	228
Colt *v.* People.....	15
Colton *v.* Beardsley 97,	165
Comins *v.* Hetfield	222
Comm. *v.* Abbott.....4,	14
" *v.* Allen	110
" *v.* Annis.....16,	20
" *v.* Barnacle	14
" *v.* Bigelow.....	29
" *v.* Billings	212
" *v.* Blair.....	15
" *v.* Bradford 14, 25,	33
" *v.* Brady	21
" *v.* Brailey.....	19
" *v.* Brayman.....	101
" *v.* Brown 18,	196
" *v.* Brownbridge	181
" *v.* Burke.....	239
" *v.* Campbell	25
" *v.* Carey.....	60
" *v.* Castles.....	133
" *v.* Choate....14, 25, 33,	179

		PAGE
Comm.	v. Coe	30
"	v. Cooper	61, 237
"	v. Crowninshield	11
"	v. Cuffee	55, 59
"	v. Culver	54
"	v. Curtis	54
"	v. Damon	30
"	v. Densmore	6, 67
"	v. Desmond	119, 122
"	v. Dorsey	22, 102
"	v. Dowdican	101
"	v. Drake	55
"	v. Eastman	111
"	v. Eddy	179
"	v. Elisha	96
"	v. Elmey	18
"	v. Emigrant Sav. Bk	160
"	v. Emmons	128
"	v. Felch	38, 74, 75
"	v. Fenno	32
"	v. Ferrigan	15
"	v. Ford	237
"	v. Galavan	18
"	v. Goddard	204
"	v. Goodwin	14, 16
"	v. Gorham	228
"	v. Gormley	188
"	v. Graves	211
"	v. Gray	236
"	v. Griffin	198
"	v. Hackett	9
"	v. Hall	80
"	v. Haney	61, 62
"	v. Harmon	56, 58
"	v. Harris	236
"	v. Hawkins	230
"	v. Hill	201
"	v. Holmes	211
"	v. Howe	56, 59
"	v. Hudson	14
"	v. Ingraham	10, 53, 234
"	v. Jackson	25, 28, 30

		PAGE
Comm.	v. James	56
"	v. Jeffries	4, 129
"	v. Jeffs	238, 239
"	v. Jenkins	29, 235
"	v. Kane	165
"	v. Kennon	34
"	v. Keyes	224
"	v. Kimball	36, 178
"	v. King	58, 59
"	v. Lanman	239
"	v. Larrabee	211
"	v. Lawler	233
"	v. Littlejohn	111
"	v. McDermott	53
"	v. McGorty	179, 221
"	v. McKie	178
"	v. McPike	9
"	v. Mead	202
"	v. Morey	55
"	v. Morrell	138
"	v. Mosler	55
"	v. Mullins	194
"	v. Nefus	108
"	v. Nichols	31, 209
"	v. Nott	54
"	v. O'Brien	101, 114
"	v. Parker	213
"	v. Parmenter	16
"	v. People	225
"	v. Pitsinger	53
"	v. Pratt	209
"	v. Price	29
"	v. Reynolds	40
"	v. Ricker	38
"	v. Roberts	61
"	v. Ryan	34, 247
"	v. Sanborn	52
"	v. Scott	10, 25, 196
"	v. Sego	54, 56
"	v. Shaw	209
"	v. Smith	55, 109
"	v. Sparks	210

PAGE

Comm. *v.* Sturtivant....82, 101, 247
" *v.* Tarr 53
" *v.* Tolliver 15
" *v.* Tuckerman 55
" *v.* Webster.....6, 15
" *v.* Williams 20
Comstock *v.* Crawford..... 98
" *v.* Smith 158, 159
Confederate Note Case 170
Conkey *v.* People 114, 235
Conley *v.* Meeker..... 227
Conn. Ins. Co. *v.* Ellis 83
" " " *v.* Schwenk...74, 75
Conn. Life Ins. Co. *v.* Schaefer 202
Connelly *v.* McKean 188
Connolly *v.* Pardon 172
Conrad *v.* Griffey.....229, 235
Contee *v.* Platt 119
Continental Ins. Co. *v.* Delpench...100, 101
" Co. *v.* Lathrop.100, 102, 221
" Co. *v.* Union Trust Co.... 206
Converse *v.* Colton 119
" *v.* Wales..... 33
Conway *v.* Nicol..... 31
Cook *v.* Barr 40, 42
" *v.* Brown 230
" *v.* Champlain, etc. Co... 34
" *v.* Cook 99, 187
" *v.* N. Y. C. R. Co..... 79
Cooke *v.* Tanswell 133
Coole *v.* Braham..... 50
Coon *v.* Swan..... 203
Cooper *v.* Cooper..... 185
Cope *v.* Cope..... 184
Copeland *v.* Taylor 51
Copperman *v.* People 29
Corbett *v.* Gibson 136, 140
" *v.* State..... 53
Corbin *v.* Jackson..... 128

PAGE

Corbishley's Trusts, Re..... 185
Corbley *v.* Wilson.....95, 176
Corlies *v.* Van Note 155
Cornett *v.* Williams 138, 187
Corning *v.* Ashley..... 64
" *v.* Corning 155
Cornish *v.* Farm, etc. Ins. Co. 107
Cornwell *v.* Wooley 131
Corr *v.* Sellers..... 64
Cory *v.* Bretton..... 51
Costello *v.* Crowell 63, 106, 110, 238, 239
Costigan *v.* Lunt 78
Cotton *v.* Smithwick 168
Cottrell, Matter of..... 134
Coulter *v.* Amer. Exp. Co..... 230
Courney *v.* Macfarlane..... 178
Courtenay *v.* Fuller..... 164
Coveney *v.* Tannahill 208
Cowley *v.* People..... 128
Cox *v.* Davis 131
" *v.* Palmer..... 159
" *v.* Sayres 230
Coye *v.* Leach..... 185
Coyle *v.* Comm 103, 105, 179
Cozzens *v.* Higgins 137
Craig *v.* Browne..... 147
Craig's Appeal..... 20
Craighead *v.* McLoney... 157, 160
Crawford *v.* Loper..... 78, 82
Crease *v.* Barrett..... 71, 73
Crill *v.* Rome..... 81
Crispell *v.* Dubois 71
Crist *v.* Erie R. Co..... 27
Crittenden *v.* Rogers 238, 239
Crocker *v.* Crocker 171
" *v.* McGregor 27
Cromwell *v.* Sac..... 87
Cronk *v.* Frith..... 132
Cronkhite *v.* Nebeker..... 160
Crooks *v.* Whitford..... 171
Crosby *v.* Berger 204

PAGE

Cross *v.* Cross 183
" *v.* Johnson 207
" *v.* Riggins 203
" *v.* Sabin 123
Crossley *v.* Dixon 192
Crossman *v.* Crossman ... 128, 158
Croudson *v.* Leonard 91
Crowell *v.* Western Reserve Bank 127, 219
Crower *v.* Pinckney 168
Cuddy *v.* Brown 74
Cullison *v.* Bossom 206
Culver's Appeal 98
Cummer *v.* Kent Judge 140
Cummings *v.* Arnold 164
" *v.* Taylor 221
Cummins *v.* People 16
Cunningham *v.* Hudson River Bank 108
" *v.* Smith's Adm'r. 96, 125
Currier *v.* Silloway 46
Curry *v.* Walter 199
Curtis *v.* Belknap 133
" *v.* Chicago, etc. R. Co.. 201
Curtiss *v.* Ayrault 82
Cushing *v.* Field 160
" *v.* Laird 91
Cuthbertson's Appeal 179
Cutler *v.* Thomas 164
" *v.* Wright 125
Cutter *v.* Caruthers 119
" *v.* Evans 95
Cuyler *v.* McCartney 43

D

Dabney *v.* Mitchell 199, 237
Daby *v.* Ericsson 22
Da Costa *v.* Jones 249
Daily *v.* N. Y., etc. R. Co. 60
Dain *v.* Wyckoff 115
Dainese *v.* Hall 104

PAGE

Dale *v.* Dale 179
Dalrymple *v.* Williams 201
Dalton *v.* Angus 186
Daly *v.* Byrne 30
Dan *v.* Brown 47, 131
Dana *v.* Conant 141
" *v.* Fiedler 170
Dance *v.* McBride 32
Daniel *v.* Daniel 205
" *v.* Pitt 51
Daniels *v.* Hudson River Ins. Co 107
Dann *v.* Kingdom 111
Darling *v.* Westmoreland 4, 101
Dartmouth (Lady) *v.* Roberts . 265
Davenbagh *v.* M'Kinnie 207
Davenport *v.* Ogg 220
Davidson *v.* Cooper 157, 160
" *v.* Delano 68
Davie *v.* Briggs 185
Davies *v.* Lowndes 74, 76, 260
" *v.* Waters 208
Davis *v.* Byrd 220
" *v.* Davis 99, 176
" *v.* Field 238, 239
" *v.* Spooner 131
" *v.* State 83, 235
Day *v.* Day 194
" *v.* Floyd 85
" *v.* Stickney 228
Dayton *v.* Monroe 11, 33
Dazey *v.* Mills 41
Dean *v.* State 184
De Armond *v.* Neasmith 83
De Camp *v.* Miller 98
Deck *v.* Johnson 45
Dederich *v.* McAllister 180
De Haven *v.* De Haven 75
De Kay *v.* Irving 168
Delafield *v.* Hand 121
Delaware, The 193
D. & C. Towboat Co. *v.* Starrs. 105

PAGE

Demarest *v.* Darg 87
De May *v.* Roberts 232
Den *v.* McAllister 139
Dennie *v.* Williams 40, 46
Dennison *v.* Page..... 184
Dent *v.* Dent..... 42
Derby *v.* Alling..... 82
De Rosaz, In the Goods of 192
Derwert *v.* Loomer..... 47
De Thoren *v.* A. G..... 111
Devlin *v.* Comm..... 85
Dewey *v.* Moyer..... 10
De Witt *v.* Barly 101
" *v.* Prescott..... 140
Dexter *v.* Hall..... 105
Dickerman *v.* Graves 197
Dickerson *v.* Colgrove 188
" *v.* State..... 58
Dickinson *v.* Poughkeepsie.... 13
Dickson *v.* State..... 220
Diehl *v.* Adams Co. Ins. Co... 81
" *v.* Emig..... 136
Dilleber *v.* Life Ins. Co..... 32
Dimick *v.* Downs..... 101
Di Sora *v.* Phillipps..... 103
Distin *v.* Rose 30
Dist. of Col. *v.* Armes 26, 194
Division of Howard Co..... 118
Dixon *v.* Hammond..... 192
" *v.* Nichols..... 123
" *v.* People..... 177
Dobson *v.* Pearce..... 99
Dodd *v.* Gloucester Ins. Co.... 180
" *v.* Moore 235
Dodge *v.* Haskell 158, 159
" *v.* Trust Co.....42, 44
Doe *v.* Barton 190
" *v.* Baytup..... 190
" *v.* Beviss..... 69
" *v.* Brydges..... 91
" *v.* Catomore 158
" *v.* Coulthred..... 180

PAGE

Doe *v.* Date 207
" *v.* Derby..... 78
" *d.* Devine *v.* Wilson..... 186
" *v.* Edwards 123
" *d.* Hammond *v.* Cooke ... 187
" *v.* Hiscocks.....172, 268, 269
" *v.* Hodgson 240
" *v.* Kemp..... 10
" *v.* Needs 172, 268
" *v.* Palmer 71
" *v.* Pegg..... 190
" *v.* Pulman 12
" *v.* Ross 143
" *v.* Suckermore 109
" *v.* Smyth 190
" *v.* Tatham....78, 250, 253, 262
" *v.* Turford 63
" *v.* Vowles 69
Dole *v.* Wilson 121
Dollner *v.* Lintz..... 233
Donahue *v.* Coleman..... 187
Donellan *v.* Hardy..... 142
Donelson *v.* Taylor 222
Donnelly *v.* State.....61, 223
Donohue *v.* People..... 15
Doon *v.* Rarey..... 52
Doran *v.* Muller..... 224
Dorman *v.* Kane..... 34
Dorrell *v.* State..... 84
Doty *v.* Brown..... 90
Doubet *v.* Kirkman..... 116
Doughty *v.* Doughty..... 100
Douglass *v.* Mitchell's Exer.... 47
Dover *v.* Child..... 88
Dowdell *v.* Wilcox..... 230
Donner *v.* Rowell..... 238
Downey *v.* Andrus..... 194
Downs *v.* N. Y. C. R. Co. 39
Doyle *v.* Jessup..... 236
" *v.* N. Y. Infirmary 107
Draper *v.* Draper..... 194
" *v.* Hatfield 52, 139

PAGE

Drew *v.* Swift 168
Driscoll *v.* People 17, 228
Drown *v.* Allen 115
Drum *v.* Drum.....157, 158
Drummond *v.* Priestman 94
Drury *v.* Hervey 18
" *v.* Midland R. Co. 71
Du Barré *v.* Livette..... 275
Du Bois *v.* Hermance..... 84
Dudley *v.* Beck..... 203
Duffin *v.* People 129
Dufresne *v.* Weise..... 229
Duffy *v.* People..... 56
Dugan *v.* Mahoney.....238, 239
Duncan *v.* Lawrence..... 42
" *v.* Seely..... 239
Dunham *v.* Averill.....169, 171
" *v.* Barnes..... 166
" *v.* Bower..... 89
Dunlap *v.* Cody 99
Dunn, *In re*..... 207
Dunn *v.* Record 179
Dunn's Case..... 29
Durant *v.* Abendroth 91, 100
" *v.* Essex Co..... 87
Durgin *v.* Somers..... 52
Durkee *v.* Leland..... 208
" *v.* Vt. R. Co..... 129
Duttenhofer *v.* State 203, 205
Dutton *v.* Woodman..... 223
Duval *v.* Covenhofer..... 51
" *v.* Davey..... 116
Duvall's Exer. *v.* Darby..... 127
Dwight *v.* Brown..... 67
Dwyer *v.* Collins.....139, 141, 265
Dyckman *v.* Mayor of N. Y.... 97
Dye *v.* Young 33
Dyer *v.* Fredericks 139

E

Eagan *v.* State..... 124
Eames *v.* Eames..... 187

PAGE

Earl *v.* Tupper 78
Earl's Trust 123
Earle *v.* Grout..... 203
Eason *v.* Chapman..... 233
East Pa. R. Co. *v.* Hottenstine 102
Eastman *v.* Martin..... 76
" *v.* Wadleigh..... 100
Eaton *v.* Alger..... 79
" *v.* Eaton 162
" *v.* Tallmadge 74, 76
Eckert *v.* Louis..... 157
" *v.* Pickel..... 157
Eddy *v.* Gray..... 23
Edgar *v.* Richardson..... 128
Edgerton *v.* Wolf..... 48
Edington *v.* Life Ins. Co....32, 206
Edwards, *In re*..... 177
Edwards *v.* Bonneau. 141
" *v.* Noyes 135
" *v.* Tracy.....45, 128
Egan *v.* Bowker 16
Egbert *v.* Egbert 101
" *v.* Greenwalt 183
Eggler *v.* People..... 20
Eidt *v.* Cutler..... 112
Eighmy *v.* People 6, 18
Eilbert *v.* Finkheiner..... 139
Elkin *v.* Janson..... 181
Elkins *v.* McKean 6
Ellicott *v.* Pearl.....71, 73
Elliott *v.* Boyles 227
" *v.* Hayden 94
" *v.* Russell..... 115
" *v.* Van Buren 101
Ellis *v.* Buzzell 176
" *v.* Duncan..... 186
Ellison *v.* Cruser..... 240
" *v.* Lindsley 37
" *v.* Weathers..... 199
Ellsworth *v.* Muldoon..... 67
Elwell *v.* Cunningham 144
" *v.* Mersick.....137, 139

	PAGE
Ely *v.* Ely	158, 159
Emerson *v.* Bleakley	78
" *v.* Lowell Gas Co.	24, 103
Emery *v.* Fowler	78
Empire Mf'g Co. *v.* Stuart	108
Enders *v.* Van Steenbergh	41, 156
Ennis *v.* Smith	104, 152
Enos *v.* Tuttle	7
Entick *v.* Carrington	135
Erie R. Co. *v.* Heath	140
Eschbach *v.* Collins	159
Eskridge *v.* State	59
Eslow *v.* Mitchell	138
Estabrook *v.* Boyle	178
Ettinger *v.* Comm	14, 18, 53
Evans *v.* Beattie	50
" *v.* Evans	211
" *v.* Rees	259
Evanston *v.* Gunn	80
Evarts *v.* Young	72
Evening Journal Ass'n *v.* McDermott	30
Everitt *v.* Everitt	70
Exers. of Shoenberger *v.* Hackman	165
Eyster *v.* Gaff	119

F

Fairchild *v.* Bascom	230
" *v.* Fairchild	40
Fairlie *v.* Hastings	256
Fall River Bk. *v.* Buffinton	189
Fanning *v.* Ins. Co	92
Farley *v.* McConnell	120, 122
" *v.* Rodocanachi	39
Farmers' Ins. Co. *v.* Bair	224, 230
" " " *v.* Gargett	176
Farnum *v.* Farnum	228
Farrar *v.* Olmstead	85
Farrington *v.* Payne	89
Fassin *v.* Hubbard	126
Faucett *v.* Nicholls	27
Faulkner *v.* Bailey	48
Faunce *v.* Life Ins. Co	166
Faxon *v.* Hollis	65
Fay *v.* Guynon	198
" *v.* Harlan	32
Fed. St., etc. R. Co. *v.* Gibson	178
Fellers *v.* Lee	119
Fellows *v.* Smith	41
Fenwick *v.* Thornton	44
Ferguson *v.* Crawford	98, 99
" *v.* Hubbell	103
Ferson *v.* Wilcox	47
Feversham *v.* Emerson	92
Few *v.* Guppy	208
Fickett *v.* Swift	41
Field *v.* Munson	168
" *v.* N. Y. C. R. Co	27
Fierson *v.* Galbraith	212
Fife *v.* Comm	53, 54, 55
Filkins *v.* People	188
" *v.* Whyland	166
Fillo *v.* Jones	25
Finnegan *v.* Dugan	23
Finneran *v.* Leonard	98
First Nat. Bk. *v.* Robert	110
Fisher *v.* Mayor	63, 64
Fisk, *Ex parte*	216
Fitzgerald *v.* McCarty	65
Fitzgibbon *v.* Brown	115
Fitzpatrick *v.* Fitzpatrick	168, 169
Fitzsimons *v.* Marks	100
Flagg *v.* People	54
Flattery *v.* Flattery	211
Flitters *v.* Allfrey	88
Flood *v.* Mitchell	239
Flowery Co. *v.* Bonanza Co.	155
Fogarty *v.* Jordan	45
Fogg *v.* Dennis	108
Follansbee *v.* Walker	86, 199, 201
Follett *v.* Jefferyes	203
Folsom *v.* Apple River Co.	237

PAGE

Folsom *v.* Brawn 176, 228
Foot *v.* Bentley..... 129
Foote *v.* Hayne..... 204
Forbes *v.* Howe 31
Force *v.* Craig..... 155
Ford *v.* Jones..... 236
Forrest *v.* Forrest..... 137
" *v.* Kissam..... 222
Forsythe *v.* Hardin 132
" *v.* Norcross..... 65
Fosdick *v.* Van Horn.....137, 138
Foster *v.* Newbrough 139, 233
" *v.* People 16
" *v.* Persch 40
Foster's Appeal..... 70
Foulkes *v.* Chadd..... 108
Fowler *v.* Chichester..... 20
Fox *v.* Comm..... 120
" *v.* Moyer..... 218
" *v.* People 16
" *v.* Riel 132
Foye *v.* Patch 86, 87, 92, 108
Frank *v.* Manny 138
Franklin Ins. Co. *v.* Gruver ... 103
Fraser *v.* Hunter..... 72
" *v.* Jennison 206
Frauenthal's Appeal 87
Frazer *v.* Frazer 68
Frazier *v.* Brown..... 186
Frear *v.* Evertson..... 41
Fred. M. Laurence, The 220
Free *v.* Buckingham.....195, 227
Freeman *v.* Cooke.....189, 271
Frew *v.* Clarke 21
Freydendall *v.* Baldwin 98
Frost *v.* Deering 132, 134
" *v.* McCargar..... 234
Fry *v.* Wood 77
Fuller *v.* Linzee 185
" *v.* Naugatuck R. Co.... 33
" *v.* Rice..... 222
Funk *v.* Ely 35

PAGE

Furbush *v.* Goodwin 224
Furley *v.* Haubert 92
Furst *v.* Second Av. R. Co.... 227

G

Gaffney *v.* People 232
Gage *v.* Campbell.....190, 240
Gahagan *v.* B. & L. R. Co 26
Gallup *v.* Wright 172
Galpin *v.* Page 98
Galt *v.* Galloway..... 80
Gardiner *v.* People..... 15
Gardner *v.* Collector..... 118
" *v.* Eberhart 128
Garland *v.* Jacomb 191
Garloch *v.* Geortner..... 188
Garner *v.* White..... 219
Garrard *v.* Lewis..... 160
Garrity *v.* People..... 179
Gartside *v.* Conn. Ins. Co..... 206
Gass *v.* Stimson 222
Gassen-Lernier *v.* State..... 25
Gawtry *v.* Doane 63
Gay *v.* Parpart 180
Geary *v.* Kansas..... 155
" *v.* People 228
Gelott *v.* Goodspeed 130, 131
Gelston *v.* Hoyt.....90, 120
" *v.* Shields 171
George *v.* Pilcher.....221, 235
Gerish *v.* Chartier 31
Germania Bank *v.* Distler..153, 162
Gertz *v.* Fitchburg R. Co..... 234
Gery *v.* Redman 16
Gethin *v.* Walker.....141, 145
Geyer *v.* Aguilar 84, 91
Gibney *v.* Marchay 42
Gibson *v.* Comm..... 196
" *v.* Hunter..... 30
Gilbert *v.* Flint, etc. R. Co.... 124
" *v.* Knox..... 71

	PAGE
Gilbert *v.* Sage	223
" *v.* Simpson	110
Gildersleeve *v.* Landon	39
Gillespie *v.* Torrance	87
Gillies *v.* Smither	131
Gillooley *v.* State	206
Gilman *v.* Gilman	99, 100
" *v.* Moody	153
Gilmanton *v.* Ham	23
Gilmore *v.* Driscoll	186
Giltman *v.* Strong	95
Girard Ins. Co. *v.* Marr	245
Gleadow *v.* Atkin	66, 259
Glenn *v.* Gleason	223, 232
Gloucester *v.* Gaffney	12
Glynn *v.* George	190
Goblet *v.* Beechy	170
Goble *v.* Dillon	89
Godard *v.* Gray	99, 262
Goddard *v.* Foster	171
" *v.* Gardner	204
Godeau *v.* Blood	30
Goersen *v.* Comm	25, 33, 35
Golder *v.* Bressler	165
Good *v.* French	179
Goodall *v.* State	237
Gooding *v.* Morgan	122
Goodnow *v.* Smith	84
Goodrich *v.* Tracy	45
" *v.* Weston	138
Goodtitle *v.* Baldwin	186
Goodwin *v.* Appleton	122
" *v.* Jack	12, 156
Gordon *v.* B. & M. R. Co	27
" *v.* Bowne	180
" *v.* Comm	202
Gore *v.* State	53
Gorrissen *v.* Perrin	170
Gosling *v.* Birnie	192
Goss *v.* Lord Nugent	166, 267
Gott *v.* Dinsmore	51
Gouge *v.* Roberts	26
Gough *v.* St. John	115
Gould *v.* Conway	66
" *v.* Crawford	194
" *v.* Lakes	71
" *v.* Norfolk Lead Co	230
" *v.* R. Co	87
Gragg v. Learned	134, 144
Graham *v.* Chrystal	233
" *v.* Davis	224
" *v.* Graham	199
" *v.* Spencer	100
Grand Rapids, etc. Co. *v.* Huntley	32
G. T. R. Co. *v.* Latham	95
" " *v.* Richardson	27, 34
Grant *v.* Coal Co	150
Grattan *v.* Ins. Co	39, 206
Graves *v.* Jacobs	20
" *v.* Johnson	162
" *v.* State	179
Graville *v.* N. Y. C. R. Co	81
Gray *v.* Comm	53
" *v* Goodwin	38
Gray's Case	62
G. W. R. Co. *v.* Bacon	181
Green *v.* B. & L. R. Co	48
" *v.* Caulk	238
" *v.* Disbrow	22
" *v.* New River Co	84, 94
" *v.* N. Y. C. R. Co	48
" *v.* Randall	163
" *v.* Rice	230
Green, etc. R. Co. *v.* Bresner	30
Greenabaum *v.* Elliott	89
Greenawalt *v.* Kohne	161, 163
" *v.* McEnelley	116, 198
Greenfield *v.* Camden	72, 74, 187
" *v.* People	6, 16, 22, 106
Greenfield Bk. *v.* Crafts	40
Greenfield Sav. Bk. *v.* Stowell	160, 190
Greenman *v.* O'Connor	219

PAGE

Greenough *v.* Eeeles..... 278
" *v.* Gaskell..... 274
Greenwood *v.* Sias..... 46
Gregg *v.* Forsyth 151
Gregory *v.* Chambers..... ... 115
" *v.* Morris..... 232
Grierson *v.* Mason 162
Griffin *v.* Auburn..... 24
" *v.* State..... 113
Griffith *v.* Diffenderffer 21, 33
Grignon's Lessee *v.* Astor..... 97
Grimes *v.* Kimball 137
Griscom *v.* Evens..... 169
Griswold *v.* Pitcairn..... 120
Grob *v.* Cushman..... 118
Guaranty Co. *v.* Gleason. 10
Guernsey *v.* Rexford..... 40
Guetig *v.* State..... 179
Guiterman *v.* Liverpool, etc. St. Co 105
Guldin's Adm'rs. *v.* Guldin's Adm'rs..... 193
Gulerette *v.* McKinley. ...234, 236
Gulick *v.* Gulick..... 204
Guptill *v.* Verback..... 206
Gurney *v.* Howe..... 80
Gutterson *v.* Morse 225
Guy *v.* West..... 180

H

Hackett *v.* Judge 219
" *v.* King 22
" *v.* People..... 59
" *v.* Potter 104
Haddock *v.* B. & M. R. Co..73, 74, 75
Hahn *v.* Kelly..... 98
Haines *v.* Guthrie 74
Hale *v.* Rich..... 42
" *v.* Silloway..... 42
" *v.* Smith 181

PAGE

Haley *v.* State... .....229, 234
Halifax Guardians *v.* Wheelwright..... 272
Hall *v.* Bainbridge..... 155
" *v.* Brown 34, 36, 125
" *v.* Costello 104
" *v.* Erwin 162
" *v.* Glidden 65
" *v.* Hall 173
" *v.* Huse..... 199
" *v.* Lawrence..... 119
" *v.* Mayo..... 72
" *v.* Ray 239
Halliday *v.* Martinett 63
Ham *v.* Wisconsin, etc. R. Co. 245
Hamer *v.* McFarlin..... 115
Hamilton *v.* Nickerson..... 127
" *v.* People..6, 11, 233, 234
Hamish *v.* Herr..... 194
Hammond *v.* —— 82
" *v.* Bradstreet 73
" *v.* Hopping..... 141
" *v.* Varian 36, 108
Hamsher *v.* Kline..... 134
Hance *v.* Hair..... 46
Hancock Ins. Co. *v.* Moore.... 42
Hanoff *v.* State..... 227
Hanover R. Co. *v.* Coyle..... 7
Hanson *v.* Eustace's Lessee... 135
" *v.* South Scituate..... 80
Happy *v.* Mosher..... 50
Harding *v.* Jewell..... 155
" *v.* Williams 284
Hardman *v.* Wilcock..... 192
Hardy *v.* Merrill..... 101
Harger *v.* Thomas 95
" *v.* Worrall 178
Harland *v.* Eastman 76
Harman *v.* Brotherson 97
Harrat *v.* Wise 33
Harriman *v.* Jones..... 203
Harrington *v.* Gable.....40, 134

	PAGE
Harrington *v.* Keteltas	14
Harris *v.* Barnett	146
" *v.* Harris	70, 177
" *v.* Panama R. Co.	82
" *v.* White	104, 180
Harrison *v.* Charlton	78
" *v.* Clark	95
" *v.* Rowan	225
Harrison's Appeal	230
Hart *v.* Hudson River Bridge Co.	229
" *v.* Stevenson	50
Harter *v.* Crill	32
Hartford *v.* Palmer	194
Hartman *v.* Diller	10
" *v.* Keystone Ins. Co.	107
Hartranft, Appeal of	200
Harvey *v.* Osborn	225
" *v.* Thorp	139
Harwood *v.* Mulry	66
" *v.* People	34
Haskins *v.* Warren	13, 180
Hassan *v.* Barrett	162
Hastings *v.* Riders	101
" *v.* Stetson	16, 115
Hatch *v.* Brown	42, 219
" *v.* Carpenter	136
" *v.* Douglas	167
" *v.* Elkins	48
" *v.* Sigman	70
Hatcher *v.* Rocheleau	119, 147
Hatfield *v.* Lasher	115
Hatton *v.* Robinson	204
Haughwout *v.* Garrison	162, 180
Hawes *v.* Draeger	183
" *v.* Gustin	211
Hawkins *v.* Fall River	112
" *v.* Grimes	110
Hawkes *v.* Charlemont	108
Hayden *v.* Goodnow	159
Hayes *v.* Kelley	40
" *v.* People	111
Haynes *v.* Comm	17
" *v.* Haynes	159
" *v.* Ledyard	223
" *v.* Ordway	89
Hay's Appeal	222
Hays *v.* Miller	115
Hayward *v.* People	226
Hazleton *v.* Union Bk.	110
Hazlewood *v.* Heminway	219
Heald *v.* Heald	167
Healy *v.* O'Sullivan	116
Hebbard *v.* Haughian	162, 205
Hedden *v.* Roberts	37
Hedge *v.* Clapp	230
Hedrick *v.* Hughes	63
Heffron *v.* Gallupe	201
Heine *v.* Comm	10, 113
Heinemann *v.* Heard	177, 178
Heiser *v.* Hatch	95
Heller *v.* Howard	50
Helyear *v.* Hawke	49
Hemenway *v.* Smith	205
Hemingway *v.* Garth	231
Hemmens *v.* Bentley	223
Hemmenway *v.* Towner	183
Hendrick *v.* Whittemore	98
Hendrickson *v.* People	58
Henry *v.* Bishop	130
" *v.* Salina Bank	209
Hepler *v.* Mt. Carmel Bank	78
Herrick *v.* Malin	157
" *v.* Smith	235
" *v.* Swomley	110
Heslop *v.* Heslop	16
Hess *v.* Griggs	132
" *v.* Wilcox	221
Hester *v.* Comm	15, 211, 227, 235
Hetherington *v.* Kemp	36
Hewett *v.* Chapman	201
Hewitt *v.* Morris	131
Hewlett *v.* Wood	101, 222
Hey's Case	220

	PAGE
Heyward's Case	199
Heywood *v.* Heywood	42
Hibbs *v.* Blair	199
Hickins *v.* People's Ins. Co	224
Hicks *v.* Lovell	77
Higbee *v.* Dresser	202, 203
" *v.* Life Ins. Co	101
Highberger *v.* Stiffler	199
Higbie *v.* Guardian, etc. Ins. Co	127
Higgins *v.* People	17
" *v.* Reed	139
Higham *v.* Ridgway	69, 258
Hildreth *v.* O'Brien	163
Hill *v.* Blake	164
" *v.* Canfield	219
" *v.* Eldridge	74
" *v.* Naylor	30
" *v.* Packard	143
" *v.* State	238
" *v.* Syracuse, etc. R. Co	25
Hillis *v.* Wylie	233
Hills *v.* Goodyear	176
" *v.* Home Ins. Co	102
Hilton *v.* Bender	187
Himmelmann *v.* Hoadley	120
Hinckley *v.* Beckwith	122
Hoag *v.* Lamont	48
Hodgkins *v.* Chappell	24
Hoey *v.* Jarman	159
Hoffman *v.* Bank of Milwaukee	191
" *v.* Kemerer	236
" *v.* N. Y. C. R. Co	66
Hogan *v.* Cregan	116
Hohensack *v.* Hallman	67
Holbrook *v.* Gay	65
" *v.* Holbrook	43
Holcomb *v.* Holcomb	101, 194
" *v.* People	236
Holcombe *v.* Hewson	25
Holley *v.* Young	40 47
Holly *v.* Boston Gas Co	33
Holman *v.* Kimball	204
Holmes' Appeal	162
Holmes *v.* Anderson	229
" *v.* Trumper	190
Holt *v.* Squire	49
" *v.* Walker	51
Holzworth *v.* Koch	163
Homan *v.* Earle	211
Homans *v.* Corning	127
Home *v.* Williams	78
Home Ins. Co. *v.* Baltimore, etc. Co	52
Homer *v.* Fish	86
" *v.* Life Ins. Co	168
Hood *v.* Hood	85
Hoover *v.* Gehr	65
Hope *v.* Liddell	207
" *v.* People	25, 33
Hopewell *v.* De Pinna	184
Hopkins *v.* Lee	93
Hoppe *v.* Byers	71
Hopt *v.* Utah	55
Horn *v.* Pullman	21
Hornbeck *v.* State	17
Hornbuckle *v.* Stafford	245
Horseman *v.* Todhunter	219
Horstman *v.* Kaufman	209
Horton *v.* Chadbourn	229, 232
Hosford *v.* Ballard	12
Hotchkiss *v.* Mosher	141, 163
Houghton *v.* Jones	223
" *v.* Watertown Ins. Co.	167
Houlston *v.* Smith	154
House *v.* Metcalf	27
Hovey *v.* Grant	30
How *v.* Hall	141
Howard *v.* Brower	198
" *v.* Daly	36
" *v.* Hudson	189
" *v.* McDonough	238
" *v.* Moot	123, 124
" *v.* Patrick	77, 226

PAGE

Howard *v.* Sexton 30
" *v.* State 179
Howe *v.* Howe 33
Howe Co. *v.* Pettibone..... 218
Howe Machine Co. *v.* Edwards 217
Howell *v.* Goodrich 89
Howland *v.* Blake 165
Howley *v.* Whipple..... 129
Howser *v.* Comm..... 201
Hoy *v.* Morris..... 204
Hoyt *v.* Newbold..... 185
Hubbard *v.* Gurney..... 162
" *v.* Hubbard 220
" *v.* Russell..... 128
Hubbell *v.* Judd Oil Co.. 136, 208
" *v.* Meigs 81, 143
Hudnutt *v.* Comstock..... 237
Huff *v.* Bennett 129, 199, 237
Hughes *v.* Muscatine 103
" *v.* U. S..... 87
" *v.* Westmoreland Co.. 223
Huidekoper *v.* Cotton 201
Hulbert *v.* Nichols..... 68
Humes *v.* O'Bryan..... 67
Hunnicutt *v.* Peyton 72
Hunt *v.* Gray.....157, 158
" *v.* Hunt 85, 100
" *v.* Johnson..... 76
" *v.* Lowell Gas Co.....24, 105
" *v.* Strew 45
Hunter *v.* Atkins..... 179
" *v.* Leathley 207
" *v.* State..... 7, 19
Huntley *v.* Whittier..... 37
Hurlburt *v.* Meeker..... 223
Hurst *v.* Leach 173
Huston *v.* Ticknor..... 130
Hutchings *v.* Corgan..... 78
Hutchins *v.* Hebbard 164
" *v.* Kimmel 111
Hutchinson *v.* Bernard..... 219
" *v.* Consumers' Coal Co. 201

PAGE

Hyde Park *v.* Canton.....177, 185
Hynes *v.* McDermott..... 104, 108, 111, 152

I

Idaho, The..... 192
Indianapolis, etc. R. Co. *v.* Horst 181
Ingalls *v.* State.....179, 211
Ingram *v.* State..... 120
Inhab. of Woburn *v.* Henshaw. 205
Insurance Co. *v.* Mosley 7
" " *v.* Newton..... 39
" " *v.* Weide..... 4, 239
Ireland *v.* Rochester 80
Iron Cliffs Co. *v.* Buhl 83
Irwin *v.* Thompson 164
Isaacson *v.* N. Y. C. R. Co.... 124
Isler *v.* Dewey..... 234

J

Jackson *v.* Allen..... 191
" *v.* Bailey 78
" *v.* Benton 127
" *v.* Brooks 109
" *v.* Browner..... 74
" *v.* Chamberlain..... 131
" *v.* Christman.....133, 156
" *v.* Cole..... 187
" *v.* Comm..... 62
" *v.* Cooley 76
" *v.* Crissey 78
" *v.* French 204
" *v.* Frost..... 82
" *v.* Gager 130
" *v.* Humphrey..... 199
" *v.* King 73
" *v.* Kingsley 133
" *v.* Lawson..... 79
" *v.* Lunn..... 185

PAGE

Jackson *v.* Luquere 156
" *v.* McCall 72, 185
" *v.* Moore 187
" *v.* Sill 168
" *v.* State 25, 55
" *v.* Vail 131, 132
" *v.* Van Dusen 108
" *v.* Vickery 131
" *v.* Waldron 131
" *v.* Witter 82
" *v.* Woolsey 133
Jaggers *v.* Binning 50
Jardine *v.* Reichert 99
Jarrett *v.* Leonard 50
Jarvis *v.* Driggs 87
Jay *v.* East Livermore 145
Jefferds *v.* People 59
Jenner *v.* Hineh 173
Jessup *v.* Cook 78
Jewell's Lessee *v.* Jewell 74, 75
Jewett *v.* Banning 14, 18
" *v.* Brooks 105
Joannes *v.* Bennett 136
Jochumsen *v.* Suffolk Sav. Bk. 85
Johnson *v.* Agr. Ins. Co 176
" *v.* Arnwein 136
" *v.* Daverne 109
" *v.* Donaldson 140, 207
" *v.* Holliday 18
" *v.* H. R. R. Co 124
" *v.* Kershaw 138
" *v.* Leggett 231
" *v.* Sherwin 19
" *v.* State 60
Johnson's Will, *In re* 70
Johnston *v.* Hedden 123
" *v.* Jones 82
Jones *v.* Abraham 213
" *v.* Greaves 176
" *v.* Hoey 213
" *v.* Jones 23
" *v.* Keen 218

PAGE

Jones *v.* Knaus 40, 136
" *v.* People 96, 194
" *v.* Phelps 153
" *v.* Roberts 131
" *v.* State 60, 61, 62
" *v.* Stevens 115
" *v.* Tucker 103
" *v.* Underwood. 132, 133, 138
" *v.* Williams 10
Jordan *v.* Osgood 25, 138
" *v.* State 55
" *v.* Stewart 159
" *v.* Van Epps 86
" *v.* Volkenning 95
Jorden *v.* Money 190
Joyce *v.* Maine Ins. Co 107
Juilliard *v.* Chaffee 163

K

Kallenbach *v.* Dickinson 46, 49
Kane *v.* Hibernia Ins. Co 176
Kearney *v.* Denn 96
" *v.* Mayor of N. Y 136
Keech *v.* Rinehart 185
Keen's Exer 160
Keep *v.* Griggs 197, 210
Kehoe *v.* Comm 61, 196
Keichline *v.* Keichline 146
Keller *v.* N. Y. C. R. Co 107
" *v.* Stuck 185
Kelley *v.* People 11, 18, 53
Kelliker *v.* Miller. 26
Kellogg *v.* French 31
" *v.* Kellogg 143, 145
" *v.* Secord 77
Kelly *v.* Drew 177
" *v.* West 85
Kelsea *v.* Fletcher 238, 239
Kelsey *v.* Hanmer 131
" *v.* Layne 229
Kemp *v.* King 207

PAGE

Kempland *v.* Macaulay 50
Kempsey *v.* McGinnis 105
Kendall *v.* May..... 194
" *v.* Weaver..... 223
Kendig *v.* Overhulser..... 176
Kendrick *v.* Comm..... 209
Kennebec Co. *v.* Augusta Ins. Co..... 163
Kennedy *v.* Comm..... 119
" *v.* Doyle.....63, 66
" *v.* Gifford 115
" *v.* People 5, 247
" *v.* Ryall..... 21
Kent *v.* Garvin 66
" *v.* Lincoln 26
" *v.* Mason..... 239
" *v.* Tyson..... 36
Kenyon *v.* Ashbridge.....21, 75
Keran *v.* Trice's Excrs..... 237
Kerr *v.* Kerr..... 99
" *v.* McGuire..... 141
Kessel *v.* Albetis 118
Kibler *v.* McIlwain 221
Kidder *v.* Blaisdell 119
" *v.* Stevens 187
Kilpatrick *v.* Comm.....60, 119
Kilrow *v.* Comm..... 29
Kimball *v.* Morrill..... 131
King *v.* Donahue 110
" *v.* Faber 238
" *v.* Gallun 124
" *v.* N. Y. C. R. Co..... 127
" *v.* Richards 192
" *v.* Ruckman..... 233
" *v.* State..... 59
" *v.* Worthington 129
Kingman *v.* Cowles..... 149
" *v.* Tirrell..... 240
Kingsbury *v.* Moses...127, 138, 219
Kingsford *v.* Hood..... 17
Kingsland *v.* Chittenden..... 82
Kingsley *v.* Davis..... 94

PAGE

Kingston (Duchess of), Case.91, 95, 99, 205, 261, 262
Kingwood *v.* Bethlehem 132
Kinney *v.* Farnsworth..... 72
" *v.* Flynn..... 132
Kip, *In re* 210
Kip *v.* Brigham..... 84
Kirkstall Brewery *v.* Furness Ry..... 48
Kitchen *v.* Smith 133
Kittredge *v.* Russell 39
Klein *v.* Russell 165
Knapp *v.* Roche..... 94
" *v.* Smith 30
Knight *v.* Clements.....158, 159
" *v.* Cunnington..... 64
" *v.* House..... 233
Knights *v.* Wiffen 189
Knode *v.* Williamson 233
Knoll *v.* State.....83, 103
Knolls *v.* Bambart..... 156
Knox *v.* Wheelock..... 247
Kobbé *v.* Price 74
Koehler *v.* Black River Co.... 155
Koenig *v.* Bauer..... 223
Kolsti *v.* M. & St. L. R. Co... 34
Konitzky *v.* Meyer..... 95
Koons *v.* State 110
Koster *v.* Reed 180
Kramer *v.* Comm..... 25
" *v.* Goodlander..... 72
Krekeler *v.* Ritter..... ...92, 99
Kribs *v.* Jones..... 164
Krise *v.* Neason.....136, 143
Kurtz *v.* Hibner 168

L

Labaree *v.* Wood 197
La Bau *v.* Vanderbilt..... 47
La Beau *v.* People..... 15
Laclede Bank *v.* Keeler..... 233

	PAGE
Lacroix Fils *v.* Sarrazin	121
Lady Ivy's Case	21
Laird *v.* Campbell	63
Lake *v.* Clark	26
Lake Co. *v.* Young	122
Lake Merced Co. *v.* Cowles	119
Lamar *v.* Micou	42, 118
Lamb *v.* Camden, etc. R. Co.	178
" *v.* Munster	209
Lambert *v.* People	51
Lanahan *v.* Comm.	188
Land Co. *v.* Bonner	139
Landell *v.* Hotchkiss	27
Lander *v.* Arno	86, 93
" *v.* People	6
Landers *v.* Bolton	131
Lane *v.* B. & A. R. Co.	45
" *v.* Cole	140, 207
Lanergan *v.* People	18
Langhorn *v.* Allnutt	49
Lanning *v.* Francis	168
Lansing *v.* Coley	219
Larne *v.* Rowland	65
Larum *v.* Wilmer	92
Lathrop *v.* Bramhall	138, 164
Lavin *v.* Emigrant Sav. Bk.	85
Lawler *v.* McPheeters	229
Lawrence *v.* Farley	155
" *v.* Hopkins	52
" *v.* Kimball	67
Laws *v.* Comm.	56
Lawson *v.* Bachman	141
" *v.* Glass	237, 238
Lay Grae *v.* Peterson	45
Lazier *v.* Westcott. 100, 120, 122,	144
Learned *v.* Tillotson	40
Leas *v.* Wells	190
Leathers *v.* Salvor Co.	129
Leavitt *v.* Stansell	227
" *v.* Wolcott	86
Leconfield *v.* Lonsdale	186
Lee *v.* Pain	172
Leeds *v.* Cook	141
Lefever *v.* Johnson	40
Lefevre *v.* Lefevre	171
Leggatt *v.* Tollervey	85
Legge *v.* Edmonds	184
Lehigh R. Co. *v.* McFarlan	185
Lehman *v.* Central R. Co	190
Leland *v.* Cameron	63
" *v.* Knauth	227
Lemmon *v.* Moore	212
Lenahan *v.* People	123, 125
Lenox *v.* Fuller	233
Lentz *v.* Wallace	93
Leonard *v.* Kingsley	232
" *v.* Pope	31
Lerned *v.* Jones	162
Lessee of Clarke *v.* Courtney	131
Lessee of Rhodes *v.* Selin	208
Lester *v.* McDowell	222
Levison *v.* State	53
Levy *v.* People	96
Lewis *v.* Eastern R. Co	27
" *v.* Payn	128
" *v.* Seabury	166
" *v.* Sumner	47
" *v.* Woodworth	47
Ley *v.* Barlow	207
Lichtenwallner *v.* Laubach	32
Lincoln *v.* Battelle	144, 151
" *v.* Claflin	10, 30
" *v.* Taunton Mf'g Co.	107
Lindley *v.* Lacey	166
Linnell *v.* Sutherland	64
Linsday *v.* People	16, 22, 106, 112, 196
Linsley *v.* Lovely	221
Linthicum *v.* Ray	180
" *v.* Remington	204
Lithographing Co. *v.* Kerting	82
Little *v.* Herndon	159
" *v.* McKeon	199
Livingston *v.* Arnoux	66, 67, 153

	PAGE
Livingston *v.* Kreisted	194
" *v.* Tyler	63
Logue's Appeal	162
Lohman *v.* People	225
L. & S. W. Bank *v.* Wentworth	191
Long *v.* Colton	72
" *v.* Drew	240
" *v.* Hartwell	164
" *v.* Spencer	154
Loom Co. *v.* Higgins	167
Loomis *v.* Wadhams	42, 128
Lord *v.* Bigelow	47
Loring *v.* Mansfield	89
" *v.* Whittemore	128, 135
" *v.* Worcester, etc. R. Co	27
Los Angeles *v.* Mellus	87
Losee *v.* Losee	38
Lothian *v.* Henderson	90
Lothrop *v.* Adams	115
" *v.* Blake	149
Lovejoy *v.* Murray	94
" *v.* Spafford	189
Low *v.* Payne	64
Low's Case	202
Lowell Mf'g Co. *v.* Safeguard Ins. Co	173
Lowenstein *v.* Carey	140
Lowery *v.* Telegraph Co	190
Lowney *v.* Perham	210
Loyd *v.* Hannibal, etc. R. Co.	128
Luby *v.* Hudson R. Co	7
Lucas *v.* Brooks	198
" *v.* De La Cour	49
Luce *v.* Dorchester Ins. Co.	103
Lucier *v.* Pierce	165
Lund *v.* Tyngsborough	7
Lurton *v.* Gilliam	151
Lush *v.* Druse	131
Lyman *v.* Philadelphia	233
" *v.* State, etc. Ins. Co.	107
Lyon *v.* Lyon	211
Lyon *v.* Manning	50
Lyons *v.* Lawrence	16

M

MacDougall *v.* Central R. Co.	181
" *v.* Purrier	187
Mackay *v.* Easton	83
Mackie *v.* Story	162
Mackinnon *v.* Barnes	119
Maclean *v.* Scripps	129
Macomber *v.* Scott	110
Magee *v.* Raiguel	43
Maggi *v.* Cutts	34
Maguire *v.* Middlesex R. Co.	26
Mahoney *v.* Belford	115
Maillet *v.* People	17
Maine *v.* People	9, 60, 61, 68
Major *v.* State	120
Malcolmson *v.* O'Dea	250
Malloney *v.* Horan	87
Mallory *v.* Benjamin	208
" *v.* Griffey	181
Malone *v.* Dougherty	164
Mandeville *v.* Reynolds	36, 47, 99, 128, 135
Manke *v.* People	107
Mann *v.* Langton	249
" *v.* Mann	170
Mansfield *v.* Edwards	162
Mansfield Coal Co. *v.* McEnery	5
Marble *v.* McMinn	82
March *v.* Comm	119
Marcly *v.* Shults	238
Marcy *v.* Barnes	111
" *v.* Dunlap	158
Marine Investment Co. *v.* Haviside	154
Marks *v.* Townsend	179
Marlow *v.* Marlow	137
Marsh *v.* Hand	129

	PAGE
Marshall *v.* Davies	178, 224
Marsters *v.* Lash	104
Marston *v.* Downs	136
Martin *v.* Berens	161
" *v.* Cole	161
" *v.* Cope	78
" *v.* Good	238, 239
" *v.* Rector	156
Marvich *v.* Elsey	77
Marvin *v.* Richmond	52
Marx *v.* Hilsendegen	225
" *v.* McGlynn	33
Maryland *v.* Baldwin	111
Mason *v.* Libbey	139
" *v.* Phelps	237
Masser *v.* Strickland	84
Massey *v.* Allen	258
Mast *v.* Perace	163
Mather *v.* Parsons	127
Matteson *v.* N. Y. C. R. Co.	32
Matthews, *In re*	13, 120
" *v.* Yerex	198
Mauri *v.* Heffernan	137
Maxwell *v.* Chapman	66
" *v.* Wilkinson	239
May *v.* Bradlee	21, 33, 101
Maybee *v.* Avery	88
" *v.* Sniffen	158
Mayer *v.* Appel	229
" *v.* People	28, 30
Maynard *v.* Buck	34
Mayo *v.* B. & M. R. Co	181
" *v.* Mayo	209
Mayor of Doncaster *v.* Day	76
Mayor of Swansea *v.* Quirk	204
McCarthy *v.* Marsh	86
McCarty *v.* Terry	74
McCausland *v.* Fleming	72, 82
McCombs *v.* State	236
McCormick *v.* Pa. Cent. R. Co.	239
McCue *v.* Comm	15
McCurdy's Appeal	156
McDonald *v.* Savoy	34
McFadden *v.* Kingsbury	138
McFarlan *v.* Triton Ins. Co.	81
McGoldrick *v.* Traphagen	64, 65
McGrath *v.* Clark	160, 190
" *v.* Seagrave	199
McGregor *v.* Wait	45, 133, 141
McGuire *v.* People	194
McIntosh *v.* Lee	123
McIntyre *v.* N. Y. C. R. Co.	78
McKee *v.* Nelson	102
McKeen *v.* Gammon	47
McKeone *v.* Barnes	108
McKinney *v.* Collins	91
" *v.* Salem	40
McKinnon *v.* Bliss	71, 80, 81, 123
McKivitt *v.* Cone	239
McKnight *v.* Devlin	86
McLain *v.* Comm	77, 106, 243
McLanathan *v.* Patten	43
McLaughlin *v.* Conley	115
McLean *v.* Fleming	192
McLellan *v.* Cox	50
" *v.* Longfellow	203
McLeod *v.* Ginther	7
McMahon *v.* Harrison	34
" *v.* McElroy	184
McMakin *v.* Weston	139
McManus *v.* Comm	15
McMicken *v.* Comm	95
McMillen *v.* Andrews	199
McMinn *v.* Whelan	131
McMurray's Heirs *v.* Erie	187
McNair *v.* Comm	108
McPherson *v.* Rathbone	140
McReynolds *v.* Longenberger	156
McVey *v.* Cantrell	219
Mead *v.* Husted	27
Meade *v.* Smith	201
Meakings *v.* Cromwell	207
Mechanics' Bank *v.* Gilson	123
Meech *v.* Buffalo	163

	PAGE
Melcher *v.* Flanders	130
Melia *v.* Simmons	85
Melvin *v.* Melvin	249
Mercer *v.* Vose	105
Mercer's Adm'r *v.* Mackin	70
Mercer Co. *v.* McKee's Adm'r.	167
Merchants' Nat. Bk. *v.* Hall	118
Merk *v.* Gelzhaeuser	176
Merkel's Appeal	17
Merluzzi *v.* Gleason	226
Merrick *v.* Parkman	43
Merrill *v.* Merrill	240
Merritt *v.* Cornell	155
" *v.* Day	46
Messner *v.* People	32
Metzger *v.* Doll	20
Mey *v.* Gulliman	213
Meyer *v.* Bohlfing	31
" *v.* Huneke	157
" *v.* Peck	193
" *v.* Sefton	138
Michels *v.* Olmstead	163
Michigan Cent. R. Co. *v.* Gilbert	26
Miles *v.* State	111
" *v.* U. S	175
Mill Dam Co. *v.* Hovey	155
Miller *v.* Barber	30
" *v.* Binder	155
" *v.* Dungan	98
" *v.* Gambie	166
" *v.* Hale	142
" *v.* Irish	22
" *v.* L. I. R. Co	12
" *v.* McKesson	30
" *v.* Payne	125
" *v.* People	55
" *v.* Stevens	170
" *v.* Travers	171
Milliken *v.* Barr	141
Mills *v.* Barber	178
" *v.* Hallock	13
Mills *v.* Oddy	136
Milwaukee R. Co. *v.* Kellogg	103, 107
Minet *v.* Morgan	205
Mink *v.* State	184
Missouri *v.* Kentucky	82
Mitchell *v.* Jacobs	137
" *v.* Pitts	218
" *v.* Work	116
Mitchell's Case	207, 208
Moats *v.* Rymer	208
Moett *v.* People	5, 212
Monfort *v.* Rowland	222
Monocacy, etc. Co. *v.* American, etc. Co.	45
Monroe *v.* Douglas	118
Montgomery *v.* Montgomery	184
" *v.* Pickering	203
" *v.* State	62
Montville *v.* Haughton	155
Moody *v.* Rowell	225
" *v.* State	118
" *v.* Tenney	31
Mooers *v.* Bunker	74
—— *v.* Moor	114
Moore *v.* Hamilton	42
" *v.* Livingston	131
" *v.* Meacham	7, 22
" *v.* Moore	78
" *v.* People	227
Moots *v.* State	64, 238, 239
Moran *v.* Prather	167
Morehead *v.* State	53
Morehouse *v.* Mathews	102
Moreson *v.* Northwestern Ins. Co.	176
Morford *v.* Peck	232
Morgan *v.* Burrows	169
" *v.* Griffiths	166
" *v.* People	129
" *v.* Railroad Co	188
" *v.* Roberts	199

PAGE

Morgan's Assignees *v.* Shum .. 162
Moriarty *v.* L. C. & D. R. Co. 16, 44, 255
Morley *v.* Green..... 207
Morrill *v.* B. & M. R. Co..... 141
" *v.* Foster..... 74
" *v.* Robinson..... 128
Morris *v.* Budlong..... 162
" *v.* Davies..... 184
" *v.* French 14
" *v.* Harmer 81
" *v.* Miller 111
" *v.* Patchin 147
" *v.* White 213
Morris's Appeal 168
Morrison *v.* Chapin..... 237
Morrow *v.* Comm..... 141
Morse *v.* Hewett 122
" *v.* Minn., etc. R. Co ... 24
" *v.* Stearns 169
Morss *v.* Morss 199
" *v.* Palmer 234
" *v.* Salisbury..... 42
Mortimer *v.* McCallan 137
Moseley *v.* Mastin 123
Mosley *v.* Vermont, etc. Ins. Co.....115, 234
Motley *v.* Head..... 222
Mott *v.* Consumers' Ice Co.... 39
" *v.* Richtmyer 153, 161
Mowatt *v.* Carow 168
Mowry *v.* Chase 104
" *v.* Smith 224
Muggleton *v.* Barnett..... 13
Muldowney *v.* Ill. Cen. R. Co. 103
Mulford *v.* Muller 203
Mullen *v.* St. John..... 178
Muller *v.* St. Louis Hospital Ass'n..... 225
Mumford *v.* Bowne 121
Munn *v.* Godbold 135, 138
Munshower *v.* State..... 83

PAGE

Munson *v.* Atwood..... 176
Murphy *v.* People.....14, 22, 56
" *v.* Purdy 219
" *v.* State 53, 55, 56
Murray *v.* Chase 15, 47
" *v.* Deyo 84
" *v.* Elston 140
" *v.* Green 98
" *v.* Murray 177
" *v.* N. Y. Life Ins. Co.. 178
Musselman *v.* Wise..... 125
Mutual Ins. Co. *v.* Morris..... 188
" " " *v.* Tisdale...85, 86, 95, 96

N

Nance *v.* Lary..... 189
Nason *v.* Jordan..... 139
National Bank *v.* Bangs..... 191
Naugatuck Co. *v.* Babcock ... 136
Naumberg *v.* Young..161, 163, 166
Nealley *v.* Greenough 137
Needham *v.* Bremner..... 85
Needles *v.* Hamfan 173
Neel *v.* Potter..... 33
Neely *v.* Neely 38, 131
Neese *v.* Farmers' Ins. Co.... 104
Negley *v.* Jeffers 164
Neil *v.* Case..... 159
" *v.* Jakle 18
Nelson *v.* Sun Ins. Co. 105, 167
Nepean *v.* Doe 184
" *v.* Knight 184
Nesbit, *In re* 177
Nettles, *Ex parte* 61
Nevling *v.* Comm.....5, 175
Newcastle (Duke of) *v.* Broxtowe 73
Newcomb *v.* Griswold 228
Newell *v.* Carpenter..... 92
" *v.* Nichols 185
N. H., etc. R. Co. *v.* Goodwin. 63

	PAGE
N. J. Exp. Co. *v.* Nichols	181
Newlin *v.* Lyon	43
Newman *v.* McComas	46
New Orleans, The	50
Newton *v.* Chaplin	140
" *v.* Porter	219
N. Y. Inst. for Blind *v.* How's Exers	169
Nichols *v.* Allen	134
" *v.* Haynes	64
" *v.* Iron Co	136
" *v.* Nichols	100
" *v.* Webb	63
" *v.* White	46
Nicholson *v.* State	54
" *v.* Waful	5
Nicolay *v.* Unger	127
Nicoll *v.* Burke	128, 162
Niskayuna *v.* Albany	139
Nixon *v.* Palmer	187
Noble *v.* Ward	267
Noden *v.* Murray	129
Noonan *v.* State	103
Norris *v.* Spofford	20
North Brookfield *v.* Warren	74, 76, 137
N. & W. Branch R. Co. *v.* Swank	165
Northrop *v.* Hale	74, 75
Northumberland Co. *v.* Zimmermann	145
Norton *v.* Huxley	93
Norwich Co. *v.* Flint	6
Nudd *v.* Burrows	10
Nunes *v.* Perry	109

O

Oakland Ice Co. *v.* Maxcy	224
Oaksmith's Lessee *v.* Johnston	185
Ocean Bk. *v.* Carll	64
Ocean Beach Ass'n *v.* Brinley	13
Ochsenbein *v.* Papelier	99
O'Connell *v.* People	175, 178
O'Connor *v.* Chicago, etc. R. Co	7
Odiorne *v.* Marine Ins. Co	167
O'Gara *v.* Eisenlohr	185
Ogletree *v.* State	178
Ogsbury *v.* La Farge	87
Ohio *v.* Hinchman	118
Olcott *v.* Tioga R. Co	36
Oldtown *v.* Shapleigh	72
Oliver *v.* Bennett	47
Olmsted *v.* Gere	105, 107
Omichund *v.* Barker	215
Opinion of Justices	118, 122, 124
Oppenheim *v.* Wolf	124
Ordway *v.* Haynes	83
Oregon Steamship Co. *v.* Otis	129
Organ *v.* Stewart	164
Ormsby *v.* People	11
O'Rourke *v.* O'Rourke	212
Osborn *v.* Pell	78
Oscanyan *v.* Arms Co	47
Osgood *v.* Coates	12
" *v.* Manhattan Co	47
" *v.* Nichols	191
Otis *v.* The Rio Grande	97
O'Toole, *In re*	207
Ottawa, etc. R. Co. *v.* Hall	163
Otterson *v.* Hofford	38
" *v.* Middleton	99
Owen *v.* Cawley	40, 47

P

Pacific Gas Co. *v.* Wheelock	104
Packard *v.* Reynolds	199
Packer *v.* Steward	164
Packet Co. *v.* Clough	6
" " *v.* Sickles	201
Paddock *v.* Forester	52
" *v.* Salisbury	116

	PAGE
Page *v.* Cole	164
Paige *v.* Carter	238
Paine *v.* Ins. Co	118
" *v.* Jones	157
" *v.* Upton	162
Palleys *v.* Ocean Ins. Co	219
Palmer *v.* Albee	167
" *v.* Crook	32
" *v.* Trower	227
Papendick *v.* Bridgewater	70
Parke *v.* Neely	153
Parker *v.* Butterworth	46
" *v.* Foote	186
Parks *v.* Loomis	169
" *v.* Mosher	94
Parnell *v.* Hahn	86
Paromore *v.* Lindsey	158
Parr *v.* Greenbush	145
Parrashick, The	104
Parsons *v.* Mfrs. Ins. Co	238
Passmore *v.* Passmore's Estate	205
Patten *v.* Elevated R. Co	122
" *v.* Moor	205
Patterson *v.* Gaines	183
" *v.* Tucker	134
Paul *v.* Rider	162
Paulk *v.* State	23
Payne *v.* Hodge	66
" *v.* State	229
Payson *v.* Lamson	163
Pearce *v.* Cooper	133
" *v.* Langfit	122, 124
Pears *v.* Wilson	68
Pearse *v.* Pearse	205
Pearson *v.* Pearson	76
Pease *v.* Shippen	115
Peck *v.* Brewer	201
" *v.* Callaghan	110
" *v.* Lake	239
" *v.* Valentine	239
Pelletreau *v.* Jackson	131
Pells *v.* Webquish	80, 187
Pendleton *v.* Empire, etc. Co	229
Pennoyer *v.* Neff	91, 100
Pennsylvania Co. *v.* Conlan	212
Pennsylvania R. Co. *v.* Fortney	230
" " *v.* Stranahan	27
Penny *v.* Corwithe	157
Pennywit *v.* Foote	99
People *v.* Ah Fat	234
" *v.* Ah Fook	14
" *v.* Ah Lee	7
" *v.* Aleck	10
" *v.* Alivtre	14
" *v.* Amanacus	234
" *v.* Arnold	10, 11
" *v.* Augsbury	105
" *v.* Baker	85, 90
" *v.* Bank N. America	190
" *v.* Beach	38, 224
" *v.* Beck	209, 233
" *v.* Benson	236
" *v.* Blakely	203
" *v.* Boscovitch	220
" *v.* Brown	209
" *v.* Buckland	94
" *v.* Burns	245
" *v.* Carney	23
" *v.* Carrier	31
" *v.* Casey	209, 226
" *v.* Chee Kee	123
" *v.* Chin Mook Sow	61, 237
" *v.* Chung Ah Chue	77
" *v.* Cole	222
" *v.* Collins	97
" *v.* Cotta	237
" *v.* Courtney	196
" *v.* Cox	55
" *v.* Crapo	227
" *v.* Davis	6, 9, 10, 60, 62
" *v.* Dawell	99
" *v.* Denison	82, 93
" *v.* Dennis	20

	PAGE
People *v.* Devine	229
" *v.* Devlin	118
" *v.* Dibble	29
" *v.* Dohring	199, 201
" *v.* Dowling	196
" *v.* Doyell	201, 235
" *v.* Eastwood	101
" *v.* Fair	113
" *v.* Feilen	177, 185
" *v.* Finley	175
" *v.* Fire Ins. Co	75
" *v.* Freshour	209
" *v.* Gates	206
" *v.* Gay	234
" *v.* Gelabert	53
" *v.* Gibbs	24
" *v.* Gonzalez	127
" *v.* Gray	61
" *v.* Grunzig	62
" *v.* Hall	82
" *v.* Hennessy	53
" *v.* Henssler	30
" *v.* Hovey	220
" *v.* Hoy Yen	56
" *v.* Hulbut	201, 202
" *v.* Hunt	201
" *v.* Irving	226
" *v.* Jackson	215
" *v.* Jacobs	230
" *v.* Johnson	93
" *v.* Keith	245
" *v.* Kelley	58, 209
" *v.* Knapp	61, 227
" *v.* Knickerbocker	61
" *v.* Lake	106
" *v.* Lane	53
" *v.* Langtree	196, 198
" *v.* Laurence	237
" *v.* Mahaney	118
" *v.* Manning	227
" *v.* Markham	233
" *v.* Mather	224, 225, 233, 234
People *v.* Matteson	195
" *v.* McGloin	55, 58, 195
" *v.* McGowan	86
" *v.* Mead	25, 113
" *v.* Miller	119, 223
" *v.* Montgomery	102
" *v.* Morgan	112
" *v.* Murray	92
" *v.* Nevins	119
" *v.* Newman	77
" *v.* N. Y. Hospital	194
" *v.* Niles	5
" *v.* Noelke	225
" *v.* Nyce	181
" *v.* Overseers, etc	184
" *v.* Oyer & Term. Court	36, 223, 225
" *v.* Parish	225
" *v.* Parton	52
" *v.* Phillipps	54
" *v.* Ramirez	59
" *v.* Rathbun	16
" *v.* Robinson	59
" *v.* Rolfe	101
" *v.* Ruloff	53
" *v.* Ryland	188
" *v.* Shattuck	202
" *v.* Shaw	60
" *v.* Sheriff	208
" *v.* Shulman	28, 30, 33
" *v.* Simpson	9, 59, 61
" *v.* Sligh	77
" *v.* Snyder	122, 153
" *v.* Soto	54, 212
" *v.* Stephens	47, 87
" *v.* Stevens	53
" *v.* Stone	213
" *v.* Suppiger	122
" *v.* Swinford	179
" *v.* Taylor	58, 60, 61
" *v.* Thayer	58
" *v.* Thrall	53

	PAGE
People *v.* Tyler	233
" *v.* Velarde	71
" *v.* Walker	139
" *v.* Walsh	219
" *v.* Ward	56
" *v.* Welsh	16
" *v.* Wentz	54, 59
" *v.* Wheeler	82, 238
" *v.* White	113
" *v.* Willett	18
" *v.* Wilson	179
" *v.* Wolcott	55
" *v.* Wreden	101
" *v.* Zeyst	81
Peoples *v.* Evening News	176
Pepin *v.* Lachenmeyer	147
Perkins *v.* Augusta Ins. Co	63
" *v.* Stickney	105
Perrine *v.* Cooley's Exers	164
Perry *v.* Bailey	201
" *v.* Dickerson	95
" *v.* Lovejoy	32
" *v.* Randall	198
" *v.* Simpson, etc. Co	40, 47
Petch *v.* Lyon	49
Peter *v.* Thickstun	83
Petershine *v.* Thomas	86
Petrie *v.* Nuttall	96
Peugh *v.* Davis	162
Phelin *v.* Kenderdine	209
Phelps *v.* Hunt	142
" *v.* Nowlen	186
" *v.* Prew	208
Phené's Trust, *In re*	184
Phenix *v.* Castner	228
Phil. R. Co. *v.* Henrice	20
Phila., etc. R. Co. *v.* Anderson	178
" " " " *v.* Hickman	109
" " " " *v.* Howard.	79
" " " " *v.* Lehman.	123
Philbrook *v* Eaton	162
Philips *v.* Bury	85

	PAGE
Phillips *v.* Allen	183
" *v.* Jamieson	93
" *v.* Mahan	68
" *v.* McCombs	170
" *v.* Middlesex	43
" *v.* Thorn	234
Philpot *v.* Gruninger	153
Pickard *v.* Bailey	104
" *v.* Sears	189, 271
Pickens *v.* Davis	70
Pickering *v.* Noyes	206
" *v.* Reynolds	42
Picton's Case	103
Pidcock *v.* Potter	101, 105
Pier *v.* Duff	43, 47
Pierce *v.* Indseth	104, 121
" *v.* Pierce	21
Piers *v.* Piers	111
Pierson *v.* Atlantic Bk	36
" *v.* Freeman	218
" *v.* People	15, 25, 206
Pigott's Case	157
Pim *v.* Currell	73
Pinney *v.* Andrus	238
" *v.* Cahill	83
Pipe *v.* Fulcher	73
Piper *v.* Chappell	120
Pitcher *v.* Clark	219
Pitts *v.* State	247
" *v.* Wilder	42
Pittsburg, etc. R. Co. *v.* Andrews	229
" " *v.* Robinson	102
Place *v.* Gould	17
" *v.* Minster	11
Plate *v.* N. Y. C. R. Co	92
Platner *v.* Platner	39, 221
Plaxton *v.* Dare	73
Player *v.* Burlington, etc. R. Co	225
Pleasants *v.* Fant	46

	PAGE
Plumer *v.* Briscoe	133
Plummer *v.* Currier	52
Plunkett *v.* Cobbett	200
Pocock *v.* Billing	44
Poignard *v.* Smith	139
Pollock *v.* Hoag	199
" *v.* Pollock	230
Polston *v.* See	176
Pontius *v.* People	14, 20
Poole *v.* Warren	133
Pope *v.* Allen	194
" *v.* Devereux	48
Porter *v.* Judson	63
" *v.* Waring	117, 122
" *v.* Wilson	131
Porter's Appeal	169
Portland *v.* Richardson	94
Post *v.* Supervisors	145, 151
Poteete *v.* State	62
Potter *v.* Deyo	181
" *v.* National Bank	194
" *v.* Ware	199
Powell, *Ex parte*	13, 120
Powers *v.* Cary	235
" *v.* Chelsea Sav. Bk	88
Pratt *v.* Andrews	115
" *v.* White	64, 65
Pratt's Adm'rs *v.* U. S	163
Preston *v.* Bowers	32
Preston's Case	31
Prevot *v.* Lawrence	190
Price *v.* McGoldrick	36
" *v.* State	59
" *v.* Torrington	65, 258
Priest *v.* Groton	105
Prince *v.* Skillin	118
Prindle *v.* Glover	21
Pringle *v.* Leverich	46
" *v.* Pringle	153, 222
" *v.* Woodworth	100, 187
Pritt *v.* Fairclough	65
Proctor *v.* Bigelow	111
Providence Tool Co. *v.* U. S. Mfg. Co	127
Prudential Assurance Co. *v.* Edmonds	184
Pulford's Appeal	208
Pullen *v.* Hutchinson	134
Pulliam *v.* Penseneau	199
Putnam *v.* Bond	169
" *v.* Clark	88, 159
" *v.* Sullivan	189
Pym *v.* Campbell	166

Q

Quackenbush *v.* Ehle	87
Queen's Case	232, 250, 279
Queen's Proctor *v.* Fry	80
Quick *v.* Quick	71
Quidort's Adm'r. *v.* Pergeaux	85
Quigley *v.* De Haas	164
Quin *v.* Lloyd	222
Quincey *v.* White	20
Quinlan *v.* Utica	26
Quinley *v.* Atkins	141
Quinn *v.* Halbert	195
" *v.* Quinn	88, 159
Quinsigamond Bk. *v.* Hobbs	233

R

Radcliff *v.* Ins. Co	80
Radcliffe *v.* Fursman	205
Rae *v.* Beach	48
Railroad Co. *v.* Bk. of Ashland	117
" " *v.* Cunnington	81
" " *v.* Nat. Bk	90
Railway Co. *v.* Cronin	141
Randall *v.* Lynch	132
Randegger *v.* Ehrhardt	43
Rankin *v.* Blackwell	35
Ransom *v.* Wheeler	147
Rapalye *v.* Rapalye	168

	PAGE
Ratcliff *v.* Wales	197
Rathbone *v.* Hooney	93
Rau *v.* People	124
Rawley *v.* Brown	188
" *v.* Doe	133
Rawson *v.* Haigh	18
Raynes *v.* Bennett	21, 198
Rea *v.* Tucker	197
Read *v.* State	14
Readman *v.* Conway	40
Real *v.* People	226
Rearden *v.* Minter	133
Rector *v.* Comm	56
Redd *v.* State	54, 56
Reddington *v.* Gilman	139
Redlich *v.* Bauerlee	65
" *v.* Doll	160
Reed *v.* N. Y. C. R. Co	20
" *v.* Spaulding	235
" *v.* U. S	168
" *v.* Wilson	117
Reeder *v.* Holcomb	127
Reese *v.* Reese	108
Reeve *v.* Wood	196
Reffell *v.* Reffell	162
Regan *v.* Dickinson	31
Reinhart *v.* People	15
Reitz *v.* State	23
Remington Co. *v.* O'Dougherty	153
Remsen *v.* People	6, 113
Ressequie *v.* Byers	89
R. *v.* ——	249
" *v.* Adamson	174
" *v.* All Saints, Worcester	210
" *v.* Baker	258
" *v.* Baldry	54, 257
" *v.* Barnard	21
" *v.* Bathwick	209
" *v.* Bedingfield	7, 9
" *v.* Bembridge	xvii
" *v.* Blake	11
" *v.* Bliss	73

	PAGE
R. *v.* Boswell	56
" *v.* Boyes	209
" *v.* Butler	179
" *v.* Canning	36
" *v.* Castleton	138
" *v.* Cheadle	173, 270
" *v.* Chidley & Cummins	58
" *v.* Clapham	66
" *v.* Clarke	235
" *v.* Clewes	15, 57
" *v.* Cliviger	209, 210
" *v.* Cole	24
" *v.* Cooper	29
" *v.* Cresswell	187
" *v.* Davis	29
" *v.* Donellan	21
" *v.* Doolin	222
" *v.* Dove	106
" *v.* Drummond	237
" *v.* Dunn	29
" *v.* Edmunds	18
" *v.* Eriswell	76
" *v.* Exeter	70
" *v.* Fennell	54
" *v.* Forster	29
" *v.* Foster	9
" *v.* Fowkes	8
" *v.* Francis	29, 30
" *v.* Francklin	80
" *v.* Garbett	58, 209
" *v.* Garner	35, 252
" *v.* Gazard	198
" *v.* Geering	35
" *v.* Gilham	57
" *v.* Gordon	159
" *v.* Gould	57
" *v.* Gray	35, 252
" *v.* Griffin	276
" *v.* Halliday	210
" *v.* Harborne	184
" *v.* Hardy	11, 200
" *v.* Harringworth	132, 264

	PAGE
R. *v.* Hartington Middle Quarter	88
" *v.* Haworth	136
" *v.* Heyford	69
" *v.* Hind	62
" *v.* Hogg	76
" *v.* Holmes	235
" *v.* Holt	30
" *v.* Horne Tooke	109
" *v.* Hull	167
" *v.* Hutchins	88
" *v.* Hutchinson	62
" *v.* Jarvis	54, 181
" *v.* Jenkins	62
" *v.* Llanfaethly	140
" *v.* Lloyd	57
" *v.* Lord George Gordon	21
" *v.* Lord Thanet	274
" *v.* Luffe	184
" *v.* Lumley	184
" *v.* Mainwaring	111
" *v.* Mansfield	184
" *v.* Martin	235
" *v.* Mead	62
" *v.* Moore	57
" *v.* Mosly	62
" *v.* Oddy	29
" *v.* Orton	82, 226
" *v.* Palmer	15, 32, 106, 107
" *v.* Parbhudas and Others	248
" *v.* Patch	15
" *v.* Payne	195
" *v.* Pike	237
" *v.* Reeve	54
" *v.* Richardson	35, 200, 201
" *v.* Robinson	58
" *v.* Rowton	114, 262
" *v.* Russell	274
" *v.* Scaife	76, 77, 241
" *v.* Scott	58, 210
" *v.* Sparkes	275
" *v.* Stephenson	241
R. *v.* Stone	181
" *v.* Sutton	80
" *v.* Tait	242
" *v.* Thompson	195
" *v.* Thornhill	125
" *v.* Turberfield	114
" *v.* Turner	96
" *v.* Twyning	177
" *v.* Walker	19, 251
" *v.* Warwickshall	57
" *v.* Watson	129, 135
" *v.* Webb	194
" *v.* Weeks	29
" *v.* Whitehead	222
" *v.* Widdop	58
" *v.* Willshire	177
" *v.* Wood	19
" *v.* Woodcock	63
Reynolds, *In re*	209
Reynolds *v.* Manning	52, 64
" *v.* Robinson	102, 170
" *v.* U. S.	77
Rhine *v.* Robinson	78
Rhodes *v.* Seibert	137
Rice *v.* Comm	211, 220
" *v.* Rice	101
Richards *v.* Skiff	131
Richie *v.* State	236
Rider *v.* Legg	131
" *v.* White	30
Riggs *v.* Pursell	87
" *v.* Tayloe	139
Riley *v.* Suydam	49
Ripley *v.* Burgess	119
Ripon *v.* Bittell	83
Risley *v.* Phenix Bank	90, 98, 166
Roady *v.* Finegan	209
Roath *v.* Driscoll	186
Robards *v.* Marley	104
Robb *v.* Hackley	235
Robb's Appeal	197
Robbins *v.* Chicago	94

PAGE

Robbins *v.* Robbins..... 211
" *v.* State..... 60
Roberge *v.* Burnham 176
Robert *v.* Good..... 132
Roberts *v.* Chittenden 177
" *v.* Doxen..... 138
" *v.* Johnson 105
" *v.* Medbery 43
" *v.* Noyes..... 191
" *v.* Ogdensburgh, etc. R. Co..... 128
" *v.* Orr..... 86
" *v.* Spencer..... 139
" *v.* State..... 14
" *v.* Walley..... 218
Roberts' Will, *In re* 19, 104
Robertson *v.* Bullions..... 171
" *v.* Hay.. .....158, 160
Robinson *v.* Adams 33
" *v.* Brown 119
" *v.* F. & W. R. Co... 34
" *v.* Marks 87
" *v.* Myers..... 158
" *v.* Randall..... 176
" *v.* State 19
" *v.* U. S 13, 213
" *v.* Yarrow 191
Rockwell *v.* Taylor..... ..7, 47
Roderigas *v.* East River Sav. Inst.....85, 97
Rodgers *v.* State..... 119
" *v.* Stophel 4
Roe *d.* West *v.* Davis..... 128
Rogers *v.* Allen..... 12
" *v.* Anderson..... 48
" *v.* Andrews 47
" *v.* Greenwood..... 47
" *v.* Gwinn..... 100
" *v.* Ritter 109
" *v.* Zook 104
Romertze *v.* East River Bk.... 232
Roosa *v.* Boston Loan Co..... 32

PAGE

Root *v.* Hamilton.. 226
" *v.* King 80, 116, 151
" *v.* Wright 202, 204
Rose *v.* Chapman..... 45
" *v.* Himely 84
Roseboom *v.* Billington 68
Rosenthal *v.* Walker..... 37
Ross *v.* Ackerman 34
" *v.* Boswell..... 123
" *v.* Doland..... 189
" *v.* Wood..... 99
Roth *v.* Roth 100
Rothrock *v.* Gallaher 230
Rothschild *v.* Amer. Ins. Co... 176
Rounds *v.* McCormick 127
Rousillon *v.* Rousillon 99
Rowand *v.* Finney 162
Rowley *v.* L. & N. W. R'y.... 105
Royal Ins. Co. *v.* Noble..... 210
Ruch *v.* Rock Island..... 78
Ruckman *v.* Decker 45
Ruddell *v.* Fhalor..... 189
Rufer *v.* State 54
Ruloff's Case..... 16
Rumsey *v.* Lovell..... 240
Runyan *v.* Price 231
Rusling *v.* Bray 225
Russell *v.* Church..... 163
" *v.* Hallett..... 185
" *v.* Hudson Riv. R. Co. 237
" *v.* Place 93
Rutland *v.* Page..... 155
Ryall *v.* Hannam..... 172
Ryan *v.* Merr'am..... 41
" *v.* People 15
Ryerson *v.* Abington..... 231
Ryerss *v.* Wheeler 168, 170

S

Sage *v.* Harpending..... 98
Sailor *v.* Hertzogg..... 12

	PAGE
St. John *v.* Amer. Ins. Co.	134
" *v.* Croll	146
St. Louis Ins. Co. *v.* Cravens	94
St. Luke's Home *v.* Assn. for Females	169
Samuels *v.* Borrowscale	144
Sanderson *v.* Coleman	191
" *v.* Peabody	86
Sandifer *v.* Hoard	43
Sandilands, *In re*	155
Sargeant *v.* Sargeant	41
Sargent *v.* Adams	169
" *v.* Wilson	233
Saunders *v.* McCarthy	47
Savage *v.* O'Neil	104
Saveland *v.* Green	129
Sayles *v.* Briggs	85
Sayres *v.* Comm	15
Schafer *v.* Schafer	199
Schall *v.* Miller	199
Scharff *v.* Keener	76, 156
Schaser *v.* State	223
Schell *v.* Plumb	83
Schisby *v.* Westenholz	99
Schlicht *v.* State	124
Schmidt *v.* N. Y., etc. Ins. Co.	176
Schmied *v.* Frand	198
Scholfield, *Ex parte*	210
Sch. Freeman *v.* Buckingham	193
Schrauth *v.* Dry Dock Bk.	93
Schroeder *v.* Railroad Co.	128
Schultz *v.* Third Avenue R. Co.	226, 228
Schuylkill Co. *v.* Copley	195
Scotia, The	121
Scott *v.* Pentz	141
" *v.* People	60
" *v.* Sampson	115
" *v.* Waithman	133
" *v.* Williams	218
Scovill *v.* Baldwin	220
Searcy *v.* Miller	195
Searight *v.* Craighead	46
Sears *v.* Wingate	192
Second Nat. Bk. *v.* Ocean Nat. Bk.	94
Secor *v.* Sturgis	86
Secrist *v.* Petty	125
Seeley *v.* Engell	222
Selden *v.* Canal Co.	146
Selkirk *v.* Cobb	222
Selover *v.* Rexford's Exer.	237
Servis *v.* Nelson	131
Sewell *v.* Gardner	230
Sexton *v.* Bridgewater	102
Seybolt *v.* N. Y., etc. R. Co.	176
Seymour *v.* Fellows	103, 105
Shaffer *v.* Shaffer	68
Shaffner *v.* Comm	25
Shailer *v.* Bumstead	33, 42, 47
Shaughnessy *v.* Lewis	162
Shaw *v.* Emery	233
" *v.* Mason	137
" *v.* Tobias	117
Shawneetown *v.* Mason	101
Sheaffer *v.* Eakman	42
Sheen *v.* Bumpstead	31
Shelburne Falls Bk. *v.* Townsley	36
Sheldon *v.* Benham	63
" *v.* Patterson	92
" *v.* Wright	98
Shelp *v.* Morrison	140, 141
Shepard *v.* Potter	221
Shephard, *In re*	140
Shepley *v.* Waterhouse	46
Sheppard *v.* Giddings	139
" *v.* Yocum	229, 234
Sheridan *v.* New Quay	192
Sherman *v.* People	128
" *v.* Wilder	33, 162
Sherwood *v.* Pratt	130
" *v.* Sherwood	165, 168
" *v.* Titman	31

	PAGE
Shields *v.* Boucher	260
Shifflet *v.* Comm	55
Shinkle *v.* Crock	108
Shirts *v.* Overjohn	189
Shockey *v.* Miles	127
Shoemaker *v.* Benedict	46
Shorb *v.* Kinzie	110
Shore *v.* Wilson	171
Shorey *v.* Hussey	230
Short *v.* Lee	258, 259
Showalter *v.* State	196
Shrewsbury Peerage Case	74
Shriedly *v.* State	29
Shufflin *v.* People	5
Shuler *v.* Gillette	160
Shurtleff *v.* Parker	227
" *v.* Willard	222
Shuttle *v.* Thompson	71
Sibley *v.* Waffle	204
Sill *v.* Reese	109
Simmons *v.* Havens	131
" *v.* New Bedford, etc. St. Co	100
" *v.* Rudall	159
Simpson *v.* Dall	136
" *v.* Dix	42, 44
" *v.* Westenberger	115
Sims *v.* Sims	95, 195
Sinclair *v.* Baggallay	154
" *v.* Murphy	191
Singer Mf'g Co. *v.* McFarland	110
Sisson *v.* Cleveland, etc. R. Co.	83
Sitler *v.* Gehr	66, 75, 76
Skilbeck *v.* Garbett	36
Slade *v.* Leonard	41
Slane Peerage Case	143
Slasser *v.* Burlington	77
Slatterie *v.* Pooley	128
Slingerland *v.* Bennett	31
Sloan *v.* Edwards, 227, 229, 233,	234
" *v.* N. Y. C. R. Co	230
Slocumb *v.* Railroad Co	188
Slossen *v.* Railroad Co	27
Small *v.* Comm	61
Smith *v.* Aldrich	50
" *v.* Beattie	162
" *v.* Blakey	66
" *v.* Cawlin	132
" *v.* Chapin	84
" *v.* Collins	45
" *v.* Comm	55, 56
" *v.* Easton	129
" *v.* Ehanert	230
" *v.* Floyd	13
" *v.* Forbes	212
" *v.* Forrest	72, 73
" *v.* Frankfield	98
" *v.* Hickenbottom	101
" *v.* Law	64, 66
" *v.* Long	204
" *v.* McCool	87
" *v.* McGowan	158
" *v.* McNeal	87
" *v.* Morgan	44
" *v.* N. Y. C. R. Co	133
" *v.* Porter	153
" *v.* Sac Co	178
" *v.* Shoemaker	153
" *v.* Smith	86, 172
" *v.* Whippingham	50
" *v.* Wilson	170
" *v.* Yaryan	236
Snow *v.* B. & M. R. Co	102
" *v.* Gould	204
Snyder *v.* Comm	114
" *v.* McKeever	109
" *v.* Winsor	68
Sohns *v.* McCulloh	47
Somerville, etc. R. Co. *v.* Doughty	223
Soper *v.* Buffalo, etc. R. Co	45
Souder *v.* Schechterly	43
South *v.* People	53
South Bend *v.* Hardy	226, 236

PAGE

S. W. School Dist. *v.* Williams. 72
Southwark Bank *v.* Comm.... 151
Southwick *v.* Stevens..... 129
Soutier *v.* Kellerman 170
Spalding *v.* Hedges..... 81
Spangler *v.* Jacoby..... 80
Spargo *v.* Brown 256
Spatz *v.* Lyon 38
Spaulding *v.* Hallenbeck 41
" *v.* Hedges 83
" *v.* Vincent.....104, 144
Spears *v.* State..... 55
Specht *v.* Howard..... 222
Sperry *v.* Moore's Estate..... 222
Spitley *v.* Frost..... 87
Spring Co. *v.* Edgar..... 103
Spring Garden Ins. Co. *v.* Evans..... 239
Spring Run Co. *v.* Tosier..... 87
Squire *v.* State 177
Stacy *v.* Graham..... 231
Stalker *v.* State 29
Stanbro *v.* Hopkins. 195
Stanton *v.* Crosby 99
Stanwood *v.* McLellan..... 239
Stape *v.* People.....211, 234
Stapleton *v.* King 201
Starin *v.* Genoa 45
Staring *v.* Bowen..... 156
Starkey *v.* People.....61, 62
Starks *v.* People..... 234
Starkweather *v.* Martin 155
State *v.* Able.....77, 78
" *v.* Albert..... 53
" *v.* Alexander..... 14
" *v.* Alford 224, 245
" *v.* Allen 211
" *v.* Arnold..... 10
" *v.* B. & P. R. Co..... 181
" *v.* Barrowes..... 196
" *v.* Bartlett 179
" *v.* Benner.....202, 224, 227

PAGE

State *v.* Bloom..... 113
" *v.* Bohan 258
" *v.* B. & M. R. Co..... 34
" *v.* Bridgman.....31, 210
" *v.* Briggs 210
" *v.* Brockman..... 56
" *v.* Brown 56
" *v.* Byrne 17
" *v.* Clare..... 125
" *v.* Clinton.....110, 209
" *v.* Damery..... 222
" *v.* Danforth..... 23
" *v.* Davis 54
" *v.* Dennin 235
" *v.* Dickinson.....60, 62
" *v.* Dickson 15, 101
" *v* Donovan..... 127
" *v.* Dunnell 122
" *v.* Egan 233
" *v.* Elliott.....14, 61, 237
" *v.* Fassett..... 201
" *v.* Fay..... 209
" *v.* Feltes..... 59
" *v.* Fitzgerald..... 77
" *v.* Foote..... 218
" *v.* Forshner 235, 236
" *v.* Fortner 55
" *v.* Fraunburg 62
" *v.* Gann 175
" *v.* Gedicke 32
" *v.* Gilman.....58, 59
" *v.* Glynn..... 230
" *v.* Graham..... 14
" *v.* Grant.....54, 229, 233, 235
" *v.* Grear 59
" *v.* Gurnee 128, 135
" *v.* Hamilton 179
" *v.* Harper..... 62
" *v.* Hastings..... 110
" *v.* Hayden.. ....101, 105, 106
" *v.* Heed..... 213
" *v.* Heinrich..... 179

	PAGE
State *v.* Hendricks	235
" *v.* Henke	185
" *v.* Hodge	179
" *v.* Hodgskins	111
" *v.* Hopkins	83
" *v.* Houser	77
" *v.* Hoyt.....5, 14, 23, 82,	198
" *v.* Humbird	155
" *v.* Intoxicating Liquors..	123
" *v.* Ivins	17
" *v.* Jones 17, 54,	196
" *v.* Kelly	179
" *v.* King	113
" *v.* Kingsbury	245
" *v.* Kinney	17
" *v.* Klinger	105
" *v.* Knight	231
" *v.* Knowles	53
" *v.* Lamb 58,	59
" *v.* Lapage....33, 34, 113,	114
" *v.* Larkin	10
" *v.* Lawlor	234
" *v.* Levy	194
" *v.* Lewis	228
" *v.* Litchfield.....208,	211
" *v.* Lonsdale	209
" *v.* Macdonald	86
" *v.* Mallon	16
" *v.* Markins	31
" *v.* Mayberry	141
" *v.* McAllister	117
" *v.* McCaffrey	245
" *v.* McDonnell	53
" *v.* McGlothlen	211
" *v.* McKean	211
" *v.* McLaughlin	229
" *v.* Mewherter	203
" *v.* Miller	238
" *v.* Minnick	121
" *v.* Morris 83, 123,	125
" *v.* Mortimer	56
" *v.* Mosley	96

	PAGE
State *v.* Nelson	234
" *v.* Nichols	211
" *v.* Niles	17
" *v.* Nugent	25
" *v.* Ober	209
" *v.* Patterson.53, 54, 55, 62,	178
" *v.* Peck	155
" *v.* Phair	63
" *v.* Phelps	59
" *v.* Pike	201
" *v.* Potter 55,	187
" *v.* Powers	122
" *v.* Railroad Co.. 26,	34
" *v.* Randolph.....195,	233
" *v.* Red	209
" *v.* Redemeier	179
" *v.* Reed 18,	236
" *v.* Resells	55
" *v.* Richards	17
" *v.* Riggs	30
" *v.* Rodman 113,	220
" *v.* Romaine	183
" *v.* Rorabacher	221
" *v.* Roswell	111
" *v.* Rush	233
" *v.* Sayers	221
" *v.* Scanlan	194
" *v.* Shaffer	179
" *v.* Shee	188
" *v.* Smith	223
" *v.* Soper	200
" *v.* Staley.....56,	59
" *v.* Stein	232
" *v.* Sullivan	61
" *v.* Swayze	223
" *v.* Tatro	55
" *v.* Thompson	155
" *v.* Timmens	211
" *v.* Tully	211
" *v.* Turner 221,	236
" *v.* Wagner 81,	125
" *v.* Walker	7

PAGE

State *v.* Ward.....29, 110, 226, 234
" *v.* Warner 17
" *v.* Welch 210
" *v.* Wentworth 28, 55, 209
" *v.* Westfall 258
" *v.* White 205, 236
" *v.* Williams 31, 120
" *v.* Wilner..... 187
" *v.* Wilson 210
" *v.* Wingo..... 178
" *v.* Witham....20, 58, 209, 224
" *v.* Wood 60, 202
" *v.* Woodson 14
" *v.* Worthingham 111
Staunton *v.* Parker 206
Stead *v.* Heaton 69
Stearns *v.* Doe 137
" *v.* Field 105
" *v.* Merchants' Bk..230, 231
Stebbins *v.* Duncan...130, 135, 136
Steed *v.* Cruise..... 208
Steele *v.* Lord..... 136
Steen *v.* Bennett..... 85
Stein *v.* Bowman 75, 217
Steinbach *v.* Relief Ins. Co.... 88
Stephens *v.* People 106
" *v.* Vrooman..... 38
Stevens *v.* McNamara 187
Stevenson *v.* Hoy..... 139
" *v.* Superior Ct..... 85
Stewart *v.* First Nat. Bk..... 78
" *v.* Keteltas..... 164
" *v.* Wells..... 41
Stier *v.* Oskaloosa 117
Stiles *v.* Allen 221
Stilwell *v.* Carpenter..... 213
Stimpson *v.* Brooks..... 219
Stirling *v.* Buckingham 142
Stitt *v.* Huidekopers.....173, 240
Stoate *v.* Stoate 89
Stobart *v.* Dryden 38
Stockbridge Co. *v.* Hudson Co. 165

PAGE

Stockfleth *v.* De Tastet..... 52
Stoddard *v.* Johnson..... 97
Stokes *v.* Johnson 222
" *v.* Macken..... 117
" *v.* People..... 14, 228
Stolp *v.* Blair..... 235
Stone *v.* Segur..... 21
Storm *v* U. S..... 225
Story *v.* Bishop..... 155
Stott *v.* Rutherford 190
Stout *v.* Cook 77
Stover *v.* People.....6, 16, 113, 179
Stowell *v.* Chamberlain.....87, 93
" *v.* Moore 219
Strang *v.* People..... 236
Stringer *v.* Gardiner.....172, 269
Strong *v.* Connell..... 224
" *v.* Lord 232
Strong's Exers..... 108
Stroud *v.* Tilton 64
Sturla *v.* Freccia.....39, 80
Sturm *v.* Atlantic Ins. Co..... 222
Sugden *v.* St. Leonards..... 71
Sullivan *v.* Comm 61, 112
Summerbell *v.* Summerbell ... 211
Summons *v.* State.....77, 78
Supples *v.* Cannon 86, 199
" *v.* Lewis 164
Susquehanna Ins. Co. *v.* Toy Co 37
Susq., etc. R. Co. *v.* Quick ... 42
Sussex Peerage Case..... 70, 238
Sutton *v.* Bowker 171
Swain *v.* Frazier..... 163
Swaine *v.* Seamens 164
Swan *v.* Comm 33
" *v.* British, etc. Co....190, 272
" *v.* Middlesex..... 102
Swartz *v.* Chickering..... 239
Sweet *v.* Sherman 234
" *v.* Tuttle..... 93
Swift *v.* Life Ins. Co.....16, 32

PAGE

Swinnerton *v.* Ins. Co. 122, 123, 125
Swisher *v.* Comm 61
Switzer *v.* Knapps 155
Sydleman *v.* Beckwith 101
Sykes, *In re* 148
Sykes *v.* Bonner 89

T

Tabor *v.* Van Tassell 43
Taddiker *v.* Cantrell 157
Talbot *v.* Hodson 134
Talcott *v.* Harris 18
Tams *v.* Hitner 130
Tanner *v.* Parshall 44
Tarbox *v.* State 28
Tate *v.* Tate 211
Taylor *v.* Foster 204
" *v.* Gilman 16
" *v.* Glaser 155
" *v.* Gould 66
" *v.* G. T. R. Co 41, 44
" *v.* Larkin 199
" *v.* Peck 128
" *v.* State 195
" *v.* Withams 69
Taylor Will Case 71
Teachout *v.* People 58
Teague *v.* Irwin 224
Tedens *v.* Schumers 234
Teerpenning *v.* Corn Ex. Ins. Co 100, 126
Teese *v.* Huntingdon 233
Tenney *v.* Berger 245
" *v.* Tuttle 115
Thayer *v.* Boston 172
" *v.* Thayer 31
Thielmann *v.* Burg 120
Thomas *v.* Hubbell 95
" *v.* Le Baron 134
" *v.* Nelson 138, 164
" *v.* Stigers 123

PAGE

Thompson *v.* Blanchard 189
" *v.* Bowie 20, 34
" *v.* Comm 54, 56
" *v.* Engle 206
" *v.* German, etc. R. Co 200
" *v.* Haskell 120
" *v.* Higginbotham 219
" *v.* Stewart 121
" *v.* Whitman 99
" *v.* Woolf 75
Thomson *v.* State 17
Thornton's Exers. *v.* Thornton's Heirs 230
Thorpe *v.* Keokuk Coal Co 132
Thorson *v.* Peterson 123
Thurber *v.* Anderson 36
Thurman *v.* Cameron 146
Thurtell *v.* Beaumont 176
Tillou *v.* Clinton, etc. Ins. Co. 158
Tilson *v.* Terwilliger 43
Tilton *v.* Amer. Bible Soc 169
" *v.* Miller 107
Tioga Co. *v.* South Creek Tp. 184
Titford *v.* Knott 109
Titus *v.* Ash 233
Toebbe *v.* Williams 159
Tome *v.* Parkersburgh, etc. R. Co 111
Tomlinson *v.* Derby 230
Tompson *v.* Fisher 134
Tooker *v.* Gonner 52
Topliff *v.* Jackson 40
Totten *v.* Bucy 128, 141
" *v.* U. S 200
Towne *v.* Butterfield 190
Townsend *v.* Merchants' Ins. Co 52
" *v.* Pepperell 66
Tracy *v.* McManus 21
Trambly *v.* Ricard 162
Trasker *v.* Everhart 155

PAGE

Travis *v.* Brown 111
Treadway *v.* S. C., etc. R. Co.. 47
Trelawney *v.* Coleman..... 32
Trotter *v.* McLean..... 36
Truax *v.* Slater..... 44
Trustees *v.* Bledsoe..... 239
" *v.* Calhoun 71
" *v.* Colegrove 169
" *v.* McKechnie..... 155
Tucker *v.* Call..... 176
" *v.* Seamen's Aid Soc.. 169, 171
" *v.* Woolsey 137
Tufts *v.* Charlestown..... 18
Tunlow *v.* P. & R. R. Co..... 117
Turnbull *v.* Payson.....121, 147
Turner *v.* Comm..... 178
" *v.* Green..... 130
Turner's Adm'r.....121, 123
Turnpike Co. *v.* Baily..... 128
" " *v.* M'Kean..... 81
Turquand *v.* Knight 204
Turrell *v.* Warren 98
Tuska *v.* O'Brien..... 89
Twomley *v.* C. P. N. R. Co... 9
Tyler *v.* Fickett 169
" *v.* Flanders 74, 75
" *v.* Todd..... 110
" *v.* Ulmer 84
Tyng *v.* U. S. Submarine, etc. Co..... 240

U

Udderzook *v.* Comm.....20, 128
Ulrich *v.* People..... 55
Union *v.* Plainfield..... 74
Union Bk. *v.* Knapp..... 63
Union Pac. R. Co. *v.* Shoup... 47
U. S. *v.* Amedy 121, 150
" *v.* Angell 77
" *v.* Babcock 37, 140

PAGE

U. S. *v.* Biebusch 195, 211
" *v.* Charles..... 58, 202
" *v.* Clark..... 193
" *v.* Dickinson..... 224
" *v.* Duff..... 140
" *v.* Duffy..... 58
" *v.* Eighteen Barrels, etc. 223
" *v.* Farrington 202
" *v.* Guiteau 197, 198
" *v.* Hunter.....140, 208
" *v.* Jackson..... 123
" *v.* Jones..... 110
" *v.* Linn..... 158
" *v.* Macomb 77, 78
" *v.* McCarthy..... 209
" *v.* McKee 11
" *v.* Moses 200
" *v.* Noelke 36
" *v.* Percheman..... 146
" *v.* Perot 117
" *v.* Pocklington..... 56
" *v.* Stone..... 55
" *v.* Tilden..... 140
" *v.* Van Sickle..... 233
" *v.* Walker 98
" *v.* Williams..... 36
" *v.* Wood 213
" *v.* Wright 175
Unity *v.* Burrage 117
Upstone *v.* People..... 101
Upthegrove *v.* State 14
Utica Ins. Co. *v.* Cadwell 140

V

Vaise *v.* Deleval..... 201
Van Aernam *v.* Van Aernam .. 183
Van Bokkelen *v.* Taylor 154
Van Brunt *v.* Day 163
Van Buren *v.* Cockburn..... 159
Van der Donct *v.* Thellusson.. 104
Vandervoort *v.* Smith..... 121

PAGE

Vanderwerker *v.* People 122
Van Duyne *v.* Thayre..... 41, 139
Van Gelder *v.* Van Gelder 41
Van Houten *v.* Post 170
Van Keuren *v.* Parmalee.... 45, 46
Vanneter *v.* Crossman 39
Van Nostrand *v.* Moore..... 169
Van Rensselaer *v.* Jones 130
" " *v.* Vickery 154
Van Sickle *v.* Gibson 74
Van Storch *v.* Griffin..... 116, 147
Vaughan *v.* O'Brien 87
Veazie *v.* Forsaith 168
Veiths *v.* Hagge..... 177
Viele *v.* Jackson..... 188
Vigel *v.* Hopp..... 213
Village of Port Jervis *v.* First Nat. Bk 94
Vilmar *v.* Schall 65
Vinal *v.* Burrill 46
Vining *v.* Baker 188
Vogel *v.* Osborne..... 40
Volant *v.* Soyer..... 208
Von Sachs *v.* Kretz.. 43, 44, 50, 138
Vooght *v.* Winch 92
Vosburgh *v.* Thayer 64
Vrooman *v.* Griffiths 224
" *v.* King 43

W

Wadsworth *v.* Sharpsteen..... 84
" *v.* Williams..... 42
Wagenseller *v.* Immers 20
Wakeman *v.* Bailey..... 208
Walbridge *v.* Knippen... 77, 78, 79
Waldele *v.* N. Y. C. R. Co..6, 7, 9
Walden *v.* Davison 140
Waldron *v.* Waldron..... 162
Walker *v.* Chase..... 92
" *v.* Dunspaugh 225
" *v.* People..... 179

PAGE

Walker *v.* Walker 156
Wallace *v.* Taunton St. R'y... 226
Wallack *v.* Wylie..... 237
Wallis *v.* Littell 166
" *v.* Randall..... 47
Wallize *v.* Wallize 162, 171
Walls *v.* Bailey..... 164
Walrath *v.* Whittekind..... 167
Walsh *v.* People 14, 23
" *v.* Porterfield 224
Walter *v.* Gernant..... 7
Walters *v.* State..... 179
Walton *v.* State 233
Wandell *v.* Edwards..... 236
Ward *v.* Henry..... 120
" *v.* Kilpatrick 127
" *v.* Lewis 155
" *v.* Oxford 72
" *v.* People 56
" *v.* Warren 185
Ware *v.* Morgan 137
Waring *v.* Smyth..... 158
Warner *v.* Hurdy..... 146
" *v.* Lockerby..... 233
" *v.* N. Y. C. R. Co.... 26
Warren *v.* Cornings 86
" *v.* Gabriel 230
" *v.* Gregg 162
" *v.* Warren..... 36
Washburn *v.* Cuddihy 82
Water Comm'rs *v.* Lansing.... 145
Waterman *v.* Whitney.....6, 18
Waters *v.* People 179
Waters Heater Co. *v.* Smith .. 30
Watkins *v.* Holman..... 151
" *v.* Pintard 141
Watry *v.* Ferber..... 236
Watson *v.* Brewster.....74, 76
" *v.* Comm 179, 213
" *v.* Riskamire 222
" *v.* Rodwell..... 125
" *v.* Walker 144, 151

PAGE

Wayland *v.* Ware 145
Weaver *v.* Leiman.....66, 74, 76
Webb *v.* Bird 186
" *v.* Buckalew 87
" *v.* East 210
" *v.* Richardson 76
" *v.* State 234
Webster *v.* Mann..... 237
" *v.* Paul 67
Weed *v.* People 25
Weeks *v.* Lowerre..... 77
" *v.* Sparke 71, 259, 260
Wehle *v.* Spelman..... 51
Wehrkamp *v.* Willet..... 233
Weigand *v.* Sichels..... 132
Welcome *v.* Batchelder....199, 237
Weldon *v.* Harlem R. Co..... 28
Wellford *v.* Eakin 131
Wells *v.* Company..... 120
" *v.* Stevens..... 97
" *v.* Wells 194
Wendlinger *v.* Smith 163
Wentworth *v.* Wentworth..... 185
Wertheim *v.* Continental R. Co. 140
Wertz *v.* May 234
Wesner *v.* Stein 40
West *v.* Smith..... 52
Westcott *v.* Atlantic Co..... 208
" *v.* Edmunds..... 87
Western Trans. Co. *v.* Barber. 192
W. U. Tel. Co. *v.* Hopkins.... 129
Westmann *v.* Krumweide 163
Weston *v.* Eames..... 165
" *v.* Gravlin 176
Wetherbee *v.* Norris..... 233
Wetherill *v.* Stillman.....98, 99
Wetmore *v.* Carryl 159
Weyman *v.* People 35
Whalin *v.* White 190
Wharam *v.* Routledge 240
Wheat *v.* Summers 40
Wheatly *v.* Baugh 186

PAGE

Wheeler *v.* Ruckman 87
Whelan *v.* Lynch..... 83
Whelpley *v.* Loder 203
Whitaker *v.* Izod 207
" *v.* Jackson 93
" *v.* Salisbury..... 230
Whitcher *v.* McLaughlin... 66, 136
" *v.* Morey 78
" *v.* Shattuck 31
Whitcomb *v.* Whiting..... 48, 49
White *v.* Beaman..... 68
" *v.* Chase..... 86
" *v.* Continental Nat. Bk. 191
" *v.* Graves..... 5
" *v.* Merritt..... 86
" *v.* Miller..... 45
" *v.* Milwaukee R. Co.... 128
" *v.* Murtland 236
" *v.* Ross..... 32
" *v.* Weatherbee..... 88
" *v.* Wood..... 130
Whitehead *v.* Kennedy 179
Whitehouse *v.* Bickford..... 82
Whiting *v.* Lake..... 45
" *v.* Nicoll..... 185
Whitman *v.* Heneberry 156
Whitney *v.* Leominster 34
" *v.* Thacher.....83, 102
Whitney Arms Co. *v.* Barlow.. 176
Whiton *v.* Albany, etc. Ins. Co. 80, 150
" *v.* Snyder.. 40, 42, 102, 180
Whittlesey *v.* Frantz..... 85
Whittuck *v.* Walters..... 76
Whitwell *v.* Winslow..... 33
Whyman *v.* Garth.....132, 264
Widdifield *v.* Widdifield 164
Wiggin *v.* B. & A. R. Co..... 42
" *v.* Goodrich..... 166
Wiggins *v.* Burkham..... 40, 124
" *v.* People..... 14
Wigglesworth *v.* Dallison..164, 267

PAGE

Wightman *v.* Coates..... 211
Wikoff's Case 159
Wilberforce *v.* Hearfield 82
Wilbur *v.* Selden..... 77
Wilder *v.* Cowles..... 177
Wilkins *v.* Babbershall..... 230
Willett *v.* People 54
Williams *v.* Bridges..... 50
" *v.* Comm.....58, 213, 247
" *v.* East India Co..... 177
" *v.* Floyd 132
" *v.* Freeman 162
" *v.* Graves 69
" *v.* Gunnels..... 176
" *v.* Montgomery 201
" *v.* Sergeant.....42, 221
" *v.* State. 110
" *v.* Wilkes..... 121
" *v.* Williams 91
Willis *v.* Hulbert 163
Wilmington *v.* Burlington 74
Wilson *v.* Anderton..... 192
" *v.* Boerem 60
" *v.* Bowden..... 50
" *v.* Deen..... 163
" *v.* Granby 32
" *v.* Knapp 66
" *v.* M. & N. R. Co..... 129
" *v.* New Bedford..... 186
" *v.* O'Day 47
" *v.* Powers 163
" *v.* Randall 161
" *v.* Rastall 204
" *v.* State..... 233
" *v.* Sullivan..... 173
" *v.* Terry 19
" *v.* Wagar 223
" *v.* Webber..... 207
Willson *v.* Betts.....131, 156
Winchester *v.* Charter 43
Wing *v.* Angrave..... 185
" *v.* Bishop 41, 90

PAGE

Wing *v.* Chesterfield..... 243
Winn *v.* Paterson..... 156
Winooski *v.* Gokey..... 117
Withington *v.* Warren..... 199
Wolf *v.* Comm..... 56
Womack *v.* Tankersley..... 111
Wood *v.* Chetwood..... 198
" *v.* Fowler..... 122
" *v.* Ins. Co..... 123
" *v.* Morehouse 187
" *v.* State..... 6
" *v.* Steele..... 160
Woodbury *v.* Obear 105
Woodcock *v.* Houldsworth.... 36
Woodford *v.* People..... 54
Woodman *v.* Dana 110
" *v.* Segar..... 131
Woodruff *v.* Woodruff..... 89
Woods *v.* Keyes..... 78
" *v.* People.....235, 236
Woodward *v.* Leavitt..... 201
Wooley *v.* Grand St. R. Co... 26
Wooster *v.* Butler 71
Worthington *v.* Scribner 206
Wottrich *v.* Freeman 197
Wright *v.* Doe *d.* Tatham ..19, 102
" *v.* Hanna..... 233
" *v.* Masseras 18
" *v.* Nostrand 14
" *v.* Paige..... 233
" *v.* U. S..... 149

X

Xenia Bank *v.* Stewart..... 45

Y

Yale *v.* Comstock 78, 79
Yates *v.* Fassett 87
" *v.* People..... 25
" *v.* Yates..... 119

PAGE

Yeaton *v.* Fry 151
Yocum *v.* Smith 190
York *v.* Pease 224
York Co. *v.* Central R. Co.... 219
York, etc. R. Co. *v.* Winans .. 120
Young *v.* Clare Hall..... 258
" *v.* Comm..... 55
" *v.* Edwards..... 224
" *v.* Grote.....190, 272
" *v.* Makepeace 23
Young *v.* Perkins. 68
" *v.* State 54, 55
Youngs *v.* Youngs 209
Yount *v.* Howell..... 120

Z

Zabriskie *v.* State..... 211
Zepp *v.* Hager..... 99
Zerley *v.* Wilson..... 132
Zitske *v.* Goldberg..... 199

TABLE OF STATUTES CITED.

ENGLISH.

	PAGE
7 James I. c. 12	279
20 Ch. II. c. 3	186
7 & 8 Will. III. c. 3, ss. 2, 4	212, 279
13 Geo. III. c. 63	216
" " " ss. 40, 42, 44	216
39 & 40 Geo. III. c. 93	212, 279
41 Geo. III. c. 90, s. 9	287
46 Geo. III. c. 37	210, 280
7 Geo. IV. c. 64, s. 4	243
7 & 8 Geo. IV. c. 28	114
" " " s. 11	114, 279
9 Geo. IV. c. 14, s. 1	48, 279
" " " s. 3	67, 68, 279
1 Will. IV. c. 22	216
3 & 4 Will. IV. c. 42	68, 279
5 & 6 Will. IV. c. 50, s. 100	273
6 & 7 Will. IV. c. 111	114, 279
7 Will. IV. & 1 Vict. c. 26	281
1 & 2 Vict. c. 94, ss. 1, 12, 13	286
" " " s. 13	146
1 & 2 Vict. c. 105	215
3 & 4 Vict. c. 26	273
3 & 4 Vict. c. 105	216
6 & 7 Vict. c. 85	273, 280
8 & 9 Vict. c. 10, s. 6	211, 279
8 & 9 Vict. c. 113 (preamble)	145, 280
" " " s. 1	146, 280
" " " s. 2	122, 280
8 & 9 Vict. c. 113, s. 3	280, 287
" " " ss. 4-7	280
11 & 12 Vict. c. 42	216, 257
" " " s. 17	217, 241, 279
13 & 14 Vict. c. 21, ss. 7, 8	118
14 & 15 Vict. c. 99, ss. 1-20	280, 281
" " " s. 2	272, 273
" " " s. 3	273
" " " s. 4	283
" " " s. 7	289
" " " ss. 9, 10, 11, 19	286
" " " s. 14	146
" " " s. 16	215
16 & 17 Vict. c. 83, ss. 1, 2	273
" " " s. 2	283
" " " s. 3	198
17 & 18 Vict. c. 104, s. 270	217, 243
17 & 18 Vict. c. 125, s. 2	234
" " " s. 20	214
" " " ss. 22, 23	278
" " " ss. 22, 27	281, 282
" " " ss. 22-27	282, 283
" " " s. 24	232
" " " s. 26	134, 265
" " " s. 27	110

	PAGE
18 & 19 Vict. c. 111, s. 3.....	192
19 & 20 Vict. c. 97, s. 13....	48, 279
" " " s. 14.....	48
24 & 25 Vict. c. 66.....	214, 282
" " " ss. 1-3.....	282
24 & 25 Vict. c. 96, s. 116...114,	279
24 & 25 Vict. c. 99, s. 37....114,	279
28 Vict. c. 18	282
" " ss. 1-8	282
" " s. 3	234
" " ss. 3-8	284
" " s. 5	232
" " s. 8.....106,	110
" " s. 18	103
28 & 29 Vict. c. 18, ss. 1, 7..134,	265
" " " s. 6.....	228
28 & 29 Vict. c. 63, s. 6.....	290
28 & 29 Vict. c. 104, s. 34.....	197
30 & 31 Vict. c. 35, s. 6.217, 242,	279
31 & 32 Vict. c. 37	288

	PAGE
31 & 32 Vict. c. 37, ss. 1-6.....	282
" " " ss. 2-3.....	288
32 & 33 Vict. c. 68, ss. 1-6..281,	283
" " " s. 2.....	210
" " " s. 3. 197, 273,	281
" " " s. 4. 214, 273,	283
33 & 34 Vict. c. 49, s. 1.... 214,	283
" " " ss. 2, 3.....	283
33 & 34 Vict. c. 79, s. 21.....	288
34 & 35 Vict. c. 70, s. 5.....	288
34 & 35 Vict. c. 112, s. 19....28,	279
35 & 36 Vict. c. 6, s. 4.....216,	279
36 & 37 Vict. c. 66, s. 25.....	118
" " " s. 76.....	122
37 & 38 Vict. c. 35	273
37 & 38 Vict. c. 96	273
40 & 41 Vict. c. 14	197
42 & 43 Vict. c. 2	285
42 & 43 Vict. c. 11..... 207,	285
" " " ss. 3, 5	286

[AMERICAN.]

UNITED STATES.

Revised Statutes.

(Edition of 1878.)

PAGE	PAGE	PAGE	PAGE
§ 1 214	§ 724 140	§§ 863-868 .. 218	§ 906 148
§ 101 216	§ 828 147	§§ 882-898 .. 143	§ 908 149
§ 183 216	§ 858 194	§§ 882-900 .. 145	§ 1778 216
§ 213 147	§ 863 217	§ 892 147	§§ 4194, 4195. 147
§§ 460, 461.. 147	§§ 863-876.. 217,	§ 895 151	§ 5392 214
§ 474 216	242	§ 905....148, 150	pp. 1090-1092 149

Act of Congress, March 16, 1878.....196

MAINE.

Revised Statutes.

(Edition of 1883.)

PAGE	PAGE	PAGE	PAGE
c. 73, § 19 .. 130	c. 82, §§ 98,	c. 82, §§ 108,	c. 82, § 109.. 152
c. 81, § 100 . 68	100..... 48	109..... 104	c. 82, § 110.. 134
			c. 134, § 19.. 242

NEW HAMPSHIRE.

General Laws.

(Edition of 1878.)

PAGE	PAGE	PAGE
c. 228, § 14.. 207	c. 228, § 15.. 230	c. 228, § 27.. 228

VERMONT.

Revised Laws.

(Edition of 1880.)

PAGE	PAGE
§ 1938 130	§ 1943 130

MASSACHUSETTS.

Public Statutes.

(Edition of 1882.)

PAGE	PAGE	PAGE	PAGE
c. 85, § 16 .. 211	c. 169, § 2 .. 231	c. 169, §§ 23–64.. 217	c. 169, §§ 72, 73.. 104
c. 120, §§ 8, 10..... 130	c. 169, §§ 7, 12 216	" § 67 . 149	" § 73 . 152
c. 159, § 51 . 217	" §§ 13–18. 215	" §§ 69,	c. 197, § 16 . 68
c. 167, §§ 49–60..140, 216	" § 18. 196, 198	71.. 149	" § 17 . 48
" § 56.. 207	" § 19. 195, 228	" § 70 . 144	c. 213, § 13 . 201
			c. 214, § 12 . 181

RHODE ISLAND.

Public Statutes.

(Edition of 1882.)

PAGE	PAGE
c. 214, § 41 . 134	c. 214, § 42 . 110

NEW YORK.

Code of Civil Procedure.

(Edition of 1885.)

PAGE	PAGE	PAGE	PAGE
§ 530 117	§ 828 198	§ 832 ...195, 228	§ 837 ...209, 210
§§ 803–809.. 140	§ 829 193	§ 833 206	§ 839 45
§ 827 217	§ 831... ... 198	§ 834 206	§ 843 216

NEW YORK—Code of Civil Procedure (*Continued*).

PAGE §§ 845-851.. 215 § 847 ..... 214 § 851..... 214 § 868 ..... 140 §§ 870-886.. 216 §§ 887-920 ..217, 242 § 899 ..... 217 §§ 900-909.. 218 §§ 910, 911.. 219 §§ 921-924.. 145, 146 § 924..... 63, 64 § 928 ..... 146 §§ 928-941.. 145 § 932 ..... 149 § 933 ..... 144 §§ 935-937.. 134 § 936 ..... 146 § 942 ...104, 149, 152 §§ 943, 944.. 144 §§ 943-947.. 145 §§ 948-951.. 148 §§ 952-956..121, 152 §§ 957, 958.. 144 §§ 957-962.. 145 § 961 ..... 147 § 962.... 63, 143, 145, 152 §§ 1011-1026 217 § 1018 ..... 218 § 1209 ..... 87 § 1753 ..... 211 § 1865 ..... 70 § 2591 ..... 85 §§ 2618-2620 131 § 2621 70

Code of Criminal Procedure.

(Edition of 1885.)

PAGE §§ 188-221.. 216 § 198 ..... 58 § 265 ..... 201 § 266 ..... 202 § 393 ..... 196 § 395 ..... 55 § 399 ..... 211 §§ 620-657 .. 242

PAGE Penal Code, § 715 ..... 196 Revised Statutes,* 63, § 38 .... 71 Laws of 1880, c. 36 ..... 110 Laws of 1883, c. 195 134

NEW JERSEY.

Revision of Statutes.

(Edition of 1877.)

PAGE p. 378, § 1.. 228 p. 379, § 9.. 228 p. 381 ..... 110 p. 595, § 10 . 48

ILLINOIS.—*Revised Statutes* (Edition of 1883), c. 51, § 1 228
" " " " p. 543, § 51 134

INDIANA.—*Revised Statutes* (Edition of 1881), § 507..... 231
" " " " § 508..... 229

NEBRASKA.—*Code of Civil Procedure* (Edition of 1881), § 338..... 228

WISCONSIN.—*Revised Statutes* (Edition of 1878), § 4073 228

LIST OF ABBREVIATIONS.

(ENGLISH AND IRISH REPORTS, ETC.)

A. & E.....Adolphus & Ellis's Reports.
App. Cas .....Appeal Cases.
Atk.....Atkyn's Reports.

B. & A.....Barnewall & Alderson's Reports.
B. & Ad .....Barnewall & Adolphus's Reports.
B. & B.....
Br. & Bing.....} Broderip & Bingham's Reports.
B. & C.....Barnewall & Cresswell's Reports.
Beav.....Beavan's Reports.
Bell, C. C.....Bell's Crown Cases.
Best, ...Best on Evidence, 6th ed.
B. & S.....Best & Smith's Reports.
Bing.... .....Bingham's Reports.
Bing. N. C.....Bingham's New Cases.
Bligh, N. S.... .....Bligh's House of Lords' Reports, New Series.
B. & P.....Bosanquet & Puller's Reports.
B. N. P.....Buller's Nisi Prius.
Br. P. C .....Brown's Parliamentary Cases.
Buller, N. P..... ..Buller's Nisi Prius.
Burr.....Burrows' Reports.

C. A.....Court of Appeal.
Camp.....Campbell's Reports.
Car. & Kir.....Carrington & Kirwan's Reports.
C. B.....Common Bench Reports.
C. B. (N. S.).....Common Bench Reports, New Series.
Ch. D.....Chancery Division.
C. C. C.....
Cox, Cr. Ca.....} Cox's Crown Cases.
C. C. R.....Crown Cases Reserved.

C. & F.....Clark & Finnelly's Reports.
C. M. & R.....Crompton, Meeson, & Roscoe's Reports.
C. & Marsh.....Carrington & Marshman's Reports.
Cowp.....Cowper's Reports.
C. & P.....Carrington & Paine's Reports.
C. P. D.....
C. P. Div.....} Common Pleas Division.
C. & J.....Crompton & Jervis's Reports.

D. & B.....
Dear. & B.....} Dearsly & Bell's Crown Cases.
Dear.....
Dearsly & P.....} Dearsly's Crown Cases.
De G. & J.....De Gex & Jones's Reports.
De G. M. & G.....De Gex, Macnaghten, & Gordon's Reports.
De G. & S.....De Gex & Smale's Reports.
Den. C. C.....Denison's Crown Cases.
Doug.....Douglas's Reports.
Dru. & War.....Drury & Warren's Reports.

Ea.....East's Reports.
East, P. C.....East's Pleas of the Crown.
E. & B.....Ellis & Blackburn's Reports.
E. & E.....Ellis & Ellis's Reports.
Esp.....Espinasse's Reports.
Ex.....Exchequer Reports.
Ex. D.....
Ex. Div.....} Exchequer Division.

F. & F.....Foster & Finlason's Reports.

Gen. View. Cr. Law.Stephen's General View of the Criminal Law.
Giff.....Giffard's Reports, Chancery.
Godb.....Godbolt's Reports.

Hale, P. C.....Hale's Pleas of the Crown.
Hare,.....Hare's Reports.
H. Bl.....H. Blackstone's Reports.
H. & C.....Hurlstone & Coltman's Reports.
H. & N.....Hurlstone & Norman's Reports.
H. L. C.....House of Lords Cases.

Ir. Cir. Rep.....Irish Circuit Reports.
Ir. Eq. Rep.....Irish Equity Reports.

Jac. & Wal .....Jacob & Walker's Reports.
Jebb, C. C.....Jebb's Criminal Cases (Ireland).

Keen,.....Keen's Reports, Chancery.

L. & C.....Leigh & Cave's Crown Cases.
Leach,.....Leach's Crown Cases.
L. J. Ch .....Law Journal, Chancery.
L. J. Eq.... .....Law Journal, Equity.
L. J. M. C.....Law Journal, Magistrates' Cases.
L. J. N. S.....Law Journal, New Series.
L. J. Q. B.....Law Journal, Queen's Bench.
L. R. App. Cas.....Law Reports, Appeal Cases.
L. R. Ch. Ap.....Law Reports, Chancery Appeals.
L. R. Ch. D.....Law Reports, Chancery Division.
L. R. C. C. R.....Law Reports, Crown Cases Reserved.
L. R. C. P.....Law Reports, Common Pleas.
L. R. C. P. D.....Law Reports, Common Pleas Division.
L. R. E. & I. App...Law Reports, English & Irish Appeals.
L. R. Ex.....Law Reports, Exchequer.
L. R. Ex. D.....Law Reports, Exchequer Division.
L. R. P. & D.....Law Reports, Probate & Divorce.
L. R. P. D.....Law Reports, Probate Division.
L. R. Q. B.....Law Reports, Queen's Bench.
L. R. Q. B. D.....Law Reports, Queen's Bench Division.
L. R. Sc. Ap.....Law Reports, Scotch Appeals.

Madd.....Maddock's Reports.
Man. & R.....Manning & Ryland's Reports.
McNally Ev.....McNally's Rules of Evidence.
M. & G.....Manning & Granger's Reports.
M. & K.....Mylne & Keen's Reports.
M. & M.....Moody & Malkin's Reports.
M. & S..... ...Maule & Selwyn's Reports.
M. & W..... .....Meeson & Welsby's Reports.
Moo. C. C.....Moody's Crown Cases.
Mo. & Ro.....Moody & Robinson's Reports.
Moo. P. C.... .....Moore's Privy Council Reports.

Pea. R.....Peake's Reports.
Phi. Ev.....Phillips on Evidence, 10th ed.
Phill.....Phillips' Reports.

Price,.....Price's Reports.
P. D.....Probate Division.

Q. B.....Queen's Bench Reports.
Q. B. D.....Queen's Bench Division.

Rep.....Coke's Reports.
R. N. P.....Roscoe's Nisi Prius, 13th ed.
R. & R.....Russell & Ryan's Crown Cases.
Russ. Cri .....
Russ. on Crimes ..
} Russell on Crimes, 4th ed.
Ry. & Mo.....Ryan & Moody's Nisi Prius Reports.

Selw. N. P.....Selwyn's Nisi Prius.
Sim .....
Simon,.....
} Simon's Reports.
Sim. (N. S.) .....
Simon (N. S.).....
} Simon's Reports, New Series.
Sim. & Stu.....Simon & Stuart's Reports.
S. L. C.....
Smith, L. C.....
} Smith's Leading Cases, 7th ed.
Star .....Starkie's Reports.
Starkie,.....Starkie on Evidence, 4th ed.
S. & T.....
Swa. & Tr .....
} Swabey & Tristram's Reports.
S. T., or St. Trl.....State Trials.
Story's Eq. Jur.....Story on Equity Jurisprudence.
Swab. Ad.....Swabey's Admiralty Reports.

T. E.....Taylor on Evidence, 6th ed.
T. R.....Term Reports.
Tau.....Taunton's Reports.

Ve .....Vesey's Reports.
Vin. Abr.....Viner's Abridgment.

Wigram, or.....
Wig. Ext. Ev.....
} Wigram on Extrinsic Evidence.
Wills' Circ. Ev.....Wills on Circumstantial Evidence.

[AMERICAN REPORTS, ETC.]

(The abbreviations of the names of the several States, being well understood, are omitted.)

Abb. Dec .....Abbott's Decisions, Court of Appeals, N. Y.
Abb. N. C.....Abbott's New Cases, N. Y.
Abb. Pr.....Abbott's Practice Reports, N. Y.
Abb. Pr. (N. S.) .... " " " " New Series.
Alb. L. J.....Albany Law Journal, N. Y.
Allen,.....Allen's Reports, Mass.
Am. Dec.....American Decisions (cases from all States).
Am. Law Reg. N. S.American Law Register, New Series.
Am. Law Rev.....American Law Review.
Anth. N. P.....Anthon's Nisi Prius Reports, N. Y.

Barb.....Barbour's Reports, Supreme Court, N. Y.
Barb. Ch.....Barbour's Chancery Reports, N. Y.
Barr, ...Barr's Reports, Pa.
Baxt.....Baxter's Reports, Tenn.
Beas.....Beasley's Chancery Reports, N. J.
Ben.....Benedict's Reports, U. S. District Court.
Binn.....Binney's Reports, Pa.
Bishop, Cr. L.....Bishop on Criminal Law, 7th ed.
Bishop, Cr. Pro.....Bishop on Criminal Procedure, 3d ed.
Bishop, M. & D.....Bishop on Marriage and Divorce, 6th ed.
Black, ...Black's Reports, U. S. Supreme Court.
Blackf. .....Blackford's Reports, Ind.
Blatch.....Blatchford's Reports, U. S. Circuit Court.
B. Mon .....Ben Monroe's Reports, Ky.
Bos.....Bosworth's Reports, Superior Court, N. Y.
Bradw.....Bradwell's Appellate Reports, Ill.
Brews.....Brewster's Reports, Pa.
Bump's Fed. Pro....Bump on Federal Procedure.
Bush,.....Bush's Reports, Ky.

Cai.....Caine's Reports, N. Y.
C. E. Gr.....C. E. Greene's Equity Reports, N. J.
Cf.....*Confer*, compare.
Cinc.....Cincinnati Reports, Ohio.
Cow .....Cowen's Reports, N. Y.
Cr.....Cranch's Reports, U. S. Supreme Court.

Cr. C. C.....Cranch's U. S. Circuit Court Reports.
Ct. of Cl.....Court of Claims Reports, U. S.
Cush.....Cushing's Reports, Mass.

Daly,.....Daly's Reports, Court of Common Pleas, N. Y.
Daniel, Neg. Inst....Daniel on Negotiable Instruments, 3d ed.
Del. Ch.....Delaware Chancery Reports.
Dem.....Demarest's Reports, Surrogate Courts, N. Y.
Den.....Denio's Reports, N. Y.
Dill.....Dillon's Reports, U. S. Circuit Court.
Disney,.....Disney's Reports, Superior Court, Ohio.
Duer,.....Duer's Reports, Superior Court, N. Y.
Dutch.....Dutcher's Reports, N. J.

E. D. Sm.....E. D. Smith's Reports, Court of Common Pleas, N. Y.
Edm. Sel. Cas.....Edmond's Select Cases, N. Y.
Edw. Ch.....Edward's Chancery Reports, N. Y.

F. R.....Federal Reporter, U. S. Circuit and District Courts.
Fost.....Foster's Reports, N. H.

G. & J.....Gill & Johnson's Reports, Md.
Gill.....Gill's Reports, Md.
Gr. Ch.....Green's (H. W.) Chancery Reports, N. J.
Gr. Ev.....Greenleaf on Evidence.
Gratt .....Grattan's Reports, Va.
Gray,.....Gray's Reports, Mass.

Hill,.....Hill's Reports, N. Y.
Hilt.....Hilton's Reports, Court of Common Pleas, N. Y.
Houst. C. C.....Houston's Criminal Cases, Del.
How. Pr.....Howard's Practice Reports, N. Y.
How. (U. S.) .....Howard's Reports, U. S. Supreme Court.
Humph. .....Humphrey's Reports, Tenn.
Hun,.....Hun's Reports, Supreme Court, N. Y.

J. & Sp .....Jones & Spencer's Reports, Superior Court, N. Y.
Johns. .....Johnson's Reports, N. Y.
Johns. Cas.....Johnson's Cases, N. Y.
Johns. Ch.....Johnson's Chancery Reports, N. Y.

Kent's Comm.....Kent's Commentaries on American Law.
Keyes,.....Keyes' Reports, Court of Appeals, N. Y.

La. Ann.....Louisiana Annual Reports.
Lans.....Lansing's Reports, Supreme Court, N. Y.
Lea,.....Lea's Reports, Tenn.
Low.....Lowell's Reports, U. S. District Court.

McCrary,.....McCrary's Reports, U. S. Circuit Court.
McL.....McLean's Reports, U. S. Circuit Court.
Mackey,.....Mackey's Reports, District of Columbia.
Mass. Pub. St.....Massachusetts Public Statutes.
Md. Ch.....Maryland Chancery Reports.
Met.....Metcalf's Reports, Mass.
Mo. App.....Missouri Appeals Reports.

N. J. Eq.....New Jersey Equity Reports.
N. J. L.....New Jersey Law Reports.
N. J. Rev.....New Jersey Revision of Statutes.
N. S.....New Series.
N. Y. Code Civ. Pro.New York Code of Civil Procedure.
N. Y. Code Cr. Pro..New York Code of Criminal Procedure.
N. Y. Daily Reg.. ..New York Daily Register (N. Y. City).
N. Y. Pen. Code....New York Penal Code.

O. St.....Ohio State Reports.

P. & W.....Penrose & Watts' Reports, Pa.
Pai.....Paige's Chancery Reports, N. Y.
Park. Cr.....Parker's Criminal Reports, N. Y.
Pet.....Peters' Reports, U. S. Supreme Court.
Pet. C. C.....Peters' U. S. Circuit Court Reports.
Pick.....Pickering's Reports, Mass.

R. S.....Revised Statutes.
Redf.....Redfield's Reports, Surrogate Courts, N. Y.
Rev. St.....Revised Statutes.
Rob.....Robertson's Reports, Superior Court, N. Y.

S.....Section.
S. C.....Same Case.
S. P.....Same Principle.

S. & R.....Sergeant & Rawle's Reports, Pa.
Sandf.....Sandford's Reports, Superior Court, N. Y.
Sandf. Ch.....Sandford's Chancery Reports, N. Y.
Scam.....Scammon's Reports, Ill.
Sneed,.....Sneed's Reports, Tenn.
Story,.....Story's Reports, U. S. Circuit Court.
Sumn.....Sumner's Reports, U. S. Circuit Court.

T. & C.....Thompson & Cook's Reports, Supreme Court, N. Y.
Tucker,.....Tucker's Reports, Surrogate Courts, N. Y.

Vr. .....Vroom's Reports, N. J.

W. D.....Weekly Digest, N. Y.
W. & M.....Woodbury & Minot's Reports, U. S. Circuit Court.
Wall.....Wallace's Reports, U. S. Supreme Court.
Wash. C. C.....Washington's U. S. Circuit Court Reports.
Washb. R. P.....Washburn on Real Property, 4th ed.
Watts,.....Watts' Reports, Pa.
Wend.....Wendell's Reports, N. Y.
Wh. Cr. Ev.....Wharton on Criminal Evidence, 9th ed.
Wh. Ev.....Wharton on Evidence.
Whart.....Wharton's Reports, Pa.
Wheat. .....Wheaton's Reports, U. S. Supreme Court.
Woods,.....Woods' Reports, U. S. Circuit Court.

Zab.....Zabriskie's Reports, N. J.

CONTENTS.

PART I.

RELEVANCY.

CHAPTER I.—PRELIMINARY.

ART. 1. Definition of Terms ..... Pages 3-4

CHAPTER II.—OF FACTS IN ISSUE AND RELEVANT TO THE ISSUE.

ART. 2. Facts in issue and Facts relevant to the issue may be proved—3. Relevancy of Facts forming part of the same transaction as the Facts in issue—4. Acts of Conspirators—5. Title—6. Customs—7. Motive, preparation, subsequent conduct, explanatory statements—8. Statements accompanying acts, complaints, statements in presence of a person—9. Facts necessary to explain or introduce relevant Facts ..... Pages 5-23

CHAPTER III.—OCCURRENCES SIMILAR TO BUT UNCONNECTED WITH THE FACTS IN ISSUE IRRELEVANT EXCEPT IN CERTAIN CASES.

ART. 10. Similar but unconnected Facts—11. Acts showing intention, good faith, etc.—12. Facts showing system—13. Existence of course of business, when deemed to be relevant ..... Pages 24-37

CHAPTER IV.—HEARSAY IRRELEVANT EXCEPT IN CERTAIN CASES.

ART. 14. Hearsay and the contents of documents irrelevant.. Pages 38-39

SECTION I.—*Hearsay, when relevant.*

ART. 15. Admissions defined—16. Who may make admissions on behalf of others, and when—17. Admissions by agents and persons jointly interested with parties—18. Admissions by strangers—19.

Admission by person referred to by party—20. Admissions made without prejudice—21. Confessions defined—22. Confession caused by inducement, threat, or promise, when irrelevant in Criminal Proceeding —23. Confessions made upon oath, etc.—24. Confession made under a promise of secrecy—25. Statements by deceased persons, when deemed to be relevant—26. Dying declaration as to cause of death—27. Declarations made in the course of business or professional duty—28. Declarations against interest—29. Declarations by testators as to contents of will—30. Declarations as to public and general rights—31. Declarations as to pedigree—32. Evidence given in former proceeding, when relevant .....Pages 39–79

SECTION II.—*Statements in Books, Documents, and Records, when relevant.*

ART. 33. Recitals of public facts in statutes and proclamations—34. Relevancy of entry in public record made in performance of duty—35. Relevancy of statements in works of history, maps, charts, and plans—36. Entries in bankers' books—37. Bankers not compellable to produce their books—38. Judge's powers as to bankers' books—39. "Judgment"—40. All judgments conclusive proof of their legal effect—41. Judgments conclusive as between parties and privies of Facts forming ground of judgment—42. Statements in judgments irrelevant as between strangers, except in Admiralty Cases—43. Effect of judgment not pleaded as an estoppel—44. Judgments generally deemed to be irrelevant as between strangers—45. Judgments conclusive in favor of Judge—46. Fraud, collusion, or want of jurisdiction may be proved—47. Foreign judgments ..... Pages 79–99

CHAPTER V.—OPINIONS, WHEN RELEVANT AND WHEN NOT.

ART. 48. Opinion generally irrelevant—49. Opinions of experts on points of science or art—50. Facts bearing upon opinions of experts—51. Opinion as to handwriting, when deemed to be relevant—52. Comparison of handwritings—53. Opinion as to existence of marriage, when relevant—54. Grounds of opinion, when deemed to be relevant.....Pages 100–112

CHAPTER VI.—CHARACTER, WHEN DEEMED TO BE RELEVANT AND WHEN NOT.

ART. 55. Character generally irrelevant—56. Evidence of character in Criminal Cases—57. Character as affecting damages..Pages 113–116

PART II.

ON PROOF.

CHAPTER VII.—FACTS PROVED OTHERWISE THAN BY EVIDENCE—JUDICIAL NOTICE.

ART. 58. Of what Facts the Court takes judicial notice—59. As to proof of such Facts—60. Evidence need not be given of Facts admitted.....Pages 117-125

CHAPTER VIII.—OF ORAL EVIDENCE.

ART. 61. Proof of Facts by oral evidence—62. Oral evidence must be direct .....Page 126

CHAPTER IX.—OF DOCUMENTARY EVIDENCE—PRIMARY AND SECONDARY, AND ATTESTED DOCUMENTS.

ART. 63. Proof of contents of Documents—64. Primary evidence—65. Proof of documents by primary evidence—66. Proof of execution of document required by law to be attested—67. Cases in which attesting witness need not be called—68. Proof when attesting witness denies the execution—69. Proof of document not required by law to be attested—70. Secondary evidence—71. Cases in which secondary evidence relating to documents may be given—72. Rules as to notice to produce .....Pages 127-141

CHAPTER X.—PROOF OF PUBLIC DOCUMENTS.

ART. 73. Proof of public documents—74. Production of document itself—75. Examined copies—76. [General records of the Nation or State]—77. Exemplifications—78. Copies equivalent to exemplifications—79. Certified copies—80. [Documents and records of the several States admissible throughout the United States]—81. [Officially printed copies]—82. [Proof of the statutes of any State or Territory]—83. [Proclamations, acts of state, Legislative Journals, etc.]—84. [Foreign written laws, acts of state, records, etc.] ....Pages 142-152

CHAPTER XI.—PRESUMPTIONS AS TO DOCUMENTS.

ART. 85. Presumption as to date of a document—86. Presumption as to stamp of a document—87. Presumption as to sealing and delivery of deeds—88. Presumption as to documents thirty years old—89. Presumption as to alterations ..... Pages 153-160

CHAPTER XII.—OF THE EXCLUSION OF ORAL BY DOCUMENTARY EVIDENCE, AND OF THE MODIFICATION AND INTERPRETATION OF DOCUMENTARY BY ORAL EVIDENCE.

ART. 90. Evidence of terms of contracts, grants, and other dispositions of property reduced to a documentary form—91. What evidence may be given for the interpretation of documents —92. Cases to which articles 90 and 91 do not apply ..... Pages 161-174

PART III.

PRODUCTION AND EFFECT OF EVIDENCE.

CHAPTER XIII.—BURDEN OF PROOF.

ART. 93. He who affirms must prove—94. Presumption of innocence—95. On whom the general burden of proof lies—96. Burden of proof as to particular Fact—97. Burden of proving Fact to be proved to make evidence admissible.....Pages 175-182

CHAPTER XIV.—ON PRESUMPTIONS AND ESTOPPELS.

ART. 98. Presumption of legitimacy — 99. Presumption of death from seven years' absence—100. Presumption of lost grant — 101. Presumption of regularity and of deeds to complete title—102. Estoppel by conduct — 103. Estoppel of tenant and licensee—104. Estoppel of acceptor of bill of exchange—105. Estoppel of bailee, agent, and licensee .....Pages 183-192

CHAPTER XV.—OF THE COMPETENCY OF WITNESSES.

ART. 106. Who may testify — 107. What witnesses are incompetent — 108. Competency in Criminal Cases—109. [Husband and wife in civil cases,—cases of adultery] — 110. Communications during marriage—111. Judges and advocates privileged as to certain questions—112. Evidence as to affairs of state—113. Information as to commission of offences — 114. Competency of jurors — 115. Professional communications—116. Confidential communications with legal advisers—117. Clergymen and medical men—118. Production of title-deeds of witness not a party—119. Production of documents which another person, having possession, could refuse to produce—120. Witness not to be compelled to criminate himself—121. Corroboration, when required—122. Number of witnesses .....Pages 193-213

CHAPTER XVI.—OF TAKING ORAL EVIDENCE, AND OF THE EXAMINATION OF WITNESSES.

ART. 123. Evidence to be upon oath, except in certain cases—124. Form of oaths; by whom they may be administered—125. How oral evi-

dence may be taken—126. Examination in chief, cross-examination, and re-examination—127. To what matters cross-examination and re-examination must be directed—128. Leading questions—129. Questions lawful in cross-examination—130. Exclusion of evidence to contradict answers to questions testing veracity—131. Statements inconsistent with present testimony may be proved—132. Cross-examination as to previous statements in writing—133. Impeaching credit of witness—134. Offences against women—135. What matters may be proved in reference to declarations relevant under Articles 25–32—136. Refreshing memory—137. Right of adverse party as to writing used to refresh memory—138. Giving, as evidence, document called for and produced on notice—139. Using, as evidence, a document production of which was refused on notice..Pages 214–240

CHAPTER XVII.—OF DEPOSITIONS.

ART. 140. Depositions before magistrates—141. Depositions under 30 & 31 Vict. c. 35, s. 6—142. Depositions under Merchant Shipping Act, 1854.....Pages 241–244

CHAPTER XVIII.—OF IMPROPER ADMISSION AND REJECTION OF EVIDENCE.

ART. 143 .....Page 245

APPENDIX OF NOTES .....Pages 246–290

INDEX.....Page 291

A DIGEST

OF

THE LAW OF EVIDENCE.

NOTES ON EVIDENCE—GREENLEAF—STEPHEN.

By Prof. Chase.

Officially Revised.

G, § 18. Under such circumstances some courts infer not an intent to murder, but only an intent to kill, and whether it shall be deemed murder or manslaughter is to be determined by the jury from all the circumstances of the case (67 N. Y., 218.)

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But in Indiana it is held that an expert is entitled to compensation for his professional opinion and may refuse to testify without it, 59 Ind., 1 & 15.

* See Note I.

- I. What facts may and what may not be proved.
  - Facts in issue.
  - Facts relevant to the issue — Excluding (relation must be a causal one.)
    - 1. *Res inter alios acta.* — Admitting
      - Acts showing intention in good faith.
      - Acts showing system
      - Acts showing course of business
    - 2. Hearsay — Admitting
      1. Admissions and confessions
      2. Statements of deceased
      3. Dying declarations
      4. Declarations in course of business
      5. Declarations against interest.
      6. Declarations of testators as to contents of a will
      7. Declarations as to public and general rights
      8. Declarations as to pedigree
      9. Evidence in former case.
    - 3. Opinion — Admitting.
      - Opinion of experts
      - As to existence of marriage
    - 4. Character — Admitting.
      - Character in criminal cases.
      - Character as affecting damages
- II. What kind of evidence must be given of a fact which may be proved.
  - Judicial notice.
  - Oral evidence — Direct
  - Documentary evidence
    - Primary
    - Secondary — Attestation of proof of public documents
- III. By whom and in what manner the evidence must be produced by which any fact is to be proved.
  - Burden of proof — On him who affirms.
  - Presumptions
    - Legitimacy.
    - Death after 7 years absence
    - Lost grant
    - Of regularity and lost deeds to complete title.
  - Estoppel.
    - By conduct
    - Of tenant and licensee
    - Of acceptor of bill of exchange
    - Of bailee and agent.
  - Competency.
    - Communications during marriage
    - Judges and advocates
    - Affairs of state.
    - Professional and privileged communications
    - Witness need not criminate himself
  - Examination
    - Evidence on oath
    - Examination in chief
    - Cross examination —— Counsel bound by witness' answer except to prove former conviction or hostility.
    - Redirect examination.
    - Leading questions excluded. — Leading questions admitted
      - Statements inconsistent with present testimony may be proved to impeach credit.

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G, § 45. Corroboration of an accomplice's testimony is absolutely necessary to sustain a conviction in New York. (Code Crim Pro., 399.)

G, § 102. Now that parties are competent witnesses, the declarations of a party injured, made some time after the injury that he is suffering pain, are *not* competent as evidence, at least when not made to a physician in professional attendance. But evidence may still be given if groans, screams or exclamations indicative of present pain and suffering. 105 N Y., 294; 99 N Y., 136.

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The contrary is held in Alabama, 12 Am. L Rev., 589.

G, § 367. If it appears to the trial judge that the child does not sufficiently understand the nature and obligation of an oath, it is within his discretion to permit it to be properly instructed, provided it is of sufficient age and intellect to receive the instruction, 142 Mass., 577.

G, § 569. Unless subscribing witnesses are necessary to the validity of the instrument, a writing may be proved without calling the subscribing witness to it, in the same way as it might be proved if it had no such witness. (N. Y. Laws of 1883, c. 195.)

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A DIGEST

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THE LAW OF EVIDENCE.

PART I.

RELEVANCY.

CHAPTER I.

PRELIMINARY.

ARTICLE 1.*

DEFINITION OF TERMS.

IN this book the following words and expressions are used in the following senses, unless a different intention appears from the context.

"Judge" includes all persons authorized to take evidence, either by law or by the consent of the parties.

"Fact" includes the fact that any mental condition of which any person is conscious exists.

"Document" means any substance having any matter expressed or described upon it by marks capable of being read.

"Evidence" means—

(1) Statements made by witnesses in court under a legal sanction, in relation to matters of fact under inquiry;

such statements are called oral evidence:

(2) Documents produced for the inspection of the Court or judge;

such documents are called documentary evidence.

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* See Note I.

"Conclusive Proof" means evidence upon the production of which, or a fact upon the proof of which, the judge is bound by law to regard some fact as proved, and to exclude evidence intended to disprove it.[1]

"A presumption" means a rule of law that Courts and judges shall draw a particular inference from a particular fact, or from particular evidence, unless and until the truth of such inference is disproved.[1]

The expression "facts in issue" means—

(1) All facts which, by the form of the pleadings in any action, are affirmed on one side and denied on the other:

(2) In actions in which there are no pleadings, or in which the form of the pleadings is such that distinct issues are not joined between the parties, all facts from the establishment of which the existence, non-existence, nature, or extent of any right, liability, or disability asserted or denied in any such case would by law follow.

The word "relevant" means that any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present, or future existence or non-existence of the other.[2]

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[1] [What is here called "conclusive proof" is termed by Mr. Greenleaf and some other writers, a "conclusive presumption of law," while what is here called a "presumption" is termed by them a "disputable presumption of law." Gr. Ev. i. §§ 14-46. For illustrations of "conclusive proof," see *post*, Articles 40-44; of "presumptions," see Articles 85-89, 94, 95, 98-101.]

[2] [*Insurance Co.* v. *Weide*, 11 Wall. 438, 440; *Comm.* v. *Abbott*, 130 Mass. 473; *Comm.* v. *Jeffries*, 7 Allen, 548, 563; *Rodgers* v. *Stophel*, 32 Pa. St. 111; *Darling* v. *Westmoreland*, 52 N. H. 401. It is to be observed that the author uses the expression, "deemed to be relevant," in many of the following articles to apply not only to evidence which has true logical relevancy as here defined, but also to evidence which, not being logically relevant, is nevertheless declared admissible by law, as a means of proof. And so as to the expression "deemed to be irrelevant."]

CHAPTER II.

OF FACTS IN ISSUE AND RELEVANT TO THE ISSUE.

ARTICLE 2.*

FACTS IN ISSUE AND FACTS RELEVANT TO THE ISSUE MAY BE PROVED.

EVIDENCE may be given in any proceeding of any fact in issue,

and of any fact relevant to any fact in issue unless it is hereinafter declared to be deemed to be irrelevant,

and of any fact hereinafter declared to be deemed to be relevant to the issue whether it is or is not relevant thereto.

Provided that the judge may exclude evidence of facts which, though relevant or deemed to be relevant to the issue, appear to him too remote to be material under all the circumstances of the case.[1]

Illustration.

(*a*) A is indicted for the murder of B, and pleads not guilty.

The following facts may be in issue:—The fact that A killed B; the fact that at the time when A killed B he was prevented by disease from knowing right from wrong:[2] the fact that A had received from B such provocation as would reduce his offense to manslaughter.[3]

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* See Note II.

[1] [*Nicholson* v. *Waful*, 70 N. Y. 604; *Kennedy* v. *People*, 39 N. Y. 245, 254; *White* v. *Graves*, 107 Mass. 325; *People* v. *Niles*, 44 Mich. 606; *Mansfield Coal Co.* v. *McEnery*, 91 Pa. St. 185; *Amoskeag Co.* v. *Head*, 59 N. H. 332.]

[2] [*Moett* v. *People*, 85 N. Y. 373; *State* v. *Hoyt*, 47 Ct. 518; *Nevling* v. *Comm.*, 98 Pa. St. 322.]

[3] [Bishop Cr. L. ii. §§ 701–719; see *Shufflin* v. *People*, 62 N. Y. 229.]

The fact that A was at a distant place at the time of the murder would be relevant to the issue; the fact that A had a good character would be deemed to be relevant;[1] the fact that C on his deathbed declared that C and not A murdered B would be deemed not to be relevant.[2]

ARTICLE 3.

RELEVANCY OF FACTS FORMING PART OF THE SAME TRANSACTION AS THE FACTS IN ISSUE.

A transaction is a group of facts so connected together as to be referred to by a single legal name, as a crime, a contract, a wrong or any other subject of inquiry which may be in issue.

Every fact which is part of the same transaction as the facts in issue is deemed to be relevant to the facts in issue, although it may not be actually in issue, and although if it were not part of the same transaction it might be excluded as hearsay.[3]

---

[1] [*Stover* v. *People*, 56 N. Y. 315; *Remsen* v. *People*, 43 N. Y. 6; *Comm.* v. *Webster*, 5 Cush. 295; *Hamilton* v. *People*, 29 Mich. 195.]

[2] [So a letter of C stating that he committed the murder would be deemed not to be relevant. *Greenfield* v. *People*, 85 N. Y. 75.]

[3] [This rule is embraced in the doctrine which is commonly called in the law of evidence the doctrine of *res gestæ*. (See Gr. Ev. i. § 108.) This, briefly stated, is that evidence of acts or declarations forming part of the *res gestæ* (*i.e.*, "transaction," or "act to be proved") so as to explain or qualify it, is admissible when such "transaction" or "act" forms the fact in issue or is deemed relevant thereto. *Waldele* v. *N. Y. C. R. Co.*, 95 N. Y. 274; *Lander* v. *People*, 104 Ill. 248; *Norwich Co.* v. *Flint*, 13 Wall. 3; *Comm.* v. *Densmore*, 12 Allen, 535; *Elkins* v. *McKean*, 79 Pa. St. 493. These acts or declarations so connected with the *res gestæ* are deemed relevant, because they serve to show its nature, purpose, occasion, or object, to explain its origin or significance, to exhibit the relations of the parties concerned therein, etc. *Id.*; *People* v. *Davis*, 56 N. Y. 95, 102; *Eighmy* v. *People*, 79 N. Y. 546. But declarations which are prior or subsequent to the transaction, so as to form no constituent part of it, are not admissible. *Wood* v. *State*, 92 Ind. 269; *Waterman* v. *Whitney*, 11 N. Y. 157; *Packet Co.* v. *Clough*, 20 Wall. 528; *Bigley* v. *Williams*, 80 Pa. St. 107. But declarations may form part of the *res gestæ*, though made, not by parties to the action, but by bystanders.

Whether any particular fact is or is not part of the same transaction as the facts in issue is a question of law upon which no principle has been stated by authority and on which single judges have given different decisions.[1]

When a question as to the ownership of land depends on the application to it of a particular presumption capable of being

Castner v. *Sliker*, 33 N. J. L. 95; *Walter* v. *Gernant*, 13 Pa. St. 515; *Baker* v. *Gansin*, 76 Ind. 317; *State* v. *Walker*, 78 Mo. 380.]

This general doctrine also includes the rule stated *post* at the beginning of Article 8, and is usually deemed to embrace the cases considered under Article 4 ("Acts of Conspirators"), Article 17 (so far as the declarations of agents and partners are concerned), Article 27 ("Declarations made in course of business," etc.), and also certain cases included under Article 9 (see Illustration *c*) and Article 11 (see Illustrations *k*, *l*, and *m*). Sometimes also other cases are included under this general principle. Gr. Ev. i. §§ 108–123; see *post*, Note V. Appendix.]

[1] [The author has added this paragraph to the text since the decision in England in Bedingfield's case (see Illustration *b*). In some American decisions an attempt has been made to express a definite rule upon the subject, but it is stated in so vague and general a form as to be difficult of application. Thus it is said, "The general rule is that declarations, to become a part of the *res gestæ*, must accompany the act which they are supposed to characterize and must so harmonize as to be obviously one transaction." *Moore* v. *Meacham*, 10 N. Y. 207, 210; *Enos* v. *Tuttle*, 3 Ct. 250. It is often stated that acts or declarations, to form part of the *res gestæ*, must be "contemporaneous" or "concomitant" with it (Gr. Ev. i. § 110), and Bedingfield's case shows that this rule is applied in England very strictly. In this country also numerous decisions are found applying the rule strictly (*Luby* v. *Hudson R. Co.*, 17 N. Y. 131; *People* v. *Ah Lee*, 60 Cal. 85; *Cleveland, etc., R. Co.* v. *Mara*, 26 O. St. 185; *Adams* v. *H. & St. J. R. Co.*, 74 Mo. 553; *Rockwell* v. *Taylor*, 41 Ct. 55), while, on the other hand, many cases hold it to be sufficient if the acts or declarations occur *at* or *near* the time of the main transaction, if they are so closely near as to be directly occasioned or evoked by such transaction, and not by any supervening cause or motive. *Insurance Co.* v. *Mosley*, 8 Wall. 397; *Hunter* v. *State*, 40 N. J. L. 495; *Hanover R. Co.* v. *Coyle*, 55 Pa. St. 396; *O'Connor* v. *Chicago, etc., R. Co.*, 27 Minn. 166; *Cleveland* v. *Newsom*, 45 Mich. 62; *McLeod* v. *Ginther*, 80 Ky. 399; and see *Lund* v. *Tyngsborough*, 9 Cush. 36; *Alabama, etc., R. Co.* v. *Hawk*, 72 Ala. 112. The subject is fully discussed in *Waldele* v. *N. Y. C. R. Co.*, 95 N. Y. 274.]

rebutted, the fact that it does not apply to other neighboring pieces of land similarly situated is deemed to be relevant.[1]

Illustrations.

(*a*) The question was, whether A murdered B by shooting him.

The fact that a witness in the room with B when he was shot, saw a man with a gun in his hand pass a window opening into the room in which B was shot, and thereupon exclaimed, "There's butcher!" (a name by which A was known), was allowed to be proved by Lord Campbell, L. C. J.[2]

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[1] [Gr. Ev. i. § 53 *a*.]

[2] *R.* v. *Fowkes*, Leicester Spring Assizes, 1856. Ex relatione O'Brien, Serjt.

Since the last edition of this work was published I have referred to the report of this case in the *Times* for March 8, 1856, where the evidence of the witnesses on this point is thus given :—

"*William Fowkes :* My father got up the window, and opened it and shoved the shutter back. He waited there about three minutes. It was moonlight, the moon about the full. He closed the window but not the shutter. My father was returning to the sofa when I heard a crash at the window. I turned to look and hooted 'There's butcher.' I saw his face at the window, but did not see him plain. He was standing still outside. I aren't able to tell who it was not certainly. I could not tell his size. While I was hooting the gun went off. I hooted very loud. He was close to the shutter or thereabouts. It was only open about eight inches. *Lord Campbell :* Did you see the face of the man? *Witness :* Yes, it was moonlight at the time. I have a belief that it was the butcher. I believe it was. I now believe it from what I then saw. I heard the gun go off when he went away. We heard him run by the window through the garden towards the park."

Upon cross-examination the witness said that he saw the face when he hooted and heard the report at the same moment. The report adds "the statement of this witness was confirmed by Cooper, the policeman (who was in the room at the time), except that Cooper saw nothing when William Fowkes hooted 'there's butcher at the window!' He stated he had not time to look before the gun went off. In this case the evidence as to W. Fowkes' statement could not be admissible on the ground that what he said was in the prisoner's presence, as the window was shut when he spoke. It is also obvious that the fact that he said at the time 'there's butcher' was far more likely to impress the jury than the fact that he thought it was not true that the person he saw was the butcher,"

(*b*) The question was, whether A cut B's throat, or whether B cut it herself.

A statement made by B when running out of the room in which her throat was cut immediately after it had been cut was not allowed to be proved by Cockburn, L. C. J.[1]

(*c*) The question was, whether A committed manslaughter on B by carelessly driving over him.

A statement made by B as to the cause of his accident as soon as he was picked up was allowed to be proved by Park, J., Gurney, B., and Patteson, J., though it was not a dying declaration within article 26.[2]

(*ca*) [The question was whether A, a physician, committed the crime of killing B (a woman) by the use of means to procure an abortion upon B's person.

A statement made by B after returning home from A's office of what A had done and said to her there was not allowed to be proved.] [3]

(*cb*) [The question was whether A was negligent in jumping from the vehicle of B (a carrier of passengers) when the vehicle was apparently in a position of imminent danger.

The acts of other passengers in jumping from the vehicle at the same time were allowed to be proved.] [4]

(*d*) The question is, whether A, the owner of one side of a river, owns the entire bed of it or only half the bed at a particular spot. The fact

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[1] *R.* v. *Bedingfield*, Suffolk Assizes, 1879 [14 C. C. C. 341]. The propriety of this decision was the subject of two pamphlets, one, by W. Pitt Taylor, who denied, the other, by the Lord Chief Justice, who maintained, it.

[In Massachusetts it has been held that where a person was stabbed and said to a person who reached him within about twenty seconds after the injury, "I'm stabbed; I'm gone; Dan Hackett stabbed me," these words were admissible in the trial of his assailant for murder, as part of the *res gestæ*. *Comm.* v. *Hackett*, 2 Allen, 136; see *Comm.* v. *McPike*, 3 Cush. 181; *People* v. *Simpson*, 48 Mich. 474; *Waldele* v. *N. Y. C. R. Co.*, 95 N. Y. 278.

For a valuable discussion of Bedingfield's case and of the general doctrine of *res gestæ*, see American Law Review, xiv. 817, xv. 1 and 71. The writer thinks the evidence should have been admitted in this case. Id. xv. 89.]

[2] *R.* v. *Foster*, 6 C. & P. 325.

[3] [*People* v. *Davis*, 56 N. Y. 95; *Maine* v. *People*, 9 Hun, 113.]

[4] [*Twomley* v. *C. P. N. R. Co.*, 69 N. Y. 158.]

that he owns the entire bed a little lower down is deemed to be relevant.[1]

(*e*) The question is, whether a piece of land by the roadside belongs to the lord of the manor or to the owner of the adjacent land. The fact that the lord of the manor owned other parts of the slip of land by the side of the same road is deemed to be relevant.[2]

ARTICLE 4.*

ACTS OF CONSPIRATORS.

When two or more persons conspire together to commit any offence or actionable wrong, everything said, done, or written by any one of them in the execution or furtherance of their common purpose is deemed to be so said, done, or written by every one, and is deemed to be a relevant fact as against each of them;[3] but statements as to measures taken in the execution or furtherance of any such common purpose are not deemed to be relevant as such as against any conspirators, except those by whom or in whose presence such statements are made.[4] Evidence of acts or statements deemed to be relevant under this article may not be given until the judge is satisfied that, apart from them, there are prima facie grounds for be-

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* See Note III. [also Art. 3, note].

[1] *Jones* v. *Williams*, 2 M. & W. 326.

[2] *Doe* v. *Kemp*, 7 Bing. 332; 2 Bing. N. C. 102.

[3] [*Dewey* v. *Moyer*, 72 N. Y. 70; *Comm.* v. *Scott*, 123 Mass. 222; *Nudd* v. *Burrows*, 91 U. S. 426; *Hartman* v. *Diller*, 62 Pa. St. 37; *Lincoln* v. *Claflin*, 7 Wall. 132. It is immaterial at what time any one entered into the conspiracy. Gr. Ev. i. § 111.]

[4] [Thus statements made by a co-conspirator as a narrative of past acts or measures taken are not deemed to be relevant, not forming part of the *res gestæ*. *People* v. *Davis*, 56 N. Y. 95; *Guaranty Co.* v. *Gleason*, 78 N. Y. 503; *Heine* v. *Comm.*, 91 Pa. St. 145; *State* v. *Larkin*, 49 N. H. 39. Confessions made by one after the conspiracy is ended can only be received as evidence against himself and not against his associates. *Comm.* v. *Ingraham*, 7 Gray, 46; *State* v. *Arnold*, 48 Ia. 566; *People* v. *Arnold*, 46 Mich. 268; *People* v. *Aleck*, 61 Cal. 137; see Art. 21, *post*.]

lieving in the existence of the conspiracy to which they relate.[1]

Illustrations.

(*a*) The question is, whether A and B conspired together to cause certain imported goods to be passed through the custom-house on payment of too small an amount of duty.

The fact that A made in a book a false entry, necessary to be made in that book in order to carry out the fraud, is deemed to be a relevant fact as against B.

The fact that A made an entry on the counterfoil of his cheque-book showing that he had shared the proceeds of the fraud with B, is deemed not to be a relevant fact as against B.[2]

(*b*) The question is, whether A committed high treason by imagining the king's death; the overt act charged is that he presided over an organized political agitation calculated to produce a rebellion, and directed by a central committee through local committees.

The facts that meetings were held, speeches delivered, and papers circulated in different parts of the country, in a manner likely to produce rebellion by, and by the direction of, persons shown to have acted in concert with A, are deemed to be relevant facts as against A, though he was not present at those transactions, and took no part in them personally.

An account given by one of the conspirators in a letter to a friend, of his own proceedings in the matter, not intended to further the common object, and not brought to A's notice, is deemed not to be relevant as against A.[3]

[1] [*Ormsby* v. *People*, 53 N. Y. 472; the judge may in his discretion admit evidence of the acts and declarations of one alleged conspirator, upon condition that such proof of the conspiracy be supplied during the trial; but this should only be allowed in urgent cases. *Place* v. *Minster*, 65 N. Y. 89; *Hamilton* v. *People*, 29 Mich. 195. The existence of the conspiracy may be proved by circumstantial evidence as well as by showing an actual preconcerted agreement; as by proving acts and declarations indicating that the parties were all acting with a common design. *Kelley* v. *People*, 55 N. Y. 565; *People* v. *Arnold*, 46 Mich. 268; see *U. S.* v. *McKee*, 3 Dill. 546; *Comm.* v. *Crowninshield*, 10 Pick. 497; *Dayton* v. *Monroe*, 47 Mich. 193.]

[2] *R.* v. *Blake*, 6 Q. B. 137–140.

[3] *R.* v. *Hardy*, 24 S. T. *passim*, but see particularly 451–3.

ARTICLE 5.*

TITLE.

When the existence of any right of property, or of any right over property is in question, every fact which constitutes the title of the person claiming the right, or which shows that he, or any person through whom he claims, was in possession of the property, and every fact which constitutes an exercise of the right, or which shows that its exercise was disputed, or which is inconsistent with its existence or renders its existence improbable, is deemed to be relevant.[1]

Illustrations.

(*a*) The question is, whether A has a right of fishery in a river.

An ancient *inquisitio post mortem* finding the existence of a right of fishery in A's ancestors, licenses to fish granted by his ancestors, and the fact that the licensees fished under them, are deemed to be relevant.[2]

(*b*) The question is, whether A owns land.

The fact that A's ancestors granted leases of it is deemed to be relevant.[3]

(*c*) The question is, whether there is a public right of way over A's land.

The facts that persons were in the habit of using the way, that they were turned back, that the road was stopped up, that the road was repaired at the public expense, and A's title-deeds showing that for a length of time, reaching beyond the time when the road was said to

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* See Note IV.

[1] [*Hosford* v. *Ballard*, 39 N. Y. 147; *Cagger* v. *Lansing*, 64 N. Y. 417; *Miller* v. *L. I. R. Co.*, 71 N. Y. 380; *Boston* v. *Richardson*, 105 Mass. 351; *Gloucester* v. *Gaffney*, 8 Allen, 11; *Berry* v. *Raddin*, 11 Allen, 577; *Sailor* v. *Hertzogg*, 10 Pa. St. 296. In proving facts of ancient date to establish title, evidence may be received which would be inadmissible as to facts within the memory of living witnesses. *Bogardus* v. *Trinity Church*, 4 Sandf. Ch. 633; *Goodwin* v. *Jack*, 62 Me. 414.]

[2] *Rogers* v. *Allen*, 1 Camp. 309.

[3] *Doe* v. *Pulman*, 3 Q. B. 622, 623, 626 (citing *Duke of Bedford* v. *Lopes*). The document produced to show the lease was a counterpart signed by the lessee. See *post*, art. 64. [See *Osgood* v. *Coates*, 1 Allen, 77.]

have been used, no one had power to dedicate it to the public, are all deemed to be relevant.[1]

ARTICLE 6.

CUSTOMS.

When the existence of any custom is in question, every fact is deemed to be relevant which shows how, in particular instances, the custom was understood and acted upon by the parties then interested.

Illustration.

(*a*) The question is, whether, by the custom of borough-English as prevailing in the manor of C, A is heir to B.

The fact that other persons, being tenants of the manor, inherited from ancestors standing in the same or similar relations to them as that in which A stood to B, is deemed to be relevant.[2]

ARTICLE 7.

MOTIVE, PREPARATION, SUBSEQUENT CONDUCT, EXPLANATORY STATEMENTS.

When there is a question whether any act was done by any person, the following facts are deemed to be relevant, that is to say—

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[1] Common practice. As to the title-deeds, *Brough* v. *Lord Scarsdale*, Derby Summer Assizes, 1865. In this case it was shown by a series of family settlements that for more than a century no one had had a legal right to dedicate a certain footpath to the public.

[2] *Muggleton* v. *Barnett*, 1 H. & N. 282. For a late case of evidence of a custom of trade, see *Ex parte Powell, in re Matthews*, L. R. 1 Ch. D. 501. [As to proof of a usage of trade or business, see *Dickinson* v. *Poughkeepsie*, 75 N. Y. 65; *Mills* v. *Hallock*, 2 Edw. Ch. 652; *Haskins* v. *Warren*, 115 Mass. 514; *Adams* v. *Pittsburgh Ins. Co.*, 95 Pa. St. 348. Such a custom may be proved by one witness. *Robinson* v. *U. S.*, 13 Wall. 363; *Bissell* v. *Campbell*, 54 N. Y. 353.

As to other customs, see *Smith* v. *Floyd*, 18 Barb. 522; *Ocean Beach Ass'n* v. *Brinley*, 34 N. J. Eq. 438.]

any fact which supplies a motive for such an act,[1] or which constitutes preparation for it ; [2]

any subsequent conduct of such person apparently influenced by the doing of the act, and any act done in consequence of it by or by the authority of that person.[3]

Illustrations.

(*a*) The question is, whether A murdered B.

The facts that, at the instigation of A, B murdered C twenty-five years

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[1] [Illustrations (*a*) and (*ab*). *Murphy* v. *People*, 63 N. Y. 592 ; *Wright* v. *Nostrand*, 94 N. Y. 31 ; *Comm.* v. *Bradford*, 126 Mass. 42 ; *Comm.* v. *Hudson*, 97 Mass. 565 ; *Ettinger* v. *Comm.*, 98 Pa. St. 338. But the evidence to show motive must not be too remote. *Comm.* v. *Abbott*, 130 Mass. 472. Evidence of motive is admissible, though it tends also to prove the commission of another crime than the one charged. *Pontius* v. *People*, 82 N. Y. 339. See Art. 10, *post*.]

[2] Illustrations (*b*) and (*bc*). [See *Walsh* v. *People*, 88 N. Y. 458 ; *Comm.* v. *Choate*, 105 Mass. 451. In trials for homicide, evidence of antecedent *threats* made by the defendant against the deceased is admissible (*Comm.* v. *Goodwin*, 14 Gray, 55 ; *State* v. *Hoyt*, 46 Ct. 330 ; *Read* v. *State*, 68 Ala. 492 ; and so in cases of forcible injury, *Jewett* v. *Banning*, 21 N. Y. 27) ; and so in cases where it appears that the deceased was or may have been the aggressor, so as to cause the defendant to act in self-defence, evidence is received in many States of threats made by the deceased against the defendant, though the defendant had not heard of such threats (*Wiggins* v. *People*, 93 U. S. 465 ; *Stokes* v. *People*, 53 N. Y. 164 ; *People* v. *Alivtre*, 55 Cal. 263 ; *Roberts* v. *State*, 68 Ala. 156 ; *State* v. *Alexander*, 66 Mo. 148 ; *Campbell* v. *People*, 16 Ill. 17) ; so *a fortiori*, if such threats are made known to the defendant (*State* v. *Woodson*, 41 Ia. 425) ; but generally in other cases, evidence of threats is not admitted. *State* v. *Elliott*, 45 Ia. 486.

So evidence of the violent and quarrelsome character of the deceased is only received when the circumstances indicate that the defendant was acting in self-defence. *Abbott* v. *People*, 86 N. Y. 460 ; *Upthegrove* v. *State*, 37 O. St. 662 ; *Alexander* v. *Comm.*, 105 Pa. St. 1 ; *State* v. *Graham*, 61 Ia. 608 ; *Roberts* v. *State*, 68 Ala. 156 ; Wharton Cr. Ev. §§ 68–84 ; see *Comm* v. *Barnacle*, 134 Mass. 215.]

[3] Illustrations (*c*) (*d*) and (*e*). [See *Harrington* v. *Keteltas*, 92 N. Y. 40 ; *Morris* v. *French*, 106 Mass. 326 ; *Banfield* v. *Whipple*, 10 Allen, 27 ; *People* v. *Ah Fook*, 64 Cal. 380.]

before B's murder, and that A at or before that time used expressions showing malice against C, are deemed to be relevant as showing a motive on A's part to murder B.[1]

(*ab*) [The question is, whether A murdered B.

The fact that A had been living in adultery with B's wife is deemed to be relevant, as showing motive.[2]

The fact that B had been personally pressing A for payment of a debt which A had no means to pay is deemed to be relevant, for a like reason.][3]

(*b*) The question is, whether A committed a crime.

The fact that A procured the instruments with which the crime was committed is deemed to be relevant.[4]

(*bc*) [A, B, and C are tried for the murder of D.

The facts that at the time of the alleged crime these persons were members of a secret society, organized for the commission of crimes of violence against person and property, and for the protection of one another from detection and punishment, and that on the night before the murder they met together and planned its commission, are deemed to be relevant.][5]

(*c*) A is accused of a crime.

The facts that, either before or at the time of, or after the alleged crime, A caused circumstances to exist tending to give to the facts of the case an appearance favorable to himself, or that he destroyed or concealed things or papers, or prevented the presence or procured the absence of persons who might have been witnesses, or suborned persons to give false evidence, are deemed to be relevant.[6]

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[1] *R.* v. *Clewes*, 4 C. & P. 221. [See *Sayres* v. *Comm.* 83 Pa. St. 291; *McCue* v. *Comm.*, 78 id. 185; *State* v. *Dickson*, 78 Mo. 438.]

[2] [*Comm.* v. *Ferrigan*, 44 Pa. St. 386; see 105 Mass. 458; *Pierson* v. *People*, 79 N. Y. 424; *Reinhart* v. *People*, 82 N. Y. 607.]

[3] [*Comm.* v. *Webster*, 5 Cush. 295; see 97 Mass. 566.]

[4] *R.* v. *Palmer* (*passim*). [*Comm.* v. *Blair*, 126 Mass. 40; *Colt* v. *People*, 1 Park. Cr. 611; see *La Beau* v. *People*, 6 id. 371, 34 N. Y. 223.]

[5] [*Hester* v. *Comm.*, 85 Pa. St. 139; *McManus* v. *Comm.*, 91 id. 57.]

[6] *R.* v. *Patch*, Wills' Circ. Ev. 230; *R.* v. *Palmer*, *ub. sup.* (*passim*). [Thus the concealment of an accused person to avoid arrest may be shown (*Comm.* v. *Tolliver*, 119 Mass. 312; *Ryan* v. *People*, 79 N. Y. 593); the act of writing letters to fasten the crime on others (*Gardiner* v. *People*, 6 Park. Cr. 157) or to keep a witness away from the trial (*Adams* v. *People*, 9 Hun, 89). As to suborning witnesses, see *Donohue* v. *People*, 56 N. Y. 208; *Murray* v. *Chase*, 134 Mass. 92.]

(*d*) The question is, whether A committed a crime.

The facts that, after the commission of the alleged crime, he absconded, or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it, and the manner in which he conducted himself when statements on the subject were made in his presence and hearing, are deemed to be relevant.[1]

(*e*) The question is, whether A suffered damage in a railway accident.

The fact that A conspired with B, C, and D to suborn false witnesses in support of his case is deemed to be relevant,[2] as conduct subsequent to a fact in issue tending to show that it had not happened.

ARTICLE 8.*

STATEMENTS ACCOMPANYING ACTS, COMPLAINTS, STATEMENTS IN PRESENCE OF A PERSON.

Whenever any act may be proved, statements accompanying and explaining that act made by or to the person doing it may be proved, if they are necessary to understand it.[3]

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* See Note V. [and Art. 3, note.]

[1] Common practice. [Thus an accused person's flight may be shown (*Comm.* v. *Annis*, 15 Gray, 197; *Cummis* v. *People*, 42 Mich. 142; *Fox* v. *People*, 95 Ill. 71); his attempted escape from jail (*State* v. *Mallon*, 75 Mo. 355); his advice to an accomplice to escape (*People* v. *Rathbun*, 21 Wend. 509); his possession of property obtained by the crime (*Stover* v. *People*, 56 N. Y. 315; *Linsday* v. *People*, 63 N. Y. 143; *Comm.* v. *Parmenter*, 101 Mass. 211; *Brown* v. *Comm.*, 76 Pa. St. 319); his acts in disposal of such property (*Foster* v. *People*, 63 N. Y. 619); his giving a false account of himself when arrested (*Comm.* v. *Goodwin*, 14 Gray, 55); his conduct after the crime was committed (*Greenfield* v. *People*, 85 N. Y. 75; *People* v. *Welsh*, 63 Cal. 167); and see *Ruloff's case*, 11 Abb. Pr. (N. S.) 245.]

[2] *Moriarty* v. *London, Chatham and Dover Ry. Co.*, L. R. 5 Q. B. 314; compare *Gery* v. *Redman*, L. R. 1 Q. B. D. 161. [*Egan* v. *Bowker*, 5 Allen, 449; *Heslop* v. *Heslop*, 82 Pa. St. 537; *Lyons* v. *Lawrence*, 12 Bradw. 531; so as to bribing a juror, *Hastings* v. *Stetson*, 130 Mass. 76; *Taylor* v. *Gilman*, 60 N. H. 506; see Note 6, *supra*.]

[3] Illustrations (*a*) [(*ab*) (*ac*)] and (*b*). Other statements made by such persons are relevant or not according to the rules as to statements hereinafter contained. See ch. iv. *post*. [*Swift* v. *Life Ins. Co.*, 63 N. Y.

In criminal cases [of rape] the conduct of the person against whom the offence is said to have been committed, and in particular the fact that [she] made a complaint soon after the offence to persons to whom [she] would naturally complain, are deemed to be relevant; but the terms of the complaint itself seem to be deemed to be irrelevant.[1]

186, 190; *Kingsford* v. *Hood*, 105 Mass. 495; *Place* v. *Gould*, 123 Mass. 347; *Merkel's Appeal*, 89 Pa. St. 340.]

[1] Illustration (*c*). [The form in which this rule is stated by Mr. Stephen makes it applicable to all criminal cases (he omits the words "of rape" and has "he" for "she" in the third and fourth lines), but the rule is regarded in this country as one peculiar to cases of *rape*, and it is at least questionable whether it applies to other crimes even under English law. There appear to be only two English decisions extending the rule to other crimes than rape, and they are both *nisi prius* cases and of slight value. (This subject is fully discussed in the Am. Law Rev., xiv. 829-838; and see *Haynes* v. *Comm.* 28 Gratt. 942.) Still the doctrine of *res gestæ*, as applied to other crimes, is sometimes extended so far as to make the analogy to cases of rape a noticeable one. See *Driscoll* v. *People*, 47 Mich. 413.

This rule, as applied to cases of rape, is fully supported by American decisions. *Baccio* v. *People*, 41 N. Y. 265; *Higgins* v. *People*, 58 Id. 377; *State* v. *Ivins*, 36 N. J. L. 233; *State* v. *Richards*, 33 Ia. 420; *Thomson* v. *State*, 38 Ind. 39; *State* v. *Warner*, 74 Mo. 83. In these cases evidence of the particulars of the complaint was held not admissible, but in some States it is admitted. *State* v. *Kinney*, 44 Ct. 153; *Burt* v. *State*, 23 O. St. 394 Nor is it necessary, by some decisions, that the complaint be made "*soon* after" the offence, but the lapse of time may be considered by the jury as affecting the weight of the evidence (*State* v. *Byrne*, 47 Ct. 465; *State* v. *Niles*, 47 Vt. 82; see *Maillet* v. *People*, 42 Mich. 262); so the delay may be explained (*Baccio* v. *People*, supra).

The making of a complaint is said to be admissible, not as constituting part of the *res gestæ*, but as a fact corroborative of the testimony of the complainant (Gr. Ev. iii. § 213; *Baccio* v. *People*, 41 N. Y. 265, 268; Am. Law Rev., xiv. 832; if she is incompetent to testify the evidence is not received. *Hornbeck* v. *State*, 35 O. St. 277). But Mr. Stephen appears to regard it as within the doctrine of *res gestæ* (see Note V. in Appendix).

The particulars of the complaint may be brought out by the defendant on cross-examination. *State* v. *Jones*, 61 Mo. 232.]

When a person's conduct is in issue or is, or is deemed to be, relevant to the issue, statements made in his presence and hearing by which his conduct is likely to have been affected, are deemed to be relevant.[1]

Illustrations.

(*a*) The question is, whether A committed an act of bankruptcy, by departing the realm with intent to defraud his creditors.

Letters written during his absence from the realm, indicating such an intention, are deemed to be relevant facts.[2]

(*ab*) [The question is, whether a written paper which A destroyed was his will, and what was his intent in destroying it.

Statements made by A at the time of destruction that the paper was his will and giving his reasons for the act were deemed to be relevant. But statements made after the destruction were deemed not to be relevant.][3]

(*ac*) [The question is, whether a person is domiciled in the town of B.

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[1] *R.* v. *Edmunds*, 6 C. & P. 164; *Neil* v. *Jakle*, 2 C. & K. 709. [Illustration (*d*). This is because tacit acquiescence in such statements may be deemed an admission of their truth. The rule applies when the statements made impute a crime, as well as in other cases (*Kelley* v. *People*, 55 N. Y. 565; *Comm.* v. *Galavan*, 9 Allen, 271; *Ettinger* v. *Comm.*, 98 Pa. St. 338; *State* v. *Reed*, 62 Me. 129; *Jewett* v. *Banning*, 21 N. Y. 27); but it does not apply if the person be incapable of hearing or understanding the statements, though these are made in his presence. *Lancrgan* v. *People*, 39 N. Y. 39; *Wright* v. *Maseras*, 56 Barb. 521; *Tufts* v. *Charlestown*, 4 Gray, 537; *Comm.* v. *Elmey*, 126 Mass. 49. So if the statements are made in a judicial proceeding, silence does not admit their truth, since there is no opportunity to respond. *People* v. *Willett*, 92 N. Y. 29; *Johnson* v. *Holliday*, 79 Ind. 151; but see *Blanchard* v. *Hodgkins*, 62 Me. 119. Nor does "silence give consent" if the circumstances are such as would not naturally call for a reply or explanation. *Drury* v. *Hervey*, 126 Mass. 519; *Kelley* v. *People*, 55 N. Y. 565, 571; see further *Talcott* v. *Harris*, 93 N. Y. 567. If a reply is actually made in any case, it is admissible in evidence with the statement. *Comm.* v. *Brown*, 121 Mass. 69; see Art. 21, *post*.]

[2] *Rawson* v. *Haigh*, 2 Bing. 99; *Bateman* v. *Bailey*, 5 T. R. 512.

[3] [*Eighmy* v. *People*, 79 N. Y. 546; *Waterman* v. *Whitney*, 11 N. Y. 157.]

Statements made by him, after he had left B and was living elsewhere, that B was his home are deemed to be relevant.][1]

(*b*) The question is, whether A was sane.

The fact that he acted upon a letter received by him is part of the facts in issue. The contents of the letter so acted upon are deemed to be relevant, as statements accompanying and explaining such conduct.[2]

(*c*) The question is, whether A was ravished.

The fact that, shortly after the alleged rape, she made a complaint relating to the crime, and the circumstances under which it was made, are deemed to be relevant, but not (it seems) the terms of the complaint itself.[3]

The fact that, without making a complaint, she said that she had been ravished, is not deemed to be relevant as conduct under this article, though it might be deemed to be relevant (*e.g.*) as a dying declaration under article 26.

(*d*) [The question is, whether A committed arson.

The fact that at the fire or soon afterwards A's son said to him "What did you want to set this afire for?" and that he made no reply, is deemed to be relevant.][4]

ARTICLE 9.

FACTS NECESSARY TO EXPLAIN OR INTRODUCE RELEVANT FACTS.

Facts necessary to be known to explain or introduce a fact in issue or relevant or deemed to be relevant to the issue, or

[1] [*Wilson* v. *Terry*, 9 Allen, 214; *Roberts' Will*, 8 Pai. 519; so where a person on leaving home states his reasons for so doing, such declarations are admissible, but not those made subsequently. *Johnson* v. *Sherwin*, 3 Gray, 374; *Hunter* v. *State*, 40 N. J. L. 495; *Cattison* v. *Cattison*, 22 Pa. St. 275; *Robinson* v. *State*, 57 Md. 14. So replies given at the house of an absent defendant to the sheriff, who is attempting to serve process upon him, are admissible to show whether he can be found or is evading service. *Buswell* v. *Lincks*, 8 Daly, 518; Gr. Ev. i. § 101.]

[2] *Wright* v. *Doe* d. *Tatham*, 7 A. & E. 324-5 (per Denman, C. J.).

[3] *R.* v. *Walker*, 2 M. & R. 212. See Note V. [In a late English case evidence was received of the particulars of the complaint. *R.* v. *Wood*, 14 C. C. C. 46.]

[4] [*Comm.* v. *Brailey*, 134 Mass. 527.]

which support or rebut an inference suggested by any such fact, or which establish the identity of any thing or person whose identity is in issue or is, or is deemed to be, relevant to the issue, or which fix the time or place at which any such fact happened, or which show that any document produced is genuine or otherwise, or which show the relation of the parties by whom any such fact was transacted, or which afforded an opportunity for its occurrence or transaction, or which are necessary to be known in order to show the relevancy of other facts, are deemed to be relevant in so far as they are necessary for those purposes respectively.[1]

Illustrations.

(*a*) The question is, whether a writing published by A of B is libellous or not.

The position and relations of the parties at the time when the libel was published may be deemed to be relevant facts as introductory to the facts in issue.

The particulars of a dispute between A and B about a matter unconnected with the alleged libel are not deemed to be relevant under this article, though the fact that there was a dispute may be deemed to be relevant if it affected the relations between A and B.[2]

(*b*) The question is, whether A wrote an anonymous letter, threatening B, and requiring B to meet the writer at a certain time and place to satisfy his demands.

The fact that A met B at that time and place is deemed to be relevant, as conduct subsequent to and affected by a fact in issue.

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[1] [As to evidence of identity, see *Udderzook* v. *Comm.*, 76 Pa. St. 340; *State* v. *Witham*, 72 Me. 531; of the relations of the parties, *Metzger* v. *Doll*, 91 N. Y. 365; *Craig's Appeal*, 77 Pa. St. 448; *People* v. *Dennis*, 39 Cal. 625. For other cases of relevant evidence under this article, see *Pontius* v. *People*, 82 N. Y. 339, 350; *Bronner* v. *Frauenthal*, 37 N. Y. 166; *Quincey* v. *White*, 63 N. Y. 370, 380; *Comm.* v. *Annis*, 15 Gray, 197; *Comm.* v. *Williams*, 105 Mass. 62; *Norris* v. *Spofford*, 127 Id. 85; *Wagenseller* v. *Immers*, 97 Pa. St. 465; for cases of irrelevant evidence, see *Reed* v. *N. Y. C. R. Co.*, 45 N. Y. 574; *Eggler* v. *People*, 56 N. Y. 642; *Phil. R. Co.* v. *Henrice*, 92 Pa. St. 431; *Thompson* v. *Bowie*, 4 Wall. 463; *Graves* v. *Jacobs*, 8 Allen, 141.]

[2] Common practice; [see *Fowler* v. *Chichester*, 26 O. St. 9.]

The fact that A had a reason, unconnected with the letter, for being at that time at that place, is deemed to be relevant, as rebutting the inference suggested by his presence.[1]

(*c*) A is tried for a riot, and is proved to have marched at the head of a mob. The cries of the mob are deemed to be relevant, as explanatory of the nature of the transaction.[2]

(*d*) The question is, whether a deed was forged. It purports to be made in the reign of Philip and Mary, and enumerates King Philip's titles.

The fact that at the alleged date of the deed, Acts of State and other records were drawn with a different set of titles, is deemed to be relevant.[3]

(*e*) The question is, whether A poisoned B. Habits of B known to A, which would afford A an opportunity to administer the poison, are deemed to be relevant facts.[4]

(*f*) The question is, whether A made a will under undue influence. His way of life and relations with the persons said to have influenced him unduly, are deemed to be relevant facts.[5]

(*g*) [The question is, whether A, an infant child, who was killed while on his way from England to this country, was domiciled in New York State at the time of his death.

The fact that his father, having resided in England, had lived in New York several months prior to A's death, and had come there for the purpose of making his home and living in that State, is deemed to be relevant.][6]

(*h*) [The question is, whether a gold watch, chain, and locket sold to a wife, are necessaries, for which the husband should pay.

The fact that the husband wore diamonds and kept a fast horse, and had paid for silk dresses worn by her, is deemed to be relevant.][7]

[1] *R.* v. *Barnard*, 19 St. Tri. 815, &c. [S. P. *Prindle* v. *Glover*, 4 Ct. 266; *Comm.* v. *Brady*, 7 Gray, 320; *Tracy* v. *McManus*, 58 N. Y. 257.]

[2] *R.* v. *Lord George Gordon*, 21 St. Tri. 520. [See *Stone* v. *Segur*, 11 Allen, 568.]

[3] *Lady Ivy's Case*, 10 St. Tri. 615.

[4] *R.* v. *Donellan*, Wills' Circ. Ev. 192; and see my 'General View of the Criminal Law,' p. 338, &c.

[5] *Boyse* v. *Rossborough*, 6 H. L. C. 42–58. [*Horn* v. *Pullman*, 72 N. Y. 269; *Coit* v. *Patchen*, 77 N. Y. 533; *May* v. *Bradlee*, 127 Mass. 414; *Pierce* v. *Pierce*, 38 Mich. 412; *Frew* v. *Clarke*, 80 Pa. St. 170; *Griffith* v. *Diffenderffer*, 50 Md. 466; *Kenyon* v. *Ashbridge*, 35 Pa. St. 157.]

[6] [*Kennedy* v. *Ryall*, 67 N. Y. 379.]

[7] [*Raynes* v. *Bennett*, 114 Mass. 424.]

(*i*) [The question is, whether A was employed by B.

Conduct of A during the term of such employment, inconsistent with the theory of such employment, is deemed to be a relevant fact.][1]

(*j*) [The question is, whether A has survived his partner B.

Evidence that a person having the same name as B has died at the place of B's residence, is deemed to be relevant.][2]

(*k*) [The question is, whether A has been appropriating his employer's property.

The fact that for several years A has been living beyond his apparent means is deemed to be relevant.][3]

(*l*) [The question is, whether A murdered B.

Evidence is relevant which tends to identify a body found six months after B's disappearance as that of B by showing similarity in the color of the hair, in the size of the body, in the appearance of the teeth, etc. Evidence of the following facts is also deemed relevant:—that blood-stains were found on boards where an accomplice of A testified the body of B had been placed; that these stains were of human blood; that A had B's watch in his possession a few months after B's disappearance; that the accomplice was absent from home on the night when, as he swore, he aided A in removing the body to another place; that A was seen on this night to ride in the direction of this place.][4]

(*m*) [The question is, whether A, a physician, has been guilty of malpractice and neglect.

The fact that A has not presented any bill or asked any pay for his services is deemed not to be relevant.][5]

(*n*) [The question is, whether a credit for goods sold was given to the defendant or his son.

Evidence that the son had no property at the time of the sale and was entirely irresponsible, is deemed not to be relevant.][6]

(*o*) [The question is, whether an executor is liable to pay a note of long standing, signed by his testator.

Evidence that the testator was in the habit of paying his debts

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[1] [*Miller* v. *Irish*, 63 N. Y. 652.]

[2] [*Daby* v. *Eriesson*, 45 N. Y. 786.]

[3] [*Hackett* v. *King*, 8 Allen, 144.]

[4] [*Linsday* v. *People*, 63 N. Y. 143; see *Murphy* v. *People*, 63 N. Y. 590; *Greenfield* v. *People*, 85 N. Y. 75; *Comm.* v. *Dorsey*, 103 Mass. 412.]

[5] [*Baird* v. *Gillett*, 47 N. Y. 186.]

[6] [*Green* v. *Disbrow*, 56 N. Y. 334; but see *Moore* v. *Meacham*, 10 N. Y. 207.]

promptly, or that another person had agreed to pay them for him, or that he made a list of his debts in which this note was not included, is deemed not to be relevant.] [1]

(*p*) [The question is, whether A is the father of B, a young child.

Evidence that B resembles A, or counter-evidence to show non-resemblance, is deemed not to be relevant.[2] But if both A and B are in court, the jury may take into consideration their resemblance or non-resemblance.] [3]

(*q*) [The question is, whether A is insane.

The fact that his father, mother, or other blood relation is or has been insane, is deemed to be relevant.] [4]

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[1] [*Abercrombie* v. *Sheldon*, 8 Allen, 532.]

[2] [*Young* v. *Makepeace*, 103 Mass. 50; *Jones* v. *Jones*, 45 Md. 144; *Eddy* v. *Gray*, 4 Allen, 435; cf. *People* v. *Carney*, 29 Hun, 47; but see *Paulk* v. *State*, 52 Ala. 427.]

[3] [*Gilmanton* v. *Ham*, 38 N. H. 108; *Finnegan* v. *Dugan*, 14 Allen, 197; contra, *Reitz* v. *State*, 33 Ind. 187; *State* v. *Danforth*, 48 Ia. 43.]

[4] [*State* v. *Hoyt*, 47 Ct. 518; *Walsh* v. *People*, 88 N. Y. 458.]

CHAPTER III.

OCCURRENCES SIMILAR TO BUT UNCONNECTED WITH THE FACTS IN ISSUE, IRRELEVANT EXCEPT IN CERTAIN CASES.

ARTICLE 10.*

SIMILAR BUT UNCONNECTED FACTS.

A FACT which renders the existence or non-existence of any fact in issue probable by reason of its general resemblance thereto, and not by reason of its being connected therewith, in any of the ways specified in articles 3–9 both inclusive, is deemed not to be relevant to such fact except in the cases specially excepted in this chapter.[1]

Illustrations.

(*a*) The question is, whether A committed a crime.

The fact that he formerly committed another crime of the same sort, and had a tendency to commit such crimes, is irrelevant.[2]

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* See Note VI.

[1] [But where the question is as to the cause of a certain occurrence, the fact that similar occurrences have, under like conditions, been produced by a particular cause is deemed to be relevant. So the quality of an act, as prudent or negligent, safe or dangerous, etc., may be exhibited, by showing that under like conditions it has produced similar favorable or injurious results, as in the case in question (see illustrations *h* to *m*). This rule is analogous to that stated in Article 12, *post.* But if the conditions are not substantially the same in all cases, the evidence is not relevant. *Morse* v. *Minn. etc. R. Co.*, 30 Minn. 465; *Hunt* v. *Lowell Gas Co.*, 8 Allen, 169; *Emerson* v. *Lowell Gas Co.*, 3 id. 410; *Griffin* v. *Auburn*, 58 N. H. 121; *Hodgkins* v. *Chappell*, 128 Mass. 197.]

[2] *R.* v. *Cole.* 1 Phi. Ev. 508 (said to have been decided by all the Judges in Mich. Term, 1810). [*People* v. *Gibbs*, 93 N. Y. 470; *Coleman*

(*b*) The question is, whether A, a brewer, sold good beer to B, a publican. The fact that A sold good beer to C, D, and E, other publicans, is irrelevant[1] (unless it is shown that the beer sold to all is of the same brewing).[2]

(*c*) [The question is, whether A, having killed a person at night, knew him to be an officer of the law.

The fact that there was a lighted street-lamp near by is relevant, as tending to show that A could see the official uniform. But to prove the amount of light cast by the lamp on this night, evidence showing the amount of light cast by the same lamp on a night four months afterwards is irrelevant (the conditions not being shown to be the same).][3]

(*d*) [The question is, whether A has a right to travel on a railroad ticket after the time limited therein for its use, without the payment of fare.

The fact that he has at other times purchased similar tickets and used them after the time specified, without being required to pay fare, is irrelevant.][4]

(*e*) [The question is, what is the value of a certain vessel.

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v. *People*, 55 N. Y. 81, 90; *Jordan* v. *Osgood*, 109 Mass. 457; *Shaffner* v. *Comm.*, 72 Pa. St. 60. But the commission of another crime may be shown, if it supplies a motive or constitutes preparation for the commission of the one in question (*Pierson* v. *People*, 79 N. Y. 424; *Comm.* v. *Choate*, 105 Mass. 451, 458; *Hope* v. *People*, 83 N. Y. 418; see Art. 7, *supra*); or if it tends to prove any fact constituting an element of the crime charged (*Weed* v. *People*, 56 N. Y. 628); or if the different crimes form parts of one general scheme or transaction and exhibit the same general purpose (*Comm.* v. *Campbell*, 7 Allen, 541; *Comm.* v. *Scott*, 123 Mass. 222; *Hope* v. *People*, supra; *Brown* v. *Comm.*, 76 Pa. St. 319; *Kramer* v. *Comm.*, 87 id. 299; *Jackson* v. *State*, 38 O. St. 585; *People* v. *Mead*, 50 Mich. 228; *Gassen-Lernier* v. *State*, 52 Ala. 313); and in other like cases (see *Comm.* v. *Jackson*, 132 Mass. 16, 19; *Goersen* v. *Comm.*, 99 Pa. St. 388). Thus former attempts to commit the same crime may be proved to show criminal intent, the identity of the actor, etc. *Comm.* v. *Bradford*, 126 Mass. 42; *State* v. *Nugent*, 71 Mo. 136. These latter cases fall properly under Arts. 11 and 12, *post.*]

[1] *Holcombe* v. *Hewson*, 2 Camp. 391.

[2] See Illustrations to article 3.

[3] [*Yates* v. *People*, 32 N. Y. 509; see 72 N. Y. 610; and *Fillo* v. *Jones*, 2 Abb. Dec. 121.]

[4] [*Hill* v. *Syracuse etc. R. Co.*, 63 N. Y. 101.]

Evidence to prove the value of other vessels with which she might be compared is irrelevant.][1]

(*f*) [The question is, whether a servant was negligent on a particular occasion.

Evidence that he was negligent on previous occasions is irrelevant; but if the question were whether the master was negligent in retaining in his employ a careless and incompetent servant, evidence of the servant's prior acts of negligence to the master's knowledge, would be relevant.][2]

(*g*) [The question is, how much hay was eaten by a horse, not in ordinary condition, in eight weeks.

Evidence as to the amount of hay eaten by an ordinary horse in a week is irrelevant.][3]

(*h*) [The question is, whether A, having been injured by slipping and falling upon a sidewalk, can recover damages from the city for its neglect to keep the walk in a safe condition.

The fact that other persons slipped and fell upon the same walk, while its condition remained the same as when A fell, is relevant to show that it was unsafe for use at the time of his fall.][4]

(*i*) [The question is, whether the act or structure of A which frightened B's horse, was one which was calculated to render the use of the highway with horses dangerous.

Evidence that other horses of ordinary steadiness were frightened by

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[1] [*Blanchard* v. *Steamboat Co.*, 59 N. Y. 292; see *Gouge* v. *Roberts*, 53 N. Y. 619; *Bonynge* v. *Field*, 81 N. Y. 159; *Lake* v. *Clark*, 97 Mass. 71; but see *Carr* v. *Moore*, 41 N. H. 131. But in Massachusetts the value of land may be proved by showing the prices received upon sales of other lands of like description in the vicinity at times not too remote. *Chandler* v. *Jamaica etc. Corporation*, 122 Mass. 305.]

[2] [*Baulec* v. *N. Y. etc. R. Co.*, 59 N. Y. 356; *Warner* v. *N. Y. C. R. Co.*, 44 N. Y. 465; *Maguire v. Middlesex R. Co.*, 115 Mass. 239; *Gahagan* v. *B. & L. R. Co.*, 1 Allen, 187; *Michigan Cent. R. Co.* v. *Gilbert*, 46 Mich. 176; contra, *State* v. *Railroad Co.*, 52 N. H. 528; see Art. 12.]

[3] [*Carlton* v. *Hescox*, 107 Mass. 410; cf. *Kelliker* v. *Miller*, 97 Mass. 71.]

[4] [*Dist. of Col.* v. *Armes*, 107 U. S. 519; *Quinlan* v. *Utica*, 11 Hun, 217, 74 N. Y. 603; *Aurora* v. *Brown*, 12 Bradw. 122; *Calkins* v. *Hartford*, 33 Ct. 57; cf. *Kent* v. *Lincoln*, 32 Vt. 591; *Wooley* v. *Grand St. R. Co.*, 83 N. Y. 121. But some cases are to the contrary. See *Collins* v. *Dorchester*, 6 Cush. 396; *Bauer* v. *Indianapolis*, 99 Ind. 56.]

the same act or structure, or one of the same kind under like circumstances, is relevant.][1]

(*j*) [The question is, whether a loom-attachment will work successfully on a certain loom.

The fact that it works successfully on another loom of substantially the same construction, is relevant.][2]

(*k*) [The question is, whether a fire was caused by sparks and coals from a locomotive of a railroad company.

The fact that passing locomotives of similar construction have on other occasions caused fires at or near the place in question by scattering sparks and coals, is deemed to be relevant; so also is the fact that they have thus repeatedly scattered sparks and coals, though no actual fires were thereby caused, since such a cause may have occasioned fire in this instance, though not in others. But preliminary evidence should be given excluding the probability that the fire in question originated from another source.][3]

(*l*) [The question is, whether a fire causing the destruction of a certain building by night was of incendiary origin.

The fact that an attempt was made on the same night to set fire to a neighboring building by the use of similar means is relevant.][4]

(*m*) [The question is, whether the foundering of a vessel, while she is being towed by a tug, is caused by her being overladen and unseaworthy, or is due to the reckless and improper rate of speed at which she is towed.

The fact that she has been frequently towed in safety with as heavy or heavier loads and at as high a rate of speed is deemed to be relevant, as

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[1] [*Crocker* v. *McGregor*, 76 Me. 282; *Gordon* v. *B. & M. R. Co.*, 58 N. H. 396; *House* v. *Metcalf*, 27 Ct. 631; cf. *Lewis* v. *Eastern R. Co.*, 60 N. H. 187.]

[2] [*Brierly* v. *Miles*, 128 Mass. 291.]

[3] [*Field* v. *N. Y. C. R. Co.*, 32 N. Y. 339; *Crist* v. *Erie R. Co.*, 58 N. Y. 638; *G. T. R. Co.* v. *Richardson*, 91 U. S. 454; *Pa. R. Co.* v. *Stranahan*, 79 Pa. St. 405; *Boyce* v. *Cheshire R. Co.*, 43 N. H. 627; *Slossen* v. *Railroad Co.*, 60 Ia. 215; see *Atchison etc. R. Co.* v. *Stanford*, 12 Kan. 354; *Loring* v. *Worcester etc. R. Co.*, 131 Mass. 469; *Albert* v. *Nor. Central R. Co.*, 98 Pa. St. 316. In some of these cases it is also said that evidence of this kind may show a habit of negligence in running the trains. The last sentence of the Illustration states a rule declared by the New York cases.]

[4] [*Faucett* v. *Nicholls*, 64 N. Y. 377; see *Landell* v. *Hotchkiss*, 1 T. & C. 580; *Mead* v. *Husted*, 49 Ct. 336.]

tending to show that negligence in towing must have caused the disaster. The fact that she has repeatedly foundered while being carefully towed is deemed to be relevant, as indicating that her own improper condition must have occasioned the loss.][1]

ARTICLE 11.*

ACTS SHOWING INTENTION, GOOD FAITH, ETC.

When there is a question whether a person said or did something, the fact that he said or did something of the same sort on a different occasion may be proved, if it shows the existence on the occasion in question of any intention, knowledge, good or bad faith, malice, or other state of mind, or of any state of body or bodily feeling, the existence of which is in issue or is deemed to be relevant to the issue;[2] but such acts or words may not be proved merely in order to show that the person so acting or speaking was likely on the occasion in question to act in a similar manner.[3]

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* See Note VI.

[1] [*Baird* v. *Daly*, 68 N. Y. 547; see *Weldon* v. *Harlem R. Co.*, 5 Bos. 576.]

[2] [This rule is fully considered and its proper limitations stated in *People* v. *Shulman*, 80 N. Y. 373; *Mayer* v. *People*, id. 364; *Comm.* v. *Jackson*, 132 Mass. 16. See also Gr. Ev. i. § 53; *Butler* v. *Watkins*, 13 Wall. 456; *Bottomley* v. *U. S.*, 1 Story, 135; *Tarbox* v. *State*, 38 O. St. 581; *State* v. *Wentworth*, 37 N. H. 196; p. 24, *ante*, note 2.]

[3] [At this point Mr. Stephens adds the following rule derived from an English statute (34 and 35 Vict. c. 112, s. 19): "Where proceedings are taken against any person for having received goods, knowing them to be stolen, or for having in his possession stolen property, the fact that there was found in the possession of such person other property stolen within the preceding period of twelve months, is deemed to be relevant to the question whether he knew the property to be stolen which forms the subject of the proceeding taken against him.

If, in the case of such proceedings as aforesaid, evidence has been given that the stolen property has been found in the possession of the person proceeded against, the fact that such person has within five years

Illustrations.

(*a*) A is charged with receiving two pieces of silk from B, knowing them to have been stolen by him from C.

The facts that A received from B many other articles stolen by him from C in the course of several months, and that A pledged all of them, are deemed to be relevant to the fact that A knew that the two pieces of silk were stolen by B from C.[1]

(*b*) A is charged with uttering, on the 12th December, 1854, a counterfeit crown piece, knowing it to be counterfeit.

The facts that A uttered another counterfeit crown piece on the 11th December, 1854, and a counterfeit shilling on the 4th January, 1855, are deemed to be relevant to show A's knowledge that the crown piece uttered on the 12th was counterfeit.[2]

(*c*) A is charged with attempting to obtain money by false pretences, by trying to pledge to B a worthless ring as a diamond ring.

The facts that two days before, A tried, on two separate occasions, to obtain money from C and D respectively, by a similar assertion as to the same or a similar ring, and that on another occasion on the same day he obtained a sum of money from E by pledging as a gold chain a chain which was only gilt, are deemed to be relevant, as showing his knowledge of the quality of the ring.[3]

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immediately preceding been convicted of any offence involving fraud or dishonesty, is deemed to be relevant for the purpose of proving that the person accused knew the property which was proved to be in his possession to have been stolen, and may be proved at any stage of the proceedings; provided that not less than seven days' notice in writing has been given to the person accused that proof is intended to be given of such previous conviction." This enactment, he says, overrules *R.* v. *Oddy*, 2 Den. C. C. 264, and practically supersedes *R.* v. *Dunn*, 1 Moo. C. C. 150, and *R.* v. *Davis*, 6 C. & P. 177. In this country such cases are governed by the general common law rule. See Illustrations and cases cited.].

[1] *Dunn's Case*, 1 Moo. C. C. 146. [S. P. *Copperman* v. *People*, 56 N. Y. 591; *Coleman* v. *People*, 58 N. Y. 555; *State* v. *Ward*, 49 Ct. 429; *Kilrow* v. *Comm.* 89 Pa. St. 480; *Shriedly* v. *State*, 23 O. St. 130; see *Comm.* v. *Jenkins*, 10 Gray, 485; but the fact that A received property on other occasions from other persons than B, knowing it to have been stolen, is deemed not to be relevant. *Coleman* v. *People*, 55 N. Y. 81.]

[2] *R.* v. *Forster*, Dear. 456; and see *R.* v. *Weeks*, L. & C. 18; [see *Comm.* v. *Bigelow*, 8 Met. 235; *Comm.* v. *Price*, 10 Gray, 472; *Stalker* v. *State*, 9 Ct. 341; *People* v. *Dibble*, 3 Abb. Dec. 518.]

[3] *R.* v. *Francis*, L. R. 2 C. C. R. 128. The case of *R.* v. *Cooper*, L.

(*d*) A is charged with obtaining money from B by falsely pretending that Z had authorized him to do so.

The fact that on a different occasion A obtained money from C by a similar false pretence is deemed to be irrelevant,[1] as A's knowledge that he had no authority from Z on the second occasion had no connection with his knowledge that he had no authority from Z on the first occasion.

(*e*) A sues B for damage done by a dog of B's, which B knew to be ferocious.

The facts that the dog had previously bitten X, Y, and Z, and that they had made complaints to B, are deemed to be relevant.[2]

(*f*) The question is, whether A, the acceptor of a bill of exchange, knew that the name of the payee was fictitious.

The fact that A had accepted other bills drawn in the same manner before they could have been transmitted to him by the payee, if the payee had been a real person, is deemed to be relevant, as showing that A knew that the payee was a fictitious person.[3]

(*g*) A sues B for a malicious libel. Defamatory statements made by B regarding A for ten years before those in respect of which the action is brought are deemed to be relevant to show malice.[4]

R. 1 Q. B. D. (C. C. R.) 19, is similar to *R.* v. *Francis*, and perhaps stronger. [S. P. *Mayer* v. *People*, 80 N. Y. 364; *Comm.* v. *Coe*, 115 Mass. 481; see *People* v. *Henssler*, 48 Mich. 50. Evidence of this kind is also relevant in *civil actions* to prove guilty knowledge or fraudulent purpose. *Hill* v. *Naylor*, 18 N. Y. 588; *Miller* v. *Barber*, 66 N. Y. 558; *Lincoln* v. *Claflin*, 7 Wall. 132; *Hovey* v. *Grant*, 52 N. H. 569; *Waters' Heater Co.* v. *Smith*, 120 Mass. 444.]

[1] *R.* v. *Holt*, Bell, C. C. 280; and see *R.* v. *Francis*, *ub. sup.* p. 130 [*Comm.* v. *Jackson*, 132 Mass. 16; but see *People* v. *Shulman*, 80 N. Y. 373.]

[2] See cases collected in Roscoe's *Nisi Prius*, 739. [See *Godeau* v. *Blood*, 52 Vt. 251; *Green etc. R. Co.* v. *Bresner*, 97 Pa. St. 103; *Rider* v. *White*, 65 N. Y. 54; *Muller* v. *McKesson*, 73 N. Y. 195.]

[3] *Gibson* v. *Hunter*, 2 H. Bl. 288.

[4] *Barrett* v. *Long*, 3 H. L. C. 395, 414. [*Evening Journal Ass'n.* v. *McDermott*, 44 N. J. L. 430; *State* v. *Riggs*, 39 Ct. 498. It is generally held that the charges proved to show malice must be substantially similar to the one in question. *Comm.* v. *Damon*, 136 Mass. 441, 448; *Brown* v. *Barnes*, 39 Mich. 211; *Cavanaugh* v. *Austin*, 42 Vt. 576; *Howard* v. *Sexton*, 4 N. Y. 157. In some States they may be proved though made after suit brought (*Chamberlain* v. *Vance*, 51 Cal. 75; *Knapp* v. *Smith*, 55 Vt. 311), but not in others. *Distin* v. *Rose*, 69 N. Y. 122; *Daly* v. *Byrne*, 77 N. Y. 182. Sometimes also they are received to enhance the

(*gg*) [The question is whether A committed adultery with B.

The fact that on other occasions, not too remote, these persons had committed adultery is deemed to be relevant, to show the existence of an adulterous disposition; but not to show the commission of the particular act in question.][1]

(*h*) A is sued by B for fraudulently representing to B that C was solvent, whereby B, being induced to trust C, who was insolvent, suffered loss.

The fact that, at the time when A represented C to be solvent, C was to A's knowledge supposed to be solvent by his neighbors and by persons dealing with him, is deemed to be relevant, as showing that A made the representation in good faith.[2]

(*i*) A is sued by B for the price of work done by B, by the order of C, a contractor, upon a house, of which A is owner.

A's defence is that B's contract was with C.

The fact that A paid C for the work in question is deemed to be relevant, as proving that A did, in good faith, make over to C the management of the work in question, so that C was in a position to contract with B on C's own account, and not as agent for A.[3]

(*j*) A is accused of stealing property which he had found, and the question is, whether he meant to steal it when he took possession of it.

The fact that public notice of the loss of the property had been given in the place where A was, and in such a manner that A knew or probably might have known of it, is deemed to be relevant, as showing that A did not, when he took possession of it, in good faith believe that the real owner of the property could not be found.[4]

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damages (*Leonard* v. *Pope*, 27 Mich. 145), but not in most States (*Meyer* v. *Bohlfing*, 44 Ind. 238; see *Alpin* v. *Morton*, 21 O. St. 536); and so there are other differences of doctrine.]

[1] [*Comm.* v. *Nichols*, 114 Mass. 285; *Thayer* v. *Thayer*, 101 id. 111; *State* v. *Williams*, 76 Me. 480; *Sherwood* v. *Titman*, 55 Pa. St. 77; *State* v. *Bridgman*, 49 Vt. 202; *State* v. *Markins*, 95 Ind. 464; *Conway* v. *Nicol*, 34 Ia. 533; see *People* v. *Carrier*, 46 Mich. 442.]

[2] *Sheen* v. *Bumpstead*, 2 H. & C. 193; [see *Slingerland* v. *Bennett*, 6 T. & C. 446; *Whitcher* v. *Shattuck*, 3 Allen, 319; *Forbes* v. *Howe*, 102 Mass. 427.]

[3] *Gerish* v. *Chartier*, 1 C. B. 13; [see *Moody* v. *Tenney*, 3 Allen, 327; *Regan* v. *Dickinson*, 105 Mass. 112.]

[4] This illustration is adapted from *Preston's Case*, 2 Den. C. C. 353; but the misdirection given in that case is set right. As to the relevancy of the fact, see in particular Lord Campbell's remark on p. 359. [Cf. *Kellogg* v. *French*, 15 Gray, 354.]

(*k*) The question is, whether A is entitled to damages from B, the seducer of A's wife.

The fact that A's wife wrote affectionate letters to A before the adultery was committed, is deemed to be relevant, as showing the terms on which they lived and the damage which A sustained.[1]

(*l*) The question is, whether A's death was caused by poison.

Statements made by A before his illness as to his state of health, and during his illness as to his symptoms, are deemed to be relevant facts.[2]

(*m*) The question is, what was the state of A's health at the time when an insurance on her life was effected by B.

Statements made by A as to the state of her health at or near the time in question are deemed to be relevant facts.[3]

(*n*) The question is, whether A, the captain of a ship, knew that a port was blockaded.

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[1] *Trelawney* v. *Coleman*, 1 B. & A. 90. [Gr. Ev. i. § 102; *Palmer* v. *Crook*, 7 Gray, 418; *Perry* v. *Lovejoy*, 49 Mich. 529; *Harter* v. *Crill*, 33 Barb. 283; *Preston* v. *Bowers*, 13 O. St. 1; see *Dance* v. *McBride*, 43 Ia. 624; *White* v. *Ross*, 47 Mich. 172.]

[2] *R.* v. *Palmer*. See my 'Gen. View of Crim. Law,' p. 363, 377 (evidence of Dr. Savage and Mr. Stephens). [Gr. Ev. i. § 102. It is a general rule that expressions of present bodily pain or suffering or symptoms of disease are admissible as part of the *res gestæ*; but not statements as to past sufferings. *Caldwell* v. *Murphy*, 11 N. Y. 416; *Matteson* v. *N. Y. C. R. Co.*, 35 N. Y. 487; *Comm.* v. *Fenno*, 134 Mass. 217; *Ashland* v. *Marlborough*, 99 id. 47; *Wilson* v. *Granby*, 47 Ct. 59; *Lichtenwallner* v. *Laubach*, 105 Pa. St. 366; *State* v. *Gedicke*, 43 N. J. L. 86. Such statements are provable whether made to physicians or other persons; but some decisions allow wider scope to the testimony of physicians. *Roosa* v. *Boston Loan Co.*, 132 Mass. 439. Declarations of this kind have been excluded when made *post litem motam*. *Grand Rapids, etc. Co.* v. *Huntley*, 38 Mich. 537.

The witness cannot be asked what the outcries of the injured person indicated, as this is a question for the jury. *Messner* v. *People*, 45 N. Y. 1; see Art. 3, note.]

[3] *Aveson* v. *Lord Kinnaird*, 6 Ea. 188. [See *Swift* v. *Life Ins. Co.*, 63 N. Y. 186; *Edington* v. *Life Ins. Co.*, 67 N. Y. 185; *Dilleber* v. *Life Ins. Co.*, 69 N. Y. 256. By these New York cases the statements of the assured, if made at a time prior to, and not remote from the application, are deemed relevant to show his *knowledge* of his physical condition. See also *Barber* v. *Merriam*, 11 Allen, 322; *Fay* v. *Harlan*, 128 Mass. 244, and cases cited under last Illustration.]

The fact that the blockade was notified in the Gazette is deemed to be relevant.

(*o*) [The question is, whether a testator, in making his will, was controlled by undue influence.

Statements made by him on prior occasions as to his testamentary intentions in the disposition of his property are deemed to be relevant, as showing his cherished purposes and state of mind when the will was made; if such statements are consistent with the provisions of the will, they serve to rebut charges of undue influence, otherwise to confirm them. But statements of the testator to show the *fact* of undue influence are deemed not to be relevant.][2]

ARTICLE 12.*

FACTS SHOWING SYSTEM.

When there is a question whether an act was accidental or intentional, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is deemed to be relevant.[3]

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* See Note VI.

[1] *Harrat* v. *Wise*, 9 B. & C. 712.

[2] [*Neel* v. *Potter*, 40 Pa. St. 483; *Griffith* v. *Diffenderffer*, 50 Md. 466; *Marx* v. *McGlynn*, 88 N. Y. 357; *Robinson* v. *Adams*, 62 Me. 369; *May* v. *Bradlee*, 127 Mass. 414; *Dye* v. *Young*, 55 Ia. 433. So subsequent statements or acts may be shown which indicate the state of mind when the will was made. *Shailer* v. *Bumstead*, 99 Mass. 112; *Waterman* v. *Whitney*, 11 N. Y. 157. And in general, evidence of the testator's acts or declarations may be given, which show his mental peculiarities, settled convictions, deeply rooted feelings or purposes, or any enduring state of mind, as they existed at the making of the will. *Shailer* v. *Bumstead*, supra. So as to making a deed, (*Howe* v. *Howe*, 99 Mass. 88), or a lease, (*Sherman* v. *Wilder*, 106 Mass. 537), or a gift *causa mortis*. *Whitwell* v. *Winslow*, 132 Mass. 307; see *Converse* v. *Wales*, 4 Allen, 512.]

[3] [*State* v. *Lapage*, 57 N. H. 245, 294; *People* v. *Shulman*, 80 N. Y. 373; *Comm.* v. *Bradford*, 126 Mass. 42; *Goersen* v. *Comm.*, 99 Pa. St. 388; *Hope* v. *People*, 83 N. Y. 418; see *Comm.* v. *Choate*, 105 Mass. 451; *Swan* v. *Comm.*, 104 Pa. St. 218; *Dayton* v. *Monroe*, 47 Mich. 193; and p. 24, *ante*, notes 1 and 2.

So a party's system or course of business may be proved to show whether he has exercised due diligence on a particular occasion (*Holly* v. *Boston Gas Co.*, 8 Gray, 123; *Fuller* v. *Naugatuck R. Co.*, 21 Ct. 557);

Illustrations.

(*a*) A is accused of setting fire to his house in order to obtain money for which it is insured.

The facts that A had previously lived in two other houses successively, each of which he insured, in each of which a fire occurred, and

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and the usual practice of others in the same business or employment under like circumstances may be shown, to indicate whether ordinary care has been used in a special instance. *Maynard* v. *Buck*, 100 Mass. 40; *Cass* v. *B. & L. R. Co.*, 14 Allen, 448; *Kolsti* v. *M. & St. L. R. Co.*, 32 Minn. 133; *Cook* v. *Champlain, etc. Co.*, 1 Den. 91; but see *G. T. R. Co.* v. *Richardson*, 91 U. S. 454; *Chicago, etc., R. Co.* v. *Clark*, 108 Ill. 113.

With the cases under this article may be compared those in which a system of conduct or action, as shown by a series of similar acts, is proved, in order to establish the habit of a person or animal, the character of a house, etc. See *Harwood* v. *People*, 26 N. Y. 190; *Baulec* v. *N. Y. etc. R. Co.*, 59 N. Y. 356. Thus the vicious habit of a horse for shying, balking, etc., may be shown by proving cases of like misbehavior, both before and after the act in question. *Maggi* v. *Cutts*, 123 Mass. 535; *Chamberlain* v. *Enfield*, 43 N. H. 356; cf. *Whitney* v. *Leominster*, 136 Mass. 25. And it is suggested that evidence of repeated acts of drunkenness may, in the discretion of the Court, be admitted, to prove habitual drunkenness. *Comm.* v. *Ryan*, 134 Mass. 223. In New Hampshire, evidence of prior acts of negligence of the same kind by a person is received, as tending to show his negligence on a particular occasion (*State* v. *Railroad Co.*, 52 N. H. 528, but the doctrine is not there extended to proof of a crime or other act involving wrongful intent by other like crimes or acts, id. 550, *State* v. *Lapage*, supra); but in most States this doctrine is generally denied. (See Art. 10, Illustrations (*f*) and (*k*); *Robinson* v. *F. & W. R. Co.*, 7 Gray, 92.) So in that State, on the question at what speed an engineer drove a railway train at a certain time and place, evidence of the speed at which he drove the same train at the same place on other days may be admitted. *State* v. *B. & M. R. Co.*, 58 N. H. 410; S. P. *Hall* v. *Brown*, id. 93. But it is elsewhere held that to prove care on a particular occasion, the party's habit of being careful cannot be shown (*McDonald* v. *Savoy*, 110 Mass. 49; but see *Dorman* v. *Kane*, 5 Allen, 38; *Chicago, etc. R. Co.* v. *Clark*, 108 Ill. 113); nor can the fact of gambling on a certain occasion, when intoxicated, be proved by showing a habit so to do (*Thompson* v. *Bowie*, 4 Wall. 463; cf. *McMahon* v. *Harrison*, 6 N. Y. 443), nor the taking of usury on one occasion by showing prior acts of taking usury, (*Ross* v. *Ackerman*, 46 N.Y. 210), nor a habit of lying by lies told on other occasions. *Comm.* v. *Kennon*, 130 Mass. 39.]

that after each of those fires A received payment from a different insurance office, are deemed to be relevant, as tending to show that the fires were not accidental.[1]

(*b*) A is employed to pay the wages of B's laborers, and it is A's duty to make entries in a book showing the amounts paid by him. He makes an entry showing that on a particular occasion he paid more than he really did pay.

The question is, whether this false entry was accidental or intentional.

The fact that for a period of two years A made other similar false entries in the same book, the false entry being in each case in favor of A, is deemed to be relevant.[2]

(*c*) The question is, whether the administration of poison to A, by Z, his wife, in September, 1848, was accidental or intentional.

The facts that B, C, and D (A's three sons), had the same poison administered to them in December, 1848, March, 1849, and April, 1849, and that the meals of all four were prepared by Z, are deemed to be relevant, though Z was indicted separately for murdering A, B, and C, and attempting to murder D.[3]

(*d*) A promises to lend money to B on the security of a policy of insurance which B agrees to effect in an insurance company of his choosing. B pays the first premium to the company, but A refuses to lend the money except upon terms which he intends B to reject, and which B rejects accordingly.

The fact that A and the insurance company have been engaged in similar transactions is deemed to be relevant to the question whether the receipt of the money by the company was fraudulent.[4]

ARTICLE 13.*

EXISTENCE OF COURSE OF BUSINESS, WHEN DEEMED TO BE RELEVANT.

When there is a question whether a particular act was done, the existence of any course of office or business accord-

* See Note VII.

[1] *R.* v. *Gray*, 4 F. & F. 1102.

[2] *R.* v. *Richardson*, 2 F. & F. 343; [see *Funk* v. *Ely*, 45 Pa. St. 444; for a case of forgery, see *Rankin* v. *Blackwell*, 2 Johns. Cas. 198.]

[3] *R.* v. *Geering*, 18 L. J. M. C. 215; cf. *R.* v. *Garner*, 3 F. & F. 681; [see *Goersen* v. *Comm.*, 99 Pa. St. 388; *Weyman* v. *People*, 4 Hun, 511, 518, 62 N. Y. 623.]

[4] *Blake* v. *Albion Life Assurance Society*, L. R. 4 C. P. D. 94.

ing to which it naturally would have been done, is a relevant fact.[1]

When there is a question whether a particular person held a particular public office, the fact that he acted in that office is deemed to be relevant.[2]

When the question is whether one person acted as agent for another on a particular occasion, the fact that he so acted on other occasions is deemed to be relevant.[3]

Illustrations.

(*a*) The question is, whether a letter was sent on a given day.

The post-mark upon it is deemed to be a relevant fact.[4]

(*b*) The question is, whether a particular letter was despatched.

The facts that all letters put in a certain place were, in the common course of business, carried to the post, and that that particular letter was put in that place, are deemed to be relevant.[5]

(*c*) The question is, whether a particular letter reached A.

The facts that it was posted in due course properly addressed, and was not returned through the Dead Letter Office, are deemed to be relevant.[6]

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[1] [Gr. Ev. i. §§ 38, 40; *Mandeville* v. *Reynolds*, 68 N. Y. 528; *People* v. *Oyer and Terminer Court*, 83 N. Y. 436; *Pierson* v. *Atlantic Bk.* 77 N. Y. 304; *Bk. of U. S.* v. *Dandridge*, 12 Wheat. 64; *Comm.* v. *Kimball*, 108 Mass. 473; *Hall* v. *Brown*, 58 N. H. 93.]

[2] 1 Ph. Ev. 449; R. N. P. 46; T. E. s. 139; [see Art. 90, *post*, last paragraph.]

[3] [*Olcott* v. *Tioga R. Co.*, 27 N. Y. 546; *Hammond* v. *Varian*, 54 N. Y. 398; *Kent* v. *Tyson*, 20 N. H. 121; *Thurber* v. *Anderson*, 88 Ill. 167; Kent's Comm. ii. 615.]

[4] *R.* v. *Canning*, 19 S. T. 370. [*U. S.* v. *Williams*, 3 F. R. 484; *U. S.* v. *Noelke*, 17 Blatch. 554. But there is no presumption that the date of the postmark was the day of depositing the letter. *Shelburne Falls Bk.* v. *Townsley*, 102 Mass. 177; see *Price* v. *McGoldrick*, 2 Abb. N. C. 69.]

[5] *Hetherington* v. *Kemp*, 4 Camp. 193; and see *Skilbeck* v. *Garbett*, 7 Q. B. 846, and *Trotter* v. *Maclean*, L. R. 13 Ch. Div. 574; [see *Howard* v. *Daly*, 61 N. Y. 362: *Hall* v. *Brown*, 58 N. H. 93, 97.]

[6] *Warren* v. *Warren*, 1 C. M. & R. 250; *Woodcock* v. *Houldsworth*, 16 M. & W. 124. Many cases on this subject are collected in Roscoe's *Nisi*

(*d*) The facts stated in illustration (*d*) to the last article are deemed to be relevant to the question whether A was agent to the company.[1]

Prius, pp. 734-5. [*Hedden* v. *Roberts*, 134 Mass. 38; *Rosenthal* v. *Walker*, 111 U. S. 185; cf. *Ellison* v. *Lindsley*, 33 N. J. Eq. 258. This is only *prima facie* evidence that the letter was received, not a conclusive presumption of law. *Huntley* v. *Whittier*, 105 Mass. 391; *Susquehanna Ins. Co.* v. *Toy Co.*, 97 Pa. St. 424; *Austin* v. *Holland*, 69 N. Y. 571. The same rule applies to telegrams. *U. S.* v. *Babcock*, 3 Dill. 571.]

[1] *Blake* v. *Albion Life Assurance Society*, L. R. 4 C. P. D. 94.

CHAPTER IV.

HEARSAY IRRELEVANT EXCEPT IN CERTAIN CASES.

ARTICLE 14.*

HEARSAY AND THE CONTENTS OF DOCUMENTS IRRELEVANT.

(*a*) THE fact that a statement was made by a person not called as a witness, and

(*b*) the fact that a statement is contained or recorded in any book, document, or record whatever, proof of which is not admissible on other grounds,

are respectively deemed to be irrelevant to the truth of the matter stated, except (as regards (*a*)) in the cases contained in the first section of this chapter ; [1]

and except (as regards (*b*)) in the cases contained in the second section of this chapter.

Illustrations.

(*a*) A declaration by a deceased attesting witness to a deed that he had forged it, is deemed to be irrelevant to the question of its validity.[2]

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* See Note VIII.

[1] It is important to observe the distinction between the principles which regulate the admissibility of the statements contained in a document and those which regulate the manner in which they must be proved. On this subject see the whole of Part II. [As to the general rule that hearsay evidence is excluded, see *Stephens* v. *Vrooman*, 16 N. Y. 381 ; *People* v. *Beach*, 87 N. Y. 508 ; *Comm.* v. *Ricker*, 131 Mass. 581 ; *Comm.* v. *Felch*, 132 id. 22.]

[2] *Stobart* v. *Dryden*, 1 M. & W. 615. [Some American decisions deny the doctrine of this case (*Boylan* v. *Meeker*, 4 Dutch. 274, 295 ; *Otterson* v. *Hofford*, 36 N. J. L. 129 ; *Neely* v. *Neely*, 17 Pa St. 227 ; cf. *Losee* v. *Losee*, 2 Hill, 609); but others follow it (*Baxter* v. *Abbott*, 7 Gray, 71 ; *Boardman* v. *Woodman*, 47 N. H. 120 ; see also Gr. Ev. i. § 126). That the declarations of other deceased witnesses may be rejected as hearsay, see *Gray* v. *Goodwin*, 7 Johns. 95 ; *Spatz* v. *Lyon*, 55 Barb. 476.]

(*b*) The question is, whether A was born at a certain time and place. The fact that a public body for a public purpose stated that he was born at that time and place is deemed to be irrelevant, the circumstances not being such as to bring the case within the provisions of Article 34.[1]

SECTION I.

HEARSAY, WHEN RELEVANT.

ARTICLE 15.*

ADMISSIONS DEFINED.

An admission is a statement, oral or written, suggesting any inference as to any fact in issue or relevant or deemed to be relevant to any such fact, made by or on behalf of any party to any proceeding. Every admission is (subject to the rules hereinafter stated) deemed to be a relevant fact as against the person by or on whose behalf it is made, but not in his favor unless it is, or is deemed to be, relevant for some other reason.[2]

* See Note IX.

[1] *Sturla* v. *Freccia*, L. R. 5 App. Cas. 623.

[2] [It is an important rule that if part of a statement made by a party be relevant against him as an admission, other parts of the same statement which in any way qualify or explain such admission are also relevant, though they are in such party's favor. Gr. Ev. i. § 201; *Grattan* v. *Ins. Co.*, 92 N. Y. 274; *Gildersleeve* v. *Landon*, 73 N. Y. 609; *Insurance Co.* v. *Newton*, 22 Wall. 32; *Vanneter* v. *Crossman*, 42 Mich. 465; *Farley* v. *Rodocanachi*, 100 Mass. 427. But other portions of the same conversation or statement, which do not explain or affect the part which is unfavorable to the declarant, are not admissible (*Platner* v. *Platner*, 78 N. Y. 90), nor are independent declarations which are made by him and are in his own favor. *Downs* v. *N. Y. C. R. Co.*, 47 N. Y. 83. But a party giving evidence of the opposing party's admissions may also disprove those parts of the same statement which are in the other party's favor, but are nevertheless receivable in evidence. *Mott* v. *Consumers' Ice Co.*, 73 N. Y. 543.

Oral admissions may be proved by any witness who heard them; if he cannot remember the exact words, he may testify to the substance of the admission. Gr. Ev. i. § 191; *Kittredge* v. *Russell*, 114 Mass. 67.

ARTICLE 16.*

WHO MAY MAKE ADMISSIONS ON BEHALF OF OTHERS, AND WHEN.

Admissions may be made on behalf of the real party to any proceeding—

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*See Note X.

Admissions may also be implied from acts and conduct. Gr. Ev. i. §§ 195-199; *Hayes* v. *Kelley*, 116 Mass. 300; *Greenfield Bk.* v. *Crafts*, 2 Allen, 269; *Wesner* v. *Stein*, 97 Pa. St. 322; *Lefever* v. *Johnson*, 79 Ind. 554; *Foster* v. *Persch*, 68 N. Y. 400. Thus, if an account rendered be not objected to within a reasonable time, it is deemed to be admitted by the party charged to be *prima facie* correct. *Wiggins* v. *Burkham*, 10 Wall. 129; *Guernsey* v. *Rexford*, 63 N. Y. 631. The act of a landlord in making repairs after an injury is an admission that it is his duty, rather than that of the tenant. *Readman* v. *Conway*, 126 Mass. 374. So if a partner has access to the books of the firm, the book-entries therein are admissible against him. *Fairchild* v. *Fairchild*, 64 N. Y. 471; *Topliff* v. *Jackson*, 12 Gray, 565. But failure to answer a letter is not generally deemed an admission of the truth of its contents. *Learned* v. *Tillotson*, 97 N. Y. 1. As to other admissions by acquiescence, see Art. 8, *ante*, last paragraph.

Admissions made incidentally or indirectly are competent evidence as well as those made directly. Gr. Ev. i. § 194; *Harrington* v. *Gable*, 81 Pa. St. 406. Admissions may also be made in pleading, or in evidence given in a former proceeding. *Cook* v. *Barr*, 44 N. Y. 156; *Bliss* v. *Nichols*, 12 Allen, 443; *Comm.* v. *Reynolds*, 122 Mass. 454; *Wheat* v. *Summers*, 13 Bradw. 444; *Whiton* v. *Snyder*, 88 N. Y. 299; see this rule limited in *Dennie* v. *Williams*, 135 Mass. 28; *Vogel* v. *Osborne*, 32 Minn. 167. Admissions made simply for one trial cannot be used in another (*McKinney* v. *Salem*, 77 Ind. 213), but the rule is otherwise, if they are made without such limitation. *Holley* v. *Young*, 68 Me. 215; *Owen* v. *Cawley*, 36 N. Y. 600; *Perry* v. *Simpson etc. Co.*, 40 Ct. 313

Oral admissions, though competent as evidence, must be received, it is said, with great caution. Gr. Ev. i. §§ 199, 200; *Jones* v. *Knauss*, 31 N. J. Eq. 609. But admissions are conclusive when they amount to estoppels (Gr. Ev. i. §§ 204-208); and admissions made in pleading and not obviated by amendment, are conclusive in the same case. *Cook* v. *Barr*, supra.]

By any nominal party to that proceeding ;[1]

By any person who, though not a party to the proceeding, has a substantial interest in the event ;[2]

By any one who is privy in law,[3] in blood,[4] or in estate [5] to any party to the proceeding on behalf of that party.

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[1] [Mr. Stephen illustrates this rule by saying that the admissions of an assignor of a chose in action who is the nominal plaintiff in an action brought for the benefit of his assignee, are admissible against the latter. But in New York and many other States of this country, the assignee sues in his own name, and there is, therefore, no ground for receiving the admissions of the assignor made after the assignment; they are therefore excluded. *Van Gelder* v. *Van Gelder*, 81 N. Y. 625. And evidence of such admissions has been generally rejected in this country, even when the assignee sued in the assignor's name. *Wing* v. *Bishop*, 3 Allen, 456 ; *Butler* v. *Millett*, 47 Me. 492 ; *Sargeant* v. *Sargeant*, 18 Vt. 371 ; *Dazey* v. *Mills*, 5 Gilm. (Ill.) 67 ; *Frear* v. *Evertson*, 20 Johns. 142. But the admissions of the assignee, after a valid assignment, are relevant against him.]

[2] [Gr. Ev. i. § 180 ; *Fickett* v. *Swift*, 41 Me. 65 ; *Bigelow* v. *Foss*, 59 Me. 162 ; *Benjamin* v. *Smith*, 4 Wend. 332, 335, 12 Wend. 404, 407 ; see *Taylor* v. *G. T. R. Co.*, 48 N. H. 304. But the declarations of a person who is not a party to the record nor a witness, are not received to show that he is the real party in interest. *Ryan* v. *Merriam*, 4 Allen, 77.

Under this head is sometimes placed the rule that in an action against a sheriff for the misconduct of his deputy the admissions of the deputy are receivable, on the ground that he is the real party in interest. Gr. Ev. § 180, note. But in some States it is held that such declarations are only receivable when they accompanied the deputy's official acts, and therefore formed part of the *res gestæ*. *Barker* v. *Bininger*, 14 N. Y. 270 ; *Stewart* v. *Wells*, 6 Barb. 79.]

[3] [Thus the admissions of an intestate are receivable against his administrator (*Brown* v. *Mailler*, 12 N. Y. 118 ; *Fellows* v. *Smith*, 130 Mass. 378 ; *Slade* v. *Leonard*, 75 Ind. 171); and of testator against executor (*Childs* v. *Jordan*, 106 Mass. 321). So in an action by a widow for dower, admissions made by her husband while living are deemed to be relevant against her. *Van Duyne* v. *Thayre*, 14 Wend. 233.]

[4] [Admissions made by an ancestor are receivable against his heirs. *Spaulding* v. *Hallenbeck*, 35 N. Y. 204 ; *Enders* v. *Van Steenbergh*, 2 Abb. Dec. 31.]

[5] [Admissions by a grantor of land are relevant against his grantee ; of

A statement made by a party to a proceeding may be an admission whenever it is made,[1] unless it is made by a person suing or sued in a representative character only, in which case (it seems) it must be made whilst the person making it sustains that character.[2]

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a landlord against his tenant; of devisor against devisee; of any owner of land against those who subsequently derive title from or through him. *Chadwick* v. *Fonner*, 69 N. Y. 404; *Simpson* v. *Dix*, 131 Mass. 179; *Pickering* v. *Reynolds*, 119 Mass. 111. As to personal property, see note 1, next page.

Not only those declarations by an owner of land, or by one claiming title, which are in disparagement of his title, are admissible against the declarant or persons in privity with him (see *Bowen* v. *Chase*, 98 U. S. 254), but also those statements made by him while in possession, which show the character of his possession and by what title he claims (*Pitts* v. *Wilder*, 1 N. Y. 525; *Moore* v. *Hamilton*, 44 N. Y. 666; *Hale* v. *Rich*, 48 Vt. 217; *Hale* v. *Silloway*, 1 Allen, 21), as *e.g.* to show that he held under adverse claim of title (*Morss* v. *Salisbury*, 48 N. Y. 636; *Susq., etc., R. Co.* v. *Quick*, 68 Pa. St. 189), or as the tenant of a particular person (*Gibney* v. *Marchay*, 34 N. Y. 301), or, as some cases hold, to show the extent of occupation or boundary. *Abeel* v. *Van Gelder*, 36 N. Y. 513; *Sheaffer* v. *Eakman*, 56 Pa. St. 144; see *Chapman* v. *Edmands*, 3 Allen, 512. Such evidence comes properly under the doctrine of *res gestæ*. (Gr. Ev. i. § 109; see *ante*, Art. 3, note.) But declarations of an owner in possession will not be received in place of record evidence nor to destroy a record title. *Gibney* v. *Marchay*, supra; *Dodge* v. *Trust Co.*, 93 U. S. 379; *Hancock Ins. Co.* v. *Moore*, 34 Mich. 41; but see *Loomis* v. *Wadham*, 8 Gray, 556.]

[1] [*Cook* v. *Barr*, 44 N. Y. 156; *Williams* v. *Sergeant*, 46 N. Y. 481; *Wiggin* v. *B. & A. R. Co.*, 120 Mass. 201; *Hatch* v. *Brown*, 63 Me. 410; *Duncan* v. *Lawrence*, 24 Pa. St. 154; cf. *Shailer* v. *Bumstead*, 99 Mass. 112, 127; so if one be substituted as a party after suit brought, his admissions are receivable. *Wadsworth* v. *Williams*, 100 Mass. 126.]

[2] [Gr. Ev. i. § 179; *Lamar* v. *Micou*, 112 U. S. 452. Thus the declarations of an executor or administrator are not competent as admissions, unless made after his appointment and while he was acting in that capacity and representing the estate. *Church* v. *Howard*, 79 N. Y. 415; *Brooks* v. *Goss*, 61 Me. 307; *Dent* v. *Dent*, 3 Gill, 482; see *Heywood* v. *Heywood*, 10 Allen, 105. But if he sues or is sued in an individual capacity, his admissions made at other times are receivable. See *Whiton* v.

A statement made by a person interested in a proceeding, or by a privy to any party thereto, is not an admission, unless it is made during the continuance of the interest which entitles him to make it.[1]

Snyder, 88 N. Y. 299. And his admissions made as party in one suit are receivable against him as party in another. *Phillipps* v. *Middlesex*, 127 Mass. 262.]

[1] [Thus declarations by a grantor of land after parting with his interest are not receivable as admissions against the grantee (*Vrooman* v. *King*, 36 N. Y. 477; *Brower* v. *Callender*, 105 Ill. 88; *Winchester* v. *Charter*, 97 Mass. 140); nor those of an assignor of chattels or *choses* in action against the assignee, when they are made after the assignment and transfer of possession. *Coyne* v. *Weaver*, 84 N. Y. 386; *Burnham* v. *Brennan*, 74 N. Y. 597; *Roberts* v. *Medbery*, 132 Mass. 100; *McLanathan* v. *Patten*, 39 Me. 142; *Benson* v. *Lundy*, 52 Ia. 265. But if a transferor of land or chattels remains in possession, his declarations characterizing that possession are often competent. *Pier* v. *Duff*, 63 Pa. St. 59; *Newlin* v. *Lyon*, 49 N. Y. 661; *Roberts* v. *Medbery*, supra; but see *Vrooman* v. *King*, supra. In New York the declarations of an assignor of personal property, made while he remains in continuous possession of it after the assignment, are receivable to show fraud as to creditors. *Adams* v. *Davidson*, 10 N. Y. 309; but see *Tilson* v. *Terwilliger*, 56 N. Y. 273; *Tabor* v. *Van Tassell*, 86 N. Y. 642. But the declarations of a grantor of land after the grant cannot be received for the same purpose (*Holbrook* v. *Holbrook*, 113 Mass. 74), unless there be a conspiracy between the parties to defraud creditors and such declarations are made in pursuance of the conspiracy. *Cuyler* v. *McCartney*, 40 N. Y. 221; *Souder* v. *Schechterly*, 91 Pa. St. 83; this rule applies to personalty also.

The admissions of an assignor of a chattel or *chose* in action, made while he had ownership and possession, are in many States held competent against his assignee (*Sandifer* v. *Hoard*, 59 Ill. 246; *Merrick* v. *Parkman*, 18 Me. 407; *Alger* v. *Andrews*, 47 Vt. 238; *Magee* v. *Raiguel*, 64 Pa. St. 110; *Bond* v. *Fitzpatrick*, 4 Gray, 89; *Randegger* v. *Ehrhardt*, 51 Ill. 101; *aliter*, as to commercial paper negotiated before maturity); but the rule is sometimes limited by important qualifications. *Coit* v. *Howe*, 1 Gray, 547. This rule is like that applied to real estate. (See *ante*, note 5.) But in New York, while the rule as to realty is accepted, a different rule is applied to personalty, and it is held that the declarations of the assignor, though made before the assignment, are not admissible against an assignee *for value* or for the benefit of creditors. *Von Sachs*

Illustrations.

(*a*) The assignee of a bond sues the obligor in the name of the obligee.

An admission on the part of the obligee that the money due has been paid is deemed to be relevant on behalf of the defendant.[1]

(*b*) An admission by the assignee of the bond in the last illustration would also be deemed to be relevant on behalf of the defendant.

(*ba*) [The question is, whether a horse was sold to the defendant by the plaintiff for $500, or was entrusted to him as a bailee.

The defendant upon seeing an entry made in the plaintiff's book of account immediately after the transaction, charging him with $500 as the price of the horse, admitted its accuracy; this admission is deemed to be relevant against him.] [2]

(*bb*) [A sues B to recover the possession of land. A claims under C and B claims under D. Declarations made by D while in possession of the land that C was the owner are admissible against B.][3]

(*bc*) [The admissions of a holder of a promissory note after maturity, made while he held it, are deemed to be relevant against a subsequent holder.][4]

(*c*) A statement made by a person before he becomes the assignee of a bankrupt is not deemed to be relevant as an admission by him in a proceeding by him as such assignee.[5]

(*d*) Statements made by a person as to a bill of which he had been the holder are deemed not to be relevant as against the holder, if they are made after he has negotiated the bill.[6]

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v. *Kretz*, 72 N. Y. 548, 554; *Truax* v. *Slater*, 86 N. Y. 630; *Clews* v. *Kehr*, 90 N. Y. 633. The same rule is adopted by the U. S. Supreme Court. *Dodge* v. *Trust Co.*, 93 U. S. 379. But against other assignees, not acquiring title for value (as an executor, etc.), such declarations of the assignor are competent. *Von Sachs* v. *Kretz*, supra.

As to the rule that the admissions of a person in interest must be made during the continuance of his interest, see *Taylor* v. *G. T. R. Co.*, 48 N. H. 304.]

[1] See *Moriarty* v. *L. C. & D. Co.*, L. R. 5 Q. B. 320; [see page 41, *ante*, note 1.]

[2] [*Tanner* v. *Parshall*, 4 Abb. Dec. 356.]

[3] [*Simpson* v. *Dix*, 131 Mass. 179.]

[4] [*Bond* v. *Fitzpatrick*, 4 Gray, 89; contra, *Clews* v. *Kehr*, 90 N. Y. 633.]

[5] *Fenwick* v. *Thornton*, M. & M. 51 (by Lord Tenterden). In *Smith* v. *Morgan*, 2 M. & R. 257, Tindal, C. J., decided exactly the reverse.

[6] *Pocock* v. *Billing*, 2 Bing. 269.

ARTICLE 17.*

ADMISSIONS BY AGENTS AND PERSONS JOINTLY INTERESTED WITH PARTIES.

Admissions may be made by agents authorized to make them either expressly or by the conduct of their principals; but a statement made by an agent is not an admission merely because if made by the principal himself it would have been one.[1]

Partners and joint contractors are each other's agents for the purpose of making admissions against each other in relation to partnership transactions or joint contracts.[2]

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* See Note XI.

[1] [The admissions of an agent, in order to be competent evidence against his principal, must relate to, and be made in connection with, some act done in the course of his agency, so as to form part of the *res gestæ*. *Anderson* v. *Rome, etc. R. Co.*, 54 N. Y. 334; *Alexander* v. *Cauldwell*, 83 N. Y. 480; *Monocacy, etc. Co.* v. *American, etc. Co.*, 83 Pa. St. 517; *Xenia Bk.* v. *Stewart*, 114 U. S. 224; *Lane* v. *B. & A. R. Co.*, 112 Mass. 455. Or else they must be expressly authorized. *White* v. *Miller*, 71 N. Y. 118, 136. But an agent's declarations are not admissible to prove his own authority. *Starin* v. *Genoa*, 23 N. Y. 439; *Whiting* v. *Lake*, 91 Pa. St. 349.

A wife's declarations are competent against her husband when she makes them as his agent, within this rule, but not otherwise; and so of a husband's admissions as against his wife. The marital relation does not of itself establish the agency, but it must be otherwise shown to exist; it may be express or implied. Gr. Ev. i. § 185; *Lay Grae* v. *Peterson*, 2 Sandf. 338; *Deck* v. *Johnson*, 1 Abb. Dec. 497; *Rose* v. *Chapman*, 44 Mich. 312; *Hunt* v. *Strew*, 33 Mich. 85; *Goodrich* v. *Tracy*, 43 Vt. 314; see *McGregor* v. *Wait*, 10 Gray, 72.

The admission of a member of an aggregate corporation, who is not a party to the action, is not competent evidence against the corporation, unless made within this rule while he was acting as its authorized agent. *Soper* v. *Buffalo, etc. R. Co.*, 19 Barb. 310; N. Y. Code Civ. Pro. § 839; Angell & Ames on Corporations, §§ 309, 657-660.]

[2] [S. P. as to partners. *Fogerty* v. *Jordan*, 2 Rob. 319; *Van Keuren* v. *Parmalee*, 2 N. Y. 523; *Smith* v. *Collins*, 115 Mass. 388; *Ruckman* v.

Barristers and solicitors are the agents of their clients for the purpose of making admissions whilst engaged in the actual management of the cause, either in court or in correspondence relating thereto ; but statements made by a barrister or solicitor

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Decker, 23 N. J. Eq. 283. The existence of the partnership, however, must be first shown, and the admissions of one alleged partner are not competent against others to prove them to be partners, though they are receivable against himself. *Currier* v. *Silloway*, 1 Allen, 19; *Greenwood* v. *Sias*, 21 Hun, 391; *Edwards* v. *Tracy*, 62 Pa. St. 374; *Pleasants* v. *Fant*, 22 Wall. 116.

Different rules prevail in different States as to whether the admissions of one partner, after a dissolution of the firm, shall be receivable against the others. In some States they are admissible against the others, when made in regard to past debts or transactions of the firm, or to remove the bar of the Statute of Limitations as to a partnership debt. *Vinal* v. *Burrill*, 16 Pick. 401; *Buxton* v. *Edwards*, 134 Mass. 567; *Merritt* v. *Day*, 38 N. J. L. 32; *Bissell* v. *Adams*, 35 Ct. 299. But in New York admissions by one as to dealings of the firm before dissolution or as to barred claims are not competent against the others (*Baker* v. *Stackpole*, 9 Cow. 420; *Van Keuren* v. *Parmalee*, supra); though if one is authorized to act as agent in the business of winding up, the declarations which he makes in the course of his agency are competent. *Nichols* v. *White*, 85 N. Y. 531. When a partner retires, the remaining members cannot bind him by their admissions. *Pringle* v. *Leverich*, 97 N. Y. 181. Some other States have adopted similar rules. *Searight* v. *Craighead*, 1 P. & W. 135; *Bell* v. *Morrison*, 1 Pet. 351; see *Newman* v. *McComas*, 43 Md. 70; Parsons on Partnership, pp. 184–197.

So in some States the admissions of one joint debtor or contractor are received against the others, and will remove the bar of the Statute of Limitations as against all, except so far as the statutes cited below (see p. 48, note 1) modify this rule. *Dennie* v. *Williams*, 135 Mass. 28; *Caldwell* v. *Sigourney*, 19 Ct. 37; *Bound* v. *Lathrop*, 4 Ct. 336; *Shepley* v. *Waterhouse*, 22 Me. 497; *Black* v. *Lamb*, 1 Beas. 108; see *Parker* v. *Butterworth*, 46 N. J. L. 244. In other States, a contrary or modified doctrine is held (see *Kallenbach* v. *Dickinson*, 100 Ill. 427, which enumerates the States having the diverse rules, and cites many leading cases). Thus it is held in a number of the States that one cannot bind the others, so as to affect their defence that the claim is barred. *Shoemaker* v. *Benedict*, 11 N. Y. 176; *Bush* v. *Stowell*, 71 Pa. St. 208; *Clark* v. *Burn*, 86 id. 502; *Hance* v. *Hair*, 25 O. St. 349. In New York it is well settled that a joint

on other occasions are not admissions merely because they would be admissions if made by the client himself.[1]

The fact that two persons have a common interest in the same subject matter does not entitle them to make admissions respecting it as against each other.[2]

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debtor or joint contractor has no authority to bind his associate, unless he is the agent or in some other way the representative of such person. *Wallis* v. *Randall*, 81 N. Y. 164; *Lewis* v. *Woodworth*, 2 N. Y. 512; see *Rogers* v. *Anderson*, 40 Mich. 290. The rule in any State as to joint debtors is much the same as to partners after dissolution.]

[1] [This rule is generally applicable in this country to attorneys and counsellors. Gr. Ev. i. § 186; *Lewis* v. *Sumner*, 13 Met. 269; *Lord* v. *Bigelow*, 124 Mass. 185; *Oliver* v. *Bennett*, 65 N. Y. 559; *People* v. *Stephens*, 52 N. Y. 306; *Rogers* v. *Greenwood*, 14 Minn. 333; *Sohns* v. *McCulloh*, 5 Pa. St. 473. As to the effect of admissions made in counsel's opening speech, see *Oscanyan* v. *Arms Co.*, 103 U. S. 261; *Ferson* v. *Wilcox*, 19 Minn. 449; cf. *Adee* v. *Howe*, 15 Hun, 20. As to unsolemn admissions, or those made in casual conversation, etc., which are not usually admitted, see *Saunders* v. *McCarthy*, 8 Allen, 43; *Rockwell* v. *Taylor*, 41 Ct. 55; *McKeen* v. *Gammon*, 33 Me. 187; *Douglass* v. *Mitchell's Exer.*, 35 Pa. St. 441; *Treadway* v. *S. C. etc. R. Co.*, 40 Ia. 526; cf. *Murray* v. *Chase*, 134 Mass. 92. As to admissions made on a former trial, see *Perry* v. *Simpson, etc. Co.*, 40 Ct. 313; *Holley* v. *Young*, 68 Me. 215; *Union Pac. R. Co.* v. *Shoup*, 28 Kan. 394; *Owen* v. *Cawley*, 36 N. Y. 600. As to admissions by an attorney in the pleadings, see the cases cited in the preceding article (p. 40, *ante*). In this country it is the general rule, that an attorney cannot compromise or settle a suit without his client's consent. *Mandeville* v. *Reynolds*, 68 N. Y. 528; *Derwert* v. *Loomer*, 21 Ct. 245.]

[2] [Gr. Ev. i. § 176. Thus the admission of one executor or administrator is not competent against his co-executor or co-administrator to establish a demand against the estate of the deceased, nor is it receivable against heirs or devisees (*Church* v. *Howard*, 79 N. Y. 415, 418; *Osgood* v. *Manhattan Co.*, 3 Cow. 612); nor the admission of one devisee or legatee against another (*Clark* v. *Morrison*, 25 Pa. St. 453; *La Bau* v. *Vanderbilt*, 3 Redf. 384; *Shailer* v. *Bumstead*, 99 Mass. 112, 127); nor of one tenant in common against another (*Dan* v. *Brown*, 4 Cow. 483; *Pier* v. *Duff*, 63 Pa. St. 59); nor, generally, of one defendant in a tort action against another, unless made as part of the *res gestæ*, as in conspiracy (*Carpenter* v. *Welden*, 5 Sandf. 77; *Wilson* v. *O'Day*, 5 Daly,

In cases in which actions founded on a simple contract have been barred by the Statute of Limitations no joint contractor or his personal representative loses the benefit of such statute, by reason only of any written acknowledgment or promise made or signed by (or by the agent duly authorized to make such acknowledgment or promise of) any other or others of them (or by reason only of payment of any principal, interest, or other money, by any other or others of them).[1]

A principal, as such, is not the agent of his surety for the purpose of making admissions as to the matters for which the surety gives security.[2]

Illustrations.

(*a*) The question is, whether a parcel, for the loss of which a Railway Company is sued, was stolen by one of their servants. Statements made by the station-master to a police officer, suggesting that the parcel had been stolen by a porter, are deemed to be relevant, as against the railway, as admissions by an agent.[3]

354; cf. *Edgerton* v. *Wolf*, 6 Gray, 453). As to the admissions of a *cestui que trust*, see *Pope* v. *Devereux*, 5 Gray, 409.]

[1] 9 Geo. IV. c. 14, s. 1. The first set of words in parenthesis was added by 19 & 20 Vict. c. 97, s. 13; the second set by s. 14 of the same Act. The language is slightly altered. [Similar statutes have been passed in several States of this country. Mass. Pub. St., c. 197, § 17; N. J. Rev., p. 595, § 10; Maine Rev. St. c. 82, §§ 98, 100; *Faulkner* v. *Bailey*, 123 Mass. 588; *Bailey* v. *Corliss*, 51 Vt. 366; *Rogers* v. *Anderson*, 40 Mich. 290. In New York and some other States, a similar common law rule prevails; but in a number of the States, the contrary rule of the English common law prevails, which was established by *Whitcomb* v. *Whiting*. See p. 45 *ante*, note 2; also Illustration (*f*).]

[2] [Gr. Ev. i. § 187; *Hatch* v. *Elkins*, 65 N. Y. 489; *Rae* v. *Beach*, 76 N. Y. 164; *Chelmsford Co.* v. *Demarest*, 7 Gray, 1. But declarations of the principal are admissible when forming part of the *res gestæ*. *Id.; Bank of Brighton* v. *Smith*, 12 Allen, 243; see *Agricultural Ins. Co.* v. *Keeler*, 44 Ct. 161; *Bissell* v. *Saxton*, 66 N. Y. 55.]

[3] *Kirkstall Brewery* v. *Furness Ry.*, L. R. 9 Q. B. 468; [see *Green* v. *B. & L. R. Co.*, 128 Mass. 221; *B. & O. R. Co.* v. *Campbell*, 36 O. St. 647; *Green* v. *N. Y. C. R. Co.*, 12 Abb. Pr. (N. S.) 473; cf. *Heag* v. *Lamont*, 60 N. Y. 96.]

(*b*) A allows his wife to carry on the business of his shop in his absence. A statement by her that he owes money for goods supplied to the shop is deemed to be relevant against him as an admission by an agent.[1]

(*c*) A sends his servant, B, to sell a horse. What B says at the time of the sale, and as part of the contract of sale, is deemed to be a relevant fact as against A, but what B says upon the subject at some different time is not deemed to be relevant as against A[2] (though it might have been deemed to be relevant if said by A himself).

(*d*) The question is, whether a ship remained at a port for an unreasonable time. Letters from the plaintiff's agent to the plaintiff containing statements which would have been admissions if made by the plaintiff himself are deemed to be irrelevant as against him.[3]

(*e*) A, B, and C sue D as partners upon an alleged contract respecting the shipment of bark. An admission by A that the bark was his exclusive property and not the property of the firm is deemed to be relevant as against B and C.[4]

(*f*) A, B, C, and D make a joint and several promissory note. Either can make admissions about it as against the rest.[5]

(*g*) The question is, whether A accepted a bill of exchange. A notice to produce the bill signed by A's solicitor and describing the bill as having been accepted by A is deemed to be a relevant fact.[6]

(*h*) The question is, whether a debt to A, the plaintiff, was due from B, the defendant, or from C. A statement made by A's solicitor to B's solicitor in common conversation that the debt was due from C is deemed not to be relevant against A.[7]

(*i*) One co-part-owner of a ship cannot, as such, make admissions against another as to the part of the ship in which they have a common

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[1] *Clifford* v. *Burton*, 1 Bing. 199. [*Riley* v. *Suydam*, 4 Barb. 222.]

[2] *Helyear* v. *Hawke*, 5 Esp. 72; [see *Ahern* v. *Goodspeed*, 72 N. Y. 108.]

[3] *Langhorn* v. *Allnutt*, 4 Tau. 511.

[4] *Lucas* v. *De La Cour*, 1 M. & S. 249; [cf. *Brake* v. *Kimball*, 5 Sandf. 237.]

[5] *Whitcomb* v. *Whiting*, 1 S. L. C. 644. [The decision in this case was that the acknowledgment of one of the drawers of a joint and several note took it out of the Statute of Limitations as against the others. This case is followed in some States of this country, rejected in others. *Kallenbach* v. *Dickinson*, 100 Ill. 427; see p. 45, *ante*, note 2.]

[6] *Holt* v. *Squire*, Ry. & Mo. 282.

[7] *Petch* v. *Lyon*, 9 Q. B. 147.

interest, even if he is co-partner with that other as to other parts of the ship.[1]

(*j*) A is surety for B, a clerk. B being dismissed makes statements as to sums of money which he has received and not accounted for. These statements are not deemed to be relevant as against A, as admissions.[2]

ARTICLE 18.*

ADMISSIONS BY STRANGERS.

Statements by strangers to a proceeding are not relevant as against the parties except in the cases hereinafter mentioned.[3]

In actions against sheriffs for not executing process against debtors, statements of the debtor admitting his debt to be due to the execution creditor are deemed to be relevant as against the sheriff.[4]

In actions by the trustees of bankrupts an admission by the bankrupt of the petitioning creditor's debt is deemed to be relevant as against the defendant.[5]

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* See Note XII.

[1] *Jaggers* v. *Binning*, 1 Star. 64. [*The New Orleans*, 106 U. S. 13; *McLellan* v. *Cox*, 36 Me. 95; see *Smith* v. *Aldrich*, 12 Allen, 553.]

[2] *Smith* v. *Whippingham*, 6 C. & P. 78. See also *Evans* v. *Beattie*, 5 Esp. 26; *Bacon* v. *Chesney*, 1 Star. 192; *Caermarthen R. C.* v. *Manchester R. C.*, L. R. 8 C. P. 685.

[3] *Coole* v. *Braham*, 3 Ex. 183. [*Brown* v. *Mailler*, 12 N. Y. 118; *Happy* v. *Mosher*, 48 N. Y. 313; *Lyon* v. *Manning*, 133 Mass. 439; *Wilson* v. *Bowden*, 113 id. 422; *Heller* v. *Howard*, 11 Bradw. 554.]

[4] *Kempland* v. *Macaulay*, Peake, 95; *Williams* v. *Bridges*, 2 Star. 42; [*Hart* v. *Stevenson*, 25 Ct. 499.]

[5] *Jarrett* v. *Leonard*, 2 M. & S. 265 (adapted to the new law of bankruptcy). [This rule as thus stated is peculiarly applicable to English practice. But in New York it is held that the declarations of a bankrupt, made before the bankruptcy, are competent against his assignee in bankruptcy, to establish or support a claim against the bankrupt's estate. *Von Sachs* v. *Kretz*, 72 N. Y. 548; see *Holt* v. *Walker*, 26 Me. 107; *Carnes* v. *White*, 15 Gray, 378; *In re Clark*, 9 Blatch. 379.]

ARTICLE 19.*

ADMISSION BY PERSON REFERRED TO BY PARTY.

When a party to any proceeding expressly refers to any other person for information in reference to a matter in dispute, the statements of that other person may be admissions as against the person who refers to him.[1]

Illustration.

The question is, whether A delivered goods to B. B says "if C" (the carman) "will say that he delivered the goods, I will pay for them." C's answer may as against B be an admission.[2]

ARTICLE 20.†

ADMISSIONS MADE WITHOUT PREJUDICE.

No admission is deemed to be relevant in any civil action if it is made either upon an express condition that evidence of it is not to be given,[3] or under circumstances from which the judge infers that the parties agreed together that

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* See Note XIII. † See Note XIV.

[1] [Gr. Ev. i. § 182; *Gott* v. *Dinsmore*, 111 Mass. 45; *Wehle* v. *Spelman*, 1 Hun, 634, 4 T. & C. 649; *Chadsey* v. *Greene*, 24 Ct. 562; *Chapman* v. *Twitchell*, 37 Me. 59. But the statements of the referee are only admissible when they relate to the subject-matter of the reference (*Duval* v. *Covenhover*, 4 Wend. 561; *Lambert* v. *People*, 76 N. Y. 220; *Allen* v. *Killinger*, 8 Wall. 480); nor are those made before the reference admissible. *Cohn* v. *Goldman*, 76 N. Y. 284.

As to the statements of an interpreter, see Gr. Ev. i. § 183; *Camerlin* v. *Palmer Co.*, 10 Allen, 539.]

[2] *Daniel* v. *Pitt*, 1 Camp. 366, n.

[3] *Cory* v. *Bretton*, 4 C. & P. 462; [*Copeland* v. *Taylor*, 99 Mass. 613.]

evidence of it should not be given,[1] or if it was made under duress.[2]

ARTICLE 21.

CONFESSIONS DEFINED.

A confession is an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed that crime.[3] Confessions, if voluntary, are

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[1] *Paddock* v. *Forester*, 3 M. & G. 918. [Under this rule statements incorporating the express qualification that they shall be "without prejudice" are deemed not to be relevant as admissions. S. C.; see *Townsend* v. *Merchants' Ins. Co.*, 4. J. & Sp. 772. So statements made as offers to compromise a claim, or to "buy peace," as it is termed, are not competent evidence as admissions. Gr. Ev. i. § 192; *Draper* v. *Hatfield*, 124 Mass. 53; *Laurence* v. *Hopkins*, 13 Johns. 288; *Home Ins. Co.* v. *Baltimore, etc. Co.*, 93 U. S. 527; *Campan* v. *Dubois*, 39 Mich. 274. They are equivalent to statements "without prejudice." *West* v. *Smith*, 101 U. S. 263, 273; *Reynolds* v. *Manning*, 15 Md. 510. But an admission of an independent fact is relevant, though made during a negotiation for compromise. *Bartlett* v. *Tarbox*, 1 Abb. Dec. 120; *Marvin* v. *Richmond*, 3 Den. 58; *Durgin* v. *Somers*, 117 Mass. 55; *Arthur* v. *James*, 28 Pa. St. 236; *Doon* v. *Rarey*, 49 Vt. 293; *Plummer* v. *Currier*, 52 N. H. 287. This is the general American rule.]

[2] *Stockfleth* v. *De Tastet*, *per* Ellenborough, C. J., 4 Camp. 11. [But admissions made by a party, while testifying as witness in a prior suit, are relevant against him; the legal constraint to testify is not deemed "duress" under this rule. Gr. Ev. i. § 193; see Art. 15 *ante*, note 2; *Tooker* v. *Gonner*, 2 Hilt. 71.

A court of equity will sometimes restrain the use of admissions obtained by fraud and duress. *Callender* v. *Callender*, 53 How. Pr. 364.]

[3] [The word "confession" denotes an acknowledgment of guilt. Acknowledgments of other matters of fact in a criminal case are termed "admissions." Gr. Ev. i. § 170; see *People* v. *Parton*, 49 Cal. 632; *Comm.* v. *Sanborn*, 116 Mass. 61.

Confessions may not only be made expressly, but may also be implied from a person's keeping silence when he is charged with a crime under such circumstances that he would naturally reply. (See Art. 8, *ante*,

deemed to be relevant facts as against the persons who make them only.[1]

ARTICLE 22.*

CONFESSION CAUSED BY INDUCEMENT, THREAT, OR PROMISE, WHEN IRRELEVANT IN CRIMINAL PROCEEDING.

No confession is deemed to be voluntary if it appears to the judge to have been caused by any inducement, threat, or promise, proceeding from a person in authority, and having reference to the charge against the accused person, whether

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* See Note XV.

last paragraph, and note). This is true in some States, even though he be under arrest at the time. *Kelley* v. *People*, 55 N. Y. 565; *Murphy* v. *State*, 36 O. St. 628; cf. *Ettinger* v. *Comm.*, 98 Pa. St. 338; contra, *Comm.* v. *McDermott*, 123 Mass. 440.

It is a general rule that an extra-judicial confession is not sufficient to sustain a conviction unless corroborated by additional proof of the *corpus delicti*. Gr. Ev. i. § 217; *People* v. *Hennessy*, 15 Wend. 147; N. Y. Code Cr. Pro. § 395; *South* v. *People*, 98 Ill. 261; *People* v. *Thrall*, 50 Cal. 415; *State* v. *Patterson*, 73 Mo. 695; *Gray* v. *Comm.*, 101 Pa. St. 380; *People* v. *Lane*, 49 Mich. 340; *Blackburn* v. *State*, 23 O. St. 146; *State* v. *Knowles*, 48 Ia. 598; cf. *Comm.* v. *Tarr*, 4 Allen, 315. It is also an important rule that the whole of a confession is to be taken together, so that the prisoner may have the benefit of all qualifying or exculpatory statements incorporated therein. Gr. Ev. i. § 218; *State* v. *McDonnell*, 32 Vt. 491; *Morehead* v. *State*, 34 O. St. 212; *Corbett* v. *State*, 31 Ala. 329; see *People* v. *Ruloff*, 3 Park. Cr. 401. But part of a conversation may be proved, if it amounts to a confession which is substantially complete. *Comm.* v. *Pitsinger*, 110 Mass. 101; *Levison* v. *State*, 54 Ala. 520; *Bob* v. *State*, 32 id. 560; cf. *People* v. *Gelabert*, 39 Cal. 663.]

[1] [Thus the confession of one of two or more defendants in a criminal case is evidence against himself only, and not against the others. *Comm.* v. *Ingraham*, 7 Gray, 46; *State* v. *Albert*, 73 Mo. 347; *People* v. *Stevens*, 47 Mich. 411; *Fife* v. *Comm.*, 29 Pa. St. 429; *Gore* v. *State*, 58 Ala. 391. As to the declarations of conspirators, see Art. 4, *ante*.]

addressed to him directly or brought to his knowledge indirectly ; [1]

and if (in the opinion of the judge)[2] such inducement, threat, or promise, gave the accused person reasonable grounds for supposing that by making a confession he would gain some advantage or avoid some evil in reference to the proceedings against him.[3]

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[1] [The admissibility of confessions is to be determined by the judge. *Willett* v. *People*, 27 Hun, 469 ; *Comm.* v. *Culver*, 126 Mass. 464 ; *State* v. *Patterson*, 73 Mo. 695 ; *Redd* v. *State*, 69 Ala. 255 ; and cases *infra*. But in some States, the confession, when offered in evidence, is deemed *prima facie* involuntary, and the burden of proof is on the prosecutor to show it to be voluntary. *Young* v. *State*, 68 Ala. 569 ; *Nicholson* v. *State*, 38 Md. 140 ; *People* v. *Soto*, 49 Cal. 67 ; *Thompson* v. *Comm.*, 20 Gratt. 724. In other States, it is considered *prima facie* voluntary, but the defendant may object to its being admitted in evidence and show it to have been improperly obtained and so cause its exclusion. *Comm.* v. *Sego*, 125 Mass. 210 ; *Comm.* v. *Culver*, supra ; *Rufer* v. *State*, 25 O. St. 464 ; *State* v. *Davis*, 34 La. Ann. 351 ; cf. *Woodford* v. *People*, 62 N. Y. 117.]

[2] Judges are now less disposed than they formerly were to hold that the language used amounts to even an inducement. In *R.* v. *Baldry*, decided in 1852 (2 Den. C.C. 430), the constable told the prisoner that he need not say anything to criminate himself, but that what he did say would be taken down and used as evidence against him. It was held that this was not an inducement, though there were earlier cases which treated it as such. In *R.* v. *Jarvis* (L. R. 1 C. C. R. 96) the following was held not to be an inducement, "I think it is right I should tell you that besides being in the presence of my brother and myself" (prisoner's master) "you are in the presence of two officers of the public, and I should advise you that to any question that may be put to you, you will answer truthfully, so that if you have committed a fault you may not add to it by stating what is untrue. Take care. We know more than you think we know.—So you had better be good boys and tell the truth." *R.* v. *Reeve*, L. R. 1 C. C. R. 364. [See *R.* v. *Fennell*, 6 Q. B. D. 147 ; *Comm.* v. *Nott*, 135 Mass. 269.]

[3] [*People* v. *Phillips*, 42 N. Y. 200 ; *Comm.* v. *Curtis*, 97 Mass. 574 ; *Fife* v. *Comm.* 29 Pa. St. 429 ; *Flagg* v. *People*, 40 Mich. 706 ; *State* v. *Jones*, 54 Mo. 478. But a confession made to a person in authority, whether obtained by his inducements or not, is deemed to be voluntary, if no inducements of the kind stated in the text are used. *Comm.* v. *Sego*, 125 Mass. 210 ; *People* v. *Wentz*, 37 N. Y. 303 ; *State* v. *Grant*, 22 Me.

A confession is not involuntary, only because it appears to have been caused by the exhortations of a person in authority to make it as a matter of religious duty,[1] or by an inducement collateral to the proceeding,[2] or by inducements held out by a person not in authority.[3]

171; *State* v. *Fortner*, 43 Ia. 494; *Comm.* v. *Morey*, 1 Gray, 461; *Fife* v. *Comm.*, supra. So confessions made by the prisoner while in custody are competent, if the officer use no improper inducements or threats (*People* v. *Cox*, 80 N. Y. 501; *Hopt* v. *Utah*, 110 U. S. 574; *Comm.* v. *Cuffee*, 108 Mass. 285; *Comm.* v. *Mosler*, 4 Pa. St. 264; *Jackson* v. *State*, 69 Ala. 249), even though the arrest be illegal. *Balbo* v. *People*, 80 N. Y. 484. The fact that confessions are made under actual fear does not make them involuntary, if this fear were not excited by improper inducements or threats. *Comm.* v. *Smith*, 119 Mass. 305.

In some States, these common law rules are changed by statute. Thus in New York it is now provided that a confession, whether made in judicial proceedings or to a private person, can be given in evidence, unless made under the influence of fear produced by threats, or upon a stipulation of the district attorney not to prosecute therefor; but there must be additional proof of the commission of the crime to warrant conviction. Code Cr. Pro. § 395; *People* v. *McGloin*, 91 N. Y. 241. But cases decided in New York before this statute are cited herein, since they well illustrate the common-law rule.]

[1] [Illustration (*b*); cf. *Comm.* v. *Drake*, 15 Mass. 161.]

[2] [Illustration (*c*); *State* v. *Tatso*, 50 Vt. 483; *People* v. *Cox*, 80 N. Y. 501; *State* v. *Wentworth*, 37 N. H. 196.]

[3] [*U. S.* v. *Stone*, 8 F. R. 232; *Smith* v. *Comm.*, 10 Gratt. 734; *Shifflet* v. *Comm.*, 14 Id. 652; *Young* v. *Comm.*, 8 Bush. (Ky.) 366; *State* v. *Patterson*, 73 Mo. 695; cf. *Ulrich* v. *People*, 39 Mich. 245; *State* v. *Potter*, 18 Ct. 166. In Massachusetts it is said that those confessions are excluded which are obtained by threats of harm or promises of favor held out by a person in authority, or standing in any relation from which the law will presume that his communications would be likely to exercise an influence over the mind of the accused. *Comm.* v. *Tuckerman*, 10 Gray, 173, 190. And in other States there are rules more or less similar to this. *Murphy* v. *State*, 63 Ala. 1; *People* v. *Wolcott*, 51 Mich. 612; *Spears* v. *State*, 2 O. St. 583; *Beggarly* v. *State*, 8 Baxt. 520.

Confessions extorted by mob violence, or by like forcible means, have been excluded. *Miller* v. *People*, 39 Ill. 457; *Young* v. *State*, 68 Ala. 569; *Jordan* v. *State*, 32 Miss. 382; *State* v. *Resells*, 34 La. Ann. 381.]

The prosecutor, officers of justice having the prisoner in custody, magistrates, and other persons in similar positions, are persons in authority.[1] The master of the prisoner is not as such a person in authority, if the crime of which the person making the confession is accused was not committed against him.[2]

A confession is deemed to be voluntary if (in the opinion of the judge) it is shown to have been made after the complete removal of the impression produced by any inducement, threat, or promise which would otherwise render it involuntary.[3]

Facts discovered in consequence of confessions improperly obtained, and so much of such confessions as distinctly relate to such facts, may be proved.[4]

Illustrations.

(*a*) The question is, whether A murdered B.

A handbill issued by the Secretary of State, promising a reward and pardon to any accomplice who would confess, is brought to the knowledge of A, who, under the influence of the hope of pardon, makes a confession. This confession is not voluntary.[5]

(*b*) A being charged with the murder of B, the chaplain of the gaol reads the Commination Service to A, and exhorts him upon religious

[1] [*People* v. *Ward*, 15 Wend. 231; *Wolf* v. *Comm.*, 30 Gratt. 833; *State* v. *Brockman*, 46 Mo. 566; *Rector* v. *Comm.*, 80 Ky. 468; *U. S.* v. *Pocklington*, 2 Cr. C. C. 293; *State* v. *Staley*, 14 Minn. 105; and cases cited in last note and in note 3, on p. 54.]

[2] [*Smith* v. *Comm.*, 10 Gratt. 734; cf. *Comm.* v. *Sego*, 125 Mass. 210.]

[3] [Illustration (*e*); *Ward* v. *People*, 3 Hill, 395; *Comm.* v. *Howe*, 132 Mass. 250; *Thompson* v. *Comm.*, 20 Gratt. 724; *State* v. *Brown*, 73 Mo. 631; *Redd* v. *State*, 69 Ala. 255; *Comm.* v. *Harman*, 4 Pa. St. 269.]

[4] [Illustration (*f*); *Duffy* v. *People*, 26 N. Y. 588; *People* v. *Hoy Yen*, 34 Cal. 176; *Comm.* v. *James*, 99 Mass. 438; *Murphy* v. *State*, 63 Ala. 1; *State* v. *Mortimer*, 20 Kan. 93; see *Murphy* v. *People*, 63 N. Y. 590. Some of these cases seem to adopt a more restricted rule than that of the text, as to admitting proof of words of confession. But sometimes the whole confession is received, when thus corroborated, *Laws* v. *Comm.*, 84 Pa. St. 200.]

[5] *R.* v. *Boswell*, C. & Marsh. 584.

grounds to confess his sins. A, in consequence, makes a confession. This confession is voluntary.[1]

(*c*) The gaoler promises to allow A, who is accused of a crime, to see his wife, if he will tell where the property is. A does so. This is a voluntary confession.[2]

(*d*) A is accused of child murder. Her mistress holds out an inducement to her to confess, and she makes a confession. This is a voluntary confession, because her mistress is not a person in authority.[3]

(*e*) A is accused of the murder of B. C, a magistrate, tries to induce A to confess by promising to try to get him a pardon if he does so. The Secretary of State informs C that no pardon can be granted, and this is communicated to A. After that A makes a statement. This is a voluntary confession.[4]

(*f*) A, accused of burglary, makes a confession to a policeman under an inducement which prevents it from being voluntary. Part of it is that A had thrown a lantern into a certain pond. The fact that he said so, and that the lantern was found in the pond in consequence, may be proved.[5]

ARTICLE 23.*

CONFESSIONS MADE UPON OATH, ETC.

Evidence amounting to a confession may be used as such against the person who gives it, although it was given upon oath, and although the proceeding in which it was given had

* See Note XVI.

[1] *R.* v. *Gilham*, 1 Moo. C. C. 186. In this case the exhortation was that the accused man should confess "to God," but it seems from parts of the case that he was urged also to confess to man "to repair any injury done to the laws of his country." According to the practice at that time, no reasons are given for the judgment. The principle seems to be that a man is not likely to tell a falsehood in such cases, from religious motives. The case is sometimes cited as an authority for the proposition that a clergyman may be compelled to reveal confessions made to him professionally. It has nothing to do with the subject.

[2] *R.* v. *Lloyd*, 6 C. & P. 393.

[3] *R.* v. *Moore*, 2 Den. C. C. 522.

[4] *R.* v. *Clewes*, 4 C. & P. 221.

[5] *R.* v. *Gould*, 9 C. & P. 364. This is not consistent, so far as the proof of the words goes, with *R.* v. *Warwickshall*, 1 Leach, 263.

reference to the same subject-matter as the proceeding in which it is to be proved, and although the witness might have refused to answer the questions put to him ;[1] but if, after refusing to answer any such question, the witness is improperly compelled to answer it, his answer is not a voluntary confession.[2]

Illustrations.

(*a*) The answers given by a bankrupt in his examination may be used against him in a prosecution for offences against the law of bankruptcy.[3]

(*b*) A is charged with maliciously wounding B.

Before the magistrates A appeared as a witness for C, who was charged with the same offence. A's deposition may be used against him on his own trial.[4]

(*c*) [A is tried for the murder of B.

Statements made by A under oath at the coroner's inquest upon the body of B are competent evidence against him, though he knew when he made the statements that he was suspected of the crime.][5]

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[1] [*Comm.* v. *King*, 8 Gray, 501 ; *U. S.* v. *Charles*, 2 Cr. C. C. 76 ; *State* v. *Witham*, 72 Me. 531. On the trial of a person for crime, testimony voluntarily given by him in a prior suit under oath, and amounting to a confession, is receivable. *Dickerson* v. *State*, 48 Wis. 288 ; *Alston* v. *State*, 41 Tex. 39. But it is provided in some States by statute that on the preliminary examination of a prisoner before a committing magistrate, he shall not be put under oath ; if, therefore, he is sworn and makes confession, such confession is inadmissible. Gr. Ev. i. §§ 224–229 ; N. Y. Code Cr. Pro. § 198 ; *Hendrickson* v. *People*, 10 N. Y. 9, 28, 30 ; *Comm.* v. *Harman*, 4 Pa. St. 269 ; *U. S.* v. *Duffy*, 1 Cr. C. C. 164 ; contra, *People* v. *Kelley*, 47 Cal. 125.

Judicial confessions do not need corroborative proof of the *corpus delicti*. *State* v. *Lamb*, 28 Mo. 218 ; *Anderson* v. *State*, 26 Ind. 89.]

[2] *R.* v. *Garbett*, 1 Den. C. C. 236. [Gr. Ev. i. § 451 ; *Hendrickson* v. *People*, 10 N. Y. 9, 27, 31 ; see Art. 120, note, *post*.]

[3] *R.* v. *Scott*, 1 D. & B. 47 ; *R.* v. *Robinson*, L. R. 1 C. C. R. 80 ; *R.* v. *Widdop*, L. R. 2 C. C. R. 5.

[4] *R.* v. *Chidley & Cummins*, 8 C. C. C. 365 ; [see *People* v. *Thayer*, 1 Park. Cr. 595.]

[5] [*Teachout* v. *People*, 41 N. Y. 7 ; *People* v. *McGloin*, 91 N. Y. 241, 247 ; see *State* v. *Gilman*, 51 Me. 206 ; *Williams* v. *Comm.*, 29 Pa. St. 102 ; *People* v. *Taylor*, 59 Cal. 640.]

ARTICLE 24.

CONFESSION MADE UNDER A PROMISE OF SECRECY.

If a confession is otherwise relevant, it does not become irrelevant, merely because it was made under a promise of secrecy, or in consequence of a deception practised on the accused person for the purpose of obtaining it,[1] or when he was drunk,[2] or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions,[3] or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him.[4]

ARTICLE 25.

STATEMENTS BY DECEASED PERSONS, WHEN DEEMED TO BE RELEVANT.

Statements written or verbal of facts in issue or relevant or deemed to be relevant to the issue are deemed to be relevant,

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[1] [*People* v. *Wentz*, 37 N. Y. 303, 305, 306; *Price* v. *State*, 18 O. St. 418; *State* v. *Phelps*, 74 Mo. 128; *King* v. *State*, 40 Ala. 314; *State* v. *Staley*, 14 Minn. 105.]

[2] [*Comm.* v. *Howe*, 9 Gray, 110; *Jefferds* v. *People*, 5 Park. Cr. 522; *State* v. *Grear*, 28 Minn. 426; *People* v. *Ramirez*, 56 Cal. 533; *State* v. *Feltes*, 51 Ia. 495; *Eskridge* v. *State*, 25 Ala. 30. But if the intoxication be extreme, the jury may give the confession little or no weight. (*Id.*) Words spoken in sleep are not admissible as a confession. *People* v. *Robinson*, 19 Cal. 41.]

[3] [*People* v. *Wentz*, 37 N. Y. 303, 306; *Comm.* v. *Cuffee*, 108 Mass. 285.]

[4] Cases collected and referred to in 1 Ph. Ev. 420, and T. E. s. 804. See, too, Joy, sections iii., iv., v. [*Comm.* v. *Cuffee*, 108 Mass. 285. Such a warning is, however, sometimes given, though not required (*State* v. *Gilman*, 51 Me. 206; *People* v. *Simpson*, 48 Mich. 474); and sometimes upon a preliminary examination before a committing magistrate, it is required by statute. *State* v. *Lamb*, 28 Mo. 218; cf. *Comm.* v. *King*, 8 Gray, 501.]

if the person who made the statement is dead, in the cases, and on the conditions, specified in articles 26–31, both inclusive. In each of those articles the word "declaration" means such a statement as is herein mentioned, and the word "declarant" means a dead person by whom such a statement was made in his lifetime.

ARTICLE 26.*

DYING DECLARATION AS TO CAUSE OF DEATH.

A declaration made by the declarant as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death,[1] is deemed to be relevant

only in trials for the murder or manslaughter of the declarant;[2]

and only when the declarant is shown, to the satisfaction of

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* See Note XVII.

[1] [Gr. Ev. i. § 156. But such declarations are not competent evidence of prior or subsequent occurrences, as *e.g.*, of antecedent threats (*State* v. *Wood*, 53 Vt. 560; *Hackett* v. *People*, 54 Barb. 370; *Jones* v. *State*, 71 Ind. 66), nor of matters of opinion, but only of facts to which declarant would be competent to testify as a witness. Gr. Ev. i. § 159; *Burns* v. *State*, 46 Ind. 311; *People* v. *Taylor*, 59 Cal. 640; *People* v. *Shaw*, 63 N. Y. 36. But they are admissible, though made in answer to leading questions, or obtained by solicitation, or expressed by signs instead of words. *Maine* v. *People*, 9 Hun, 113; *Jones* v. *State*, 71 Ind. 66. The constitutional provision that the accused shall be confronted with the witnesses against him does not exclude evidence of dying declarations. *Brown* v. *Comm.*, 73 Pa. St. 321, 328; *State* v. *Dickinson*, 41 Wis. 299; *Comm.* v. *Carey*, 12 Cush. 246; *Robbins* v. *State*, 8 O. St. 131.]

[2] [*People* v. *Davis*, 56 N. Y. 95; *Kilpatrick* v. *Comm.*, 31 Pa. St. 198; *Scott* v. *People*, 63 Ill. 508; and other cases under this article. Thus such evidence is not received in civil actions (*Wilson* v. *Boerem*, 15 Johns. 286), though they be actions for injury causing death (*Daily* v. *N. Y. etc. R. Co.* 32 Ct. 356; *Waldele* v. *N. Y. C. R. Co.*, 19 Hun, 69; *Marshall* v. *Chicago, etc. R. Co.*, 48 Ill. 475); nor in other criminal cases. *Johnson* v. *State*, 50 Ala. 456; see Illustration (*b*).]

the judge,[1] to have been in actual danger of death, and to have given up all hope of recovery at the time when his declaration was made.[2]

Such a declaration is not irrelevant merely because it was intended to be made as a deposition before a magistrate, but is irregular.[3]

[1] [Gr. Ev. i. § 160; *Kehoe* v. *Comm.*, 85 Pa. St. 127; *Maine* v. *People*, 9 Hun, 113; *Comm.* v. *Roberts*, 108 Mass. 296. The person offering the declarations in evidence must show that they were made under the sense of impending death. This may be shown by the declarant's own statements, by his acts indicating a sense that death is near, and by other attendant circumstances. Gr. Ev. i. § 158; *People* v. *Simpson*, 48 Mich. 474; *Donnelly* v. *State*, 26 N. J. L. 463 and 601; *People* v. *Taylor*, 59 Cal. 640; *Small* v. *Comm.*, 91 Pa. St. 304; *People* v. *Knickerbocker*, 1 Park. Cr. 302; *State* v. *Elliott*, 45 Ia. 486. This preliminary evidence may be given in the presence of the jury. *Sullivan* v. *Comm.*, 93 Pa. St. 284; but see *Starkey* v. *People*, 17 Ill. 17.]

[2] [*Brotherton* v. *People*, 75 N. Y. 159; *Comm.* v. *Haney*, 127 Mass. 455; *Alison* v. *Comm.*, 99 Pa. St. 17; *Ex parte Nettles*, 58 Ala. 268; and cases *supra*. Even a faint hope of recovery excludes the declarations. *People* v. *Gray*, 61 Cal. 164; *Comm.* v. *Roberts*, 108 Mass. 296. If hope be expressed, but afterwards when hope is gone, declarations are made, they are competent. *Small* v. *Comm.*, 91 Pa. St. 304. And it has been held that declarations made when there was no hope are admissible, though the dying person lingered several days, and during this time expressed some hope. *Swisher* v. *Comm.*, 26 Gratt. 963.

It is not necessary that the declarant should die immediately. In one case he died fourteen days after making the statement (*Jones* v. *State*, 71 Ind. 66), and in another seventeen days. *Comm.* v. *Cooper*, 5 Allen, 495.

The sense of impending death is deemed equivalent to the sanction of an oath. Hence dying declarations made by persons disqualified to act as witnesses in court are not competent, as *e. g.* atheists. *Donnelly* v. *State*, 26 N. J. L. 463 and 601. But *aliter* in States where their disability to testify has been removed. *People* v. *Chin Mook Sow*, 51 Cal. 597; *State* v. *Elliott*, 45 Ia. 486. So the declarations of very young children are not received. Gr. Ev. i. § 157.]

[3] [*People* v. *Knapp*, 1 Edm. Sel. Cas. 177. If the declarations be reduced to writing by a bystander, but are not read over to the dying person, nor signed by him, parol evidence of the declarations is competent (*Alison* v. *Comm.*, 99 Pa. St. 17; *State* v. *Sullivan*, 51 Ia. 142),

Illustrations.

(*a*) The question is, whether A has murdered B.

B makes a statement to the effect that A murdered him.

B at the time of making the statement has no hope of recovery, though his doctor had such hopes, and B lives ten days after making the statement. The statement is deemed to be relevant.[1]

B, at the time of making the statement (which is written down), says something, which is taken down thus—"I make the above statement with the fear of death before me, and with no hope of recovery." B, on the statement being read over, corrects this to "with no hope *at present* of my recovery." B dies thirteen hours afterwards. The statement is deemed to be irrelevant.[2]

(*b*) The question is, whether A administered drugs to a woman with intent to procure abortion. The woman makes a statement which would have been admissible had A been on his trial for murder. The statement is deemed to be irrelevant.[3]

(*c*) The question is, whether A murdered B. A dying declaration by C that he (C) murdered B is deemed to be irrelevant.[4]

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but the writing is not, though it may be used to refresh memory. *State* v. *Fraunburg*, 40 Ia. 555. So parol evidence was received when the memorandum was lost. *State* v. *Patterson*, 45 Vt. 308. But where the writing was read over to decedent and signed by him, it was held competent evidence (*Jones* v. *State*, 71 Ind. 66), though even where it was subscribed and sworn to by him, parol evidence has been received. *Comm.* v. *Haney*, 127 Mass. 455. But some cases have held that the writing, if signed by the decedent, is the primary evidence. Gr. Ev. i. § 161; see *Epperson* v. *State*, 5 Lea (Tenn.) 291.

Oral declarations may be testified to by any one who heard them, and he is only required to state their substance (*Comm.* v. *Haney*, supra; *Starkey* v. *People*, 17 Ill. 17); but they must be substantially complete. Gr. Ev. i. § 159; *State* v. *Patterson*, 45 Vt. 308.]

[1] *R.* v. *Mosley*, 1 Moo. 97; [cf. *People* v. *Grunzig*, 1 Park. Cr. 299.]

[2] *R.* v. *Jenkins*, L. R. 1 C. C. R. 187; [cf. *Jackson* v. *Comm.*, 19 Gratt. 656.]

[3] *R.* v. *Hind*, Bell, 253, following *R.* v. *Hutchinson*, 2 B. & C. 608, n., quoted in a note to *R.* v. *Mead*. [*People* v. *Davis*, 56 N. Y. 95; *State* v. *Harper*, 35 O. St. 78. *Aliter*, upon a trial for felonious homicide, caused by an attempt to procure an abortion. *State* v. *Dickinson*, 41 Wis. 299; *Montgomery* v. *State*, 80 Ind. 338.]

[4] *Gray's Case*, Ir. Cir. Rep. 76; [see *Potecte* v. *State*, 9 Baxt. 261.]

(*d*) The question is, whether A murdered B.

B makes a statement before a magistrate on oath, and makes her mark to it, and the magistrate signs it, but not in the presence of A, so that her statement was not a deposition within the statute then in force. B, at the time when the statement was made, was in a dying state, and had no hope of recovery. The statement is deemed to be relevant.[1]

ARTICLE 27.*

DECLARATIONS MADE IN THE COURSE OF BUSINESS OR PROFESSIONAL DUTY.

A declaration is deemed to be relevant when it was made by the declarant in the ordinary course of business, and in the discharge of professional duty,[2] at or near the time

* See Note XVIII.

[1] *R.* v. *Woodcock*, 1 East, P. C. 356. In this case, Eyre, C. B., is said to have left to the jury the question, whether the deceased was not in fact under the apprehension of death? 1 Leach, 504. The case was decided in 1789. It is now settled that the question is for the judge.

[2] *Doe* v. *Turford*, 3 B. & Ad. 890. [Gr. Ev. i. §§ 115–120; *Chaffee* v. *U. S.*, 18 Wall. 516; *Fisher* v. *Mayor*, 67 N. Y. 73, 77; *Kennedy* v. *Doyle*, 10 Allen, 161, 167; *Costello* v. *Crowell*, 133 Mass. 352; *Laird* v. *Campbell*, 100 Pa. St. 159; *Livingston* v. *Tyler*, 14 Ct. 493; *State* v. *Phair*, 48 Vt. 366. Thus the books or registers of a deceased notary are admissible to prove his acts as to the presentment, demand, and notice of non-payment of negotiable paper. *Halliday* v. *Martinett*, 20 Johns. 168; *Porter* v. *Judson*, 1 Gray, 175; *Nicholls* v. *Webb*, 8 Wheat. 326; see N. Y. Code Civ. Pro. §§ 924, 962. And so as to entries of a notary's clerk. *Gawtry* v. *Doane*, 51 N. Y. 84. So entries made by merchants' clerks, bank tellers or messengers, or by other persons, as attorneys, physicians, etc., in the ordinary course of business and of professional duty as part of the *res gestæ* are competent. *Leland* v. *Cameron*, 31 N. Y. 115; *Sheldon* v. *Benham*, 4 Hill, 129; *Perkins* v. *Augusta Ins. Co.*, 10 Gray, 312; *Augusta* v. *Winslow*, 19 Me. 317; *Arms* v. *Middleton*, 23 Barb. 571; *Hedrick* v. *Hughes*, 15 Wall. 123. The handwriting of the deceased person should be proved. *Chaffee* v. *U. S.*, 18 Wall. 516; *Chenango Bridge Co.* v. *Lewis*, 63 Barb. 111. In some States, such evidence is also admitted if the person making the entries has become insane (*Union Bk.* v. *Knapp*, 3 Pick. 96), or has gone to parts unknown (*N. H., etc. Co.* v. *Goodwin*, 42 Ct.

when the matter stated occurred, and of his own knowledge.[1]

Such declarations are deemed to be irrelevant, except so far

230; *Reynolds* v. *Manning*, 15 Md. 510; see *Chaffee* v. *U. S.*, supra), or is out of the State (*Alter* v. *Berghaus*, 8 Watts, 77). In New York death is the only cause thus far held sufficient, and if the clerk, etc., is out of the State, his deposition must be taken. *Brewster* v. *Doane*, 2 Hill, 537; *Fisher* v. *Mayor*, 67 N. Y. 73; but see Code Civ. Pro. § 924. But it is a general rule that if he is alive and within the State, he should be made a witness and authenticate the entries. *Ocean Bk.* v. *Carll*, 55 N. Y. 440; *Bartholomew* v. *Farwell*, 41 Ct. 107; *Briggs* v. *Rafferty*, 14 Gray, 525. As to what is a sufficient authentication, see *Bank of Monroe* v. *Culver*, 2 Hill, 531; *Moots* v. *State*, 21 O. St. 653; *Anderson* v. *Edwards*, 123 Mass. 273. As to the admissibility of entries or memoranda, not made in the regular course of business, see Art. 136, note.]

[1] [It is a general rule in this country that entries made by a party himself in his own books of account are admissible in his own favor, when properly authenticated, as evidence of goods sold and delivered, of services rendered, and sometimes of other matters. But different modes of authentication are prescribed in different States. Thus in New York it must be shown by the party offering the books that they are the regular books of account; that there had been regular dealings between the parties, resulting in more than a single charge; that he kept no clerk; that some of the articles charged have been delivered, or some items of service rendered; and that other persons dealing with him have settled their accounts by his books and found them accurate. *Vosburgh* v. *Thayer*, 12 Johns. 461; *Corning* v. *Ashley*, 4 Den. 354; *Linnell* v. *Sutherland*, 11 Wend. 568. As to the meaning of "clerk" under the rule, see *McGoldrick* v. *Traphagen*, 88 N. Y. 334; as to a physician's books, see *Knight* v. *Cunnington*, 6 Hun, 100. But such entries are not admissible to sustain a charge for money lent. *Low* v. *Payne*, 4 N. Y. 247. The fact that parties are now competent witnesses does not exclude their books as evidence. *Stroud* v. *Tilton*, 4 Abb. Dec. 324.

In many of the States the party's suppletory oath is required to authenticate his own book entries, but there are diverse rules as to the matters which may be proved by such entries. Generally, however, they are received to prove items of work done and goods sold and delivered. *Pratt* v. *White*, 132 Mass. 477; *Corr* v. *Sellers*, 100 Pa. St. 169; *Smith* v. *Law*, 47 Ct. 431; *Codman* v. *Caldwell*, 31 Me. 560. As to the effect of making parties competent witnesses, see *Nichols* v. *Haynes*, 78 Pa. St. 174. The

as they relate to the matter which the declarant stated in the ordinary course of his business or duty.

Illustrations.

(*a*) The question is, whether A delivered certain beer to B.

The fact that a deceased drayman of A's, on the evening of the delivery, made an entry to that effect in a book kept for the purpose, in the ordinary course of business, is deemed to be relevant.[1]

(*b*) The question is, what were the contents of a letter not produced after notice.

A copy entered immediately after the letter was written, in a book kept for that purpose, by a deceased clerk, is deemed to be relevant.[2]

(*c*) The question is, whether A was arrested at Paddington, or in South Molton Street.

A certificate annexed to the writ by a deceased sheriff's officer, and returned by him to the sheriff, is deemed to be relevant so far as it relates

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rules in the different States are stated in the note to *Price* v. *Torrington*, S. L. C. (Amer. Ed.).

The book to be produced in evidence is the book of original entries. If this be a ledger, it will be competent (*Hoover* v. *Gehr*, 62 Pa. St. 136; *Faxon* v. *Hollis*, 13 Mass. 427); but not where the ledger is used for posting entries originally made in another book. *Vilmar* v. *Schall*, 3 J. & Sp. 67; *Fitzgerald* v. *McCarty*, 55 Ia. 702. Sometimes day-book and ledger are taken together as the book of original entries. *McGoldrick* v. *Traphagen*, 88 N. Y. 334; see *Larne* v. *Rowland*, 7 Barb. 107.

Sometimes entries or memoranda are first made upon a slate or paper, and afterwards transcribed into the regular account books. Where this is done on the same day or within two or three days, as a common business practice, the books are generally admitted in evidence. *Stroud* v. *Tilton*, 4 Abb. Dec. 324; *McGoldrick* v. *Traphagen*, 88 N. Y. 334; *Hoover* v. *Gehr*, 62 Pa. St. 136; *Barker* v. *Haskell*, 9 Cush. 218. But sometimes they have been admitted after a much longer interval. *Hall* v. *Glidden*, 39 Me. 445, two to four weeks; *Redlich* v. *Bauerlee*, 98 Ill. 134, four weeks. But in *Forsythe* v. *Norcross*, 5 Watts, 432, a six days' interval was held too long. As to the mode of proof when the party is dead or insane, see *Hoover* v. *Gehr*, 62 Pa. St. 136; *Pratt* v. *White*, 132 Mass. 477; *Holbrook* v. *Gay*, 6 Cush. 215.]

[1] *Price* v. *Torrington*, 1 S. L. C. 328, 7th ed.

[2] *Pritt* v. *Fairclough*, 3 Camp. 305.

to the fact of the arrest; but irrelevant so far as it relates to the place where the arrest took place.[1]

(*d*) The course of business was for A, a workman in a coal-pit, to tell B, the foreman, what coals were sold, and for B (who could not write) to get C to make entries in a book accordingly.

The entries (A and B being dead) are deemed to be irrelevant, because B, for whom they were made, did not know them to be true.[2]

(*e*) The question is, what is A's age. A statement by the incumbent in a register of baptisms that he was baptized on a given day is deemed to be relevant. A statement in the same register that he was born on a given day is deemed to be irrelevant, because it was not the incumbent's duty to make it.[3]

ARTICLE 28.*

DECLARATIONS AGAINST INTEREST.

A declaration is deemed to be relevant if the declarant had peculiar means of knowing the matter stated, if he had no interest to misrepresent it, and if it was opposed to his pecuniary or proprietary interest.[4] The whole of any such declaration,

* See Note XIX.

[1] *Chambers v. Bernasconi*, 1 C. M. & R. 347; see, too, *Smith* v. *Blakey*, L. R. 2 Q. B. 326.

[2] *Brain* v. *Preece*, 11 M. & W. 773; [S. P. *Gould* v. *Conway*, 59 Barb. 355; *Kent* v. *Garvin*, 1 Gray, 148; *Chaffee* v. *U. S.*, 18 Wall. 516, 543; *Hoffman* v. *N. Y. C. R. Co.*, 14 J. & Sp. 526, 87 N. Y. 25. Sometimes, however, entries made upon information derived from others are competent, but usually corroborative proof is required. *Payne* v. *Hodge*, 7 Hun, 612, 71 N. Y. 598; *Harwood* v. *Mulry*, 8 Gray, 250; *Smith* v. *Law*, 47 Ct. 431; cf. *Wilson* v. *Knapp*, 70 N. Y. 596.]

[3] *R.* v. *Clapham*, 4 C. & P. 29; [*Kennedy* v. *Doyle*, 10 Allen, 161; *Whitcher* v. *McLaughlin*, 115 Mass. 167; *Blackburn* v. *Crawfords*, 3 Wall. 175; *Weaver* v. *Leiman*, 52 Md. 708; *Sitler* v. *Gehr*, 105 Pa. St. 577. So as to a register of marriages (*Maxwell* v. *Chapman*, 8 Barb. 579); and a hospital record. *Townsend* v. *Pepperell*, 99 Mass. 40; see *Butler* v. *St. Louis Ins. Co.*, 45 Ia. 93.]

[4] These are almost the exact words of Bayley, J., in *Gleadow* v. *Atkin*, 1 C. & M. 423; [Gr. Ev. i. §§ 147–155; *Livingston* v. *Arnoux*, 56 N. Y. 507; *Chenango Bridge Co.* v. *Paige*, 83 N. Y. 178, 192; *Taylor* v. *Gould*.

and of any other statement referred to in it, is deemed to be relevant, although matters may be stated which were not against the pecuniary or proprietary interest of the declarant;[1] but statements, not referred to in, or necessary to explain such declarations, are not deemed to be relevant merely because they were made at the same time or recorded in the same place.[2]

A declaration may be against the pecuniary interest of the person who makes it, if part of it charges him with a liability, though other parts of the book or document in which it occurs may discharge him from such liability in whole or in part, and (it seems) though there may be no proof other than the statement itself either of such liability or of its discharge in whole or in part.[3]

A statement made by a declarant holding a limited interest in any property and opposed to such interest is deemed to be relevant only as against those who claim under him, and not as against the reversioner.[4]

An endorsement or memorandum of a payment made upon any promissory note, bill of exchange, or other writing, by or on behalf of the party to whom such payment was made, is not sufficient proof of such payment to take the case out of the operation of the Statutes of Limitation;[5] but any such declaration made in any other form by, or by the direction of, the per-

57 Pa. St. 152; *Hohensack* v. *Hallman*, 17 id. 154, 158; *Humes* v. *O'Bryan*, 74 Ala. 64; *Chase* v. *Smith*, 5 Vt. 556; *Bird* v. *Hueston*, 10 O. St. 418. The doctrine is also recognized in *dicta* in *Comm.* v. *Densmore*, 12 Allen, 537; *Dwight* v. *Brown*, 9 Ct. 83, 92; *Webster* v. *Paul*, 10 O. St. 531, 536. The *dictum* in *Lawrence* v. *Kimball*, 1 Met. 527, is inconsistent with English cases.]

[1] [*Livingston* v. *Arnoux*, supra; *Ellsworth* v. *Muldoon*, 15 Abb. Pr. (N. S.) 440, 448.]

[2] Illustrations (*a*) (*b*) and (*c*).

[3] Illustrations (*d*) and (*e*).

[4] Illustration (*g*); see Lord Campbell's judgment in case quoted, p. 177.

[5] 9 Geo. IV. c. 14, s. 3.

son to whom the payment was made is, when such person is dead, sufficient proof for the purpose aforesaid.[1]

Any endorsement or memorandum to the effect above mentioned made upon any bond or other specialty by a deceased person, is regarded as a declaration against the proprietary interest of the declarant for the purpose above mentioned, if it is shown to have been made at the time when it purports to have been made ;[2] but it is uncertain whether the date of such endorsement or memorandum may be presumed to be correct without independent evidence.[3]

Statements of relevant facts opposed to any other than the pecuniary or proprietary interest of the declarant are not deemed to be relevant as such.[4]

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[1] *Bradley* v. *James*, 13 C. B. 822.

[2] 3 & 4 Will. IV. c. 42, which is the Statute of Limitations relating to Specialties, has no provision similar to 9 Geo. IV. c. 14, s. 3. Hence, in this case the ordinary rule is unaltered.

[3] See the question discussed in 1 Ph. Ev. 302–5, and T. E. ss. 625–9, and see Article 85. [The general rule in this country, independently of statute, is that an indorsement on a bond, bill, note, etc., made by the obligee or promisee, without the privity of the debtor, cannot be admitted as evidence of payment in favor of the party making such indorsement, unless it be shown that it was made at a time when its operation would be against the interest of the party making it,—that is, before the statute has barred the claim. The date of the indorsement is not sufficient to show this, but there must be independent evidence to this point. But it is not necessary that the declarant be dead, in order that the indorsement be received in evidence. Indorsements by the debtor or with his consent and privity, are competent. *Roseboom* v. *Billington*, 17 Johns. 182 ; *Hulbert* v. *Nichol*, 20 Hun, 454 ; *Shaffer* v. *Shaffer*, 41 Pa. St. 51 ; *Phillips* v. *Mahan*, 52 Mo. 197 ; *Clough* v. *McDaniel*, 58 N. H. 201 ; *Coffin* v. *Bucknam*, 12 Me. 471 ; *White* v. *Beaman*, 85 N. C. 3 ; cf. *Acklen's Exer.* v. *Hickman*, 60 Ala. 89 ; *Frazer* v. *Frazer*, 13 Bush, (Ky.) 397 ; *Clark* v. *Burn*, 86 Pa. St. 502. In some States there are statutes on the subject, either establishing the same rule as above stated, or special rules more or less diverse. Mass. Pub. St., c. 197, § 16 ; *Davidson* v. *Delano*, 11 Allen, 523 ; Me. Rev. St., c. 81, § 100 ; *Bailey* v. *Danforth*, 53 Vt. 504 ; *Snyder* v. *Winsor*, 44 Mich. 140 ; *Young* v. *Perkins*, 29 Minn. 173 ; *Pears* v. *Wilson*, 23 Kan. 543.]

[4] Illustration (*h*). [*Maine* v. *People*, 9 Hun, 113.]

Illustrations.

(*a*) The question is, whether a person was born on a particular day.

An entry in the book of a deceased man-midwife in these words is deemed to be relevant :[1]

"W. Fowden, Junr.'s wife,
Filius circa hor. 3 post merid. natus H.
W. Fowden, Junr.,
App. 22, filius natus,
Wife, £1 6*s.* 1*d.*
Pd. 25 Oct., 1768."

(*b*) The question is, whether a certain custom exists in a part of a parish.

The following entries in the parish books, signed by deceased church-wardens, are deemed to be relevant—

"It is our ancient custom thus to proportion church-lay. The chapelry of Haworth pay one-fifth, &c."

Followed by—

"Received of Haworth, who this year disputed this our ancient custom, but after we had sued him, paid it accordingly—£8, and £1 for costs."[2]

(*c*) The question is, whether a gate on certain land, the property of which is in dispute, was repaired by A.

An account by a deceased steward, in which he charges A with the expense of repairing the gate, is deemed to be irrelevant, though it would have been deemed to be relevant if it had appeared that A admitted the charge.[3]

(*d*) The question is, whether A received rent for certain land.

A deceased steward's account, charging himself with the receipt of such rent for A, is deemed to be relevant, although the balance of the whole account is in favor of the steward.[4]

(*e*) The question is, whether certain repairs were done at A's expense.

A bill for doing them, receipted by a deceased carpenter, is deemed to be { relevant[5] / irrelevant[6] } there being no other evidence either that the repairs were done or that the money was paid.

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[1] *Higham* v. *Ridgway*, 2 Smith, L. C. 318, 7th ed.

[2] *Stead* v. *Heaton*, 4 T. R. 669.

[3] *Doe* v. *Beviss*, 7 C. B. 456.

[4] *Williams* v. *Graves*, 8 C. & P. 592.

[5] *R.* v. *Heyford*, note to *Higham* v. *Ridgway*, 2 S. L. C. 333, 7th ed.

[6] *Doe* v. *Vowles*, 1 Mo. & Ro. 261. In *Taylor* v. *Withams*, L. R. 3 Ch. Div. 605, Jessel, M. R., followed *R.* v. *Heyford*, and dissented from *Doe* v. *Vowles*.

(*f*) The question is, whether A (deceased) gained a settlement in the parish of B by renting a tenement.

A statement made by A, whilst in possession of a house, that he had paid rent for it, is deemed to be relevant, because it reduces the interest which would otherwise be inferred from the fact of A's possession.[1]

(*g*) The question is, whether there is a right of common over a certain field.

A statement by A, a deceased tenant for a term of the land in question, that he had no such right, is deemed to be relevant as against his successors in the term, but not as against the owner of the field.[2]

(*h*) The question is, whether A was lawfully married to B.

A statement by a deceased clergyman that he performed the marriage under circumstances which would have rendered him liable to a criminal prosecution is not deemed to be relevant as a statement against interest.[3]

ARTICLE 29.

DECLARATIONS BY TESTATORS AS TO CONTENTS OF WILL.

The declarations of a deceased testator as to his testamentary intentions, and as to the contents of his will, are deemed to be relevant

when his will has been lost, and when there is a question as to what were its contents;[4] and

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[1] *R.* v. *Exeter*, L. R. 4 Q. B. 341.

[2] *Papendick* v. *Bridgewater*, 5 E. & B. 166.

[3] *Sussex Peerage Case*, 11 C. & F. 108.

[4] [Cf. *Mercer's Adm'r* v. *Mackin*, 14 Bush, (Ky.) 434; *Pickens* v. *Davis*, 134 Mass. 252; *In re Johnson's Will*, 40 Ct. 587; *Foster's Appeal*, 87 Pa. St. 67. It is provided in New York by statute that in an action to establish a lost or destroyed will, or in an application to have it admitted to probate, its provisions must be proved by at least two credible witnesses, a correct copy or draft being equal to one witness (Code Civ. Pro. §§ 1865, 2621; *Everitt* v. *Everitt*, 41 Barb. 385); that evidence of the testator's declarations as to its contents may be received, see *Hatch* v. *Sigman*, 1 Demarest, 519. But in certain cases it is held that proof by one witness is sufficient. *Harris* v. *Harris*, 26 N. Y. 433.].

when the question is whether an existing will is genuine or was improperly obtained ;[1] and

when the question is whether any and which of more existing documents than one constitute his will.[2]

In all these cases it is immaterial whether the declarations were made before or after the making or loss of the will.[3]

ARTICLE 30.*

DECLARATIONS AS TO PUBLIC AND GENERAL RIGHTS.

Declarations are deemed to be relevant (subject to the third condition mentioned in the next article) when they relate to the existence of any public or general right or custom or matter of public or general interest.[4] But declarations as to par-

* See Note XX. Also see *Weeks* v. *Sparke*, 1 M. & S. 679 ; *Crease* v. *Barrett*, 1 C. M. & R. 917.

[1] [See Art. 11, Illustration (*o*) ; *Taylor Will Case*, 10 Abb. Pr. (N. S.) 300 ; *Crispell* v. *Dubois*, 4 Barb. 393 ; *Hoppe* v. *Byers*, 60 Md. 381.]

[2] [In New York it is essential to the valid execution of a will that the testator declare to the attesting witnesses that it is his last will and testament (2 R. S.* 63, s. 38). This is called the "publication" of the will. Evidence of such declarations is accordingly receivable upon a proceeding for the admission of the will to probate. Or his assent to such declarations, when made for him by others in his presence, may be enough. *Trustees, etc.* v. *Calhoun*, 25 N. Y. 422 ; *Gilbert* v. *Knox*, 52 N. Y. 125. And similar evidence may be received in other States.]

[3] *Sugden* v. *St. Leonards*, L. R. 1 P. D. (C. A.) 154. [This is cited by the author as authority for the whole article.] In questions between the heir and the legatee or devisor such statements would probably be relevant as admissions by a privy in law, estate, or blood. *Gould* v. *Lakes*, L. R. 6 P. D. 1 ; *Doe* v. *Palmer*, 16 Q. B. 747. The decision in this case at p. 757, followed by *Quick* v. *Quick*, 3 Sw. & Tr. 442, is overruled by *Sugden* v. *St. Leonards*.

[4] [The general doctrine of this article is fully recognized in this country. Gr. Ev. i. §§ 127-140, 145 ; *Ellicott* v. *Pearl*, 10 Pet. 412 ; *Shuttle* v. *Thompson*, 15 Wall. 151, 163 ; *McKinnon* v. *Bliss*, 21 N. Y. 206, 218 ; *People* v. *Velarde*, 59 Cal. 457 ; *Drury* v. *Midland R. Co.*, 127 Mass. 571 ; *Wooster* v. *Butler*, 13 Ct. 309 ; *Birmingham* v. *Anderson*, 40 Pa. St. 506.

ticular facts from which the existence of any such public or general right or custom or matter of public or general interest may be inferred, are deemed to be irrelevant.[1]

A right is public if it is common to all Her Majesty's subjects,[2] and declarations as to public rights are relevant whoever made them.

A right or custom is general if it is common to any considerable number of persons, as the inhabitants of a parish, or the tenants of a manor.

Declarations as to general rights are deemed to be relevant only when they were made by persons who are shown, to the satisfaction of the judge, or who appear from the circumstances of their statement, to have had competent means of knowledge.

Such declarations may be made in any form and manner.

But in many States evidence is also received of the declarations of deceased persons as to the boundaries of private estates; but the limitations of this doctrine are different in different States. Thus in Massachusetts the declarations must have been made by one in possession of land owned by him, while he was on the land and in the act of pointing out the boundaries. *Long* v. *Colton*, 116 Mass. 414. But in some States the declarations of deceased surveyors, or of other persons having special means of knowledge of the facts stated are deemed competent. *Kramer* v. *Goodlander*, 98 Pa. St. 366; *Hunnicutt* v. *Peyton*, 102 U. S. 333; *Evarts* v. *Young*, 52 Vt. 329; *Smith* v. *Forrest*, 49 N. H. 230; *Kinney* v. *Farnsworth*, 17 Ct. 355; contra, *Chapman* v. *Twitchell*, 37 Me. 59; cf. *Jackson* v. *McCall*, 10 Johns. 377. So ancient deeds, wills, and other solemn instruments are sometimes deemed competent to prove matters of a private nature, though evidence of verbal declarations would be excluded. *Greenfield* v. *Camden*, 74 Me. 56; *Oldtown* v. *Shapleigh*, 33 Me. 78; *Ward* v. *Oxford*, 8 Pick. 476; see *Boston, etc. Co.* v. *Hanlon*, 132 Mass. 483.]

[1] [*Hall* v. *Mayo*, 97 Mass. 416; *S. W. School Dist.* v. *Williams*, 48 Ct. 504; *Fraser* v. *Hunter*, 5 Cr.C.C. 470; and so as to declarations concerning private rights. Id.; *Boston, etc. Co.* v. *Hanlon*, 132 Mass. 483.]

[2] [Or in this country, to all the citizens of the State; the "whoever" which follows would apply to any such citizen. Gr. Ev. i. § 128.]

Illustrations.

(*a*) The question is, whether a road is public.

A statement by A (deceased) that it is public is deemed to be relevant.[1]

A statement by A (deceased) that he planted a willow (still standing) to show where the boundary of the road had been when he was a boy is deemed to be irrelevant.[2]

(*b*) The following are instances of the manner in which declarations as to matters of public and general interest may be made:—They may be made in

Maps prepared by, or by the direction of, persons interested in the matter;[3]

Copies of Court rolls;[4]

Deeds and leases between private persons;[5]

Verdicts, judgments, decrees, and orders of Courts, and similar bodies[6] if final.[7]

ARTICLE 31.*

DECLARATIONS AS TO PEDIGREE.

A declaration is deemed to be relevant (subject to the conditions hereinafter mentioned) if it relates to the existence of any relationship between persons, whether living or dead, or to the birth, marriage, or death of any person, by which such relationship was constituted, or to the time or place at which any such fact occurred, or to any fact immediately connected with its occurrence.[8]

* See Note XXI.

[1] *Crease* v. *Barrett*, per Parke, B., 1 C. M. & R. 929.

[2] *R.* v. *Bliss*, 7 A. & E. 550.

[3] Implied in *Hammond* v. *Bradstreet*, 10 Ex. 390, and *Pipe* v. *Fulcher*, 1 E. & E. 111. In each of these cases the map was rejected as not properly qualified. [Cf. *McCausland* v. *Fleming*, 63 Pa. St. 36; *Smith* v. *Forrest*, 49 N. H. 230; see p. 82, *post*, note 2.]

[4] *Crease* v. *Barrett*, 1 C. M. & R. 928.

[5] *Plaxton* v. *Dare*, 10 B. & C. 17.

[6] *Duke of Newcastle* v. *Broxtowe*, 4 B. & Ad. 273.

[7] *Pim* v. *Currell*, 6 M. & W. 234, 266.

[8] Illustration (*a*). [*Jackson* v. *King*, 5 Cow. 237; *Clark* v. *Owens*, 18 N. Y. 434, 442; *Haddock* v. *B. & M. R. Co.*, 3 Allen, 298; *Ellicott* v.

Such declarations may express either the personal knowledge of the declarant, or information given to him by other persons qualified to be declarants, but not information collected by him from persons not qualified to be declarants.[1] They may be made in any form and in any document or upon any thing in which statements as to relationship are commonly made.[2]

The conditions above referred to are as follows—

(1) Such declarations are deemed to be relevant only in cases in which the pedigree to which they relate is in issue, and not to cases in which it is only relevant to the issue ;[3]

(2) They must be made by a declarant shown to be legitimately related by blood to the person to whom they relate ; or by the husband or wife of such a person.[4]

Pearl, 10 Pet. 412 ; *Amer. Life Ins. Co.* v. *Rosenagle*, 77 Pa. St. 507 ; *Weaver* v. *Leiman*, 52 Md. 708 ; *Van Sickle* v. *Gibson*, 40 Mich. 170 ; *Cuddy* v. *Brown*, 78 Ill. 415 ; *Morrill* v. *Foster*, 33 N. H. 379 ; *Eaton* v. *Tallmadge*, 24 Wis. 217. The declarant must be dead. *Mooers* v. *Bunker*, 29 N. H. 420 ; *Kobbe* v. *Price*, 14 Hun, 55. But such evidence is not received in this country to show the *place* of birth, etc. *Wilmington* v. *Burlington*, 4 Pick. 174 ; *McCarty* v. *Terry*, 7 Lans. 236 ; *Union* v. *Plainfield*, 39 Ct. 563 ; *Greenfield* v. *Camden*, 74 Me. 56 ; *Tyler* v. *Flanders*, 57 N. H. 618. A person's age may be a question of pedigree (*Watson* v. *Brewster*, 1 Pa. St. 381 ; *Conn. Ins. Co.* v. *Schwenk*, 94 U. S. 593, 598), and he may testify to his own age, stating what he learned thereon from deceased parents, etc. *Cherry* v. *State*, 68 Ala. 29 ; *Hill* v. *Eldridge*, 126 Mass. 234.]

[1] *Davies* v. *Lowndes*, 6 M. & G. 527. [*Jewell's Lessee* v. *Jewell*, 1 How. (U. S.) 219, 231 ; cf. *Jackson* v. *Browner*, 18 Johns. 37.]

[2] Illustration (*c*).

[3] Illustration (*b*). [*Comm.* v. *Feleh*, 132 Mass. 22 ; but see *North Brookfield* v. *Warren*, 16 Gray, 174. Thus birth, marriage, and death cannot be proved by such evidence in cases in which pedigree is not in issue. *Haines* v. *Guthrie*, 13 Q. B. D. 818.]

[4] *Shrewsbury Peerage Case*, 7 H. L. C. 26. [The rule generally stated in American cases is that the pedigree of a person may be shown by the declarations of deceased persons related to him by blood or marriage. Gr. Ev. i. § 103 ; *Northrop* v. *Hale*, 76 Me. 306 ; *Haddock* v. *B. & M. R.*

(3) They must be made before the question in relation to which they are to be proved has arisen ; but they do not cease to be deemed to be relevant because they were made for the purpose of preventing the question from arising.[1]

This condition applies also to statements as to public and general rights or customs and matters of public and general interest.

Illustrations.

(*a*) The question is, which of three sons (Fortunatus, Stephanus, and Achaicus) born at a birth is the eldest.

The fact that the father said that Achaicus was the youngest, and he took their names from St. Paul's Epistles (see 1 Cor. xvi. 17), and the fact that a relation present at the birth said that she tied a string round the second child's arm to distinguish it, are relevant.[2]

(*b*) The question is, whether one of the *cestuis que vie* in a lease for lives is living.

Co., 3 Allen, 298 ; *Conn. Life Ins. Co.* v. *Schwenk*, 94 U. S. 593, 598 ; or similar expressions are used, *Tyler* v. *Flanders*, 57 N. H. 618, 624 ; *Stein* v. *Bowman*, 13 Pet. 209. But whether all relatives by marriage, both near and remote, are competent to make such declarations is undetermined. See *People* v. *Fire Ins. Co.*, 25 Wend. 205. In *Jewell's Lessee* v. *Jewell*, 1 How. (U. S.) 219, the declarations of a deceased husband that the parents of his wife were not married were received. So the declarations or conduct of deceased parents may be shown to prove their children illegitimate (*Haddock* v. *B. & M. R. Co.*, 3 Allen, 298 ; *Barnum* v. *Barnum*, 42 Md. 251), or to prove legitimacy (*Kenyon* v. *Ashbridge*, 35 Pa. St. 157 ; cf. *Alexander* v. *Chamberlain*, 1 T. & C. 600). But the relationship of the declarant must in any case be shown by other evidence than the declarations themselves. *Blackburn* v. *Crawfords*, 3 Wall. 175 ; *Thompson* v. *Woolf*, 8 Or. 454 ; *Sitler* v. *Gehr*, 105 Pa. St. 577.

The declarations of deceased neighbors, acquaintances, servants, or other strangers are not received. *Chapman* v. *Chapman*, 2 Ct. 347 ; *Cames* v. *Crandall*, 10 Ia. 377 ; *De Haven* v. *De Haven*, 77 Ind. 236 ; and cases supra ; contra, *Carter* v. *Montgomery*, 2 Tenn. Ch. 216.]

[1] *Berkeley Peerage Case*, 4 Camp. 401-417. [*People* v. *Fire Ins. Co.*, 25 Wend. 205 ; *Stein* v. *Bowman*, 13 Pet. 209 ; *Chapman* v. *Chapman*, 2 Ct. 347 ; *Northrop* v. *Hale*, 76 Me. 306 ; *Comm.* v. *Felch*, 132 Mass. 23 ; *Barnum* v. *Barnum*, 42 Md. 251, 304 ; *Caujolle* v. *Ferrié*, 23 N. Y. 90, 104.]

[2] Vin. Abr. *tit.* Evidence, T. b. 91. The report calls the son Achicus.

The fact that he was believed in his family to be dead is deemed to be irrelevant, as the question is not one of pedigree.[1]

(*c*) The following are instances of the ways in which statements as to pedigree may be made: By family conduct or correspondence; in books used as family registers; in deeds and wills; in inscriptions on tombstones, or portraits; in pedigrees, so far as they state the relationship of living persons known to the compiler.[2]

ARTICLE 32.*

EVIDENCE GIVEN IN FORMER PROCEEDING, WHEN RELEVANT.

Evidence given by a witness in a previous action is relevant for the purpose of proving the matter stated in a subsequent proceeding, or in a later stage of the same proceeding, when the witness is dead,[3] or is mad,[4] or so ill that he will probably never be able to travel,[5] or is kept out of the way by the adverse party,[6] or in civil, but not, it seems, in criminal, cases, is out

* See Note XXII.

[1] *Whittuck* v. *Walters*, 4 C. & P. 375. [For cases in which death has been deemed a question of pedigree, see *Cochrane* v. *Libby*, 18 Me. 39; *Webb* v. *Richardson*, 42 Vt. 465; *Clark* v. *Owens*, 18 N. Y. 434.]

[2] In 1 Ph. Ev. 203–15, and T. E. ss. 583–7, these and many other forms of statement of the same sort are mentioned; and see *Davies* v. *Lowndes*, 6 M. & G. 527. [See *Bussom* v. *Forsyth*, 32 N. J. Eq., note. The following are instances: family conduct or reputation (*Eaton* v. *Tallmadge*, 24 Wis. 217; *Clark* v. *Owens*, 18 N. Y. 434; *Harland* v. *Eastman*, 107 Ill. 535; *Watson* v. *Brewster*, 1 Pa. St. 381); family bible (*Weaver* v. *Leiman*, 52 Md. 708; *Hunt* v. *Johnson*, 19 N. Y. 279, 286); will (*Pearson* v. *Pearson*, 46 Cal. 610); parchment pedigree and inscription on tombstone (*North Brookfield* v. *Warren*, 16 Gray, 171); depositions (*Amer. Life Ins. Co.* v. *Rosenagle*, 77 Pa. St. 507); deeds (*Scharff* v. *Keener*, 64 Pa. St. 376; *Jackson* v. *Cooley*, 8 Johns. 128). The persons executing such instruments must have been relatives (*Sitler* v. *Gehr*, 105 Pa. St. 577); as to the testimony of a witness who derives his information from documents, etc., of these kinds, see *Eastman* v. *Martin*, 19 N. H. 152.]

[3] *Mayor of Doncaster* v. *Day*, 3 Tau. 262.

[4] *R.* v. *Eriswell*, 3 T. R. 720.

[5] *R.* v. *Hogg*, 6 C. & P. 176.

[6] *R.* v. *Scaife*, 17 Q. B. 238, 243.

of the jurisdiction of the Court,[1] or, perhaps, in civil, but not in criminal, cases, when he cannot be found.[2]

Provided in all cases—

(1) That the person against whom the evidence is to be given

[1] *Fry* v. *Wood*, 1 Atk. 444; *R.* v. *Scaife*, 17 Q. B. 243.

[2] Godbolt, p. 326, case 418; *R.* v. *Scaife*, 17 Q. B. 243. [The death of the witness will in all States admit his former testimony. As to other disabilities, there is much difference of doctrine. Thus, in civil cases, New York has thus far held only death sufficient; absence from the jurisdiction, or the fact that the witness cannot be found, is not enough. *Wilbur* v. *Selden*, 6 Cow. 162; *Weeks* v. *Lowerre*, 8 Barb. 530. In Pennsylvania such evidence is received, if the witness has died, has become insane, is sick and unable to attend, has lost his memory through disease or old age, is out of the jurisdiction, or has become incompetent to testify by reason of the death of the opposite party to the suit. *Walbridge* v. *Knippen*, 96 Pa. St. 48. In Illinois, death, insanity, or the keeping of the witness away by the adverse party, is sufficient. *Stout* v. *Cook*, 47 Ill. 530. Absence from the jurisdiction is held sufficient in California (*Hicks* v. *Lovell*, 64 Cal. 14); in Michigan, if due diligence has been used to find the witness (*Howard* v. *Patrick*, 38 Mich. 795; *Marvich* v. *Elsey*, 47 Id. 10); but not in New Jersey (*Berney* v. *Mitchell*, 34 N. J. L. 337, and that, too, even though he cannot be found, Id.); nor in Vermont, Illinois, or Iowa, if there has been a lack of diligence to secure his attendance or deposition. *Kellogg* v. *Secord*, 42 Vt. 318; *Slasser* v. *Burlington*, 47 Ia. 300; *Cassady* v. *Trustees*, 105 Ill. 560. Sickness which renders the witness unable to attend is sometimes held sufficient. *Chase* v. *Springvale Mills Co.*, 75 Me. 156; see *Berney* v. *Mitchell*, 34 N. J. L. 337, 341; *Howard* v. *Patrick*, 38 Mich. 795.

In criminal cases, death is deemed sufficient (*U. S.* v. *Macomb*, 5 McL. 286; *Brown* v. *Comm.*, 73 Pa. St. 321; *Summons* v. *State*, 5 O. St. 325; *State* v. *Fitzgerald*, 63 Ia. 268; *State* v. *Able*, 65 Mo. 357), but not absence from the jurisdiction. *U. S.* v. *Angell*, 11 F. R. 34; *Bragy* v. *Comm.*, 10 Gratt. 722; *People* v. *Newman*, 5 Hill, 295; *Collins* v. *Comm.*, 12 Bush, 271; but see *People* v. *Chung Ah Chue*, 57 Cal. 567. But if the witness is wrongfully kept away by the defendant, the former evidence has been received. *Reynolds* v. *U. S.*, 98 U. S. 145; *State* v. *Houser*, 26 Mo. 431; contra, *Bergen* v. *State*, 17 Ill. 426. As to sickness, see *McLain* v. *Comm.*, 99 Pa. St. 86. The constitutional provision that the defendant shall be confronted with the witnesses against him is generally held not to exclude this kind of evidence. (See all the cases in this paragraph; *People* v. *Sligh*, 48 Mich. 54.)

The former testimony may be proved by any witness who heard and

had the right and opportunity to cross-examine the declarant when he was examined as a witness;[1]

(2) That the questions in issue were substantially the same in the first as in the second proceeding;[1]

Provided also—

(3) That the proceeding, if civil, was between the same parties or their representatives in interest;[1]

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remembers it, if he can state the substance of the whole of it. *Woods* v. *Keyes*, 14 Allen, 236; *Hepler* v. *Mt. Carmel Bk.*, 97 Pa. St. 420; *Harrison* v. *Charlton*, 42 Ia. 573; *Black* v. *Woodrow*, 39 Md. 194; *Emery* v. *Fowler*, 39 Me. 326. He need only state the substance of such testimony, not its precise language; nor need his language be even substantially the same. Gr. Ev. i. § 163; *Ruch* v. *Rock Island*, 97 U. S. 693; *Home* v. *Williams*, 23 Ind. 37; *Hepler* v. *Mt. Carmel Bk.*, 97 Pa. St. 420; *U. S.* v. *Macomb*, 5 McL. 286; *State* v. *Able*, 65 Mo. 357; *Summons* v. *State*, 5 O. St. 325; *Whitcher* v. *Morey*, 39 Vt. 459. But in Massachusetts substantially the original language must be given. *Costigan* v. *Lunt*, 127 Mass. 354. The latest New York cases seem to support the former rule, but it is difficult to extract a definite rule from them. *Crawford* v. *Loper*, 25 Barb. 449; *McIntyre* v. *N. Y. C. R. Co.*, 37 N. Y. 287, 291; *Martin* v. *Cope*, 3 Abb. Dec. 182; *Clark* v. *Vorce*, 15 Wend. 193, 19 id. 232.

Such former testimony may be proved by a stenographer from memory (*Moore* v. *Moore*, 39 Ia. 461); by a juror who heard it (*Hutchings* v. *Corgan*, 59 Ill. 70); by an attorney (*Earl* v. *Tupper*, 45 Vt. 275; *Costigan* v. *Lunt*, 127 Mass. 354; who may refresh his recollection by his minutes, Id.); by the judge's minutes, duly authenticated by him as to completeness and accuracy (*Martin* v. *Cope*, 3 Abb. Dec. 182; *Whitcher* v. *Morey*, 39 Vt. 459); by the minutes of stenographers, counsel, masters in chancery, etc. (*Stewart* v. *First Nat. Bk.*, 43 Mich. 257; *Rhine* v. *Robinson*, 27 Pa. St. 30; *Clark* v. *Vorce*, 15 Wend. 193; *Yale* v. *Comstock*, 112 Mass. 267); and by other like methods.

These rules apply also to the former testimony of a deceased party. But by statute in some States, if this is not proved on the second trial, the surviving party cannot be a witness to testify against the decedent's representatives. *Emerson* v. *Bleakley*, 2 Abb. Dec. 22; *Bradley* v. *Mirick*, 91 N. Y. 293; *Stewart* v. *First Nat. Bk.*, 43 Mich. 257; see *Blair* v. *Ellsworth*, 55 Vt. 415.

Former testimony given before arbitrators may be proved. *Walbridge* v. *Knippen*, 96 Pa. St. 48; *Bailey* v. *Woods*, 17 N. H. 365; contra, *Jessup* v. *Cook*, 6 N. J. L. 529; cf. *Jackson* v. *Bailey*, 2 Johns. 17.]

[1] *Doe* v. *Tatham*, 1 A. & E. 319; *Doe* v. *Derby*, 1 A. & E. 783, 785, 789. [*Osborn* v. *Pell*, 5 Den. 370; *Jackson* v. *Crissey*, 3 Wend. 251; *Chase* v.

(4) That, in criminal cases, the same person is accused upon the same facts.[1]

If evidence is reduced to the form of a deposition, the provisions of article 90 apply to the proof of the fact that it was given.[2]

The conditions under which depositions may be used as evidence are stated in articles 140–142.

SECTION II.

STATEMENTS IN BOOKS, DOCUMENTS, AND RECORDS, WHEN RELEVANT.

ARTICLE 33.

RECITALS OF PUBLIC FACTS IN STATUTES AND PROCLAMATIONS.[3]

When any act of state or any fact of a public nature is in issue or is, or is deemed to be, relevant to the issue, any statement of it made in a recital contained in any public Act of

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Springvale Mills Co., 75 Me. 156; *Walbridge* v. *Knippen*, 96 Pa. St. 48, 51, and cases *supra*. It is enough that the *opportunity* for cross-examination exist, though it is not exercised. *Bradley* v. *Mirick*, 91 N. Y. 293. Privies in blood, in law, or in estate, are "representatives in interest" within this rule. *Jackson* v. *Lawson*, 15 Johns. 539; *Yale* v. *Comstock*, 112 Mass. 267. But the plaintiffs in one suit may be defendants in the other. (Id.) But the testimony of the deceased witness is inadmissible, unless he would, if living, have been a competent witness in the second suit. *Eaton* v. *Alger*, 47 N. Y. 345. The testimony of a witness given at a coroner's inquest is not admissible in an action to recover damages for causing the death of the deceased, though the witness has since died. *Cook* v. *N. Y. C. R. Co.*, 5 Lans. 401. The inquest is not an action or judicial proceeding between the parties.]

[1] *Beeston's Case*, Dears. 405. [See the criminal cases cited in note 2 on page 77, *ante*.]

[2] [See *Phil. etc. R. Co.* v. *Howard*, 13 How. (U. S.) 307; *Chase* v. *Springvale Mills Co.*, 75 Me. 156.]

[3] [This article may be adapted to American law by making it read as follows: When any act of state or any fact of a public nature is in issue,

Parliament, or in any Royal proclamation or speech of the Sovereign in opening Parliament, or in any address to the Crown of either House of Parliament, is deemed to be a relevant fact.[1]

ARTICLE 34.

RELEVANCY OF ENTRY IN PUBLIC RECORD MADE IN PERFORMANCE OF DUTY.

An entry in any record, official book, or register kept in any of Her Majesty's dominions[2] or at sea, or in any foreign country, stating, for the purpose of being referred to by the public, a fact in issue or relevant or deemed to be relevant thereto, and made in proper time by any person in the discharge of any duty imposed upon him by the law of the place in which such record, book, or register is kept, is itself deemed to be a relevant fact.[3]

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or is, or is deemed to be, relevant to the issue, any statement of it made in a recital contained in any public statute, or in any proclamation of the Executive, or in state papers communicated by the Executive to the Legislature, or published under public authority, or in legislative journals or resolutions, is deemed to be a relevant fact. Gr. Ev. i. § 491; *McKinnon* v. *Bliss*, 21 N. Y. 206; *Radcliff* v. *Ins. Co.*, 7 Johns. 38, 51; *Root* v. *King*, 7 Cow. 613; *Spangler* v. *Jacoby*, 14 Ill. 297; *Whiton* v. *Albany, etc. Ins. Co's.*, 109 Mass. 24, and cases cited; *Hanson* v. *South Scituate*, 115 Mass. 336; see *Armstrong* v. *U. S.*, 13 Wall. 154. So of recitals in the official precept of a governor. *Comm.* v. *Hall*, 9 Gray, 262. As to the effect of recitals in private statutes, see *McKinnon* v. *Bliss*, *supra*; in resolutions of a common council of a city, *Ireland* v. *Rochester*, 51 Barb. 414, 428.]

[1] *R.* v. *Francklin*, 17 S. T. 636; *R.* v. *Sutton*, 4 M. & S. 532.

[2] [For this country this should read, "in any State or Territory or the District of Columbia."]

[3] *Sturla* v. *Freccia*, L. R. 5 App. Ca. 623; see especially p. 633-4 and 643-4. T. E. (from Greenleaf) ss. 1429, 1432. See also *Queen's Proctor* v. *Fry*, L. R. 4 P. D. 230. [Gr. Ev. i. §§ 483-485, 493-495; *Evanston* v. *Gunn*, 99 U. S. 660; *Gurney* v. *Howe*, 9 Gray, 404; *Pells* v. *Webquish*, 129 Mass. 469; *Galt* v. *Galloway*, 4 Pet. 332; *Bissell* v. *Hamb-*

ARTICLE 35.

RELEVANCY OF STATEMENTS IN WORKS OF HISTORY, MAPS, CHARTS, AND PLANS.

Statements as to matters of general public history made in accredited historical books are deemed to be relevant when the occurrence of any such matter is in issue or is, or is deemed to be, relevant to the issue; but statements in such works as to private rights or customs are deemed to be irrelevant.[1]

(*Submitted*) Statements of facts in issue or relevant or deemed to be relevant to the issue made in published maps or charts generally offered for public sale as to matters of public notoriety, such as the relative position of towns and countries, and such as are usually represented or stated in such maps or charts, are themselves deemed to be relevant

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lin, 6 Duer, 512; *People* v. *Zeyst*, 23 N. Y. 140; see Art. 27, Illustration (*e*), *ante*.

The books of a private corporation are of the nature of public books as between the members (Gr. Ev. i. § 493), and are competent to show the acts of the corporation, when duly kept in the regular course of business. *Hubbell* v. *Meigs*, 50 N. Y 480; *Turnpike Co.* v. *M'Kean*, 10 Johns. 154; *Diehl* v. *Adams Co. Ins. Co.*, 58 Pa. St. 443. So they are evidence in favor of the corporation, to show that it was properly organized. *McFarlan* v. *Triton Ins. Co.*, 4 Den. 392; see Angell & Ames on Corp. §§ 679, 681. But they are not generally competent evidence in favor of the corporation against a stranger. *Graville* v. *N. Y. C. R. Co.*, 34 Hun, 224; *Railroad Co.* v. *Cunnington*, 39 O. St. 327; *Chase* v. *Sycamore, etc. R. Co.*, 38 Ill. 215.

As to entries in other books of a private or *quasi*-official character, see Art. 27, *ante*.]

[1] See cases in 2 Ph. Ev. 155-6. [*McKinnon* v. *Bliss*, 21 N. Y. 206, 216; *Bogardus* v. *Trinity Church*, 4 Sandf. Ch. 633; *Crill* v. *Rome*, 47 How. Pr. 400; *Morris* v. *Harmer*, 7 Pet. 554; *State* v. *Wagner*, 61 Me. 178, 188; *Spalding* v. *Hedges*, 2 Pa. St. 240, 243. These cases favor the view that if the author is living, he should be called as a witness to be examined as to the sources and accuracy of his knowledge. Mere local histories are not admitted in evidence.]

facts;[1] but such statements are irrelevant if they relate to matters of private concern, or matters not likely to be accurately stated in such documents.[2]

[1] In *R.* v. *Orton*, maps of Australia were given in evidence to show the situation of various places at which the defendant said he had lived.

[2] *E.g.*, a line in a tithe commutation map purporting to denote the boundaries of A's property is irrelevant in a question between A and B as to the position of the boundaries: *Wilberforce* v. *Hearfield*, L. R. 5 Ch. D. 709, and see *Hammond* v. ——, 10 Ex. 390. [As a general rule, maps, surveys, and plans of land are not competent evidence, unless their accuracy is shown by other evidence in the case (*Johnston* v. *Jones*, 1 Black, 209; *Whitehouse* v. *Bickford*, 9 Foster, 471), as *e.g.*, by the testimony of the surveyors who prepared them. *Curtiss* v. *Ayrault*, 5 T. & C. 611. But a map of public land, made by a public surveyor, and duly certified and filed in a public office, as prescribed by statute, is admissible *per se* (*People* v. *Denison*, 17 Wend. 312), and ancient maps are admissible *per se* to show matters of public and general right. *Missouri* v. *Kentucky*, 11 Wall. 395; *McCausland* v. *Fleming*, 63 Pa. St. 36; see Art. 30, *ante*. But an ancient map of partition, showing the division of land among private owners, is not evidence of title. *Jackson* v. *Witter*, 2 Johns. 180.

Where a plan or map of land is prepared, and is referred to in making conveyances of such land, it is evidence to show boundary or location, or to explain the contract (*Clark* v. *Life Ins. Co.*, 64 N. Y. 33; *Kingsland* v. *Chittenden*, 6 Lans. 15; *Crawford* v. *Loper*, 25 Barb. 449). So in dedicating land to the public. *Derby* v. *Alling*, 40 Ct. 410. But if made by a stranger without authority, it cannot be received to vary or contradict a title under a previous deed. *Marble* v. *McMinn*, 57 Barb. 610; cf. *Jackson* v. *Frost*, 5 Cow. 346. But sometimes maps, plans, etc., are admissible even between strangers. *Boston Water Power Co.* v. *Hanlon*, 132 Mass. 483. And sometimes maps are admissible by statute, as maps of the public canals in New York. *Carpenter* v. *Cohoes*, 81 N. Y. 21.

Some other rules as to the admissibility of books, papers, etc., may here be noticed. Thus it is generally held that a medical or other scientific treatise is not competent evidence to prove the truth of matters stated therein (*Comm.* v. *Sturtivant*, 117 Mass. 122; *Harris* v. *Panama R. Co.*, 3 Bos. 7; *Lithographing Co.* v. *Kerting*, 107 Ill. 344; *People* v. *Hall*, 48 Mich. 482; *Boyle* v. *State*, 57 Wis. 472; contra, *Bales* v. *State*, 63 Ala. 30; *Brodhead* v. *Wiltsee*, 35 Ia. 429 [by statute]); nor can such books be read in argument to the jury (*Washburn* v. *Cuddihy*, 8 Gray, 430; *Boyle* v. *State*, supra; *People* v. *Wheeler*, 60 Cal. 581; contra, *State* v. *Hoyt*, 46

ARTICLES 36, 37, 38.

ENTRIES IN BANKERS' BOOKS.[1]

ARTICLE 39.*

"JUDGMENT."

The word "judgment" in articles 40–47 means any final judgment, order, or decree of any Court.

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* See Note XXIII.

Ct. 330), nor given in evidence to sustain or contradict the opinion of a witness. *Davis* v. *State*, 38 Md. 15; *Knoll* v. *State*, 55 Wis. 249. But such a book may be read to discredit a witness when he has referred to it as supporting his statements. *Pinney* v. *Cahill*, 48 Mich. 584; *Ripon* v. *Bittell*, 30 Wis. 614. And standard treatises have been allowed to be read to an expert witness on cross-examination to test his knowledge. *Conn. Ins. Co.* v. *Ellis*, 89 Ill. 516. An engraving in a medical book cannot be shown to the jury. *Ordway* v. *Haynes*, 50 N. H. 159. So counsel ought not in general to read extracts from other books and papers. *Baldwin* v. *Bricker*, 86 Ind. 221; as to reading law books, see *State* v. *Hopkins*, 56 Vt. 250.

A price current list, appearing from extrinsic evidence to be reliable, is competent to prove market value (*Cliquot's Champagne*, 3 Wall. 114; *Whelan* v. *Lynch*, 60 N. Y. 469; see *Whitney* v. *Thacher*, 117 Mass. 523; *Peter* v. *Thickstun*, 51 Mich. 589); the Northampton tables to show duration of life (*Schell* v. *Plumb*, 595 N. Y. 52; *Coates* v. *Burlington, etc. R. Co.*, 62 Ia. 486); an almanac to show time of sunrise, etc. *State* v. *Morris*, 47 Ct. 179; *Munshower* v. *State*, 55 Md. 11. So market reports have been received (*Sisson* v. *Cleveland, etc. R. Co.*, 14 Mich. 489), and a weather record kept at a State asylum. *De Armond* v. *Neasmith*, 32 Mich. 231. But a gazetteer is not admissible to prove relative distances of places (*Spalding* v. *Hedges*, 2 Pa. St. 240), nor are law reports of cases formerly decided competent to prove the facts of those cases (*Mackay* v. *Easton*, 19 Wall. 619), nor to prove a local custom of trade. *Iron Cliffs Co.* v. *Buhl*, 42 Mich. 86.]

[1] [Articles 36, 37, and 38 state the provisions of special English statutes relating to entries in bankers' books. As they are peculiar to English law, they are not retained here in the text, but will be found in the appendix. See Note XLIX. As to the admissibility of corporation books in this country, see Articles 27 and 34, *ante*, and notes.]

The provisions of articles 40–45 inclusive, are all subject to the provisions of article 46.

ARTICLE 40.

ALL JUDGMENTS CONCLUSIVE PROOF OF THEIR LEGAL EFFECT.

All judgments whatever are conclusive proof as against all persons of the existence of that state of things which they actually effect when the existence of the state of things so effected is a fact in issue or is, or is deemed to be, relevant to the issue.[1] The existence of the judgment effecting it may be proved in the manner prescribed in Part II.

Illustrations.

(*a*) The question is, whether A has been damaged by the negligence of his servant B in injuring C's horse.

A judgment in an action, in which C recovered damages against A, is conclusive proof as against B, that C did recover damages against A in that action.[2]

(*b*) The question is, whether A, a shipowner, is entitled to recover as for a loss by capture against B, an underwriter.

A judgment of a competent French prize court condemning the ship and cargo as prize, is conclusive proof that the ship and cargo were lost to A by capture.[3]

(*c*) The question is, whether A can recover damages from B for a malicious prosecution.

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[1] [Gr. Ev. i. §§ 527, 538, 539; *Dorrell* v. *State*, 83 Md. 357; *Chamberlain* v. *Carlisle*, 26 N. H. 540; *Wadsworth* v. *Sharpsteen*, 8 N. Y. 388; *Murray* v. *Deyo*, 10 Hun, 3; see *Smith* v. *Chapin*, 31 Ct. 530; *Goodnow* v. *Smith*, 97 Mass. 69.]

[2] *Green* v. *New River Company*, 4 T. R. 590. See article 44, Illustration (*a*). [See *Kip* v. *Brigham*, 7 Johns. 168; *Dubois* v. *Hermance*, 56 N. Y. 673; *Masser* v. *Strickland*, 17 S. & R. 354; *Tyler* v. *Ulmer*, 12 Mass. 166; and *post*, Art. 44, Illustration (*ab*).]

[3] Involved in *Geyer* v. *Aguilar*, 7 T. R. 681; [cf. *Rose* v. *Himely*, 4 Cr. 241.]

The judgment of a Court by which A was acquitted is conclusive proof that A was acquitted by that Court.[1]

(*d*) A, as executor to B, sues C for a debt due from C to B.

The grant of probate to A is conclusive proof as against C, that A is B's executor.[2]

(*e*) A is deprived of his living by the sentence of an ecclesiastical court.

The sentence is conclusive proof of the fact of deprivation in all cases.[3]

(*f*) A and B are divorced *a vinculo matrimonii* by a sentence of the Divorce Court.

The sentence is conclusive proof of the divorce in all cases.[4]

(*g*) [The question is whether A, an alien born, is a citizen of the United States.

The record of a judgment of a competent Court admitting him to be-

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[1] *Leggatt* v. *Tollervey*, 14 Ex. 301; and see *Caddy* v. *Barlow*, 1 Man. & Ry. 277; [see *Styles* v. *Briggs*, 4 Met. 421; *Burt* v. *Place*, 4 Wend. 591.]

[2] *Allan* v. *Dundas*, 3 T. R. 125-130. In this case the will to which probate had been obtained was forged. [*Kelly* v. *West*, 80 N. Y. 139; N. Y. Code Civ. Pro. § 2591; *Day* v. *Floyd*, 130 Mass. 488; *Mutual Ins. Co.* v. *Tisdale*, 91 U. S. 238, 243; *Steen* v. *Bennett*, 24 Vt. 303; *Quidort's Adm'r.* v. *Pergeaux*, 3 C. E. Gr. 472; so as to guardian, *Farrar* v. *Olmstead*, 24 Vt. 123; or receiver, *Whittlesey* v. *Frantz*, 74 N. Y. 456. But the grant of administration upon the estate of a living person is wholly void for lack of jurisdiction. *Stevenson* v. *Superior Ct.*, 62 Cal. 60; *Jochumsen* v. *Suffolk Sav. Bk.*, 3 Allen, 87; *Melia* v. *Simmons*, 45 Wis. 334; *Devlin* v. *Comm.*, 101 Pa. St. 273; *Lavin* v. *Emigrant Sav. Bk.*, 18 Blatch. 1, 36. But in New York by statute, the determination by the surrogate of the fact of death is deemed conclusive, so far as to render the acts of the administrator valid until his authority is revoked. *Roderigas* v. *East River Sav. Inst.*, 63 N. Y. 460; but this power of the surrogate does not extend to his clerk, S. C., 76 N. Y. 316.]

[3] Judgment of Lord Holt in *Philips* v. *Bury*, 2 T. R. 346, 351; [cf. *Bouldin* v. *Alexander*, 15 Wall. 131.]

[4] Assumed in *Needham* v. *Bremner*, L. R. 1 C. P. 582. [*Hood* v. *Hood*, 110 Mass. 463; *Burlen* v. *Shannon*, 3 Gray, 387; *Hunt* v. *Hunt*, 72 N. Y. 217; as to impeaching the judgment for lack of jurisdiction, see *People* v. *Baker*, 76 N. Y. 78.]

come a citizen and reciting the facts which entitled him to such judgment is conclusive proof of his citizenship.][1]

ARTICLE 41.

JUDGMENTS CONCLUSIVE AS BETWEEN PARTIES AND PRIVIES OF FACTS FORMING GROUND OF JUDGMENT.

Every judgment is conclusive proof as against parties and privies of facts directly in issue in the case, actually decided by the Court,[2] and appearing from the judgment itself to be the

[1] [*McCarthy* v. *Marsh*, 5 N. Y. 263; *Mutual Ins. Co.* v. *Tisdale*, 91 U. S. 238, 245; *People* v. *McGowan*, 77 Ill. 644; *State* v. *Macdonald*, 24 Minn. 48.]

[2] [Gr. Ev. i. § 528 *et seq.*; *Cagger* v. *Lansing*, 64 N. Y. 417; *Leavitt* v. *Wolcott*, 95 N. Y. 219; *Bickford* v. *Cooper*, 41 Pa. St. 142; *White* v. *Chase*, 128 Mass. 158. But it is generally held in this country that a judgment is conclusive between parties and privies as to facts actually decided, whether these do or do not appear upon the record; such as do not may be shown by parol evidence to have been litigated and determined. *Campbell* v. *Rankin*, 99 U. S. 261; *Foye* v. *Patch*, 132 Mass. 105, 111; *Smith* v. *Smith*, 79 N. Y. 634; *Supples* v. *Cannon*, 44 Ct. 424; *Roberts* v. *Orr*, 56 Pa. St. 176; *Lander* v. *Arno*, 65 Me. 26; *Sanderson* v. *Peabody*, 58 N. H. 116; see Art. 44, Illustration (*cc*). But such evidence must not contradict the record. *Follansbee* v. *Walker*, 74 Pa. St. 306; *McKnight* v. *Devlin*, 52 N. Y. 399.

A judgment is said to be conclusive not only as to matters which are, but also as to those which might have been litigated and determined in the action. *Jordan* v. *Van Epps*, 85 N. Y. 427; *Petershine* v. *Thomas*, 28 O. St. 596; *Parnell* v. *Hahn*, 61 Cal. 131; *Bates* v. *Spooner*, 45 Ind. 489. Thus, if part of a single cause of action be sued on and judgment recovered, it bars an action for the residue. *Secor* v. *Sturgis*, 16 N. Y. 548; *Baird* v. *U. S.*, 96 U. S. 430; *Warren* v. *Cornings*, 6 Cush. 103; *Brunsden* v. *Humphrey*, 14 Q. B. D. 141; see Illustration (*e*). And if a defendant fails to set up defences which he might and should maintain, and judgment goes against him, this will bar any action by him based on such grounds of defence (see Illustrations (*f*) and (*g*); *White* v. *Merritt*, 8 N. Y. 352; *Homer* v. *Fish*, 1 Pick. 435); so this prior judgment will bar the use of such defences in a subsequent action between the same parties upon the same cause of action, though it will only conclude as

ground on which it was based; unless evidence was admitted in the action in which the judgment was delivered which is ex-

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to the matters actually in issue, if the subsequent cause of action be different. *Cromwell* v. *Sac*, 94 U. S. 351; *Foye* v. *Patch*, 132 Mass. 105. But matters of set-off and recoupment (and sometimes other matters), though not used as defences in actions where they might be so used, may still be sued on independently. *Brown* v. *Gallaudet*, 80 N. Y. 413; *Gillespie* v. *Torrance*, 25 N. Y. 309; *Malloney* v. *Horan*, 49 N. Y. 111; *Burnett* v. *Smith*, 4 Gray, 50; *Yates* v. *Fassett*, 5 Den. 21; see *Barker* v. *Cleveland*, 19 Mich. 230.

Some additional rules of importance concerning judgments are the following: (*a*) A judgment, in order to conclude parties and privies, must be a final decision on the merits. Gr. Ev. i. §§ 529, 530; *Webb* v. *Buckalew*, 82 N. Y. 555. Thus a judgment of nonsuit or of dismissal of the complaint in an action at law does not bar another action (*Smith* v. *McNeal*, 109 U. S. 426; *Wheeler* v. *Ruckman*, 51 N. Y. 391), though a dismissal in equity on the merits will have that effect (*Durant* v. *Essex Co.*, 7 Wall. 107; *aliter*, if not on the merits, *Hughes* v. *U. S.*, 4 id. 232; see *Ogsbury* v. *La Farge*, 2 N. Y. 113; N. Y. Code Civ. Pro. § 1209). So if there be a discontinuance (*Audubon* v. *Excelsior Ins. Co.*, 27 N. Y. 216), or the action be prematurely brought (*Quackenbush* v. *Ehle*, 5 Barb. 469), or a plea in abatement be sustained (*Vaughan* v. *O'Brien*, 57 Barb. 491), judgment for such causes is no bar. A verdict without judgment entered is no bar. *Smith* v. *McCool*, 16 Wall. 560. (*b*) Judgment on demurrer, rendered on the merits, is a bar to another action on substantially the same complaint; but not to an action on a new complaint setting forth the facts of the same transaction so as to present a different cause of action. *Alley* v. *Nott*, 111 U. S. 472; *People* v. *Stephens*, 51 How. Pr. 235; *Stowell* v. *Chamberlain*, 60 N. Y. 272; *Gould* v. *R. Co.* 91 U. S. 533; *Los Angeles* v. *Mellus*, 59 Cal. 444. (*c*) Judgment by confession or default is a bar. *Robinson* v. *Marks*, 19 Hun, 325; *Jarvis* v. *Driggs*, 69 N. Y. 143; *Spring Run Co.* v. *Tosier*, 102 Pa. St. 342. (*d*) An interlocutory order is not conclusive between parties (*Webb* v. *Buckalew*, 82 N. Y. 555; *Riggs* v. *Pursell*, 74 N. Y. 380; *Spitley* v. *Frost*, 15 F. R. 299); *aliter* as to final orders on the merits in special proceedings, where there are opposing parties who have full opportunity to be heard. *Id.*; *Demarest* v. *Darg*, 32 N. Y. 281; cf. *Frauenthal's Appeal*, 100 Pa. St. 290. (*e*) A judgment of a court of competent jurisdiction, whether of law, equity, admiralty, etc., will bar an action on the same ground in another court whose jurisdiction is of a different nature. *Westcott* v. *Edmunds*,

cluded in the action in which that judgment is intended to be proved.[1]

Illustrations.

(*a*) The question is, whether C, a pauper, is settled in parish A or parish B.

D is the mother and E the father of C. D, E, and several of their children were removed from A to B before the question as to C's settlement arose, by an order unappealed against, which order described D as the wife of E.

The statement in the order that D was the wife of E is conclusive as between A and B.[2]

(*b*) A and B each claim administration to the goods of C, deceased.

Administration is granted to B, the judgment declaring that, as far as appears by the evidence, B has proved himself next of kin.

Afterwards there is a suit between A and B for the distribution of the effects of C. The declaration in the first suit is in the second suit conclusive proof as against A that B is nearer of kin to C than A.[3]

(*c*) A company sues A for unpaid premium and calls. A special case being stated in the Court of Common Pleas, A obtains judgment on the ground that he never was a shareholder.

The company being wound up in the Court of Chancery, A applies for the repayment of the sum he had paid for premium and calls. The decision that he never was a shareholder is conclusive as between him and the company that he never was a shareholder, and he is therefore entitled to recover the sums he paid.[4]

(*d*) A obtains a decree of judicial separation from her husband B, on the ground of cruelty and desertion, proved by her own evidence.

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68 Pa. St. 34; *Powers* v. *Chelsea Sav. Bk.*, 129 Mass. 44. Thus if one sues on a contract at law as it is, he cannot afterwards sue in equity to reform the contract. *Steinbach* v. *Relief Ins. Co.*, 77 N. Y. 498.]

[1] *R.* v. *Hutchins*, L. R. 5 Q. B. D. 353 supplies a recent illustration of this principle; [cf. *Putnam* v. *Clark*, 34 N. J. Eq. 532; *Maybee* v. *Avery*, 18 Johns. 352; *Quinn* v. *Quinn*, 16 Vt. 426.]

[2] *R.* v. *Hartington Middle Quarter*, 4 E. & B. 780; and see *Flitters* v. *Allfrey*, L. R. 10 C. P. 29; and contrast *Dover* v. *Child*, L. R. 1 Ex. D. 172; [see *Bethlehem* v. *Watertown*, 47 Ct. 237.]

[3] *Barrs* v. *Jackson*, 1 Phill. 582, 587, 588; [see *Caujollé* v. *Ferrié*, 13 Wall. 465; *White* v. *Weatherbee*, 126 Mass. 450.]

[4] *Bank of Hindustan, etc., Allison's Case*, L. R. 9 Ch. App. 24.

Afterwards B sues A for dissolution of marriage on the ground of adultery, in which suit neither B nor A can give evidence. A charges B with cruelty and desertion. The decree in the first suit is deemed to be irrelevant in the second.[1]

(*e*) [A sues B to recover damages for the conversion of some bed-quilts and obtains judgment.

This judgment defeats a recovery in a subsequent action for the conversion of a bed which was taken by B at the same time with the quilts.][2]

(*f*) [A, a physician, sues B in a justice's court to recover the value of his medical services, and upon B's default to appear and contest the action obtains judgment.

B afterwards sues A in a superior court to recover damages for malpractice in rendering said services. The former judgment is conclusive in bar of the action. The defence of malpractice might have been set up in the first suit and used to defeat recovery therein; moreover, an award of damages against the physician for this cause would be wholly inconsistent with his prior recovery for his services.][3]

(*g*) [A sues B on a promissory note, and the suit not being defended, enters judgment for its full face value, without crediting B with a payment already made thereon. This judgment bars a subsequent action by B to recover the amount of said payment.][4]

(*h*) [An assignee in bankruptcy sued several defendants to determine the title to certain goods, and it was adjudged that the title was in him. One of these defendants, who claimed title in himself and had put it in issue in this suit, afterwards sued another of them to recover the same goods.

The judgment in the first suit is conclusive against the right to recover in the second.][5]

(*i*) [A sues B for the conversion of goods which are a part of those included in a certain bill of sale given by C to B, and A recovers judgment

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[1] *Stoate* v. *Stoate*, 2 Swa. & Tr. 223; [*Woodruff* v. *Woodruff*, 11 Me. 475; cf. *Bradley* v. *Bradley*, id. 367.]

[2] [*Farrington* v. *Payne*, 15 Johns. 432.]

[3] [*Blair* v. *Bartlett*, 75 N. Y. 150; S. P. *Dunham* v. *Bower*, 77 N. Y. 76; contra, *Ressequie* v. *Byers*, 52 Wis. 650; *Sykes* v. *Bonner*, 1 Cinc. (O.) 464; see *Goble* v. *Dillon*, 86 Ind. 327; *Howell* v. *Goodrich*, 69 Ill. 556; *Haynes* v. *Ordway*, 58 N. H. 167.]

[4] [*Binck* v. *Wood*, 43 Barb. 315; *Greenabaum* v. *Elliott*, 60 Mo. 25; *Loring* v. *Mansfield*, 17 Mass. 394.]

[5] [*Tuska* v. *O'Brien*, 68 N. Y. 446.]

on the ground that the bill of sale is fraudulent and void. B afterwards sues A for the residue of the goods covered by the bill of sale.

The former judgment is deemed conclusive upon the question of fraud, and defeats B's recovery.][1]

(*j*) [A sues B to recover the price of goods sold and obtains judgment. Afterwards A sues B to recover damages for fraud in obtaining a credit for the goods. The former judgment defeats recovery.][2]

ARTICLE 42.

STATEMENTS IN JUDGMENTS IRRELEVANT AS BETWEEN STRANGERS, EXCEPT IN ADMIRALTY CASES.

Statements contained in judgments as to the facts upon which the judgment is based are deemed to be irrelevant as between strangers, or as between a party or privy and a stranger,[3] except[4] in the case of judgments of Courts of Admiralty condemning a ship as prize.[5] In such cases the judg-

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[1] [*Doty* v. *Brown*, 4 N. Y. 71.]

[2] [*Caylus* v. *N. Y., etc. R. Co.*, 76 N. Y. 609; it is a general rule that a prior recovery will bar a subsequent action for the same claim, though the forms of action be entirely different. Gr. Ev. i. §§ 532, 533.]

[3] [*Campbell* v. *Hall*, 16 N. Y. 575; *Railroad Co.* v. *Nat. Bk.*, 102 U. S. 14; *Wing* v. *Bishop*, 3 Allen, 456.]

[4] This exception is treated by Lord Eldon as an objectionable anomaly in *Lothian* v. *Henderson*, 3 B. & P. 545. See, too, *Castrique* v. *Imrie*, L. R. 4 E. & I. App. 434–5.

[5] [A judgment of a court of Admiralty condemning a ship as prize, or of any competent court condemning property under laws of forfeiture, belongs to the class of judgments commonly called judgments *in rem*. It is a general rule that such judgments are conclusive, not only as to parties and privies but even as to all the world. *Gelston* v. *Hoyt*, 13 Johns. 561, 3 Wheat. 246; *Risley* v. *Phenix Bk.*, 83 N. Y. 318, 332. Decisions as to personal status, *viz.*, marriage, divorce, bastardy, etc., are often included in the same category. Gr. Ev. i. §§ 525, 541–546. But an adjudication as to personal status may, in some cases, only be effectual within the limits of the State in which the decision is rendered. *People* v. *Baker*, 76 N. Y. 78; Wh. Ev. ii. §§ 815–818; cf. Bishop, M. & D. ii. §§ 155–200, 6th Ed. So attachment suits against non-residents are in the

ment is conclusive proof as against all persons of the fact on which the condemnation proceeded, where such fact is plainly stated upon the face of the sentence.

Illustrations.

(*a*) The question between A and B is, whether certain lands in Kent had been disgavelled. A special verdict on a feigned issue between C and D (strangers to A and B) finding that in the 2nd Edw. VI. a disgavelling Act was passed in words set out in the verdict is deemed to be irrelevant.[1]

(*b*) The question is, whether A committed bigamy by marrying B during the lifetime of her former husband C.

A decree in a suit of jactitation of marriage, forbidding C to claim to be the husband of A, on the ground that he was not her husband, is deemed to be irrelevant.[2]

(*c*) The question is, whether A, a shipowner, has broken a warranty to B, an underwriter, that the cargo of the ship whose freight was insured by A was neutral property.

The sentence of a French prize court condemning ship and cargo, on the ground that the cargo was enemy's property, is conclusive proof in favor of B that the cargo was enemy's property (though on the facts the Court thought it was not.)[3]

(*d*) [The question is whether A or C is rightfully entitled to hold a public office.

A judgment in a previous action between A and B to determine the

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nature of actions *in rem*, the property attached being the *res*. *Pennoyer* v. *Neff*, 95 U. S. 714; *McKinney* v. *Collins*, 88 N. Y. 216. This general doctrine as to judgments *in rem* is virtually included in Article 40, *supra*. See Appendix, Note XXIII.

The English rule stated in this article, that the judgment of condemnation is conclusive, not only as to title but also as to the grounds of condemnation stated therein, is upheld also in some American courts. *Croudson* v. *Leonard*, 4 Cr. 434; see *Cushing* v. *Laird*, 107 U. S. 69, 80; *Baxter* v. *New Eng. Ins. Co.*, 6 Mass. 277. But in New York it is only *prima facie* evidence of such facts, and in a collateral action such evidence may be rebutted. *Durant* v. *Abendroth*, 97 N. Y. 132, 141.]

[1] *Doe* v. *Brydges*, 6 M. & G. 282.

[2] *Duchess of Kingston's Case*, 2 S. L. C. 760; [see *Williams* v. *Williams*, 3 Barb. Ch. 628.]

[3] *Geyer* v. *Aguilar*, 7 T. R. 681; [see Note 5, *supra*.]

title to the same office, in which it was declared that A had the rightful title, is deemed to be irrelevant as against C.][1]

ARTICLE 43.

EFFECT OF JUDGMENT NOT PLEADED AS AN ESTOPPEL.

If a judgment is not pleaded by way of estoppel, it is as between parties and privies deemed to be a relevant fact, whenever any matter which was or might have been decided[2] in the action in which it was given is in issue, or is or is deemed to be relevant to the issue, in any subsequent proceeding.

Such a judgment is conclusive proof of the facts which it decides, or might have decided,[2] if the party who gives evidence of it had no opportunity of pleading it as an estoppel.[3]

Illustrations.

(*a*) A sues B for deepening the channel of a stream, whereby the flow of water to A's mill was diminished.

A verdict recovered by B in a previous action for substantially the same cause, and which might have been pleaded as an estoppel, is deemed to be relevant, but not conclusive in B's favor.[4]

(*b*) A sues B for breaking and entering A's land, and building thereon a wall and a cornice. B pleads that the land was his, and obtains a verdict in his favor on that plea.

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[1] [*People* v. *Murray*, 73 N. Y. 535.]

[2] [That a judgment is conclusive as to what "might have been decided," see Art. 41, note 2.]

[3] [But it is held in many States of this country that a judgment is equally conclusive when given in evidence, as if pleaded, even though there was an opportunity to plead it. *Krekeler* v. *Ritter*, 62 N. Y. 372; *Foye* v. *Patch*, 132 Mass. 105; *Furley* v. *Haubert*, 30 Pa. St. 194; *Walker* v. *Chase*, 53 Me. 258; *Beall* v. *Pearre*, 12 Md. 550; *Larum* v. *Wilmer*, 35 Ia. 244; see *Blair* v. *Blair*, 45 Vt. 538; *Sheldon* v. *Patterson*, 55 Ill. 507. But some States follow the English rule. *Clink* v. *Thurston*, 47 Cal. 21; *Fanning* v. *Ins. Co.*, 37 O. St. 344.]

[4] *Vooght* v. *Winch*, 2 B. & A. 662; and see *Feversham* v. *Emerson*, 11 Ex. 391; [see *Plate* v. *N. Y. C. R. Co.*, 37 N. Y. 472; *Bowyer* v. *Schofield*, 1 Abb. Dec. 177; *Newell* v. *Carpenter*, 118 Mass. 411.]

Afterward B's devisee sues A's wife (who on the trial admitted that she claimed through A) for pulling down the wall and cornice. As the first judgment could not be pleaded as an estoppel (the wife's right not appearing on the pleadings), it is conclusive in B's favor that the land was his.[1]

ARTICLE 44.

JUDGMENTS GENERALLY DEEMED TO BE IRRELEVANT AS BETWEEN STRANGERS.

Judgments are not deemed to be relevant as rendering probable facts which may be inferred from their existence, but which they neither state nor decide—

as between strangers ;[2]

as between parties and privies in suits where the issue is different, even though they relate to the same occurrence or subject matter ;[3]

or in favor of strangers against parties or privies.[4]

[1] *Whitaker* v. *Jackson*, 2 H. & C. 926. This had previously been doubted. See 2 Ph. Ev. 24, n. 4.

[2] [Gr. Ev. i. §§ 522, 523 ; *Bartlett* v. *Boston Gas Co.*, 122 Mass. 209 ; *Schrauth* v. *Dry Dock Bk.*, 86 N. Y. 390 ; see Art. 42, note 3.]

[3] [Gr. Ev. i. §§ 532, 533 ; *Stowell* v. *Chamberlain*, 60 N. Y. 272 ; *Coleman's Appeal*, 62 Pa. St. 252 ; *Russell* v. *Place*, 94 U. S. 606 ; *Norton* v. *Huxley*, 13 Gray, 285 ; see Illustrations (*ca*) (*cb*). So a judgment is not binding on the parties as to matters not passed upon, though they are stated in the complaint (*Sweet* v. *Tuttle*, 14 N. Y. 465), or are given in evidence (see Illustration (*cc*)), or are improperly set up by way of counterclaim (*People* v. *Denison*, 84 N. Y. 272) ; nor as to matters which the judgment does affirm, but which are immaterial to the issue and not actually in controversy (*People* v. *Johnson*, 38 N. Y. 63), or as to matters which are only incidentally cognizable, or to be inferred by argument from the judgment (Gr. Ev. i. § 528 ; *Hopkins* v. *Lee*, 6 Wheat. 109 ; *Burlen* v. *Shannon*, 99 Mass. 200 ; *Lentz* v. *Wallace*, 17 Pa. St. 412) ; nor is a judgment against a party individually binding on him in a suit wherein he appears in a representative capacity. *Rathbone* v. *Hooney*, 58 N. Y. 463 ; *Lauder* v. *Arno*, 65 Me. 26.]

[4] [*Burdick* v. *Norwich*, 49 Ct. 225 ; *Bissell* v. *Kellogg*, 65 N. Y. 432 ; see *Phillips* v. *Jamieson*, 51 Mich. 153 ; but a judgment against one of

But a judgment is deemed to be relevant as between strangers :

(1) if it is an admission,[1] or

(2) if it relates to a matter of public or general interest, so as to be a statement under article 30.[2]

Illustrations.

(*a*) The question is, whether A has sustained loss by the negligence of B, his servant, who has injured C's horse.

A judgment recovered by C against A for the injury, though conclusive as against B, as to the fact that C recovered a sum of money from A, is deemed to be irrelevant to the question, whether this was caused by B's negligence.[3]

(*ab*) [B unlawfully creates an obstruction in the street of a city, and A, being injured thereby, sues the city for damages. The city gives notice to B to defend the action, and that he will be liable for the amount recovered. B does not defend the action, and A recovers judgment.

In a suit afterward brought by the city against B for indemnity, the prior judgment is conclusive evidence against B of the city's liability to A, of the amount of damages recoverable, and that the injury was not caused by any default on A's part ; but is not competent to prove that the injury was caused by B's negligence, which must therefore be shown.][4]

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two or more joint tortfeasors, if followed by satisfaction (not otherwise) is available to bar a suit against another. *Knapp* v. *Roche*, 94 N. Y. 329; *Lovejoy* v. *Murray*, 3 Wall. 1; *Elliott* v. *Hayden*, 104 Mass. 180. But judgment against one of two joint contractors bars an action against the other. *Kingsley* v. *Davis*, 104 Mass. 178.]

[1] [Gr. Ev. i. 527 *a*; *St. Louis Ins. Co.* v. *Cravens*, 69 Mo. 72; *Parks* v. *Mosher*, 71 Me. 304, holding it open to explanation; see *City Bk.* v. *Dearborn*, 20 N. Y. 244.]

[2] [See *People* v. *Buckland*, 13 Wend. 594.]

[3] *Green* v. *New River Company*, 4 T. R. 589; [*Bank of Owego* v. *Babcock*, 5 Hill, 152; *Second Nat. Bk.* v. *Ocean Nat. Bk.*, 11 Blatch. 362; *Drummond* v. *Prestman*, 12 Wheat. 515; see next note.]

[4] [*City of Rochester* v. *Montgomery*, 72 N. Y. 65; *Robbins* v. *Chicago*, 4 Wall. 657, 2 Black, 418; *Boston* v. *Worthington*, 10 Gray, 496; see *Portland* v. *Richardson*, 54 Me. 46. The notice need not be express. *Village of Port Jervis* v. *First Nat. Bk.*, 96 N. Y. 550. The same principle applies in other cases where one party is primarily liable, but has a remedy

(*b*) The question whether a bill of exchange is forged arises in an action on the bill. The fact that A was convicted of forging the bill is deemed to be irrelevant.[1]

(*c*) A collision takes place between two ships, A and B, each of which is damaged by the other.

The owner of A sues the owner of B, and recovers damages on the ground that the collision was the fault of B's captain. This judgment is not conclusive in an action by the owner of B against the owner of A. for the damage done to B.[2] (*Semble*, it is deemed to be irrelevant.)[3]

(*ca*) [A recovers damages from B for a wrongful dismissal from B's employment before the term of service had expired.

This judgment does not preclude a recovery by A in a subsequent action of the sum due for wages during the time he was actually employed, and payable before the dismissal.] [4]

(*cb*) [The will of A is duly admitted to probate by a surrogate's court having competent jurisdiction.

A's widow afterwards brings action for the admeasurement of her dower.

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over against another to obtain indemnity. *Heiser* v. *Hatch*, 86 N. Y. 614; *G. T. R. Co.* v. *Latham*, 63 Me. 177; *Chicago, etc. R. Co.* v. *Packet Co.*, 70 Ill. 217. As a general rule, a judgment against a principal is not binding upon his surety (though it may be used to prove the fact of its recovery), unless the latter agreed to indemnify against the results of the suit, or unless he had notice and opportunity to defend. *Thomas* v. *Hubbell*, 15 N. Y. 405; *Giltman* v. *Strong*, 64 Pa. St. 242. Sureties upon official bonds, as administrators' bonds, sheriffs' bonds, etc., are often held concluded by such judgments (in the absence of fraud or collusion), though they had no notice, such being deemed the obligation of their contracts. *Jordan* v. *Volkenning*, 72 N. Y. 300; *Harrison* v. *Clark*, 87 N. Y. 572; *McMicken* v. *Comm.*, 58 Pa. St. 213; *Cutter* v. *Evans*, 115 Mass. 27. As to the different kinds of indemnity contracts and the necessity of giving notice, see *Bridgeport Ins. Co.* v. *Wilson*, 34 N. Y. 274, 280; cf. *Konitzky* v. *Meyer*, 49 N. Y. 571.]

[1] Per Blackburn, J., in *Castrique* v. *Imrie*, L. R. 4 E. & I. App. 434; [Gr. Ev. i. § 537; see *Mutual Ins. Co.* v. *Tisdale*, 91 U. S. 238, 244; *Sims* v. *Sims*, 75 N. Y. 466, 471; *Corbley* v. *Wilson*, 71 Ill. 209; *Harger* v. *Thomas*, 44 Pa. St. 128.]

[2] *The Calypso*, 1 Swab. Ad. 28.

[3] On the general principle in *Duchess of Kingston's Case*, 2 S. L. C. 813.

[4] [*Perry* v. *Dickerson*, 85 N. Y. 345.]

The surrogate's record of probate of A's will is not deemed to be relevant to prove A's death.][1]

(*cc*) [A sues B to recover the value of board furnished to B's wife, and recovers judgment, but the judgment does not state whether it is rendered (1) because B's wife had left him on account of his cruelty, or (2) because she was absent from him on his credit by his consent. Evidence to support both grounds was given on the trial.

A afterwards sues B to recover board for a subsequent period, and sues now expressly on the ground that B's wife had left him for his cruelty. The former judgment is conclusive evidence that B's wife was absent from him during the prior period for *some* justifiable cause, but not that that cause was his cruelty, unless the jury find, from parol evidence submitted to show what was proved in the former trial, that the former jury gave their verdict on the ground of cruelty.][2]

(*d*) A is prosecuted and convicted as a principal felon.

B is afterwards prosecuted as an accessory to the felony committed by A.

The judgment against A is deemed to be irrelevant as against B, though A's guilt must be proved as against B.[3]

(*e*) A sues B, a carrier, for goods delivered by A to B.

A judgment recovered by B against a person to whom he had delivered the goods, is deemed to be relevant as an admission by B that he had them.[4]

(*f*) A sues B for trespass on land.

A judgment, convicting A for a nuisance by obstructing a highway on the place said to have been trespassed on, is (at least) deemed to be relevant to the question whether the place was a public highway (and is possibly conclusive).[5]

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[1] [*Carroll* v. *Carroll*, 60 N. Y. 121; S. P. *Mutual Ins. Co.* v. *Tisdale*, 91 U. S. 238; cf. *Kearney* v. *Denn*, 15 Wall. 51; but see *Cunningham* v. *Smith's Adm'r*, 70 Pa. St. 450.]

[2] [*Burlen* v. *Shannon*, 14 Gray, 433.]

[3] *Semble* from *R.* v. *Turner*, 1 Moo. C. C. 347. [In this country it is generally held that the judgment against A is admissible in such a case, and is *prima facie* evidence of A's guilt, but not conclusive. B may, therefore, controvert it. *Levy* v. *People*, 80 N. Y. 327; *State* v. *Mosley*, 31 Kan. 355; Bishop Cr. Pro. ii. § 12, 3d Ed.; cf. *Comm.* v. *Elisha*, 3 Gray, 460; *Jones* v. *People*, 20 Hun, 545.]

[4] Buller, N. P. 242, b.

[5] *Petrie* v. *Nuttall*, 11 Ex. 569.

ARTICLE 45.

JUDGMENTS CONCLUSIVE IN FAVOR OF JUDGE.

When any action is brought against any person for anything done by him in a judicial capacity, the judgment delivered, and the proceedings antecedent thereto, are conclusive proof of the facts therein stated, whether they are or are not necessary to give the defendant jurisdiction, if, assuming them to be true, they show that he had jurisdiction.

Illustration.

A sues B (a justice of the peace) for taking from him a vessel and 500 lbs. of gunpowder thereon. B produces a conviction before himself of A for having gunpowder in a boat on the Thames (against 2 Geo. III. c. 28).

The conviction is conclusive proof for B, that the thing called a boat was a boat.[1]

ARTICLE 46.

FRAUD, COLLUSION, OR WANT OF JURISDICTION MAY BE PROVED.

Whenever any judgment is offered as evidence under any of the articles hereinbefore contained, the party against whom

[1] *Brittain* v. *Kinnaird*, 1 B. & B. 432; [see *Harman* v. *Brotherson*, 1 Den. 537; *People* v. *Collins*, 19 Wend. 56, 62; *Wells* v. *Stevens*, 2 Gray, 115, 119. It is stated as a general rule (not limited to actions against judges) that when the jurisdiction of a court depends upon a fact which the court is required to ascertain and determine in its decision, such decision is final, until reversed or vacated in a direct proceeding for that purpose (*Otis* v. *The Rio Grande*, 1 Woods, 279; *Colton* v. *Beardsley*, 38 Barb. 29, 51; *Stoddard* v. *Johnson*, 75 Ind. 20; see *Dyckman* v. *Mayor of N. Y.*, 5 N. Y. 434, 440), and will protect all persons acting upon it in good faith. But in other cases in which some fact must exist to give jurisdiction, a court cannot acquire jurisdiction simply by deciding that such fact exists. *Roderigas* v. *East River Sav. Inst.*, 63 N. Y. 460, 464; see *Grignon's Lessee* v. *Astor*, 2 How. (U. S.) 319.]

it is so offered may prove that the Court which gave it had no jurisdiction,[1] or that it has been reversed,[2] or, if he is a stranger

[1] [On the ground that "a record imports absolute verity," it is a generally received common law doctrine in this country that while the judgment of a domestic court of general jurisdiction, acting in the scope of its general powers, may be avoided in a collateral proceeding for lack of jurisdiction apparent on the face of the record itself, yet that this cannot be done when the recitals of the record show that the court had jurisdiction (*Blaisdell* v. *Pray*, 68 Me. 269; *Finneran* v. *Leonard*, 7 Allen, 54; *Miller* v. *Dungan*, 6 Vr. 389; *Coan* v. *Clow*, 83 Ind. 417; *Turrell* v. *Warren*, 25 Minn. 9; *Culver's Appeal*, 48 Ct. 165, 173; *Bannon* v. *People*, 1 Bradw. 496; *Wetherill* v. *Stillman*, 65 Pa. St. 105; *Hahn* v. *Kelly*, 34 Cal. 391; that jurisdiction will be presumed when the record is silent on that point, see *Galpin* v. *Page*, 18 Wall. 350); but there has been much diversity of opinion as to the last branch of this rule. See *Ferguson* v. *Crawford*, 70 N. Y. 253, 86 N. Y. 609. Judgments of inferior courts, or of courts of limited jurisdiction, or even of courts of general jurisdiction acting in the exercise of special statutory powers not according to the course of the common law, may, however, be attacked collaterally, as a general rule, for lack of jurisdiction. *Id.*; *Coit* v. *Haven*, 30 Ct. 190; *Galpin* v. *Page*, supra; *Risley* v. *Phenix Bk.*, 83 N. Y. 318; but see *Hahn* v. *Kelly*, supra; *Hendrick* v. *Whittemore*, 105 Mass. 23, 28. And a judgment of any court may be impeached for this cause by a *stranger* to it. *Freydendall* v. *Baldwin*, 103 Ill. 325; *Buffum* v. *Ramsdell*, 55 Me. 252.

In some States, however, in which equitable defences are allowed in legal actions, the judgments even of higher courts may be attacked collaterally for fraud in acquiring jurisdiction, notwithstanding this contradicts the record. *Ferguson* v. *Crawford*, supra; *Clark* v. *Little*, 41 Ia. 497; see *Cavanaugh* v. *Smith*, 84 Ind. 380, in which case the record was silent as to jurisdiction. And some cases declare broadly that a judgment rendered without or in excess of jurisdiction can be shown to be void for this cause either directly or collaterally. *Bosworth* v. *Vandewalker*, 53 N. Y. 597; *U. S.* v. *Walker*, 109 U. S. 258; see *Ferguson* v. *Crawford*, supra, and cases cited therein. These rules apply both to jurisdiction over the person and over the subject matter. But a judgment cannot be collaterally impeached for error or irregularity. *Comstock* v. *Crawford*, 3 Wall. 396; *Sheldon* v. *Wright*, 5 N. Y. 497.]

[2] [*Smith* v. *Frankfield*, 77 N. Y. 414; *Clodfelter* v. *Hulett*, 92 Ind. 426. As to the effect of an appeal, while yet pending, see *Murray* v. *Green*, 64 Cal. 363; *Sage* v. *Harpending*, 49 Barb. 166; *De Camp* v. *Miller*, 44 N. J. L. 617.]

to it, that it was obtained by any fraud or collusion,[1] to which neither he nor any person to whom he is privy was a party.[2]

ARTICLE 47.

FOREIGN JUDGMENTS.

The provisions of articles 40–46 apply to such of the judgments of Courts of foreign countries as can by law be enforced in this country, and so far as they can be so enforced.[3]

[1] [A stranger, but not a party, may avoid collaterally for fraud. *Otterson* v. *Middleton*, 102 Pa. St. 78; *Davis* v. *Davis*, 61 Me. 395; *Krekeler* v. *Ritter*, 62 N. Y. 372. But as a party may in a proper case bring suit in equity to avoid a judgment procured by fraud (*Ross* v. *Wood*, 70 N. Y. 8), so in some States he may set up such fraud as an equitable defence. *Mandeville* v. *Reynolds*, 68 N. Y. 543-546; *Ferguson* v. *Crawford*, 70 N. Y. 253. And when the fraud is in acquiring jurisdiction, the rules in note 1, *supra*, apply.]

[2] Cases on this article collected in T. E. ss. 1524-1525, s. 1530. See, too, 2 Ph. Ev. 35, and *Ochsenbein* v. *Papelier*, L. R. 8 Ch. 695.

[3] The cases on this subject are collected in the note on the *Duchess of Kingston's Case*, 2 S. L. C. 813-845. A list of the cases will be found in R. N. P. 221-3. The last leading cases on the subject are *Godard* v. *Gray*, L. R. 6 Q. B. 139, and *Castrique* v. *Imrie*, L. R. 4 E. & I. App. 414. See, too, *Schisby* v. *Westenholz*, L. R. 6 Q. B. 155, and *Rousillon* v. *Rousillon*, L. R. 14 Ch. D. 370.

[The judgments of sister States are in this country ranked as foreign judgments within this rule. The U. S. Constitution declares that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State." Art. 4, § 1. Nevertheless, such judgments may be avoided collaterally for lack of jurisdiction, even in contradiction of recitals in the record showing jurisdiction (*Thompson* v. *Whitman*, 18 Wall. 457; *Kerr* v. *Kerr*, 41 N. Y. 272; *People* v. *Dowell*, 25 Mich. 247; *Jardine* v. *Reichert*, 39 N. J. L. 165; *Pennywit* v. *Foote*, 27 O. St. 600; *Gilman* v. *Gilman*, 126 Mass. 26; see *Cook* v. *Cook*, 56 Wis. 195; contra, as to impeaching recitals, *Wetherill* v. *Stillman*, 65 Pa. St. 105; *Zepp* v. *Hager*, 70 Ill. 223), or for fraud in acquiring jurisdiction over the person. *Stanton* v. *Crosby*, 9 Hun, 370; *Dunlap* v. *Cody*, 31 Ia. 260. So fraud otherwise committed in procuring the judgment (if not available as a defence in the original suit), may be set up in some States as an equitable defence to the judgment (*Dobson* v. *Pearce*, 12

CHAPTER V.*

OPINIONS, WHEN RELEVANT AND WHEN NOT.

ARTICLE 48.

OPINION GENERALLY IRRELEVANT.

THE fact that any person is of opinion that a fact in issue, or relevant or deemed to be relevant to the issue, does or does not exist is deemed to be irrelevant to the existence of such fact,[1] except in the cases specified in this chapter.[2]

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* See Note XXIV.

N. Y. 156; *Rogers* v. *Gwinn*, 21 Ia. 58; see *Hunt* v. *Hunt*, 72 N. Y. 217), and a court of equity will set such a judgment aside. *Doughty* v. *Doughty*, 27 N. J. Eq. 315. But such judgments are not impeachable upon the merits for error or for irregularity. *Pringle* v. *Woodworth*, 90 N. Y. 502; *Christmas* v. *Russell*, 5 Wall. 290; see *Nichols* v. *Nichols*, 25 N. J. Eq. 60.

Similar principles apply to foreign judgments. *Lazier* v. *Westcott*, 26 N. Y. 146; *Graham* v. *Spencer*, 14 F. R. 603; *Bischoff* v. *Wetherel*, 9 Wall. 812; *Roth* v. *Roth*, 104 Ill. 35. It is held in England that fraud in procuring such a judgment is a good defence, though the fact whether such fraud existed had been investigated in the foreign court. *Abouloff* v. *Oppenheimer*, 10 Q. B. D. 295.

As to the effect of a judgment in another State obtained by default upon service of process by publication on a non-resident and an attachment of his property, see *Pennoyer* v. *Neff*, 95 U. S. 714; *Fitzsimons* v. *Marks*, 66 Barb. 333; *Gilman* v. *Gilman*, 126 Mass. 26; *Eastman* v. *Wadleigh*, 65 Me. 25; and see generally as to judgments *in rem*, *Durant* v. *Abendroth*, 97 N. Y. 132.]

[1] [It is a general rule that witnesses must give evidence of *facts*, not of *opinions*. *Conn. Ins. Co.* v. *Lathrop*, 111 U. S. 612, 618; *Continental Ins. Co.* v. *Delpeneh*, 82 Pa. St. 225; *Simmons* v. *New Bedford, etc. St. Co.*, 97 Mass. 361; *Teerpenning* v. *Corn Ex. Ins. Co.*, 43 N. Y. 279. This is especially true of opinions relating directly to the questions of law or fact at issue in the action. These are questions to be determined by court or jury from the *facts* in evidence. *Id.*; see Illustrations (*b*) and (*c*).]

[2] [Besides the exceptions stated by the author, the following are recog-

Illustrations.

(*a*) The question is, whether A, a deceased testator, was sane or not when he made his will. His friends' opinions as to his sanity, as ex-

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nized: (1) The subscribing witnesses to a will may state their opinions as to the testator's sanity at the time of executing the will. *Egbert* v. *Egbert*, 78 Pa. St. 326; *Hastings* v. *Riders*, 99 Mass. 622; *Hewlett* v. *Wood*, 55 N. Y. 635. (2) In many States, witnesses who are not experts may state their opinion as to a person's sanity or insanity, in connection with a statement of the facts within their personal knowledge, upon which that opinion is based. *Conn. Ins. Co.* v. *Lathrop*, 111 U. S. 612; *Smith* v. *Hickenbottom*, 57 Ia. 733; *Upstone* v. *People*, 109 Ill. 169; *Hardy* v. *Merrill*, 56 N. H. 227; *Chase* v. *Winans*, 59 Md. 475; *Pidcock* v. *Potter*, 68 Pa. St. 342; *State* v. *Hayden*, 51 Vt. 296; *Rice* v. *Rice*, 50 Mich. 448; *Baughman* v. *Baughman*, 32 Kan. 538; *People* v. *Wreden*, 59 Cal. 392. In New York this is not permissible, but the witness may testify to acts and declarations known or observed by him, and characterize them as rational or irrational. *Holcomb* v. *Holcomb*, 95 N. Y. 316. And so in Massachusetts testimony of opinion as to general soundness or unsoundness of mind is not received from non-experts, but the questions to a witness which have been held allowable border very closely upon such an inquiry. *May* v. *Bradlee*, 127 Mass. 414; *Comm.* v. *Brayman*, 136 Mass. 438. (3) So generally the opinions of non-experts, when based upon facts known and observed by them, are admissible as to many matters upon which men in general, without expert training, are competent to form a reliable opinion. If only the facts upon which such opinions were based could be stated to the jury, such facts could not usually be described so perfectly as to enable the jury to form a just conclusion from them. Such testimony of opinion is received as to a person's identity (*State* v. *Dickson*, 78 Mo. 438; *People* v. *Rolfe*, 61 Cal. 540); a person's age (*Comm.* v. *O'Brien*, 134 Mass. 198; *De Witt* v. *Barly*, 17 N. Y. 340, 344); whether a person was drunk or sober (*Comm.* v. *Dowdican*, 114 Mass. 257; *Castner* v. *Sliker*, 33 N. J. L. 507; *People* v. *Eastwood*, 14 N. Y. 562); sick or well (*City of Phila.* v. *Gilmartin*, 71 Pa. St. 161; *Elliott* v. *Van Buren*, 33 Mich. 49; *Higbee* v. *Life Ins. Co.*, 53 N. Y. 603; but not as to the nature of a sickness, *Shawneetown* v. *Mason*, 82 Ill. 337); nervous, or calm, or excited (*Dimick* v. *Downs*, 82 Ill. 570); that a person had good eyesight (*Adams* v. *People*, 63 N. Y. 621); that a horse was frightened (*Darling* v. *Westmoreland*, 52 N. H. 401); and many like matters. See many illustrations given in *Sydleman* v. *Beckwith*, 43 Ct. 9; *Hardy* v. *Merrill*, 56 N. H. 227; *Comm.* v. *Sturtivant*, 117 Mass. 122; see Illustrations (*d*) and (*e*).]

pressed by the letters which they addressed to him in his lifetime, are deemed to be irrelevant.[1]

(*b*) [An action is brought to recover damages for a tort or breach of contract. The opinions of witnesses as to the amount of damage sustained by the plaintiff from the act complained of are deemed to be irrelevant. The jury are to estimate the damages from the *facts* proved.][2]

(*c*) [The question is which of two deeds convey a greater right. A witness cannot be examined as to his opinion upon this point][3]

(*d*) [In an action for breach of promise of marriage the question is whether the plaintiff was sincerely attached to the defendant.

Witnesses who lived with the plaintiff during the courtship and observed her deportment may give in evidence their opinions upon this question.][4]

(*e*) [The question is, upon a trial for murder, whether certain hairs are human hairs and like the hair of the deceased.

Witnesses, who knew the deceased, may state their opinions on this point, though they are not experts.][5]

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[1] *Wright* v. *Doe* d. *Tatham*, 7 A. & E. 313; [as to this case, see *Conn. Ins. Co.* v. *Lathrop*, 111 U. S. 612, 622; *People* v. *Montgomery*, 13 Abb. Pr. (N. S.) 207, 249.]

[2] [*Morehouse* v. *Mathews*, 2 N. Y. 514; *Bissell* v. *West*, 35 Ind. 54; *Cleveland, etc. R. Co.* v. *Ball*, 5 O. St. 568. But evidence of opinion as to the value of houses, lands, chattels, medical, legal, or other services, etc., is commonly received from persons having special knowledge and experience concerning such matters. *Hills* v. *Home Ins. Co.*, 129 Mass. 345; *Pittsburgh, etc. R. Co.* v. *Robinson*, 95 Pa. St. 426; *Whiton* v. *Snyder*, 88 N. Y. 299; *Whitney* v. *Thacher*, 117 Mass. 523; *Reynolds* v. *Robinson*, 64 N. Y. 589. This is commonly regarded as expert testimony, though it has been said that it is not such, strictly speaking, as respects the value of property. *Swan* v. *Middlesex*, 101 Mass. 173.

Evidence of opinion has been received as to the value of land both before and after an injury thereto, or a taking therefrom by eminent domain. *Sexton* v. *N. Bridgewater*, 116 Mass. 200; *Carter* v. *Thurston*, 58 N. H. 104; *East Pa. R. Co.* v. *Hottenstine*, 47 Pa. St. 28. This is much the same as giving an opinion as to damages in such cases. *Snow* v. *B. & M. R. Co.*, 65 Me. 230.].

[3] [*Bennett* v. *Clemence*, 6 Allen, 10.]

[4] [*McKee* v. *Nelson*, 4 Cow. 355.]

[5] [*Comm.* v. *Dorsey*, 103 Mass. 412.]

ARTICLE 49.

OPINIONS OF EXPERTS ON POINTS OF SCIENCE OR ART.

When there is a question as to any point of science or art, the opinions upon that point of persons specially skilled in any such matter are deemed to be relevant facts.

Such persons are hereinafter called experts.

The words "science or art" include all subjects on which a course of special study or experience is necessary to the formation of an opinion,[1] and amongst others the examination of handwriting.

When there is a question as to a foreign law, the opinions of experts who in their profession are acquainted with such law are the only admissible evidence thereof, though such experts may produce to the Court books which they declare to be works of authority upon the foreign law in question, which books the Court, having received all necessary explanations from the expert, may construe for itself.[2]

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[1] 1 S. L. C. 555, 7th ed. (note to *Carter* v. *Bochm*); 28 Vict. c. 18, s. 18. [Gr. Ev. i. § 440; *Spring Co.* v. *Edgar*, 99 U. S. 645, 657; *Jones* v. *Tucker*, 41 N. H. 546; *Coyle* v. *Comm.*, 104 Pa. St. 117; *Muldowney* v. *Ill. Cen. R. Co.*, 36 Ia. 462; *Ferguson* v. *Hubbell*, 97 N. Y. 507. An expert may not only testify to opinions, but may state general facts which are the result of scientific knowledge. *Emerson* v. *Lowell Gas Co.*, 6 Allen, 146. But the opinions of experts are not admissible upon matters of common knowledge. As these are within common observation and experience, the jurors are deemed qualified to judge without expert aid. *Ferguson* v. *Hubbell*, supra; *Milwaukee R. Co.* v. *Kellogg*, 94 U. S. 469; *Franklin Ins. Co.* v. *Gruver*, 100 Pa. St. 266; *Luce* v. *Dorchester Ins. Co.*, 105 Mass. 297; *Knoll* v. *State*, 55 Wis. 249; see Illustrations (*g*) and (*h*). Nor, in general, is expert testimony received as to the very point in issue in the case. *Seymour* v. *Fellows*, 77 N. Y. 180; *Buxton* v. *Somerset Works*, 121 Mass. 446; *Noonan* v. *State*, 55 Wis. 258; *Hughes* v. *Muscatine*, 44 Ia. 672.]

[2] *Baron de Bode's Case*, 8 Q. B. 250–267; *Di Sora* v. *Phillipps*, 10 H. L. 624; *Castrique* v. *Imrie*, L. R. 4 E. & I. App. 434; see, too, *Picton's*

It is the duty of the judge to decide, subject to the opinion of the Court above, whether the skill of any person in the mat-

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Case, 30 S. T. 510-511. [That the *unwritten* or common law of other States or countries may be proved by expert testimony is well settled in this country (*Mowry* v. *Chase*, 100 Mass. 79; *Ennis* v. *Smith*, 14 How. (U. S.) 400; In re *Roberts' Will*, 8 Pai. 446), and is often declared in statutes, which also generally provide that in proving the common law of another State or Territory in the U. S., the books of reports of cases may be given in evidence. See *e.g.*, N. Y. Code Civ. Pr. § 942; Maine Rev. St., c. 82, §§ 108, 109; Mass. Pub. St., c. 169, §§ 72, 73. Sometimes the latter provision is also extended to the law of foreign countries. Id.; see *The Parrashick*, 2 Low. 142.

In proof of foreign *written* law, expert evidence is deemed admissible in some States, either with or without a copy of such law (*Barrows* v. *Downs*, 9 R. I. 446; *Hall* v. *Costello*, 48 N. H. 176); but sometimes statutes provide that such evidence may be rejected, unless accompanied by such a copy. *Pierce* v. *Indseth*, 106 U. S. 546; see statutes *supra*. But other modes of proof are also in common use, as by an officially printed volume of the law or a duly authenticated copy (see Art. 84, *post*). This is the generally established mode of proving the statute law of Congress or of the sister States (see Art. 81, *post*). But an expert may testify as to the official or authoritative character of the printed volume, etc. *Pacific Gas Co.* v. *Wheelock*, 80 N. Y. 278; *Hynes* v. *McDermott*, 82 N. Y. 54; *Spaulding* v. *Vincent*, 24 Vt. 501.

The expert is usually a lawyer, but the testimony of other persons acquainted with the law may be received in proper cases. *Van der Donck* v. *Thellusson*, 8 C. B. 812; *Pickard* v. *Baily*, 26 N. H. 152; *Amer. Life Ins. Co.* v. *Rosenagle*, 77 Pa. St. 507.

Evidence of the foreign law must be first introduced in the trial court, not in the appellate court. The question what the foreign law is is usually deemed a question of fact, unless it involves merely the construction of a written statute or judicial opinion, when it is a question of law. *Hackett* v. *Potter*, 135 Mass. 349; *Dainese* v. *Hall*, 91 U. S. 13. In the absence of proof of the foreign law or that of another State, the law of the *forum* is usually applied (*Savage* v. *O'Neil*, 44 N. Y. 298; *Robards* v. *Marley*, 80 Ind. 185; *Marsters* v. *Lash*, 61 Cal. 622); but whether the statute law of the *forum* will be applied, or only the common law, see *Carpenter* v. *G. T. R. Co.*, 72 Me. 388; *Harris* v. *White*, 81 N. Y. 532, 544; *Rogers* v. *Zook*, 86 Ind. 237; *Neese* v. *Farmers' Ins. Co.*, 55 Ia. 604; see Art. 58, note, *post*.]

ter on which evidence of his opinion is offered is sufficient to entitle him to be considered as an expert.[1]

The opinion of an expert as to the existence of the facts on which his opinion is to be given is irrelevant, unless he perceived them himself.[2]

Illustrations.

(*a*) The question is, whether the death of A was caused by poison.

[1] *Bristow* v. *Sequeville*, 6 Ex. 275; *Rowley* v. *L. & N. W. Railway*, L. R. 8 Ex. 221. *In the Goods of Bonelli*, L. R. 1 P. D. 69. [*Nelson* v. *Ins. Co.*, 71 N. Y. 453; *Perkins* v. *Stickney*, 132 Mass. 217; *D. & C. Towboat Co.* v. *Starrs*, 69 Pa. St. 36. The witness need not be still in the practice of his profession, etc. *Roberts* v. *Johnson*, 58 N. Y. 613.

The opinion of an expert is admissible though he has no personal knowledge of the facts of the case. But in the question asking his opinion, the facts, as counsel claim them to exist, should then be stated in *hypothetical form;* and in framing the question, counsel may assume such a state of facts as the evidence fairly tends to justify (*Stearns* v. *Field*, 90 N. Y. 640; *Jewett* v. *Brooks*, 134 Mass. 505; *Pidcock* v. *Potter*, 68 Pa. St. 127); but in cross-examination counsel need not be so restricted. *People* v. *Augsbury*, 97 N. Y. 501. This rule applies even though the witness has heard the evidence of the facts as given by prior witnesses, if the facts are controverted or doubtful. *Guiterman* v. *Liverpool, etc. St. Co.*, 83 N. Y. 358; *Dexter* v. *Hall*, 15 Wall. 9; *Coyle* v. *Comm.*, 104 Pa. St. 117; *Woodbury* v. *Obear*, 7 Gray, 467. But in some cases, as where the facts are not in dispute, or the evidence heard is clear and plain and not difficult to bear in mind, the expert may be asked his opinion upon what he has heard, without a full hypothetical statement of the facts. *Seymour* v. *Fellows*, 77 N. Y. 178; *Hunt* v. *Lowell Gas Co.*, 8 Allen, 169; *State* v. *Klinger*, 46 Mo. 224; *State* v. *Hayden*, 51 Vt. 296; see *Olmsted* v. *Gere*, 100 Pa. St. 127. And where the expert bases his opinion upon his knowledge of the facts, a hypothetical case need not be stated. *Mercer* v. *Vose*, 67 N. Y. 56; *Bellefontaine, etc. R. Co.* v. *Bailey*, 11 O. St. 333.]

[2] 1 Ph. 507; T. E. s. 1278. [*Carpenter* v. *Eastern Trans. Co.*, 71 N. Y. 574; *Kempsey* v. *McGinnis*, 21 Mich. 123; so his opinion is not received as to the effect of the evidence in establishing controverted facts. *Hunt* v. *Lowell Gas Co.*, 8 Allen, 169; see *Priest* v. *Groton*, 103 Mass. 530. Nor is a witness's opinion received as to a matter of legal or moral obligation. Gr. Ev. i. § 441.]

The opinions of experts as to the symptoms produced by the poison by which A is supposed to have died, are deemed to be relevant.[1]

(*b*) The question is, whether A, at the time of doing a certain act, was, by reason of unsoundness of mind, incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law.

The opinions of experts upon the question whether the symptoms exhibited by A commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of knowing the nature of the acts which they do, or of knowing that what they do is either wrong or contrary to law, are deemed to be relevant [2]

(*c*) The question is, whether a certain document was written by A. Another document is produced which is proved or admitted to have been written by A.

The opinions of experts on the question whether the two documents were written by the same person, or by different persons, are deemed to be relevant.[3]

(*d*) The opinions of experts on the questions, whether in Illustration (*a*), A's death was in fact attended by certain symptoms ; whether in Illustration (*b*), the symptoms from which they infer that A was of unsound mind existed ; whether in Illustration (*c*), either or both of the documents were written by A, are deemed to be irrelevant.[4]

(*e*) [The question is, whether certain blood-stains have been caused by human blood or by the blood of animals.

The opinion of an expert that some of the stains are of the one sort and some of the other is deemed to be relevant.[5]

But a non-expert may give evidence that stains freshly made are caused by blood.] [6]

(*f*) [The question is, whether certain circumstances affecting property insured are material to the risk.

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[1] *R.* v. *Palmer* (*passim*). See my 'Gen. View of Crim. Law,' 357. [*Stephens* v. *People*, 4 Park. Cr. 396.]

[2] *R.* v. *Dove* (*passim*). Gen. View Crim. Law, 391. [See *People* v. *Lake*, 12 N. Y. 358 ; *State* v. *Hayden*, 51 Vt. 296.]

[3] 28 Vict. c. 18, s. 8 ; [see Art. 52, and note.]

[4] [But that an expert may testify that the disputed document was written by A, see *Costello* v. *Crowell*, 133 Mass. 352 ; see Art. 52.]

[5] [*Linsday* v. *People*, 63 N. Y. 143, 147, 156.]

[6] [*Greenfield* v. *People*, 85 N. Y. 75 ; in *McLain* v. *Comm.*, 99 Pa. St. 86, it was even held that a non-expert might testify that stains were made by human blood, and that, too, though the stains were not freshly made.]

The opinions of experts upon the materiality of these circumstances are deemed to be relevant, except in cases where an ordinary jury would be capable of determining the question.][1]

(*g*) [The question is, whether a railway train stopped long enough at a station to enable passengers to get off.

The opinion of an expert upon this question is deemed to be irrelevant.][2]

(*h*) [The question is, on a trial for murder, whether a certain piece of paper has the appearance of wadding shot from a gun.

The opinion of an expert upon this point is deemed to be irrelevant.][3]

ARTICLE 50.

FACTS BEARING UPON OPINIONS OF EXPERTS.

Facts, not otherwise relevant, are deemed to be relevant if they support or are inconsistent with the opinions of experts, when such opinions are deemed to be relevant.[4]

Illustrations.

(*a*) The question is, whether A was poisoned by a certain poison.

The fact that other persons, who were poisoned by that poison, exhibited certain symptoms which experts affirm or deny to be the symptoms of that poison, is deemed to be relevant.[5]

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[1] [*Cornish* v. *Farm, etc. Ins. Co.*, 74 N. Y. 295; *Daniels* v. *Hudson River Ins. Co.*, 12 Cush. 416; *Hartman* v. *Keystone Ins. Co.*, 21 Pa. St. 466; but the cases are not all agreed on this point; see *Lyman* v. *State, etc. Ins. Co.*, 14 Allen, 329; *Joyce* v. *Maine Ins. Co.*, 45 Me. 168; Kent's Comm., iii. 285.]

[2] [*Keller* v. *N. Y. C. R. Co.*, 2 Abb. Dec. 480; see *Milwaukee R. Co.* v. *Kellogg*, 94 U. S. 469.]

[3] [*Manke* v. *People*, 17 Hun, 410; 78 N. Y. 611.]

[4] [*Lincoln* v. *Taunton Mf'g Co.*, 9 Allen, 181; *Booth* v. *Cleveland Mill Co.*, 74 N. Y. 15; *Tilton* v. *Miller*, 66 Pa. St. 388; cf. *Doyle* v. *N. Y. Infirmary*, 80 N. Y. 631; *Olmsted* v. *Gere*, 100 Pa. St. 127.]

[5] *R.* v. *Palmer*, printed trial, p. 124, etc. In this case (tried in 1856) evidence was given of the symptoms attending the deaths of Agnes Senet, poisoned by strychnine in 1845, Mrs. Serjeantson Smith, similarly poisoned in 1848, and Mrs. Dove, murdered by the same poison subsequently to the death of Cook, for whose murder Palmer was tried,

(*b*) The question is, whether an obstruction to a harbor is caused by a certain bank. An expert gives his opinion that it is not.

The fact that other harbors similarly situated in other respects, but where there were no such banks,[1] began to be obstructed at about the same time, is deemed to be relevant.

ARTICLE 51.

OPINION AS TO HANDWRITING, WHEN DEEMED TO BE RELEVANT.

When there is a question as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the supposed writer that it was or was not written or signed by him, is deemed to be a relevant fact.[2]

A person is deemed to be acquainted with the handwriting of another person when he has at any time seen that person write,[3] or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority, and addressed to that person,[4] or

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[1] *Foulkes* v. *Chadd*, 3 Doug. 157; [cf. *Hawks* v. *Charlemont*, 110 Mass. 110.]

[2] [For a valuable article on this subject, see Am. Law Rev., xvi. 569.]

[3] [Having seen him write once is enough; this affects the weight, not the competency, of the testimony. *Hammond* v. *Varian*, 54 N. Y. 398; *Comm.* v. *Nefus*, 135 Mass. 533; *McNair* v. *Comm.*, 26 Pa. St. 388. So a person's mark may be proved in this way. *Strong's Exers.*, 17 Ala. 706; *Fagg* v. *Dennis*, 3 Humph. 47; *Jackson* v. *Van Dusen*, 5 Johns. 144; contra, *Shinkle* v. *Crock*, 17 Pa. St. 159. But a person who sees another write, or examines his handwriting, expressly for the purpose of being able to testify, is, in general, an incompetent witness. *Reese* v. *Reese*, 90 Pa. St. 89; *Board of Trustees* v. *Nusenheimer*, 78 Ill. 22; *Hynes* v. *McDermott*, 82 N. Y. 41, 53. A witness may testify as to handwriting who cannot read or write himself. *Foye* v. *Patch*, 132 Mass. 105.]

[4] [*Chaffee* v. *Taylor*, 3 Allen, 598; *Clark* v. *Freeman*, 25 Pa. St. 133; *Cunningham* v. *Hudson River Bk.*, 21 Wend. 557; *Empire Mf'g Co.* v. *Stuart*, 46 Mich. 482. But this is sometimes not sufficient authentication. *McKeone* v. *Barnes*, 108 Mass. 344. So if the witness has received letters

when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him.[1]

Illustration.

The question is, whether a given letter is in the handwriting of A, a merchant in Calcutta.

B is a merchant in London, who has written letters addressed to A, and received in answer letters purporting to be written by him. C is B's clerk, whose duty it was to examine and file B's correspondence. D is B's broker, to whom B habitually submitted the letters purporting to be written by A for the purpose of advising with him thereon.

The opinions of B, C, and D on the question whether the letter is in the handwriting of A are relevant, though neither B, C, nor D ever saw A write.[2]

The opinion of E, who saw A write once twenty years ago, is also relevant.[3]

ARTICLE 52.

COMPARISON OF HANDWRITINGS.

Comparison of a disputed handwriting with any writing proved to the satisfaction of the judge to be genuine is per-

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or other writings of a person, who has afterwards, by words or acts, acknowledged their genuineness (Gr. Ev. i. § 577; *Johnson* v. *Daverne*, 19 Johns. 134; *Snyder* v. *McKeever*, 10 Bradw. 188); but not if he has only seen letters to strangers, purporting to be those of the person in question. *Phila. etc. R. Co.* v. *Hickman*, 28 Pa. St. 318; *Nunes* v. *Perry*, 113 Mass. 275]

[1] See Illustration; [*Titford* v. *Knott*, 2 Johns. Cas. 211; *Comm.* v. *Smith*, 6 S. & R. 568. Thus public officers who have seen many official documents filed in their office, having the signature of a certain justice, may testify as to an alleged signature of his. *Rogers* v. *Ritter*, 12 Wall. 317; *Amherst Bk.* v. *Root*, 2 Met. 522; *Sill* v. *Reese*, 47 Cal. 294. As to signatures upon ancient writings, a person may testify who has gained his knowledge by inspecting other ancient authentic documents bearing the same signature. *Jackson* v. *Brooks*, 8 Wend. 426, 15 id. 111.]

[2] *Doe* v. *Suckermore*, 5 A. & E. 705 (Coleridge, J.); 730 (Patteson, J.); 739-40 (Denman, C. J.).

[3] *R.* v. *Horne Tooke*, 25 S. T. 71-2; [see *Brachmann* v. *Hall*, 1 Disney, 539.]

mitted to be made by witnesses, and such writings, and the evidence of witnesses respecting the same, may be submitted to the Court and jury as evidence of the genuineness or otherwise of the writing in dispute. This paragraph applies to all courts of judicature, criminal or civil. and to all persons having by law, or by consent of parties, authority to hear, receive, and examine evidence.[1]

[1] 17 & 18 Vict. c. 125, s. 27; 28 Vict. c. 18, s. 8. [There are diverse rules on this subject in different States. A rule substantially like the English rule prevails in all the New England States, in New York, New Jersey, Mississippi, Texas, Ohio, Iowa, and Kansas. *Woodman* v. *Dana*, 52 Me. 9; *State* v. *Hastings*, 53 N. H. 452, but here the *jury* judge whether the writing used as a standard is genuine; *State* v. *Ward*, 39 Vt. 225; *Costello* v. *Crowell*, 133 Mass. 352; Pub. St. R. I., c. 214, § 42; *Tyler* v. *Todd*, 36 Ct. 218; *Peck* v. *Callaghan*, 95 N. Y. 73; Laws of 1880, N. Y. c. 36; N. J. Rev., p. 381; *Koons* v. *State*, 36 O. St. 195; *Singer Mf'g. Co.* v. *McFarland*, 53 Ia. 540; *Macomber* v. *Scott*, 10 Kan. 335. But in many States, collateral and irrelevant writings cannot be introduced for comparison (*Williams* v. *State*, 61 Ala. 33; *First Nat. Bank* v. *Robert*, 41 Mich. 709; *Hazleton* v. *Union Bank*, 32 Wis. 34; *State* v. *Clinton*, 67 Mo. 380; *Brobston* v. *Cahill*, 64 Ill. 356; *Burress' Case*, 27 Gratt. 946; *Herrick* v. *Swomley*, 56 Md. 439; *Hawkins* v. *Grimes*, 13 B. Mon. 260; *Yates* v. *Yates*, 76 N. C. 143; so in the Federal Courts, *U. S.* v. *Jones*, 20 Blatch. 235); generally, however, in these States genuine writings properly in evidence in the case may be used for comparison by the jury, and in a number of them such comparison may be made by experts to aid the jury. (Id.) In Indiana comparison may be made by experts with writings admitted to be genuine. *Shorb* v. *Kinzie*, 80 Ind. 500. In Pennsylvania comparison with writings proved to be genuine may be made by the jury as corroborative evidence, but not by experts. *Berryhill* v. *Kirchner*, 96 Pa. St. 489. See this general subject fully treated in Am. Law Rev. xvii. 21; Gr. Ev. i. §§ 576-582.

A person's signature or other writing made in court at the trial will not generally be allowed to be used for comparison. *Comm.* v. *Allen*, 128 Mass. 46; *Gilbert* v. *Simpson*, 6 Daly, 29; *Williams* v. *State*, 61 Ala. 33. But this is sometimes permitted upon cross-examination, or when the writing is made at the request of the opposite party who offers it for comparison. *Chandler* v. *Le Barron*, 45 Me. 534; *Bronner* v. *Loomis*, 14 Hun, 341; *King* v. *Donahue*, 110 Mass. 155.

Letterpress copies cannot be used for comparison. *Cohen* v. *Teller*,

ARTICLE 53.

OPINION AS TO EXISTENCE OF MARRIAGE, WHEN RELEVANT.

When there is a question whether two persons are or are not married, the facts that they cohabited and were treated by others as man and wife are deemed to be relevant facts, and to raise a presumption that they were lawfully married, and that any act necessary to the validity of any form of marriage which may have passed between them was done; but such facts are not sufficient to prove a marriage in a prosecution for bigamy or in proceedings for a divorce, or in a petition for damages against an adulterer.[1]

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93 Pa. St. 123; *Comm.* v. *Eastman*, 1 Cush. 189. But photographic copies may be, when the originals are also before the court. *Hynes* v. *McDermott*, 82 N. Y. 41; *Marcy* v. *Barnes*, 16 Gray, 162; but see *Tome* v. *Parkersburgh, etc. R. Co.*, 39 Md. 36.

Experts in handwriting may also testify to other matters; as *e.g.*, whether a writing is forged or altered, when a writing was probably made, etc. *Travis* v. *Brown*, 43 Pa. St. 9; *Withee* v. *Rowe*, 45 Me. 571.]

[1] *Morris* v. *Miller*, 4 Burr. 2057; *Birt* v. *Barlow*, 1 Doug. 170; and see *Catherwood* v. *Caslon*, 13 M. & W. 261. Compare *R.* v. *Mainwaring*, Dear. & B. 132. See, too, *De Thoren* v. *A. G.*, L. R. 1 App. Cas. 686; *Piers* v. *Piers*, 2 H. & C. 331. Some of the references in the report of *De Thoren* v. *A. G.* are incorrect. This article was not expressed strongly enough in the former editions. [*Hynes* v. *McDermott*, 91 N. Y. 451; *Greenawalt* v. *McEnelley*, 85 Pa. St. 352; *Maryland* v. *Baldwin*, 112 U. S 490; *Proctor* v. *Bigelow*, 38 Mich. 282; *Barnum* v. *Barnum*, 42 Md. 251; Mass. Pub. St., c. 145, s. 31. Such evidence of repute, etc., has been deemed sufficient in bastardy proceedings (*State* v. *Worthingham*, 23 Minn. 528), but not in prosecutions for bigamy, incest, adultery, loose and lascivious cohabitation, nor in actions for criminal conversation. *Hayes* v. *People*, 25 N. Y. 390; *State* v. *Roswell*, 6 Ct. 446; *State* v. *Hodgskins*, 19 Me. 155; *Dann* v. *Kingdom*, 1 T. & C. 492; *Comm.* v. *Littlejohn*, 15 Mass. 163; *Hutchins* v. *Kimmel*, 31 Mich. 126. But in some States it is deemed sufficient in divorce suits. Bishop, M. & D. ii. §§ 268, 274, 6th Ed.; see *Collins* v. *Collins*, 80 N. Y. 10.

A marriage may generally be proved by admissions. *Miles* v. *State*, 103 U. S. 304; *Womack* v. *Tankersley*, 78 Va. 242.]

ARTICLE 54.

GROUNDS OF OPINION, WHEN DEEMED TO BE RELEVANT.

Whenever the opinion of any living person is deemed to be relevant, the grounds on which such opinion is based are also deemed to be relevant.[1]

Illustration.

An expert may give an account of experiments performed by him for the purpose of forming his opinion.[2]

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[1] [*Hawkins* v. *Fall River*, 119 Mass. 94.]

[2] [*Eidt* v. *Cutler*, 127 Mass. 522; *Sullivan* v. *Comm.*, 93 Pa. St. 284; *Linsday* v. *People*, 63 N. Y. 143, 156; *People* v. *Morgan*, 29 Mich. 5.]

CHAPTER VI.*

CHARACTER, WHEN DEEMED TO BE RELEVANT AND WHEN NOT.

ARTICLE 55.

CHARACTER GENERALLY IRRELEVANT.

THE fact that a person is of a particular character is deemed to be irrelevant to any inquiry respecting his conduct, except in the cases mentioned in this chapter.

ARTICLE 56.

EVIDENCE OF CHARACTER IN CRIMINAL CASES.

In criminal proceedings, the fact that the person accused has a good character, is deemed to be relevant;[1] but the fact that he has a bad character is deemed to be irrelevant, unless it is itself a fact in issue, or unless evidence has been given that he has a good character, in which case evidence that he has a bad character is admissible.[2]

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* See Note XXV.

[1] [*Stover* v. *People*, 56 N. Y. 315; *Heine* v. *Comm.*, 91 Pa. St. 145. It is generally held that the proof must be of good character in respect to the trait involved in the charge. *People* v. *Fair*, 43 Cal. 137; *State* v. *Bloom*, 68 Ind. 54; *Griffin* v. *State*, 14 O. St. 56; *State* v. *King*, 78 Mo. 555; see *Cancemi* v. *People*, 16 N. Y. 501; Gr. Ev. iii. § 25. Such evidence is now generally received, whether the evidence to show the prisoner's guilt be direct or circumstantial. Id.; *Remsen* v. *People*, 43 N. Y. 6; *State* v. *Rodman*, 62 Ia. 456; *People* v. *Mead*, 50 Mich. 228.]

[2] [*People* v. *White*, 14 Wend. 111; *State* v. *Lapage*, 57 N. H. 245; *People* v. *Fair*, 43 Cal. 137. For additional rules in criminal cases, see Art. 134, *post;* Art. 7, note 2, *ante.*]

[1] In this article the word "character" means reputation as distinguished from disposition, and evidence may be given only of general reputation and not of particular acts by which reputation or disposition is shown.[2]

ARTICLE 57.

CHARACTER AS AFFECTING DAMAGES.

In civil cases, the fact that the character of any party to the action is such as to affect the amount of damages which he ought to receive, is generally deemed to be irrelevant.[3]

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[1] [Just before this last paragraph, Mr. Stephen inserts in this article the following special statutory rules of the English law:

"When any person gives evidence of his good character who—

Being on his trial for any felony not punishable with death, has been previously convicted of felony;

Or who, being upon his trial for any offence punishable under the Larceny Act, 1861, has been previously convicted of any felony, misdemeanor, or offence punishable upon summary conviction;

Or who, being upon his trial for any offence against the Coinage Offences Act, 1861, or any former Act relating to the coin, has been previously convicted of any offence against any such Act;

The prosecutor may, in answer to such evidence of good character, give evidence of any such previous conviction, before the jury return their verdict for the offence for which the offender is being tried. (7 & 8 Geo. IV. c. 28, s. 11, amended by 6 and 7 Will. IV. c. 111. If 'not punishable with death' means not so punishable at the time when 7 & 8 Geo. IV. c. 28 was passed (21 June 1827), this narrows the effect of the article considerably; 24 & 25 Vict. c. 96, s. 116; c. 99, s. 37.)"]

[2] *R.* v. *Rowton*, 1 L. & C. 520. *R.* v. *Turberfield*, 1 L. & C. 495, is a case in which the character of a prisoner became incidentally relevant to a certain limited extent. [*Comm.* v. *O'Brien*, 119 Mass. 342; *Snyder* v. *Comm.*, 85 Pa. St. 519; *State* v. *Lapage*, 57 N. H. 245; the reputation of a person must be that in his own community. *Conkey* v. *People*, 1 Abb. Dec. 418.]

[3] In 1 Ph. Ev. 504, etc., and T. E. s. 333, all the cases are referred to. The most important are —— v. *Moor*, 1 M. & S. 284, which treats the evidence as admissible, though perhaps it does not absolutely affirm the

proposition that it is so; and *Jones* v. *Stevens*, 11 Price, 235, see especially pp. 266, 268, which decides that it is not. [The latest case is *Scott* v. *Sampson*, cited *post* in this note.] The question is now rendered comparatively unimportant, as the object for which such evidence used to be tendered can always be obtained by cross-examining the plaintiff to his credit.

[Evidence of a party's character is generally incompetent in civil actions (Gr. Ev. i. § 55; Wh. Ev. i. § 47). Thus in an action for assault and battery, the plaintiff's bad character cannot be proved (*Corning* v. *Corning*, 6 N. Y. 97; *Bruce* v. *Priest*, 5 Allen, 100), nor the defendant's good character (*Brown* v. *Evans*, 17 F. R. 912; *Elliott* v. *Russell*, 92 Ind. 526); nor the plaintiff's bad repute in an action for the seduction of his daughter (*Dain* v. *Wyckoff*, 18 N. Y. 45); nor that of a party to a note in an action thereon (*Battles* v. *Laudenslager*, 84 Pa. St. 446); nor the defendant's character for care and prudence in an action for negligence. *Tenney* v. *Tuttle*, 1 Allen, 185; *Hays* v. *Millar*, 77 Pa. St. 238. So evidence of the defendant's good character is not admissible in his behalf in a civil action, even though he be charged with fraud (*Gough* v. *St. John*, 16 Wend. 646; *Boardman* v. *Woodman*, 47 N. H. 120; *Simpson* v. *Westenberger*, 28 Kan. 756); nor generally can the good character of any party or person interested in the action be shown, except in answer to impeaching evidence from the other side. *Pratt* v. *Andrews*, 4 N. Y. 493; *Chubb* v. *Gsell*, 34 Pa. St. 114; see *Mosley* v. *Ins. Co.*, 55 Vt. 142.

But in some cases the question of character is involved in the nature of the action, and evidence of general reputation is received. Thus in actions for libel or slander, evidence may be given of the plaintiff's general bad reputation, in mitigation of damages (*Hamer* v. *McFarlin*, 4 Den. 509; *Drown* v. *Allen*, 91 Pa. St. 393; *Bathrick* v. *Detroit Post Co.*, 50 Mich. 629; Gr. Ev. ii. § 424; and now in England this doctrine is approved, *Scott* v. *Sampson*, 8 Q. B. D. 491); but not that reports were in circulation charging him with the act imputed (*Kennedy* v. *Gifford*, 19 Wend. 296; *Pease* v. *Shippen*, 80 Pa. St. 513; *Mahoney* v. *Belford*, 132 Mass. 393; *Scott* v. *Sampson*, supra; contra, *Case* v. *Marks*, 20 Ct. 248), at least if the defendant did not know of such reports when he made the charge (*Hatfield* v. *Lasher*, 81 N. Y. 246; *Lothrop* v. *Adams*, 133 Mass. 471); nor can particular acts of misconduct be proved (*McLaughlin* v. *Conley*, 131 Mass. 70; *Scott* v. *Sampson*, supra); nor can the defendant prove his own bad character. *Hastings* v. *Stetson*, 130 Mass. 76. So in an action for malicious prosecution, plaintiff's general bad repute may be shown to reduce the damages (*Gregory* v. *Chambers*, 78 Mo. 294; *Fitzgibbon* v. *Brown*, 43 Me. 169); and sometimes such evidence is received as affecting the existence of probable cause (Gr. Ev. ii. § 458). In actions

for criminal conversation, seduction, breach of promise of marriage, and indecent assault, the woman's bad reputation for chastity may be proved. *Van Storch* v. *Griffin*, 71 Pa. St. 240; *Paddock* v. *Salisbury*, 2 Cow. 811, 814; *Doubet* v. *Kirkman*, 15 Bradw. 622; *Hogan* v. *Cregan*, 6 Rob. 138; *Mitchell* v. *Work*, 13 R. I. 645; as to proof of specific acts of unchastity in such cases, see Id.; Art. 134, note, *post;* Gr. Ev. ii. §§ 56 and 579; as to rumors, see *Healy* v. *O'Sullivan*, 6 Allen, 114. As to proving the character of a witness, see Art. 133, *post.*

" Character " in this article and note means general reputation (except as otherwise stated). Usually the reputation proved concerns the particular trait involved in the cause of action (see cases *supra*), but sometimes evidence of general moral character is also received. *Clark* v. *Brown*, 116 Mass. 504, slander case; *Duval* v. *Davey*, 32 O. St. 604, 612; see *Root* v. *King*, 7 Cow. 613, 4 Wend. 113.]

PART II.

ON PROOF.

CHAPTER VII.

FACTS PROVED OTHERWISE THAN BY EVIDENCE—JUDICIAL NOTICE.

ARTICLE 58.*

OF WHAT FACTS THE COURT TAKES JUDICIAL NOTICE.

IT is the duty of all judges to take judicial notice of the following facts :—

(1) All unwritten laws, rules, and principles having the force of law administered by any Court sitting under the au-

* See Note XXVI.

[It is the duty of courts in this country to take judicial notice of the following facts :

(1) The common law and public statute law of their own State,[1]

[1] [*Shaw* v. *Tobias*, 3 N. Y. 188 ; *Unity* v. *Burrage*, 103 U. S. 447 ; so of the law merchant (*Reed* v. *Wilson*, 41 N. J. L. 29) ; of the charter of a municipal corporation, being a public statute (*Stier* v. *Oskaloosa*, 41 Ia. 353 ; *Winooski* v. *Gokey*, 49 Vt. 282 ; in some States all acts of incorporation are public laws, Mass. Pub. St., c. 169, § 68 ; *State* v. *McAllister*, 24 Me. 139) ; of the laws of the antecedent government when there has been a union or division of states or countries (*U. S.* v. *Perot*, 98 U. S. 428 ; *Stokes* v. *Macken*, 62 Barb. 145) ; but not of private statutes (*Tunlow* v. *P. & R. R. Co.*, 99 Pa. St. 284), unless, as often now happens, a special law authorizes it (*Railroad Co.* v. *Bank of Ashland*, 12 Wall. 226 ; see N. Y. Code Civ. Pr. § 530) ; nor of municipal ordinances. *Porter* v. *Waring*, 69 N. Y. 250 ; *Chicago, etc. R. Co.* v. *Klauber*, 9 Bradw. 613.]

thority of Her Majesty and her successors in England or Ireland, whatever may be the nature of the jurisdiction thereof.[1]

(2) All public Acts of Parliament,[1] and all Acts of Parliament whatever, passed since February 4, 1851, unless the contrary is expressly provided in any such Act.[2]

[1] Ph. Ev. 460–1; T. E. s. 4, and see 36 & 37 Vict. c. 66 (Judicature Act of 1873), s. 25.

[2] 13 & 14 Vict. c. 21, ss. 7, 8, and see (for date) caption of session of 14 & 15 Vict.

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but not the law of any other State or country;[1] but the judges of the Federal Courts take notice of the public laws of each State, when such laws are properly applicable to cases heard before them,[2] and, in like manner, general acts of Congress will be noticed in State courts.[3]

(2) The existence of the legislature, the time and place of its sessions, its usual course of proceeding, and the privileges of its members,[4] but not the transactions in its journals.[5]

(3) General customs observed in the transaction of business.[6]

[1] [*Monroe* v. *Douglas*, 5 N. Y. 447; see Art. 49, note 2, *ante;* but the laws of one State have been noticed in another in which acts or judgments based on such laws have been declared by its own laws or the laws of Congress to be valid. *Carpenter* v. *Dexter*, 8 Wall. 513; *Paine* v. *Ins. Co.*, 11 R. I. 411; *Ohio* v. *Hinchman*, 27 Pa. St. 479.]

[2] [*Lamar* v. *Micou*, 114 U. S. 218.]

[3] [*Kessel* v. *Albetis*, 56 Barb. 362; *Bird* v. *Comm.*, 21 Gratt. 800.]

[4] [Gr. Ev. i. § 6; *Coleman* v. *Dobbins*, 8 Ind. 156, 162. Thus the courts will notice which of two bodies of men is the rightful legislature, when each claims the right (Opinion of Justices, 70 Me. 609). The doings of the executive and legislative departments of the government will be noticed. Id., *Prince* v. *Skillin*, 71 Me. 361.]

[5] [*Grob* v. *Cushman*, 45 Ill. 119; *Burt* v. *Winona, etc. R. Co.*, 31 Minn. 472; *Coleman* v. *Dobbins*, 8 Ind. 156. But it is also held that the courts will take notice of such journals, in order to determine the validity of a statute. *People* v. *Mahaney*, 13 Mich. 481; *Division of Howard Co.*, 15 Kan. 194; *Moody* v. *State*, 48 Ala. 115; cf. *Gardner* v. *Collector*, 6 Wall. 499; but see *People* v. *Devlin*, 33 N. Y. 269.]

[6] [*Cameron* v. *Blackman*, 39 Mich. 108; *Merchants' Nat. Bank* v. *Hall*,

(3) The general course of proceeding and privileges of Parliament and of each House thereof, and the date and place of their sittings, but not transactions in their journals.[1]

(4) All general customs which have been held to have the force of law in any division of the High Court of Justice or by any of the superior courts of law or equity, and all customs

[1] Ph. Ev. 460; T. E. s. 5.

(4) The course of proceeding and all rules of practice in force in the court itself;[1] its own record books and entries therein;[2] the other courts established by law in the same State, their judges, extent of jurisdiction and course of proceeding;[3] and appellate courts will take judicial notice of the rules and methods of practice in inferior courts when reviewing their judgments or decrees.[4]

(5) The official *status* and signatures of officers of the court, as attorneys, clerks of court, etc.[5]

83 N. Y. 338. In this last case, the court took notice of the practice of banks to grant renewals of obligations upon payment of a new discount. See *American Nat. Bank* v. *Bushey*, 45 Mich. 135.]

[1] [Wh. Ev. i. § 324. The terms of court are noticed. *Kidder* v. *Blaisdell*, 45 Me. 461; *Rodgers* v. *State*, 50 Ala. 102. But not the pendency of another action in the same or another court. *Eyster* v. *Gaff*, 91 U. S. 521; *Lake Merced Co.* v. *Cowles*, 31 Cal. 215.]

[2] [*Fellers* v. *Lee*, 2 Barb. 488; *Robinson* v. *Brown*, 82 Ill. 279; see *Baker* v. *Mygatt*, 14 Ia. 131.]

[3] [*Comm.* v. *Desmond*, 103 Mass. 447; *Hatcher* v. *Rocheleau*, 18 N. Y. 86, 90; *Kennedy* v. *Comm.*, 78 Ky. 447; *Kilpatrick* v. *Comm.*, 31 Pa. St. 198. This last case holds that the superior courts will take notice who are the judges of the inferior state tribunals,—which by common law was a doubtful question. See Gr. Ev. i. § 6, note.]

[4] [*March* v. *Comm.*, 12 B. Mon. 25; *Contee* v. *Platt*, 9 Md. 67; but see *Cutter* v. *Caruthers*, 48 Cal. 178; *Cherry* v. *Baker*, 17 Md. 75. These matters are often now governed by statutes, which would be noticed under (1) *supra*.]

[5] [*People* v. *Nevins*, 1 Hill, 154; *Mackinnon* v. *Barnes*, 66 Barb. 91; *Hall* v. *Lawrence*, 21 La. Ann. 692; *Alderson* v. *Bell*, 9 Cal. 315. Thus the signature of an attorney, admitting service of papers, will be noticed. *Ripley* v. *Burgess*, 2 Hill, 360.]

which have been duly certified to and recorded in any such court.[1]

(5) The course of proceeding and all rules of practice in force in the Supreme Court of Justice. Courts of a limited or inferior jurisdiction take judicial notice of their own course of pro-

[1] The old rule was that each Court took notice of customs held by or certified to it to have the force of law. It is submitted that the effect of the Judicature Act, which fuses all the Courts together, must be to produce the result stated in the text. As to the old law, see *Piper* v. *Chappell*, 14 M. & W. 649-50. *Ex parte Powell, In re Matthews*, L. R. 1 Ch. D. 505-7, contains some remarks by Lord Justice Mellish as to proving customs till they come by degrees to be judicially noticed.

(6) The political constitution of their own government; the accession of the President of the United States or of the executive of the State, and their signatures;[1] the official *status* of the chief public officers of the United States or of the State, as *e.g.* cabinet officers, foreign ministers, senators, and the like,[2]—also of sheriffs and marshals (and their signatures)[3] but not of their deputies.[4]

(7) The existence and title of every State and sovereign recognized by the national government;[5] also their public seals when attached to public acts, decrees, judgments, or other official documents.[6]

[1] [*Yount* v. *Howell*, 14 Cal. 465; *Wells* v. *Company*, 47 N. H. 235, *State* v. *Williams*, 5 Wis. 308.]

[2] [*Major* v. *State*, 2 Sneed, 11; *York, etc. R. Co.* v. *Winans*, 17 How. (U. S.) 30; see *Brown* v. *Piper*, 91 U. S. 37, 42.]

[3] [*Thompson* v. *Haskell*, 21 Ill. 215; *Ingram* v. *State*, 27 Ala. 17. Some cases say that notice will be taken of all county officers (*Farley* v. *McConnell*, 7 Lans. 428; *Himmelmann* v. *Hoadley*, 44 Cal. 213), at least if the court sits therein. *Thielmann* v. *Burg*, 73 Ill. 293. So notice has been taken of justices and aldermen. *Fox* v. *Comm.* 81* Pa. St. 511.]

[4] [Gr. Ev. i. § 6; *Ward* v. *Henry*, 19 Wis. 76; contra, *Himmelmann* v. *Hoadley*, 44 Cal. 213.]

[5] [Gr. Ev. i. § 4; the recognition must be by the executive branch of the government, before the courts will take such judicial notice. *Gelston* v. *Hoyt*, 13 Johns. 561, 587, 3 Wheat. 249.]

[6] [*Lazier* v. *Westcott*, 26 N. Y. 146; *Griswold* v. *Pitcairn*, 2 Ct. 85; *Coit* v. *Milliken*, 1 Den. 376.]

cedure and rules of practice, but not of those of other courts of the same kind, nor does the Supreme Court of Justice take judicial notice of the course of procedure and rules of practice of such Courts.[1]

(6) The accession and (*semble*) the sign manual of Her Majesty and her successors.[2]

[1] 1 Ph. Ev. 462-3; T. E. s. 19. [2] 1 Ph. Ev. 458; T. E. ss. 16, 12.

(8) The law of nations;[1] foreign admiralty and maritime courts and their seals;[2] the seals of notaries public;[3] the seals of their own State and of the United States, and of the courts thereof which have seals;[4] but not the seals of foreign municipal courts or of foreign officers.[5]

(9) Public proclamations by the executive branch of the government, as of war, peace, amnesty, etc.,[6] treaties made with foreign countries;[7] executive decrees or messages of a public nature and ordinances of state;[8] days of general political elections.[9]

(10) The extent of territory included within their own State or with-

[1] [*The Scotia*, 14 Wall. 170.]

[2] [*Thompson* v. *Stewart*, 3 Ct. 171; *Mumford* v. *Bowne*, Anth. N. P. 56.]

[3] [*Pierce* v. *Indseth*, 106 U. S. 546; *Ashcraft* v. *Chapman*, 38 Ct. 230.]

[4] [*U. S.* v. *Amedy*, 11 Wheat. 392; *Delafield* v. *Hand*, 3 Johns. 310, 314; *Williams* v. *Wilkes*, 14 Pa. St. 228. The seal of a Federal Court will be noticed in other Federal Courts and in State courts. *Turnbull* v. *Payson*, 95 U. S. 418; *Adams* v. *Way*, 33 Ct. 419.]

[5] [*Delafield* v. *Hand*, supra; *Vandervoort* v. *Smith*, 2 Cai. 155; *Church* v. *Hubbart*, 2 Cr. 187. These rules are sometimes modified by statutory provisions, providing how foreign records shall be proved. See N. Y. Code Civ. Pr. §§ 952-956.]

[6] [*Armstrong* v. *U. S.*, 13 Wall. 154.]

[7] [*Lacroix Fils* v. *Sarrazin*, 15 F. R. 489.]

[8] [*Turner's Adm'r.*, 49 Ala. 406, 411; Wh. Ev. i. § 317; but not the orders of a military commander (*Burke* v. *Miltenberger*, 19 Wall. 519; but see *Canal Co.* v. *Templeton*, 20 La. Ann. 141); nor executive acts of a private nature, affecting persons not citizens. *Dole* v. *Wilson*, 16 Minn. 525.]

[9] [*State* v. *Minnick*, 15 Ia. 123.]

(7) The existence and title of every State and Sovereign recognized by Her Majesty and her successors.[1]

(8) The accession to office, names, titles, functions, and when attached to any decree, order, certificate, or other judicial or official documents, the signatures of all the judges of the Supreme Court of Justice.[2]

[1] 1 Ph. Ev. 460; T. E. s. 3.

[2] 1 Ph. 462; T. E. 19; and as to latter part, 8 & 9 Vict. c. 113, s. 2, as modified by 36 & 37 Vict. c. 66, s. 76 (Judicature Act of 1873).

in the national domain;[1] the civil divisions of the country or State, as into States, counties, cities, towns, etc.;[2] the relative positions of such divisions in the State, as that a city or town is in a certain county;[3] the chief geographical features of the State;[4] the existence of war against the United States;[5] other public matters directly concerning the general government of the State or country;[6] the existence of foreign countries and that they have a government and courts and a system of law like our own.[7] The Federal Courts take notice of the

[1] [Gr. Ev. i. § 6; *State* v. *Dunnell*, 3 R. I. 127.]

[2] [*Comm.* v. *Desmond*, 103 Mass. 445; *Chapman* v. *Wilber*, 6 Hill, 475; *Gooding* v. *Morgan*, 70 Ill. 275.]

[3] [*People* v. *Suppiger*, 103 Ill. 434; *State* v. *Powers*, 25 Ct. 48; *Vanderwerker* v. *People*, 5 Wend. 530; so notice is taken that a town is not within a certain distance of the place of trial. *Hinckley* v. *Beckwith*, 23 Wis. 328. Such local divisions may be determined by public statutes and be noticed for that reason. *Bronson* v. *Gleason*, 7 Barb. 472.]

[4] [*Lake Co.* v. *Young*, 40 N. H. 420; Note to 10 Abb. N. C 117. The population of counties is noticed (*Farley* v. *McConnell*, 7 Lans. 428); what rivers in the State are navigable (*Browne* v. *Schofield*, 8 Barb. 239; *Wood* v. *Fowler*, 26 Kan. 682); but not the width of streets or sidewalks in a city (*Porter* v. *Waring*, 69 N. Y. 250); the distance between great cities in different States has been noticed. *Pearce* v. *Langfit*, 101 Pa. St. 507; but see *Goodwin* v. *Appleton*, 22 Me. 453.]

[5] [*Swinnerton* v. *Ins. Co.*, 37 N. Y. 174.]

[6] [Opinion of Justices, 70 Me. 609; *People* v. *Snyder*, 41 N. Y. 397; as to matters affecting the government of a city, see *Patten* v. *Elevated R. Co.*, 3 Abb. N. C. 306.]

[7] [*Lazier* v. *Westcott*, 26 N. Y. 148; *Morse* v. *Hewett*, 28 Mich. 481.]

(9) The Great Seal, the Privy Seal, the seals of the Superior Courts of Justice,[1] and all seals which any Court is authorized to use by any act of Parliament,[2] certain other seals mentioned in Acts of Parliament,[2] the seal of the Corporation of London,[3] and the seal of any notary public in the Queen's dominions.[4]

[1] The Judicature Acts confer no seal on the Supreme or High Court or its divisions.

[2] *Doe* v. *Edwards*, 9 A. & E. 555. See a list in T. E. s. 6.

[3] 1 Ph. Ev. 464; T. E. s. 6.

[4] *Cole* v. *Sherard*, 11 Ex. 482. As to foreign notaries, see *Earl's Trust*, 4 K. & J. 300.

ports of the United States in which the tide ebbs and flows, and of the boundaries of the several States and judicial districts.[1]

(11) Matters which must have happened according to the ordinary course of nature;[2] natural and artificial divisions of time;[3] the meaning of English words and common abbreviations;[4] legal weights and measures and moneys of the country;[5] matters of general public history,[6] but not those of mere private or local history;[7] other matters of

[1] [Gr. Ev. i. § 6; *Thorson* v. *Peterson*, 9 F. R. 517; so of internal revenue districts. *U. S.* v. *Jackson*, 104 U. S. 41.]

[2] [*Wood* v. *Ins. Co.*, 46 N. Y. 421, 426; *Dixon* v. *Nichols*, 39 Ill. 372; as the time of sunrise or sunset on a certain day (*People* v. *Chee Kee*, 61 Cal. 404; *State* v. *Morris*, 47 Ct. 179); and the succession of the seasons. *Ross* v. *Boswell*, 60 Ind. 235.]

[3] [Wh. Ev. i. § 335. Thus notice is taken of the coincidence of days of the week with days of the month. *Phila. etc. R. Co.* v. *Lehman*, 56 Md. 209; *McIntosh* v. *Lee*, 57 Ia. 356; *Mechanics' Bank* v. *Gilson*, 7 Wend. 460.]

[4] [*Lenahan* v. *People*, 5 T. & C. 268; *State* v. *Intoxicating Liquors*, 73 Me. 278 (meaning of C. O. D. noticed); *Moseley* v. *Mastin*, 37 Ala. 216; so of the meaning of current expressions which every one understands. *Bailey* v. *Kalamazoo Pub'g Co.*, 40 Mich. 251; but see *Baltimore* v. *State*, 15 Md. 376, 484.]

[5] [Gr. Ev. i. § 5; *Johnston* v. *Hedden*, 2 Johns. Cas. 274.]

[6] [*Thomas* v. *Stigers*, 5 Pa. St. 480; *Howard* v. *Moot*, 64 N. Y. 262; as the civil war in this country, 1861–65, and its duration. *Cross* v. *Sabin*, 13 F. R. 308; *Turner's Adm'r.*, 49 Ala. 406; *Swinnerton* v. *Ins. Co.*, 37 N. Y. 174.]

[7] [*McKinnon* v. *Bliss*, 21 N. Y. 206.]

(10) The extent of the territories under the dominion of Her Majesty and her successors; the territorial and political divisions of England and Ireland, but not their geographical position or the situation of particular places; the commencement, continuance, and termination of war between Her Majesty and any other Sovereign; and all other public matters directly concerning the general government of Her Majesty's dominions.[1]

(11) The ordinary course of nature, natural and artificial divisions of time, the meaning of English words.[2]

(12) All other matters which they are directed by any statute to notice.[3]

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[1] 1 Ph. Ev. 466, 460, 458; and T. E. ss. 15-16.

[2] 1 Ph. Ev. 465-6; T. E. s. 14.

[3] *E.g.*, the Articles of War. See sec. 1 of the Mutiny Act.

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such general and public notoriety that everyone may fairly be presumed to be acquainted with them.[1]

(12) Matters of general knowledge and experience within their jurisdiction;[2] and matters which they are directed by any statute to notice.]

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[1] [*King* v. *Gallun*, 109 U. S. 99; *Gilbert* v. *Flint, etc. R. Co.*, 51 Mich. 488; as the ordinary duration of human life (*Johnson* v. *H. R. R. Co.*, 6 Duer, 634); the usual length of time for a voyage across the Atlantic (*Oppenheim* v. *Wolf*, 3 Sandf. Ch. 571); the usual time to run trains between prominent cities (*Pearce* v. *Langfit*, 101 Pa. St. 507; contra, *Wiggins* v. *Burkham*, 10 Wall. 129); the practice of checking baggage in this country (*Isaacson* v. *N. Y. C. R. Co.*, 94 N. Y. 278); that whiskey, brandy, gin, and ale are intoxicating (*Rau* v. *People*, 63 N. Y. 277; *Eagan* v. *State*, 53 Ind. 162); but not that all malt liquors are intoxicating. Id.; *Schlicht* v. *State*, 56 Ind. 188.]

[2] [*Howard* v. *Moot*, 64 N. Y. 262, 271; Opinion of Justices, 70 Me. 609; as *e.g.*, the result of an election affecting the organization of a county. *Andrews* v. *Knox Co.*, 70 Ill. 65.]

ARTICLE 59.

AS TO PROOF OF SUCH FACTS.

No evidence of any fact of which the Court will take judicial notice need be given by the party alleging its existence; but the judge, upon being called upon to take judicial notice thereof, may, if he is unacquainted with such fact, refer to any person or to any document or book of reference for his satisfaction in relation thereto, or may refuse to take judicial notice thereof unless and until the party calling upon him to take such notice produces any such document or book of reference.[1]

ARTICLE 60.

EVIDENCE NEED NOT BE GIVEN OF FACTS ADMITTED.

No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which they have admitted before the hearing and with reference thereto, or by their pleadings.[2] Provided that in a trial for felony the prisoner can make no admissions so as to dispense with proof, though a confession may be proved as against him, subject to the rules stated in articles 21–24.[3]

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[1] T. E. (from Greenleaf) s. 20. *E.g.*, a judge will refer in case of need to an almanac, or to a printed copy of the statutes, or write to the Foreign Office, to know whether a State had been recognized. [Gr. Ev. i. § 6; *Secrist* v. *Petty*, 109 Ill. 188; *Hall* v. *Brown*, 58 N. H. 95; *Swinnerton* v. *Ins. Co.*, 37 N. Y. 174, 188; *State* v. *Wagner*, 61 Me. 178; *State* v. *Morris*, 47 Ct. 179; *State* v. *Clare*, 5 Ia. 509. But a judge must not take judicial notice of matters merely because he in fact knows them. *Lenahan* v. *People*, 5 T. & C. 268.]

[2] See Schedule to Judicature Act of 1875, Order xxxii. [*Cutler* v. *Wright*, 22 N. Y. 472; *Cunningham* v. *Smith's Adm'r.*, 70 Pa. St. 450; *Musselman* v. *Wise*, 84 Ind. 248; *Miller* v. *Payne*, 4 Bradw. 112.] The fact that a document is admitted does not make it relevant and is not equivalent to putting it in evidence, per James, L. J., in *Watson* v. *Rodwell*, L. R. 11 Ch. D. 150.

[3] 1 Ph. Ev. 391, n. 6. In *R.* v. *Thornhill*, 8 C. & P. 575, Lord Abinger acted upon this rule in a trial for perjury. [Gr. Ev. iii. § 39.]

CHAPTER VIII.

OF ORAL EVIDENCE.

ARTICLE 61.

PROOF OF FACTS BY ORAL EVIDENCE.

ALL facts may be proved by oral evidence subject to the provisions as to the proof of documents contained in Chapters IX., X., XI. and XII.

ARTICLE 62.*

ORAL EVIDENCE MUST BE DIRECT.

Oral evidence must in all cases whatever be direct; that is to say—

If it refers to a fact alleged to have been seen, it must be the evidence of a witness who says he saw it;

If it refers to a fact alleged to have been heard, it must be the evidence of a witness who says he heard it;

If it refers to a fact alleged to have been perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;[1]

If it refers to an opinion, or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds.[2]

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* See Note XXVII.

[1] [See *Teerpenning* v. *Corn Ex. Ins. Co.*, 43 N. Y. 279; *Fassin* v. *Hubbard*, 55 N. Y. 465.]

[2] [A witness may testify to his *impression*, if this is based upon his own observation or experience or recollection, and not upon hearsay (Gr. Ev.

CHAPTER IX.

OF DOCUMENTARY EVIDENCE—PRIMARY AND SECONDARY, AND ATTESTED DOCUMENTS.

ARTICLE 63.

PROOF OF CONTENTS OF DOCUMENTS.

THE contents of documents may be proved either by primary or by secondary evidence.

ARTICLE 64.

PRIMARY EVIDENCE.

Primary evidence means the document itself produced for the inspection of the Court, accompanied by the production of an attesting witness in cases in which an attesting witness

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i. § 440; *Blake* v. *People*, 73 N. Y. 586; *Higbie* v. *Guardian, etc. Ins. Co.*, 53 N. Y. 603; *Rounds* v. *McCormick*, 11 Bradw. 220; *Crowell* v. *Western, etc. Bk.*, 3 O. St. 406; *State* v. *Donovan*, 61 Ia. 278; *Duvall's Exer.* v *Darby*, 38 Pa. St. 56; *Kingsbury* v. *Moses*, 45 N. H. 222; cf. *Mather* v. *Parsons*, 32 Hun, 338); or to his *intent* or *belief*, when that is material in the case (*Bayliss* v. *Cockcroft*, 81 N. Y. 363; *Shockey* v. *Miles*, 71 Ind. 288; *Homans* v. *Corning*, 60 N. H. 418; *Reeder* v. *Holcomb*, 105 Mass. 93; *Hamilton* v. *Nickerson*, 13 Allen, 351), but not to a *conclusion of law*. Wh. Ev. i. §§ 507, 509; *Nicolay* v. *Unger*, 80 N. Y. 54; *Ward* v. *Kilpatrick*, 85 N. Y. 413; *Providence Tool Co.* v. *U. S. Mf'g Co.*, 120 Mass. 35; *Jackson* v. *Benton*, 54 Ia. 654.

Objects which have a material bearing on the case may be shown to the jury, and thus have the effect of evidence; as the weapon or instrument used to commit a crime, bloody garments, a person's injured limb, etc. Wh. Ev. i. §§ 345–347; *People* v. *Gonzalez*, 35 N. Y. 49; *King* v. *N. Y. C. R. Co.*, 72 N. Y. 607. So a person may be produced before a jury to en-

must be called under the provisions of articles 66 and 67; or an admission of its contents proved to have been made by a person whose admissions are relevant under articles 15–20.[1]

Where a document is executed in several parts, each part is primary evidence of the document:[2]

Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.[3]

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able them to judge as to his being a minor. *Comm.* v. *Emmons*, 98 Mass. 6. And photographs of persons or places may be introduced in proper cases. *Udderzook's Case*, 76 Pa. St. 340; *Blair* v. *Pelham*, 118 Mass. 420; *Cowley* v. *People*, 83 N. Y. 464. But whether a person suing for personal injuries can be required by the court to submit to an examination by physicians is a matter upon which the authorities are conflicting; that he can, see *Atchison, etc. R. Co.* v. *Thul*, 29 Kan. 466; *Turnpike Co.* v. *Baily*, 37 O. St. 104; *White* v. *Milwaukee R. Co.*, 61 Wis. 536; *Schroeder* v. *Railroad Co.*, 47 Ia. 375; that he cannot, *Roberts* v. *Ogdensburgh, etc. R. Co.*, 29 Hun, 154; *Loyd* v. *Hannibal, etc. R. Co.*, 53 Mo. 509; in suits for divorce because of impotence, it is well settled that the court has the power. Bishop, M. & D. ii. § 590.]

[1] *Slatterie* v. *Pooley*, 6 M. & W. 664. [This doctrine that the contents of a document may be proved by a party's admissions is accepted in several States. *Loomis* v. *Wadhams*, 8 Gray, 557; *Edgar* v. *Richardson*, 33 O. St. 581; *Taylor* v. *Peck*, 21 Gratt. 11; *Edwards* v. *Tracy*, 62 Pa. St. 374; *Blackington* v. *Rockland*, 66 Me. 332; cf. *Morrill* v. *Robinson*, 71 Me. 24. But in New York it is rejected (*Sherman* v. *People*, 13 Hun, 575), though such evidence is receivable if the document is lost or destroyed. *Mandeville* v. *Reynolds*, 68 N. Y. 528, 537; *Corbin* v. *Jackson*, 14 Wend. 619; see Gr. Ev. i. § 96; Wh. Ev. ii. §§ 1091–1093.]

[2] [Each of several duplicate originals is primary evidence. *Lewis* v. *Payn*, 8 Cow. 71; *Hubbard* v. *Russell*, 24 Barb. 404; *Totten* v. *Bucy*, 57 Md. 446; *State* v. *Gurnee*, 14 Kan. 111; *Gardner* v. *Eberhart*, 82 Ill. 316; cf. *Crossman* v. *Crossman*, 95 N. Y. 145; see p. 139, note, *post*. So a copy may, under special circumstances, be deemed primary evidence. *Carroll* v. *Peake*, 1 Pet. 18; *Clark* v. *Clark*, 47 N. Y. 664.]

[3] *Roe* d. *West* v. *Davis*, 7 Ea. 362. [*Loring* v. *Whittemore*, 13 Gray, 228; *Nicoll* v. *Burke*, 8 Abb. N. C. 213; *C. & T. R. Co.* v. *Perkins*, 17 Mich. 296.]

Where a number of documents are all made by printing, lithography, or photography, or any other process of such a nature as in itself to secure uniformity in the copies, each is primary evidence of the contents of the rest ;[1] but where they are all copies of a common original, no one of them is primary evidence of the contents of the original.[2]

ARTICLE 65.

PROOF OF DOCUMENTS BY PRIMARY EVIDENCE.

The contents of documents must, except in the cases mentioned in article 71, be proved by primary evidence ;[3] and

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[1] *R.* v. *Watson*, 2 Star. 129. This case was decided long before the invention of photography ; but the judgments delivered by the Court (Ellenborough, C. J., and Abbott, Bayley, and Holroyd, JJ.) establish the principle stated in the text. [Wh. Ev. i. §§ 70, 92 ; see *Huff* v. *Bennett*, 4 Sandf. 120 ; *Southwick* v. *Stevens*, 10 Johns. 443.

When a telegram is to be proved, the primary evidence, in controversies between the sender and the company, is the original message delivered for transmission. *W. U. Tel. Co.* v. *Hopkins*, 49 Ind. 223. But when a contract is made by telegrams, the primary evidence to prove the contract is the message of the sender as delivered to the receiver and the answering message of the receiver as delivered by him to the office for transmission. *Durkee* v. *Vt. R. Co.*, 29 Vt. 127 ; *Howley* v. *Whipple*, 48 N. H. 487 ; *Wilson* v. *M. & N. R. Co.*, 31 Minn. 481 ; *Saveland* v. *Green*, 40 Wis. 431 ; *Smith* v. *Easton*, 54 Md. 138 ; see cases collected in *Oregon Steamship Co.* v. *Otis*, 14 Abb. N. C. 388. So in sending directions by telegraph, the message received by the addressee is primary evidence. *Morgan* v. *People*, 59 Ill. 58 ; cf. *Comm.* v. *Jeffries*, 7 Allen, 548.]

[2] *Noden* v. *Murray*, 3 Camp. 224. [Letter-press copies of documents are secondary evidence (*Foot* v. *Bentley*, 44 N. Y. 166 ; *Marsh* v. *Hand*, 35 Md. 123 ; *Comm.* v. *Jeffries*, 7 Allen, 548 ; *King* v. *Worthington*, 73 Ill. 161) ; so of photographic copies. *Duffin* v. *People*, 107 Ill. 113 ; *Leathers* v. *Salvor Co.*, 2 Woods, 680 ; *Maclean* v. *Scripps*, 52 Mich. 214.]

[3] [Gr. Ev. i. §§ 82-88 ; Wh. Ev. i. §§ 60-160.]

in the cases mentioned in article 66 by calling an attesting witness.[1]

ARTICLE 66.*

PROOF OF EXECUTION OF DOCUMENT REQUIRED BY LAW TO BE ATTESTED.

If a document is required by law to be attested,[2] it may not be used as evidence (except in the cases mentioned or referred to in the next article) if there be an attesting witness alive, sane, and subject to the process of the Court, until one attesting witness at least has been called for the purpose of proving its execution.[3]

If it be shown that no such attesting witness is alive or can be found, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.[4]

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* See Note XXVIII.

[1] [As to the question, who is an attesting witness, see Gr. Ev. i. § 569 *a*; *Sherwood* v. *Pratt*, 63 Barb. 137; *Huston* v. *Ticknor*, 99 Pa. St. 231.]

[2] [See Art. 69, note.]

[3] [Gr. Ev. i. § 569; Wh. Ev. i. §§ 723–725; *Henry* v. *Bishop*, 2 Wend. 575; *Barry* v. *Ryan*, 4 Gray, 523. Only one witness need testify, though there be two or more. *White* v. *Wood*, 8 Cush. 413; *Amer. Underwriters' Ass'n* v. *George*, 97 Pa. St. 238; *Melcher* v. *Flanders*, 40 N. H. 139. But the absence of all must be accounted for, before evidence of handwriting will be admitted. *Jackson* v. *Gager*, 5 Cow. 383; *Tams* v. *Hitner*, 9 Pa. St. 441; *Turner* v. *Green*, 2 Cr. C. C. 202.]

[4] [S. P. as to deeds; Mass. Pub. St., c. 120, §§ 8, 10; Maine Rev. St., c. 73, § 19; Vt. Rev. St., §§ 1938, 1943. But generally in this country it is sufficient to prove the signature either of a witness or of the party, without proving both. *Borst* v. *Empire*, 5 N. Y. 33. Proof of the signature of one witness is sufficient proof of execution (*Stebbins* v. *Duncan*, 108 U. S. 32; *Gelott* v. *Goodspeed*, 8 Cush. 411; *Van Rensselaer* v. *Jones*, 2 Barb. 643); but proof of the party's identity may be needed besides, in

The rule extends to cases in which—
the document has been burnt,[1] or cancelled,[2] [or lost] ; [3]

cases of doubt or suspected fraud (Id.; *Brown* v. *Kimball*, 25 Wend. 259) ; and the signatures of other witnesses or of the party may, of course, always be proved, in addition to that of one witness. *Jackson* v. *Chamberlain*, 8 Wend. 620 ; *Servis* v. *Nelson*, 14 N. J. Eq. 94. In New York, the signature of a witness must always be proved, if practicable, before that of a party can be (*Willson* v. *Betts*, 4 Den. 201) ; but if the witness's writing cannot be proved, then the party's should be. *Jackson* v. *Waldron*, 13 Wend. 178 ; S. P. *Lessee of Clarke* v. *Courtney*, 5 Pet. 319. But in a number of the States the writing of the party may be proved without proving that of a witness (*Jones* v. *Roberts*, 65 Me. 273 ; *Cox* v. *Davis*, 17 Ala. 714 ; *Landers* v. *Bolton*, 26 Cal. 393 ; *Wellford* v. *Eakin*, 1 Cr. C. C. 264) ; that the handwriting of either or both may be proved, see *Clark* v. *Boyd*, 2 Ohio, 55 ; *Gelott* v. *Goodspeed*, 8 Cush. 411.

Besides death or insanity (*Neely* v. *Neely*, 17 Pa. St. 227), absence of witnesses from the State will let in proof of handwriting (*Richards* v. *Skiff*, 8 O. St. 586 ; *Ballinger* v. *Davis*, 29 Ia. 512 ; *McMinn* v. *Whelan*, 27 Cal. 300 ; *Lush* v. *Druse*, 4 Wend. 313 ; the deposition of the absent witness need not be taken as to execution, *Clark* v. *Houghton*, 12 Gray, 38) ; or the fact that no witness can be found after diligent search, or none who is competent to testify. Gr. Ev. i. § 572 ; *Pelletreau* v. *Jackson*, 11 Wend. 110 ; *Woodman* v. *Segar*, 25 Me. 90.

Special statutes in some States require proof of certain documents by more than one witness ; as *e.g.*, proof of *wills* in New York for admission to probate. N. Y. Code Civ. Pr. §§ 2618–2620 ; cf. *Carson's Appeal*, 59 Pa. St. 493. But in an *action at law* in this State, the execution of a will may be proved by one subscribing witness. *Cornwell* v. *Wooley*, 1 Abb. Dec. 441 ; *Caw* v. *Robertson*, 5 N. Y. 125, 134. But if the witnesses are dead, absent, etc., it may be necessary to prove the handwriting of them all and of the testator. *Jackson* v. *Vickery*, 1 Wend. 406 ; see *Rider* v. *Legg*, 51 Barb. 260. As to the proof of a will in a *suit in equity*, see *Chapman* v. *Rodgers*, 12 Hun, 342.]

[1] *Gillies* v. *Smither*, 2 Star. R. 528.

[2] *Breton* v. *Cope*, Pea. R. 43.

[3] [*Hewitt* v. *Morris*, 5 J. & Sp. 18 ; *Kelsey* v. *Hanmer*, 18 Ct. 311 ; *Porter* v. *Wilson*, 13 Pa. St. 641 ; cf. *Dan* v. *Brown*, 4 Cow. 483 ; *Moore* v. *Livingston*, 28 Barb. 543 ; *Kimball* v. *Morrill*, 4 Me. 368 ; contra, *Simmons* v. *Havens*, 29 Hun, 119 ; if, however, by reason of the loss, it cannot be ascertained who were the subscribing witnesses, other evidence is admissible. *Jackson* v. *Vail*, 7 Wend. 125 ; *Davis* v. *Spooner*, 3 Pick. 284.]

the subscribing witness is blind ;[1]

the person by whom the document was executed is prepared to testify to his own execution of it ;[2]

the person seeking to prove the document is prepared to prove an admission of its execution by the person who executed it, even if he is a party to the cause,[3] unless such admission be made for the purpose of, or has reference to the cause.[4]

ARTICLE 67.*

CASES IN WHICH ATTESTING WITNESS NEED NOT BE CALLED.

In the following cases, and in the case mentioned in article 88, but in no others, a person seeking to prove the execution of a document required by law to be attested is not bound to call for that purpose either the party who executed the deed or

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* See Note XXVIII.

[1] *Cronk* v. *Frith*, 9 C. & P. 197 ; [see *Cheeney* v. *Arnold*, 18 Barb. 434.]

[2] *R.* v. *Harringworth*, 4 M. & S. 353. [This is true, though parties are now competent to testify. *Brigham* v. *Palmer*, 3 Allen, 450 ; *Jones* v. *Underwood*, 28 Barb. 481 ; *Weigand* v. *Sichel*, 4 Abb. Dec. 592 ; *Hess* v. *Griggs*, 43 Mich. 397 ; contra, *Bowling* v. *Hax*, 55 Mo. 446.]

[3] *Call* v. *Dunning*, 4 Ea. 53. See, too, *Whyman* v. *Garth*, 8 Ex. 803 ; *Randall* v. *Lynch*, 2 Camp. 357 ; [*Fox* v. *Riel*, 3 Johns. 477 ; *Smith* v. *Cawlin*, 1 Cr. C. C. 99 ; *Kinney* v. *Flynn*, 2 R. I. 319 ; *Zerby* v. *Wilson*, 3 Ohio, 462. But a contrary rule became established in New York as to negotiable paper. See *Jones* v. *Underwood*, 28 Barb. 483 ; S. P. *Williams* v. *Floyd*, 11 Pa. St. 499 ; but see Art. 69, note 2.

If the witnesses are dead, and the document lost or cancelled, so that handwriting cannot be proved, evidence of admissions is receivable (*Jackson* v. *Vail*, 7 Wend. 125 ; *Kingwood* v. *Bethlehem*, 13 N. J. L. 221) ; so if the witnesses' testimony is insufficient. *Frost* v. *Deering*, 21 Me. 156.]

[4] [Gr. Ev. i. §§ 569, 572 ; *Blake* v. *Sawin*, 10 Allen, 340 ; such admissions may be made in the pleadings (*Robert* v. *Good*, 36 N. Y. 408 ; *Thorpe* v. *Keokuk Coal Co.*, 48 N. Y. 253) ; so both parties may waive proof by witness. *Forsythe* v. *Hardin*, 62 Ill. 206.]

any attesting witness, or to prove the handwriting of any such party or attesting witness—

(1) When he is entitled to give secondary evidence of the contents of the document under article 71 (*a*) ; [1]

(2) When his opponent produces it when called upon, and claims an interest under it in reference to the subject-matter of the suit ; [2]

(3) When the person against whom the document is sought to be proved is a public officer bound by law to procure its due execution, and who has dealt with it as a document duly executed.[3] [4]

[1] *Cooke* v. *Tanswell*, 8 Tau. 450 ; *Poole* v. *Warren*, 8 A. & E. 588 ; [*Rawley* v. *Doe*, 6 Blackf. (Ind.) 143 ; but *Bright* v. *Young*, 15 Ala. 112, holds that the execution of the document must be proved in this case, either by direct evidence, or if this be lacking, by evidence of circumstances tending to prove the fact. See *Jackson* v. *Woolsey*, 11 Johns. 446.]

[2] *Pearce* v. *Hooper*, 3 Tau. 60 ; *Rearden* v. *Minter*, 5 M. & G. 204 ; [Gr. Ev. i. § 571 ; *Jackson* v. *Kingsley*, 17 Johns. 158 ; *McGregor* v. *Wait*, 10 Gray, 72 ; see *Balliett* v. *Fink*, 28 Pa. St. 266 ; *Adams* v. *O'Connor*, 100 Mass. 515.] As to the sort of interest necessary to bring a case within this exception, see *Collins* v. *Bayntun*, 1 Q. B. 118.

[3] *Plumer* v. *Briscoe*, 11 Q. B. 46 ; [*Scott* v. *Waithman*, 3 Stark. 168 ; Gr. Ev. i. § 571.] *Bailey* v. *Bidwell*, 13 M. & W. 73, would perhaps justify a slight enlargement of the exception, but the circumstances of the case were very peculiar. Mr. Taylor (ss. 1650-1) considers it doubtful whether the rule extends to instruments executed by corporations, or to deeds enrolled under the provisions of any Act of Parliament, but his authorities hardly seem to support his view ; at all events, as to deeds by corporations. [This exception does not appear to have become established in American law ; but see Gr. Ev. i. § 573.]

[4] [The following are additional exceptions :

(*a*) It is a rule in some States that proof by a subscribing witness is not required when the instrument is not directly in issue, but only comes incidentally or collaterally in question. Gr. Ev. i. § 573, *b* ; Wh. Ev. i. § 724 ; *Kitchen* v. *Smith*, 101 Pa. St. 452 ; *Ayers* v. *Hewett*, 19 Me. 281 ; *Curtis* v. *Belknap*, 21 Vt. 433 ; see *Comm.* v. *Castles*, 9 Gray, 121 ; contra, *Jones* v. *Underwood*, 28 Barb. 481 ; *Jackson* v. *Christman*, 4 Wend. 277 ; but see *Smith* v. *N. Y. C. R. Co.*, 4 Abb. Dec. 262.

(*b*) In many States recorded deeds and other instruments may be

ARTICLE 68.

PROOF WHEN ATTESTING WITNESS DENIES THE EXECUTION.

If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence.[1]

ARTICLE 69.

PROOF OF DOCUMENT NOT REQUIRED BY LAW TO BE ATTESTED.

An attested document not required by law to be attested may in all cases whatever, civil or criminal, be proved as if it was unattested.[2]

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proved by duly authenticated copies, without calling any subscribing witness; or the deed, etc., as acknowledged or proved and certified, so as to be recorded, may be given in evidence. But the rules vary in different States. See *Gragg* v. *Learned*, 109 Mass. 167; N. Y. Code Civ. Pr. §§ 935-937; Maine Rev. St., c. 82. § 110; Wh. Ev. i. § 740.]

[1] "Where an attesting witness has denied all knowledge of the matter, the case stands as if there were no attesting witness:" *Talbot* v. *Hodson*, 7 Tau. 251, 254. [*Hamsher* v. *Kline*, 57 Pa. St. 397; *Matter of Cottrell*, 95 N. Y. 329; *Patterson* v. *Tucker*, 9 N. J. L. 322; *Thomas* v. *Le Baron*, 8 Met. 355; cf. *Tompson* v. *Fisher*, 123 Mass. 559; so generally if the witness's testimony is inadequate to prove execution. *Harrington* v. *Gable*, 81 Pa. St. 406; *Frost* v. *Deering*, 21 Me. 156.]

[2] 17 & 18 Vict. c. 125, s. 26; 28 & 29 Vict. c. 18, ss. 1, 7. [Similar statutes are in force in some States of this country; Laws of 1883, N. Y. c. 195; Pub. St. R. I., c. 214, s. 41; cf. Ill. Rev. St., p. 543, s. 51 (ed. 1883). But by the common-law rule, which still generally prevails, if a document is actually attested, though the law does not require its attestation, its execution must be proved by the attesting witness, or as otherwise prescribed in Art. 66.

As to the proof of unattested documents, see *Nichols* v. *Allen*, 112 Mass. 23; *St. John* v. *Amer. Ins. Co.*, 2 Duer, 419; *Pullen* v. *Hutchinson*, 25 Me. 249.]

ARTICLE 70.

SECONDARY EVIDENCE.

Secondary evidence means—

(1) Examined copies, exemplifications, office copies, and certified copies : [1]

(2) Other copies made from the original and proved to be correct : [2]

(3) Counterparts of documents as against the parties who did not execute them : [3]

(4) Oral accounts of the contents of a document given by some person who has himself seen it.[4]

ARTICLE 71.

CASES IN WHICH SECONDARY EVIDENCE RELATING TO DOCUMENTS MAY BE GIVEN.

Secondary evidence may be given of the contents of a document in the following cases—

(*a*) When the original is shown or appears to be in the possession or power of the adverse party,

and when, after the notice mentioned in article 72, he does not produce it ; [5]

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[1] See chapter x.

[2] [See p. 129, n. 2 ; a copy of a copy is sometimes admissible. *Cameron* v. *Peck*, 37 Ct. 555.]

[3] *Munn* v. *Godbold*, 3 Bing. 292 ; [*Loring* v. *Whittemore*, 13 Gray, 228 ; see Art. 64, n. 3.]

[4] [The witness must be able to prove substantially all the contents. *Edwards* v. *Noyes*, 65 N. Y. 125 ; *Clark* v. *Houghton*, 12 Gray, 38 ; *Stebbins* v. *Duncan*, 108 U. S. 32.]

[5] *R.* v. *Watson*, 2 T. R. 201. *Entick* v. *Carrington*, 19 S. T. 1073, is cited by Mr. Phillips as an authority for this proposition. I do not think it supports it, but it shows the necessity for the rule, as at common law no power existed to compel the production of documents. [*Chamberlin* v. *Huguenot Co.*, 118 Mass. 532 ; *Hanson* v. *Eustace's Lessee*, 2 How.

(*b*) When the original is shown or appears to be in the possession or power of a stranger not legally bound to produce it, and who refuses to produce it after being served with a *subpœna duces tecum*, or after having been sworn as a witness and asked for the document and having admitted that it is in court ;[1] .

(*c*) When the original has been destroyed or lost, and proper search has been made for it ;[2]

(*d*) When the original is of such a nature as not to be easily

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(U. S.) 653 ; *Naugatuck Co.* v. *Babcock*, 22 Hun, 481 ; *Carland* v. *Bieme*, 37 Pa. St. 228. The party refusing to produce incurs the penalty of having all inferences from the secondary evidence taken most strongly against himself. *Cahen* v. *Continental Ins. Co.*, 69 N. Y. 300.]

[1] *Mills* v. *Oddy*, 6 C. & P. 732 ; *Marston* v. *Downes*, 1 A. & E. 31. [As where an attorney refuses to produce a document of his client (*Brandt* v. *Klein*, 17 Johns. 335 ; *Hubbell* v. *Judd, etc. Oil Co.*, 19 Alb. L. J. 97 ; see *Bird* v. *Bird*, 40 Me. 392, and Arts. 115, 118, 119, *post*) ; or a witness refuses, because the document will criminate him (*State* v. *Gurnee*, 14 Kan. 111) ; or the document is a public one on file in a public office and so not required to be produced. *Corbett* v. *Gibson*, 16 Blatch. 334 ; see p. 140, n. 1, *post*.]

[2] 1 Ph. Ev. s. 452 ; 2 Ph. Ev. 281 ; T. E. (from Greenleaf) s. 399. The loss may be proved by an admission of the party or his attorney ; *R.* v. *Haworth*, 4 C. & P. 254. [*Whitcher* v. *McLaughlin*, 115 Mass. 167 ; *Mandeville* v. *Reynolds*, 68 N. Y. 528 ; *Stebbins* v. *Duncan*, 108 U. S. 32 ; *Diehl* v. *Emig*, 65 Pa. St. 320. Diligent search must ordinarily be shown, exhausting all reasonable means of discovery. *Simpson* v. *Dall*, 3 Wall. 460 ; *Johnson* v. *Arnwine*, 42 N. J. L. 451 ; *Kearney* v. *Mayor of N. Y.*, 92 N. Y. 617 ; *Hatch* v. *Carpenter*, 9 Gray, 271. But the less the importance of the instrument, the less the diligence required. *Amer. Ins. Co.* v. *Rosenagle*, 77 Pa. St. 507. Proof of the existence and genuineness of the lost instrument is required, in order that secondary evidence may be admissible. *Nichols* v. *Iron Co.*, 56 N. Y. 618 ; *Krise* v. *Keason*, 66 Pa. St. 253.

A party who has voluntarily destroyed a document cannot give secondary evidence of its contents, unless he shows his act to have been with innocent intent. *Steele* v. *Lord*, 70 N. Y. 280 ; *Bagley* v. *McMickle*, 9 Cal. 430 ; *Jones* v. *Knaus*, 31 N. J. Eq. 609 ; *Joannes* v. *Bennett*, 5 Allen, 169.]

movable,[1] or is in a country from which it is not permitted to be removed ; [2]

(*e*) When the original is a public document ; [3]

(*f*) [When the party has been deprived of the original by fraud, so that it cannot be procured.] [4]

(*g*) When the original is a document for the proof of which special provision is made by any Act of Parliament, or any law in force for the time being ; [5] or

(*h*) When the originals consist of numerous documents which cannot conveniently be examined in court, and the fact to be proved is the general result of the whole collection ;

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[1] *Mortimer* v. *McCallan*, 6 M. & W. 67, 68 (this was the case of a libel written on a wall) ; *Bruce* v. *Nicolopulo*, 11 Ex. 133 (the case of a placard posted on a wall). [Gr. Ev. i. § 94 ; *North Brookfield* v. *Warren*, 16 Gray, 171 (inscription on a tombstone) ; *Stearns* v. *Doe*, 12 Gray, 482 (name of a vessel) ; cf. *Cozzens* v. *Higgins*, 1 Abb. Dec. 451 (photograph of a place ; see Art. 64, *ante*.)]

[2] *Alivon* v. *Furnival*, 1 C. M. & R. 277, 291–2. [*Mauri* v. *Heffernan*, 13 Johns. 58 ; so if the original is in the possession of a person in another State or country, so that its production cannot be secured. *Elwell* v. *Mersick*, 50 Ct. 272 ; *Tucker* v. *Woolsey*, 6 Lans. 482 ; *Beattie* v. *Hilliard*, 55 N. H. 428 ; *Fosdick* v. *Van Horn*, 40 O. St. 459 ; *Burton* v. *Driggs*, 20 Wall. 125, 134 ; *Ware* v. *Morgan*, 67 Ala. 461 ; *Rhodes* v. *Seibert*, 2 Pa. St. 18. These cases do not declare it necessary to take his deposition, but in some cases his deposition has been taken, and secondary evidence received because he would not give up the original. *Burney* v. *Russell*, 109 Mass. 55 ; *Bailey* v. *Johnson*, 9 Cow. 115 ; (in these cases he gave a copy which was used) ; *Forrest* v. *Forrest*, 6 Duer, 102, 137. Mere absence of the document from the State is not enough, some cases hold, if proper effort will secure its production. *Shaw* v. *Mason*, 10 Kan. 184 ; *Forrest* v. *Forrest*, supra.]

[3] See chapter x ; [including public records ; see Gr. Ev. i. § 91.]

[4] [*Grimes* v. *Kimball*, 3 Allen, 518 ; *Nealley* v. *Greenough*, 5 Foster, 325 ; *Mitchell* v. *Jacobs*, 17 Ill. 235 ; see *Marlow* v. *Marlow*, 77 Ill. 633.

This paragraph is substituted for one which is peculiar to English law. It will be found in the Appendix, note XLIX.]

[5] See chapter x ; [many such statutes are in force in this country.]

provided that that result is capable of being ascertained by calculation.[1] [2]

Subject to the provisions hereinafter contained, any secondary evidence of a document is admissible.[3]

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[1] *Roberts* v. *Doxen*, Peake, 116; *Meyer* v. *Sefton*, 2 Star. 276. The books, etc., should in such a case be ready to be produced if required. *Johnson* v. *Kershaw*, 1 De G. & S. 264. [Gr. Ev. i. § 93; Wh. Ev. i. § 80; *Burton* v. *Driggs*, 20 Wall. 125; *Von Sachs* v. *Kretz*, 72 N. Y. 548; *Jordan* v. *Osgood*, 109 Mass. 457; *B. & W. R. Co.* v. *Dana*, 1 Gray, 83; *Fosdick* v. *Van Horn*, 40 O. St. 459.]

[2] [Besides the cases here stated, another is sometimes asserted, viz., that when proof is required of the contents of a document which merely relates to some collateral fact, parol evidence of the contents is sufficient. *McFadden* v. *Kingsbury*, 11 Wend. 667. But this doctrine is doubtful. *Frank* v. *Manny*, 2 Daly, 92; *Jones* v. *Underwood*, 28 Barb. 481.

But a document may be so far collateral to the question in issue, though relating to the same subject matter, that its production is not required, nor proof of its contents necessary. In such a case parol evidence is receivable of the transaction which forms the subject of action; as *e.g.*, where a contract is made by parol, but a written memorandum of its terms is made at the same time. In proper cases the writing is competent evidence to corroborate the oral testimony. *Lathrop* v. *Bramhall*, 64 N. Y. 365; *Thomas* v. *Nelson*, 69 N. Y. 118. So the payment of a debt may be proved by parol, without producing the written receipt (*Kingsbury* v. *Moses*, 45 N. H. 222); so oftentimes of written proposals, notices, demands, etc. Gr. Ev. i. §§ 89, 90; Wh. Ev. i. §§ 64, 77; see *Comm.* v. *Morrell*, 99 Mass. 542. So collateral facts about a document may be proved by parol. See p. 164, n. 3, *post.*

As to proof of a person's holding a public office, see Art. 90, last paragraph.]

[3] If a counterpart is known to exist, it is the safest course to produce or account for it. *Munn* v. *Godbold*, 3 Bing. 297; *R.* v. *Castleton*, 7 T. R. 236.

[It is the English doctrine that there are no degrees in secondary evidence, and a party may introduce any form thereof (as *e.g.*, parol testimony instead of a copy), if the original cannot be had. Some American States adopt the same doctrine. *Goodrich* v. *Weston*, 102 Mass. 362; *Eslow* v. *Mitchell*, 26 Mich. 500; *Carpenter* v. *Dame*, 10 Ind. 125. But generally in this country a party must produce the best form of secondary evidence that is or appears to be procurable by him. *Cornett* v.

In case (*h*) evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

Questions as to the existence of facts rendering secondary evidence of the contents of documents admissible are to be decided by the judge, unless in deciding such a question the judge would in effect decide the matter in issue.[1]

ARTICLE 72.*

RULES AS TO NOTICE TO PRODUCE.

Secondary evidence of the contents of the documents referred to in article 71 (*a*) may not be given, unless the party proposing to give such secondary evidence has,

if the original is in the possession or under the control of the adverse party, given him such notice to produce it as the Court regards as reasonably sufficient to enable it to be procured ;[2] or has,

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* See Note XXIX.

Williams, 20 Wall. 226 ; *Reddington* v. *Gilman*, 1 Bos. 235; *Niskayuna* v. *Albany*, 2 Cow. 537 ; *Stevenson* v. *Hoy*, 43 Pa. St. 191 ; *Land Co.* v. *Bonner*, 75 Ill. 315 ; *Harvey* v. *Thorpe*, 28 Ala. 250 ; *Higgins* v. *Reed*, 8 Ia. 298 ; *Nason* v. *Jordan*, 62 Me. 480 ; but see as to New York, *Van Dyne* v. *Thayre*, 19 Wend. 166.

As to counterparts, see *Poignard* v. *Smith*, 8 Pick. 272 ; *Riggs* v. *Taylor*, 9 Wheat. 483 ; Art. 64, *ante*. Of duplicate originals, all must be shown to be lost, destroyed, etc., before secondary evidence will be received. *Dyer* v. *Fredericks*, 63 Me. 173, 592 ; *McMakin* v. *Weston*, 64 Ind. 270.]

[1] [*Mason* v. *Libbey*, 90 N. Y. 683 ; *Elwell* v. *Mersick*, 50 Ct. 272.]

[2] *Dwyer* v. *Collins*, 7 Ex. 648 ; [*Foster* v. *Newbrough*, 58 N. Y. 481 ; *Draper* v. *Hatfield*, 124 Mass. 53 ; *People* v. *Walker*, 38 Mich. 159 ; *Eilbert* v. *Finkheiner*, 68 Pa. St. 243. Notice is not required unless the original is in the party's possession or control. *Roberts* v. *Spencer*, 123 Mass. 397 ; *Baker* v. *Pike*, 33 Me. 213 ; *Sheppard* v. *Giddings*, 22 Ct. 282. The notice may be given to the party's attorney. *Brown* v. *Littlefield*, 7 Wend. 454 ; *Den* v. *McAllister*, 7 N. J. L. 46. The notice must be given a

if the original is in the possession of a stranger to the action, served him with a *subpœna duces tecum* requiring its production ; [1]

if a stranger so served does not produce the document, and has no lawful justification for refusing or omitting to do so, his omission does not entitle the party who served him with the *subpœna* to give secondary evidence of the contents of the document.[2]

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sufficient time beforehand (*Bourne* v. *Buffington*, 125 Mass. 481 ; *U. S.* v. *Duff*, 6 F. R. 45 ; *De Witt* v. *Prescott*, 51 Mich. 298 ; *McPherson* v. *Rathbone*, 7 Wend. 216 ; *Utica Ins. Co.* v. *Cadwell*, 3 Wend. 296), and must definitely describe the document required. *Walden* v. *Davison*, 11 Wend. 65 ; see Gr. Ev. i. § 563 ; Art. 71, *ante ;* Arts. 138, 139, *post.*

In the Federal courts, the production of books and writings by a party may also be required under a special statute in actions at law. U. S. Rev. St. § 724 ; *Lowenstein* v. *Carey*, 12 F. R. 811, and note. Statutes in many States also allow discovery and inspection of documents before trial. N. Y. Code Civ. Pr. §§ 803–809 ; Mass. Pub. St., c. 167, §§ 49–60.]

[1] *Newton* v. *Chaplin*, 10 C. B. 56-69 ; [*Aikin* v. *Martin*, 11 Pai. 499 ; *Lane* v. *Cole*, 12 Barb. 680 ; *Baker* v. *Pike*, 33 Me. 213 ; *In re Shephard*, 3 F. R. 12 ; so on examinations before masters and commissioners in federal practice. *Erie R. Co.* v. *Heath*, 8 Blatch. 413 ; *U. S.* v. *Tilden*, 10 Ben. 566. Such a subpœna may be served on a party, now that parties are competent witnesses (*Shelp* v. *Morrison*, 13 Hun, 110 ; *Murray* v. *Elston*, 23 N. J. Eq. 212 ; *Cummer* v. *Kent Judge*, 38 Mich. 351 ; but see *Campbell* v. *Johnston*, 3 Del. Ch. 94), or on a corporation, by serving the proper officer. *Wertheim* v. *Continental R. Co.*, 15 F. R. 716 ; *Ex parte Brown*, 72 Mo. 83 (telegrams) ; *U. S.* v. *Babcock*, 3 Dill. 566 (telegrams) ; N. Y. Code Civ. Pr. § 868 ; *In re Sykes*, 10 Ben. 162. The writ should describe documents definitely (*Ex parte Brown*, supra ; *U. S.* v. *Hunter*, 15 F. R. 712), and is compulsory, unless it is set aside, or the witness is privileged. *Bonesteel* v. *Lynde*, 8 How. Pr. 226, 352 ; *Corbett* v. *Gibson*, 16 Blatch. 334 ; *Johnson* v. *Donaldson*, 3 F. R. 22 ; see Art. 71 (*b*), *ante ;* Arts. 118–120, *post.*]

[2] *R.* v. *Llanfaethly*, 2 E. & B. 940. [The recusant witness may be sued for damages (*Lane* v. *Cole*, 12 Barb. 680), punished for contempt (*Bonesteel* v. *Lynde*, 8 How. Pr. 226, 352), and is generally subject also to a statutory penalty. When he is a party, his pleading has sometimes been stricken out. *Shelp* v. *Morrison*, 13 Hun, 110.]

Such notice is not required in order to render secondary evidence admissible in any of the following cases—

(1) When the document to be proved is itself a notice ;[1]

(2) When the action is founded upon the assumption that the document is in the possession or power of the adverse party and requires its production ;[2]

(3) When it appears or is proved that the adverse party has obtained possession of the original from a person subpœnaed to produce it ;[3]

(4) When the adverse party or his agent has the original in court.[4] [5]

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[1] [*Quinley* v. *Atkins*, 9 Gray, 370 ; *Edwards* v. *Bonneau*, 1 Sandf. 610 ; *Gethin* v. *Walker*, 59 Cal. 502 ; *Morrow* v. *Comm.*, 48 Pa. St. 308 ; *Central Bk.* v. *Allen*, 16 Me. 41.]

[2] *How* v. *Hall*, 14 Ea. 247. In an action on a bond, no notice to produce the bond is required. See other illustrations in 2 Ph. Ev. 373 ; T. E. s. 422. [*Lawson* v. *Bachman*, 81 N. Y. 616 ; *Morrill* v. *B. & M. R. Co.*, 58 N. H. 68 ; *Dana* v. *Conant*, 30 Vt. 246 ; *Railway Co.* v. *Cronin*, 38 O. St. 122 ; as in an action of trover for the document. *Hotchkiss* v. *Mosher*, 48 N. Y. 479. The rule applies also in criminal cases. *State* v. *Mayberry*, 48 Me. 218.]

[3] *Leeds* v. *Cook*, 4 Esp. 256 ; [cf. *Bonesteel* v. *Lynde*, 8 How. Pr. 226, 352 ; so where a party tore off a part of a document with intent to destroy, notice to produce the portion he took was held unnecessary. *Scott* v. *Pentz*, 5 Sandf. 572.]

[4] Formerly doubted, see 2 Ph. Ev. 278, but so held in *Dwyer* v. *Collins*, 7 Ex. 639. [A verbal notice in court is in this case sufficient to let in secondary evidence. *Chadwick* v. *U. S.*, 3 F. R. 750 ; *Kerr* v. *McGuire*, 28 N. Y. 446 ; see *Atwell* v. *Miller*, 6 Md. 10 ; *Barton* v. *Kane*, 17 Wis. 37 ; *Hammond* v. *Hopping*, 13 Wend. 505 ; some early cases are to the contrary ; *Watkins* v. *Pintard*, 1 N. J. L. (Coxe) 378 ; *Milliken* v. *Barr*, 7 Pa. St. 23. Or the court may compel the witness to produce the document. *Boynton* v. *Boynton*, 25 How. Pr. 490, 41 N. Y. 619 ; *Shelp* v. *Morrison*, 13 Hun, 110, 113 ; *McGregor* v. *Wait*, 10 Gray, 72.]

[5] [Additional rules are as follows :

(*a*) A duplicate original may be given in evidence, without giving notice to produce the other. Gr. Ev. i. § 561 ; *Totten* v. *Bucy*, 57 Md. 446 ; see Art. 64, *ante*.

(*b*) Absence of the party having the document from the State is no ex-

CHAPTER X.

PROOF OF PUBLIC DOCUMENTS.

ARTICLE 73.

PROOF OF PUBLIC DOCUMENTS.

WHEN a statement made in any public document, register, or record, judicial or otherwise, or in any pleading or deposition kept therewith is in issue, or is relevant to the issue in any proceeding, the fact that that statement is contained in that document, may be proved in any of the ways mentioned in this chapter.[1]

ARTICLE 74.

PRODUCTION OF DOCUMENT ITSELF.

The contents of any public document whatever may be proved by producing the document itself for inspection from proper custody, and identifying it as being what it professes to be.[2]

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cuse for not giving notice, if he can be found. *Carland* v. *Cunningham*, 37 Pa. St. 228. *Aliter*, if a stranger out of the State have the document. *Stirling* v. *Buckingham*, 46 Ct. 461; see *Burton* v. *Driggs*, 20 Wall. 125, 134; Art. 71 (*d*), *ante*.]

[1] See articles 34 and 90.

[2] [Gr. Ev. i. §§ 479, 482–484; Wh. Ev. i. §§ 635–660; Arts. 33 and 34, *ante*, and cases cited; *Miller* v. *Hale*, 26 Pa. St. 432; *Phelps* v. *Hunt*, 43 Ct. 194. A printed report of a decision is not competent original evidence of a judgment. *Donellan* v. *Hardy*, 57 Ind. 393.]

ARTICLE 75.*

EXAMINED COPIES.

The contents of any public document whatever may in all cases be proved by an examined copy.[1]

An examined copy is a copy proved by oral evidence to have been examined with the original and to correspond therewith.[2] The examination may be made either by one person reading both the original and the copy, or by two persons, one reading the original and the other the copy, and it is not necessary (except in peerage cases [3]), that each should alternately read both.[4]

ARTICLE 76.†

[GENERAL RECORDS OF THE NATION OR STATE.]

[Copies of any documents, records, books, or papers in any of the executive departments of the United States Government, authenticated under the seals of such departments, respectively, are admitted in evidence equally with the originals; and the same is true of copies of documents in various public offices, certified by the proper public officer and authenticated under his seal of office.[5]

A similar rule as to the proof in State courts of public docu-

* See Note XXX., also *Doe* v. *Ross*, 7 M. & W. 106.

† [For original article, see Note L.]

[1] [Gr. Ev. i. §§ 485, 508.]

[2] [Gr. Ev. i. § 508; *Hill* v. *Packard*, 5 Wend. 387; *Amer. Life Ins. Co.* v. *Rosenagle*, 77 Pa. St. 507; see N. Y. Code Civ. Pro. § 962. It is also called a "sworn copy." Gr. Ev. i. §§ 485, 501; *Hubbell* v. *Meigs*, 50 N. Y. 480.]

[3] *Slane Peerage Case*, 5 C. & F. 42.

[4] 2 Ph. Ev. 200, 231; T. E. ss. 1379, 1389; R. N. P. 113; [*Kellogg* v. *Kellogg*, 6 Barb. 116; *Krise* v. *Neason*, 66 Pa. St. 253.]

[5] [U. S. Rev. St. §§ 882-898; decisions collected in Bump's Federal Procedure, pp. 552-562.]

ments in State offices is commonly established by statutes of the States, respectively.][1]

ARTICLE 77.*

EXEMPLIFICATIONS.

An exemplification is a copy of a record set out either under the Great Seal or under the Seal of a Court.[2]

A copy made by an officer of the Court, bound by law to make it, is equivalent to an exemplification, though it is sometimes called an office copy.[3]

An exemplification is equivalent to the original document exemplified.[4]

ARTICLE 78.*

COPIES EQUIVALENT TO EXEMPLIFICATIONS.

A copy made by an officer of the Court, who is authorized to make it by a rule of Court, but not required by law to

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*See Note XXXI.

[1] [See N. Y. Code Civ. Pro. §§ 933, 957, 958; Mass. Pub. St., c. 169, § 70. So statutes may provide that documents in U. S. offices may be so proved in State courts. N. Y. Code Civ. Pro. §§ 943, 944.]

[2] [Gr. Ev. i. §§ 488, 501; Wh. Ev. i. § 95. The term is applied both to domestic and to foreign records, laws, and documents. *Lincoln* v. *Battelle*, 6 Wend. 475; *Lazier* v. *Westcott*, 26 N. Y. 146; *Watson* v. *Walker*, 3 Fost. 471; *Spaulding* v. *Vincent*, 24 Vt. 501.]

[3] [This rule applies to all courts within the same jurisdiction. Gr. Ev. i. § 507. Copies of public records, whether judicial or otherwise, made by a public officer authorized by law to make them, are also often termed "office copies," as *e.g.*, copies of recorded deeds. *Gragg* v. *Learned*, 109 Mass. 167; *Elwell* v. *Cuningham*, 74 Me. 127. They are also called "certified copies." *Samuels* v. *Borrowscale*, 104 Mass. 207. They are declared admissible in many cases in courts of the same jurisdiction without further authentication. The officer may be required to attach his seal of office, if he has one.]

[4] [This is spoken of domestic records, etc.; foreign records may need additional authentication. Gr. Ev. i. § 501; Art. 84, *post.*]

make it, is regarded as equivalent to an exemplification in the same Cause and Court, but in other Causes or Courts it is not admissible unless it can be proved as an examined copy.[1]

ARTICLE 79.

CERTIFIED COPIES.

It is provided by many statutes that various certificates, official and public documents, documents and proceedings of corporations, and of joint stock and other companies, and certified copies of documents, bye-laws, entries in registers and other books, shall be receivable in evidence of certain particulars in Courts of Justice, provided they are respectively authenticated in the manner prescribed by such statutes.[2]

Whenever, by virtue of any such provision, any such certificate or certified copy as aforesaid is receivable in proof of any particular in any Court of Justice, it is admissible as evidence if it purports to be authenticated in the manner pre-

[1] [Gr. Ev. i. § 507; Wh. Ev. i. §§ 104, 105; *Kellogg* v. *Kellogg*, 6 Barb. 116, 130. These are called "office copies." (Id.) But certified copies authorized by statute (or "office copies" in the broader sense of the term; see preceding article) are now commonly used in their place, being admissible in all domestic courts.]

[2] 8 & 9 Vict. c. 113, preamble. Many such statutes are specified in T. E. s. 1440 and following sections. See, too, R. N. P. 114-5. [See, *e.g.*, U. S. Rev. St. §§ 882-900; N. Y. Code Civ. Pro. §§ 921-924, 928-941, 943-947, 957-962; *Northumberland Co.* v. *Zimmerman*, 75 Pa. St. 26; *Post* v. *Supervisors*, 105 U. S. 667; *Gethin* v. *Walker*, 59 Cal. 502; or such copies may be used by virtue of immemorial usage. *Chamberlin* v. *Ball*, 15 Gray, 352. But it is sometimes provided, as in New York, that the common law methods of proof may be used, as well as the special statutory methods. Code Civ. Pro. § 962.

Certificates are not admissible in evidence unless authorized by law, and then only as to matters which the officer is required or authorized to certify. *Water Comm'rs* v. *Lansing*, 45 N. Y. 19; *Parr* v. *Greenbush*, 72 N. Y. 463; *Wayland* v. *Ware*, 109 Mass. 248; *Jay* v. *East Livermore*, 56 Me. 107.]

scribed by law without proof of any stamp, seal, or signature required for its authentication or of the official character of the person who appears to have signed it.[1]

Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom is admissible in proof of its contents,[2] provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is intrusted.[3] [4]

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[1] Ibid., s. 1. I believe the above to be the effect of the provision, but the language is greatly condensed. Some words at the end of the section are regarded as unmeaning by several text writers. See, *e.g.*, R. N. P. 116; 2 Ph. Ev. 241; T. E. s. 7, note 1. Mr. Taylor says that the concluding words of the section were introduced into the Act while passing through the House of Commons. He adds, they appear to have been copied from 1 & 2 Vict. c. 94, s. 13 (see Art. 76) "by some honorable member who did not know distinctly what he was about." They certainly add nothing to the sense. [S. P. *Thurman* v. *Cameron*, 24 Wend. 87; *St. John* v. *Croll*, 5 Hill, 573; *Keichline* v. *Keichline*, 54 Pa. St. 75; *Harris* v. *Barnett*, 4 Blackf. 369. Such copies or certificates are, however, generally deemed only presumptive or *prima facie* evidence. Id.; see N. Y. Code Civ. Pro. §§ 921–924, 928, 936.]

[2] The words "provided it be proved to be an examined copy or extract or," occur in the Act, but are here omitted because their effect is given in article 75.

[3] 14 & 15 Vict. c. 99, s. 14. [Some American decisions have maintained this rule as a common law principle. Gr. Ev. i. § 485; *U. S.* v. *Percheman*, 7 Pet. 51; *Warner* v. *Hardy*, 6 Md. 525; but see *Selden* v. *Canal Co.*, 29 N. Y. 634, 638. But the use of certified copies of public documents is now so generally authorized by statute or rules of practice that this question as to the common law doctrine has become of little practical importance.]

[4] [At this point Mr. Stephen adds the English statutory rule that "every such officer must furnish such certified copy or extract to any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding four pence for every folio of ninety words. 14 & 15 Vict. c. 99, s. 14." So in this country it is a general

ARTICLE 80.*

[DOCUMENTS AND RECORDS OF THE SEVERAL STATES ADMISSIBLE THROUGHOUT THE UNITED STATES.][1]

[The records and judicial proceedings of the courts of any State or Territory or of any country subject to the jurisdiction of the United States, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form.[2] And the said

[* For the original article, see Note L.]

rule that when the use of certified copies is authorized by statute, the proper officer must give such a copy on payment of his legal fees for the same. U. S. Rev. St. §§ 213, 460, 461, 828, 892, 4194, 4195; N. Y. Code Civ. Pro. § 961.]

[1] [The acts of Congress herein stated were enacted under the authority of the constitutional provision declaring that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof." U. S. Const., Art. iv. § 1.]

[2] [As to the construction of this provision, see Gr. Ev. i. §§ 504-506; Wh. Ev. i. §§ 96-103. The authorities are fully collected in Bump's Fed. Pro., pp. 566-616. The attestation must be made by the *clerk* of the court; that of a deputy clerk is not sufficient (*Morris* v. *Patchin*, 24 N. Y. 394); if the court has no seal, this fact should be stated; the certificate must be added by the *chief* or *presiding* judge of the court, not by an associate judge (*Van Storch* v. *Griffin*, 71 Pa. St. 240; *Hatcher* v. *Rocheleau*, 18 N. Y. 86); and must be that the attestation is in *due form* (*i.e.*, in the form required in the State whence the record comes); if he certifies, not this fact but some other, the certificate is insufficient. *Craig* v. *Brown*, 1 Pet. C. C. 352; *Pepin* v. *Lachenmeyer*, 45 N. Y. 27, 32; see *Burnell* v. *Weld*, 76 N. Y. 103; *Ransom* v. *Wheeler*, 12 Abb. Pr. 139. This statute does not apply to the Federal courts, but their records, when certified by the clerk of the court under its seal, are admissible in State courts and Federal courts alike. *Turnbull* v. *Payson*, 95 U. S. 418. Nor does it apply to courts of inferior jurisdiction, as justices' courts. The mode

records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken.[1]

All records and exemplifications of books, which may be kept in any public office of any State or Territory, or of any country subject to the jurisdiction of the United States, not appertaining to a court, shall be proved or admitted in any court or office in any other State or Territory, or in any such country, by the attestation of the keeper of the said records or books, and the seal of his office annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county, parish, or district, in which said office may be kept, or of the governor, or secretary of state, the chancellor or keeper of the great seal of the State or Territory, or country, that the said attestation is in due form, and by the proper officers. If the said certificate is given by the presiding justice of a court, it shall be further authenticated by the clerk or prothonotary of the said court, who shall certify, under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified; or, if given by such governor, secretary, chancellor or keeper of the great seal, it shall be under the great seal of the State, Territory, or country aforesaid in which it is made. And the said records and exemplifications, so authenticated, shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts or offices of the State, Territory, or country as aforesaid, from which they are taken.[2]

But these provisions do not preclude the several States from

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of proving their dockets and judgments is that prescribed by the laws of the several States, or by common law. See N. Y. Code Civ. Pro. §§ 948-951; Gr. Ev. i. § 505.]

[1] [U. S. Rev. St. § 905; as to the effect of such records, see *ante*, Art. 47, note.]

[2] [U. S. Rev. St. § 906; Bump's Fed. Pro., p. 618.]

establishing other modes of proving in their own courts the records of other States.] [1]

ARTICLE 81.[*]

[OFFICIALLY PRINTED COPIES.]

[The Revised Statutes of the United States, printed under the direction of the Secretary of State at the government printing office and embracing the statutes of the United States general and permanent in their nature, in force on December 1, 1873, as revised and consolidated, and including also the amendatory acts passed by Congress between that date and the year 1878, shall be legal evidence of the laws therein contained, in all the courts of the United States and of the several States and Territories, but shall not preclude reference to, nor control, in case of any discrepancy, the effect of any original act as passed by Congress since December 1, 1873. And copies of the acts of Congress, printed as aforesaid at the close of each session of Congress, shall be legal evidence of the laws and treaties therein contained, in said courts.[2]

It is common for State statutes to provide that the statute-law of that State, and of other States and Territories, and of the United States, may be read in evidence in its courts from a printed book, paper, or other publication, duly published under official authority and direction.] [3]

[* For the original article, see Note L.]

[1] [*Kingman* v. *Cowles*, 103 Mass. 283; *Brainard* v. *Fowler*, 119 id. 262; *Lothrop* v. *Blake*, 3 Barr (Pa.), 483; Gr. Ev. i. § 489, 505. Some States have adopted special statutes of this kind (Mass. Pub. St. c. 169, § 67); but usually the modes prescribed by the acts of Congress are followed.]

[2] [U. S. Rev. St. (ed. 1878), Appendix, pp. 1090–1092; so as to the supplement to the Revised Statutes (21 Stat. L. 308: see *Wright* v. *U. S.*, 15 Ct. of Cl. 80); the acts of Congress were formerly published by Little and Brown, of Boston, and it is provided also that their edition shall be evidence of the laws and treaties therein contained. U. S. Rev. St. § 908.]

[3] [See Mass. Pub. St., c. 169, §§ 69, 71; N. Y. Code Civ. Pro. §§ 932, 942, extending the same rule to printed copies of any proclamation,

ARTICLE 82.*

[PROOF OF THE STATUTES OF ANY STATE OR TERRITORY.]

[The acts of the legislature of any State or Territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such State, Territory, or country affixed thereto, and shall then be admitted in evidence in every other court within the United States.[1]

But this provision does not preclude the several States from establishing other modes of proving in their own courts the written law of other States.][2]

ARTICLE 83.*

[PROCLAMATIONS, ACTS OF STATE, LEGISLATIVE JOURNALS, ETC.]

[The contents of State papers, public documents, and legislative journals, printed by the official printer under the authority of Congress or a State legislature respectively (or of the proper branch thereof),[3] may be proved by the production of such a printed copy, as well as by the production of the orig-

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[* For the original article, see Note L.]

edict, decree, or ordinance, by the executive power of any other State or country. In some States where no statutes exist authorizing the statute-law of other States to be read from a printed volume, this has yet been allowed by the courts. Gr. Ev. i. §§ 480, 489. The common-law mode of proof is by exemplification under the great seal, or by examined copy, and this may still be used. (Id.) As to the cases in which statutes are judicially noticed, see Art. 58 (1), *ante;* see also Art. 49, note 2.]

[1] [U. S. Rev. St. § 905; Bump's Fed. Pro., p. 566; *Grant* v. *Coal Co.*, 80 Pa. St. 208; *U. S.* v. *Amedy*, 11 Wheat. 392.]

[2] [Gr. Ev. i. § 489; as to the other modes of proof allowed, see preceding article and note 3; also Art. 49, note 2; this last article also shows the mode of proving the common-law of other States.]

[3] [*Whiton* v. *Albany, etc. Ins. Co.*, 109 Mass. 24.]

inals.[1] Executive proclamations and acts of state may be proved by an officially printed copy.[2]

Extracts from the journals of the Senate of the United States, or of the House of Representatives, and from the executive journal of the Senate when the injunction of secrecy is removed, certified by the secretary of the Senate or by the clerk of the House of Representatives, shall be admitted as evidence in the courts of the United States, and shall have the same force and effect as the originals would have, if produced and authenticated in court.][3]

ARTICLE 84.*

[FOREIGN WRITTEN LAWS, ACTS OF STATE, RECORDS, ETC.]

[Foreign written laws, acts of state, and judicial records may be proved by an exemplification of a copy under the great seal of the state, or by a copy proved to be a true copy by a witness who has examined and compared it with the original, or by a certificate of an officer properly authorized by law to give a copy, which certificate must itself be duly authenticated.[4] Moreover, in some jurisdictions, a foreign written law may be proved by the statute book containing it, officially published

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[* For the original article, see Note L.]

[1] [Gr. Ev. i. § 479; *Watkins* v. *Holman*, 16 Pet. 25; *Bryan* v. *Forsyth*, 19 How. (U. S.) 334; *Gregg* v. *Forsyth*, 24 Id. 179; *Root* v. *King*, 7 Cow. 613; *Post* v. *Supervisors*, 105 U. S. 667.]

[2] [Gr. Ev. i. §§ 479, 492; *Lurton* v. *Gilliam*, 2 Ill. (1 Scam.) 577; but proclamations are, in general, judicially noticed; see *ante*, Art. 58.

There is a statute in New York as to the proof of executive decrees and proclamations of other States and countries; see *ante*, Art. 81, n. 3.]

[3] [U. S. Rev. St. § 895. For a like rule in State courts, see *Post* v. *Supervisors*, 105 U. S. 667; cf. *Southwark Bk.* v. *Comm.*, 26 Pa. St. 446.]

[4] [These are the recognized common-law methods. Gr. Ev. i. §§ 488, 514; *Yeaton* v. *Fry*, 5 Cr. 345; *Lincoln* v. *Battelle*, 6 Wend. 475; *Watson* v. *Walker*, 3 Foster, 471.]

by the government which made the law, either with or without the testimony of experts.] [1]

[1] [This is provided in some States by statute (Mass. Pub. St., c. 169, § 73; Maine Rev. St., c. 82, § 109; N. Y. Code Civ. Pro. § 942; Art. 49, note 2, *ante*), but is declared in *Ennis* v. *Smith*, 14 How. (U. S.) 401, as a common-law doctrine; but see *Hynes* v. *McDermott*, 82 N. Y. 41, 56. Sometimes expert testimony is received without a printed copy of the law; see Art. 49, note 2, *ante*, which also states the mode of proving a foreign unwritten law. As to proof of the statutes of sister States, see Art. 81, note, and Art. 82, *ante*.

Special State statutes are also in force, establishing modes of proving foreign records, etc. N. Y. Code Civ. Pro. §§ 952–956. But these are not generally made exclusive of common-law methods. Id. § 962.]

CHAPTER XI.

PRESUMPTIONS AS TO DOCUMENTS.

ARTICLE 85.

PRESUMPTION AS TO DATE OF A DOCUMENT.

WHEN any document bearing a date has been proved, it is presumed to have been made on the day on which it bears date,[1] and if more documents than one bear date on the same day, they are presumed to have been executed in the order necessary to effect the object for which they were executed,[2] but independent proof of the correctness of the date will be required if the circumstances are such that collusion as to the date might be practised, and would, if practised, injure any person, or defeat the objects of any law.[3]

Illustrations.

(*a*) An instrument admitting a debt, and dated before the act of bankruptcy, is produced by a bankrupt's assignees, to prove the petitioning

[1] [Gr. Ev. i. § 40, n. ; Wh. Ev. ii. § 977 ; *Livingston* v. *Arnoux*, 56 N. Y. 507, 519 ; *Smith* v. *Porter*, 10 Gray, 66 ; *Pringle* v. *Pringle*, 59 Pa. St. 281 ; so a deed is presumed to have been delivered on the day of its date (*People* v. *Snyder*, 41 N. Y. 397) ; but this is not true of forged instruments ; *Remington Co.* v. *O'Dougherty*, 81 N. Y. 474. The presumption as to all instruments may be rebutted by proof of the real date of execution. *Parke* v. *Neeley*, 90 Pa. St. 52 ; *Germania Bank* v. *Distler*, 67 Barb. 333, 64 N. Y. 642 ; *Smith* v. *Shoemaker*, 17 Wall. 63.]

[2] [*Jones* v. *Phelps*, 2 Barb. Ch. 400 ; see *Gilman* v. *Moody*, 43 N. H. 239 ; so it is a general principle that two instruments of the same date, between the same parties, and relating to the same subject matter, form parts of the same agreement or transaction. *Mott* v. *Richtmyer*, 57 N. Y. 49, 65.]

[3] 1 Ph. Ev. 482-3 ; T. E. s. 137 ; Best, s. 403 ; [see *Philpot* v. *Gruninger*, 14 Wall. 570.]

creditor's debt. Further evidence of the date of the transaction is required in order to guard against collusion between the assignees and the bankrupt, to the prejudice of creditors whose claims date from the interval between the act of bankruptcy and the adjudication.[1]

(*b*) In a petition for damages on the ground of adultery letters are produced between the husband and wife, dated before the alleged adultery, and showing that they were then on affectionate terms. Further evidence of the date is required to prevent collusion to the prejudice of the person petitioned against.[2]

ARTICLE 86.

PRESUMPTION AS TO STAMP OF A DOCUMENT.[3]

When any document is not produced after due notice to produce, and after being called for, it is presumed to have been duly stamped,[4] unless it be shown to have remained unstamped for some time after its execution.[5]

ARTICLE 87.

PRESUMPTION AS TO SEALING AND DELIVERY OF DEEDS.

When any document purporting to be and stamped as a deed, appears or is proved to be or to have been signed and

[1] *Anderson* v. *Weston*, 6 Bing. N. C. 302; *Sinclair* v. *Baggallay*, 4 M. & W. 318.

[2] *Houlston* v. *Smith*, 2 C. & P. 24; [Gr. Ev. i. § 102, ii. § 57; see Art. 11, Illustration (*k*), *ante*.]

[3] [The general abolition in this country of the laws requiring the use of stamps upon written instruments renders this article of little or no importance here. Some analogous decisions of interest under the former law requiring revenue stamps are *Van Rensellaer* v. *Vickery*, 3 Lans. 57; *Long* v. *Spencer*, 78 Pa. St. 303; for a case in which stamps were used as seals, see *Van Bokkelen* v. *Taylor*, 62 N. Y. 105.]

[4] *Closmadeuc* v. *Carrel*, 18 C. B. 44. In this case the growth of the rule is traced, and other cases are referred to, in the judgment of Cresswell, J.

[5] *Marine Investment Co.* v. *Haviside*, L. R. 5 E. & I. App. 624.

duly attested, it is presumed to have been sealed and delivered, although no impression of a seal appears thereon.[1]

[1] *Hall* v. *Bainbridge*, 12 Q. B. 699-710. *Re Sandilands*, L. R. 6 C. P. 411. [These cases, so far as they support this article, are based upon the English rule, that neither an impression upon wax or other tenacious substance, nor a scroll or other mark, is necessary to constitute a seal. But in this country the general rule is that no deed or other specialty is complete without a seal in one or the other of these forms. If, therefore, an instrument has no seal upon it, in the form recognized as valid in the particular State, the fact that it purports to be sealed, and is attested as such, is not sufficient to make it a deed. *Chilton* v. *People*, 66 Ill. 501; *State* v. *Humbird*, 54 Md. 327; *State* v. *Thompson*, 49 Mo. 188; *Taylor* v. *Glaser*, 2 S. & R. 431; *Corlies* v. *Van Note*, 16 N. J. L. 324. But where a deed is proved by the public records, and no seal has been recorded, like circumstances as to the purport of the deed, etc., will raise the presumption of a seal upon the original. *Flowery Co.* v. *Bonanza Co.*, 16 Nev. 302; *Starkweather* v. *Martin*, 28 Mich. 471; cf. *Geary* v. *Kansas*, 61 Mo. 378; contra, *Switzer* v. *Knapps*, 10 Ia. 72. If a seal is omitted by mistake, equity will cause the omission to be supplied or will disregard it. *Harding* v. *Jewell*, 73 Me. 426; *Montville* v. *Haughton*, 7 Ct. 543; *Rutland* v. *Paige*, 24 Vt. 181.

If an instrument, when given in evidence, bears a seal, this is presumed to be the seal of the party signing (*Mill Dam Co.* v. *Hovey*, 21 Pick. 417, 428; *Trustees* v. *McKechnie*, 90 N. Y. 618); and upon proof of the signature, it may be presumed that the instrument was regularly sealed and delivered, especially if there be a recital stating the fact of sealing; such recital is, however, by the weight of authority, held unnecessary. *Merritt* v. *Cornell*, 1 E. D. Sm. 335; *Miller* v. *Binder*, 28 Pa. St. 489; *Bradford* v. *Randall*, 5 Pick. 496; *Trasker* v. *Everhart*, 3 G. & J. 234; *Force* v. *Craig*, 7 N. J. L. 272; *Anthony* v. *Harrison*, 14 Hun, 200, 74 N. Y. 613; but see *Clegg* v. *Lemessurier*, 15 Gratt. 108. But the presumption is rebuttable. *Koehler* v. *Black River Co.*, 2 Black, 715. Still the fact that an instrument bears a seal and also purports to be sealed is evidence for the jury that it was sealed when signed, though the obligor denies this. *Brolley* v. *Lapham*, 13 Gray, 294; *State* v. *Peck*, 53 Me. 284, 286.

So when a deed with the regular evidence of its execution upon its face is found in the hands of the grantee, it is presumed to have been duly delivered (*Ward* v. *Lewis*, 4 Pick. 518; *Story* v. *Bishop*, 4 E. D. Sm. 423); so if it is upon record duly acknowledged and attested. *Lawrence* v.

ARTICLE 88.

PRESUMPTION AS TO DOCUMENTS THIRTY YEARS OLD.

Where any document purporting or proved to be thirty years old is produced from any custody which the judge in the particular case considers proper, it is presumed that the signature and every other part of such document which purports to be in the handwriting of any particular person is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested, by the persons by whom it purports to be executed and attested;[1] and the attestation or execution need not be proved, even if the attesting witness is alive and in court.[2]

Farley, 24 Hun, 293; *McCurdy's Appeal*, 65 Pa. St. 290. But this presumption is also rebuttable. *Knolls* v. *Bambart*, 71 N. Y. 474; see Washb. R. P. iii. 292 (4th ed).]

[1] 2 Ph. Ev. 245-8; Starkie, 521-6; T. E. s. 74 and ss. 593-601; Best, s. 220. [Wh. Ev. i. §§ 194-199, 703, 732; Gr. Ev. i. §§ 21, 142-144, 570; *Winn* v. *Paterson*, 9 Pet. 663; *Cahill* v. *Palmer*, 45 N. Y. 478; *Scharff* v. *Keener*, 64 Pa. St. 376; *Berry* v. *Raddin*, 11 Allen, 579; *Goodwin* v. *Jack*, 62 Me. 414. The age of a will under this rule is reckoned from the testator's death. *Staring* v. *Bowen*, 6 Barb. 109. It has been a mooted question, whether, if the document were a conveyance of land, it would be necessary to prove, besides its age and its production from the proper custody, that there had been possession of the land under it and in accordance with its terms. The better opinion is that evidence of possession is not strictly necessary, but other corroborative evidence may be received to establish the genuineness of the instrument. *Whitman* v. *Heneberry*, 73 Ill. 109; *Walker* v. *Walker*, 67 Pa. St. 185; see *Boston* v. *Richardson*, 105 Mass. 351; *Clark* v. *Owens*, 18 N. Y. 434; *Enders* v. *Steenbergh*, 2 Abb. Dec. 31; see Gr. Ev. i. § 144, n. But evidence of possession is the best means of corroboration, and should be produced when practicable. *Willson* v. *Betts*, 4 Den. 202. Unless there be some satisfactory corroboration, the execution of the document must be proved; its age alone is not enough to authenticate it. *Jackson* v. *Luquere*, 5 Cow. 221; *Martin* v. *Rector*, 24 Hun, 27.]

[2] [*Jackson* v. *Christman*, 4 Wend. 277; *McReynolds* v. *Longenberger*, 57 Pa. St. 13.]

Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.[1]

ARTICLE 89.

PRESUMPTION AS TO ALTERATIONS.

No person producing any document which upon its face appears to have been altered in a material part can claim under it the enforcement of any right created by it, unless the alteration was made before the completion of the document or with the consent of the party to be charged under it or his representative in interest.[2]

This rule extends to cases in which the alteration was made by a stranger, whilst the document was in the custody of the person producing it, but without his knowledge or leave.[3]

[1] [See cases in notes 1 and 2, *supra*.]

[2] [Gr. Ev. i. § 565; *Angle* v. *Life Ins. Co.*, 92 U. S. 330; *Drum* v. *Drum*, 133 Mass. 566; *Hunt* v. *Gray*, 35 N. J. L. 227. A material alteration by a party after execution avoids, though innocently made (*Booth* v. *Powers*, 56 N. Y. 22; *Eckert* v. *Pickel*, 59 Ia. 545; *Craighead* v. *McLoney*, 99 Pa. St. 211), but then, in the case of a contract, a recovery may be had on the original consideration (Id.; *Hunt* v. *Gray*, supra); *aliter*, if the alteration be fraudulent. *Meyer* v. *Huneke*, 55 N. Y. 412. A negotiable instrument, materially altered by a party, is void even in the hands of an innocent purchaser for value. *Benedict* v. *Cowden*, 49 N. Y. 396; *Angle* v. *Life Ins. Co.*, supra.

Alterations in a deed will not divest the title conveyed by it, though they will, if material, avoid the covenants. Gr. Ev. i. § 265; *Herrick* v. *Malin*, 22 Wend. 388. Alterations before execution should be noted in the attestation clause. Gr. Ev. i. § 564. As to alterations by consent or authority, see *Penny* v. *Corwithe*, 18 Johns. 499; *Taddiker* v. *Cantrell*, 69 N. Y. 597. But alterations by consent of parties may avoid the instrument as to sureties. *Paine* v. *Jones*, 76 N. Y. 274; *Eckert* v. *Louis*, 84 Ind. 99.]

[3] *Pigot's Case*, 11 Rep. 47; *Davidson* v. *Cooper*, 11 M. & W. 778; 13

Alterations and interlineations appearing on the face of a deed are, in the absence of all evidence relating to them, presumed to have been made before the deed was completed.[1]

M. & W. 343; *Aldous* v. *Cornwell*, L. R. 3 Q. B. 573. This qualifies one of the resolutions in *Pigot's Case*. The judgment reviews a great number of authorities on the subject. [This doctrine is asserted in *Marcy* v. *Dunlap*, 5 Lans. 365; but generally in this country it is held that unauthorized alterations by a stranger, even though material, do not affect the validity of the document (*Drum* v. *Drum*, 133 Mass. 566; *Robertson* v. *Hay*, 91 Pa. St. 242; *Hunt* v. *Gray*, 35 N. J. L. 227; *Bigelow* v. *Stilphens*, 35 Vt. 521; *Waring* v. *Smyth*, 2 Barb. Ch. 119), and the fact that the document is in the party's custody at the time seems to make no difference. (Id.) The stranger's act is called a "spoliation," rather than an alteration. Gr. Ev. i. § 566.]

[1] *Doe* v. *Catomore*, 16 Q. B. 745. [The American rule differs from the English in many States, though there is much diversity of doctrine in the different States. It is generally agreed, however, that if a material alteration appear upon the face of a document, and be suspicious in its character and beneficial to the party claiming the enforcement of a right under the document, the burden of proof is upon such party to show that the alteration was made before or at the time of execution, or is for other reasons proper or excusable; and if evidence be adduced to explain any material alteration, it is submitted to the jury, who are to determine as a question of fact, when, by whom, and for what reasons the alteration was made. *Smith* v. *McGowan*, 3 Barb. 404 (deed); *Waring* v. *Smyth*, 2 Barb. Ch. 119 (bond and mortgage); *U. S.* v. *Linn*, 1 How. (U. S.) 104 (bond); *Robinson* v. *Myers*, 67 Pa. St. 9 (deed); *Comstock* v. *Smith*, 26 Mich. 306 (deed); *Ely* v. *Ely*, 6 Gray, 439 (mortgage); *Drum* v. *Drum*, 133 Mass. 566 (note); *Dodge* v. *Haskell*, 69 Me. 429 (note); *Paramore* v. *Lindsey*, 63 Mo. 63 (note). But if the alteration be not suspicious, such explanatory evidence is not required. *Feig* v. *Meyers*, 102 Pa. St. 16 (deed); *Munroe* v. *Eastman*, 31 Mich. 283 (deed); *Paramore* v. *Lindsey*, supra; see *Crossman* v. *Crossman*, 95 N. Y. 145, 153.

In some States, however, it is held that if the party who is bound to explain a suspicious alteration offers no evidence for the purpose, the document may be rejected by the court as inadmissible in evidence; (this is the English rule of *Knight* v. *Clements*, 8 A. & E. 215); *Burgwin* v. *Bishop*, 91 Pa. St. 336 (lease); *Tillou* v. *Clinton, etc. Ins. Co.*, 7 Barb. 564 (written consent); but see *Maybee* v. *Sniffen*, 2 E. D. Sm. 1 (release). In other States, the document, upon proof of execution, is submitted to the jury

Alterations and interlineations appearing on the face of a will are, in the absence of all evidence relating to them, presumed to have been made after the execution of the will.[1]

There is no presumption as to the time when alterations and interlineations, appearing on the face of writings not under seal, were made,[2] except that it is presumed that they were so made that the making would not constitute an offence.[3]

An alteration is said to be material when, if it had been made

in all cases of alteration, with or without explanatory evidence *aliunde*, so that they may determine from its inspection, when, and for what purpose, the alteration was made (*Hoey* v. *Jarman*, 39 N. J. L. 523 (specialty); *Dodge* v. *Haskell*, supra; *Cole* v. *Hills*, 44 N. H. 227; cf. *Hayden* v. *Goodnow*, 39 Ct. 164); but the jury must be satisfied by a preponderance of evidence that any material alteration was rightfully made, and in the absence of evidence to show this, a verdict against the validity of the instrument will be sustainable, or may be directed. Id.; *Putnam* v. *Clark*, 33 N. J. Eq. 343.

Under both these theories, it is sometimes said that there is a presumption of *fact* that a material alteration, not sufficiently explained, was made after execution. It is denied, however, that there is any presumption of *law* as to the time of alteration, in such a case, though such a doctrine has been often asserted. *Ely* v. *Ely*, *Comstock* v. *Smith*, supra. But in some States, the presumption is that such an unexplained alteration was made before or at the time of execution. *Neil* v. *Case*, 25 Kan. 510 (note); *Beaman* v. *Russell*, 20 Vt. 205; *Little* v. *Herndon*, 10 Wall. 26 (asserting this as to *deeds*, following the English rule). By some authorities there is a presumption of law that suspicious alterations were made after execution, but other alterations before. *Cox* v. *Palmer*, 1 McCrary, 431 (mortgage). And there are other theories also on this vexed subject.

In general, each State applies the same rule to deeds, bills and notes, written contracts of any kind, and other like documents. As to wills, see next note.]

[1] *Simmons* v. *Rudall*, 1 Sim. (N. S.) 136. [*Wetmore* v. *Carryl*, 5 Redf. 544; *Toebbe* v. *Williams*, 80 Ky. 661; contra, *Wikoff's Case*, 15 Pa. St. 281; see *Van Buren* v. *Cockburn*, 14 Barb. 118; *Charles* v. *Huber*, 78 Pa. St. 448. As to the effect of alterations after execution, see *Quinn* v. *Quinn*, 1 T. & C. 437; *Eschbach* v. *Collins*, 61 Md. 478; *Bigelow* v. *Gillott*, 123 Mass. 102; *Haynes* v *Haynes*, 33 O. St. 598.]

[2] *Knight* v. *Clements*, 8 A. & E. 215; [see p. 158, note 1, *supra*.]

[3] *R.* v. *Gordon*, Dears. 592; [see *Jordan* v. *Stewart*, 23 Pa. St. 244.]

with the consent of the party charged, it would have affected his interest or varied his obligations in any way whatever.[1]

An alteration which in no way affects the rights of the parties or the legal effect of the instrument, is immaterial.[2]

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[1] [*Craighead* v. *McLoney*, 99 Pa. St. 211; *Booth* v. *Powers*, 56 N. Y. 22; *Adair* v. *England*, 58 Ia. 314; *Wood* v. *Steele*, 6 Wall. 80. Whether an alteration is material or not, is a question for the court. Id.; *Belfast Bk.* v. *Harriman*, 68 Me. 522; *Keens' Exr.*, 75 Va. 424.]

[2] This appears to be the result of many cases referred to in T. E. ss. 1619–20; see also the judgments in *Davidson* v. *Cooper* and *Aldous* v. *Cornwell*, referred to above. [Immaterial alterations by a party or stranger do not avoid an instrument (*Casoni* v. *Jerome*, 58 N. Y. 315; *Shuler* v. *Gillette*, 12 Hun, 278; *Robertson* v. *Hay*, 91 Pa. St. 242; *Cushing* v. *Field*, 70 Me. 50; *Ames* v. *Colburn*, 11 Gray, 390), unless, perhaps, when they are made by a party with fraudulent intent, but this is doubtful; see Gr. Ev. i. § 568; Daniel, Neg. Inst. ii. § 1416; *Comm.* v. *Emigrant Sav. Bk.*, 98 Mass. 12. If blank spaces are left in a negotiable bill or note so that it is incomplete, any *bona fide* holder may fill them up, and the instrument will be valid in the hands of an innocent purchaser for value. *Redlich* v. *Doll*, 54 N. Y. 234; *Angle* v. *Life Ins. Co.*, 92 U. S. 330, *Abbott* v. *Rose*, 62 Me. 194; *Garrard* v. *Lewis*, 10 Q. B. D. 30. But unwritten spaces in a complete note or bill cannot be so filled. *McGrath* v. *Clark*, 56 N. Y. 34; *Bruce* v. *Westcott*, 3 Barb. 374; *Cronkhite* v. *Nebeker*, 81 Ind. 319; *Greenfield Sav. Bk.* v. *Stowell*, 123 Mass. 196. But there are cases to the contrary, which are collected in this last decision. As to filling blanks in deeds, see Washb. R. P. iii. 240–243 (4th ed.); *Bell* v. *Kennedy*, 100 Pa. St. 215.]

CHAPTER XII.

OF THE EXCLUSION OF ORAL BY DOCUMENTARY EVIDENCE, AND OF THE MODIFICATION AND INTERPRETATION OF DOCUMENTARY BY ORAL EVIDENCE.

ARTICLE 90.*

EVIDENCE OF TERMS OF CONTRACTS, GRANTS, AND OTHER DISPOSITIONS OF PROPERTY REDUCED TO A DOCUMENTARY FORM.

WHEN any judgment of any Court or any other judicial or official proceeding, or any contract or grant, or any other disposition of property, has been reduced to the form of a document or series of documents, no evidence may be given of such judgment or proceeding, or of the terms of such contract, grant, or other disposition of property, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.[1] Nor may the contents of any such document be contradicted, altered, added to, or varied by oral evidence.[2]

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* See Note XXXII.

[1] Illustrations (*a*) and (*b*). [But contemporaneous writings between the same parties, relating to the same subject-matter, are admissible in evidence. Gr. Ev. i. § 283; *Wilson* v. *Randall*, 67 N. Y. 338.]

[2] [Gr. Ev. i. §§ 275–282; Wh. Ev. ii. §§ 920–927. This rule of the English courts is well established in this country. *Mott* v. *Richtmyer*, 57 N. Y. 49; *Martin* v. *Cole*, 104 U. S. 30; *Black* v. *Bachelder*, 120 Mass. 171; *Martin* v. *Berens*, 67 Pa. St. 459; *Naumberg* v. *Young*, 44 N. J. L. 331. But in Pennsylvania it is applied with less stringency than in other States. *Greenawalt* v. *Kohne*, 85 Pa. St. 369. The rule as to wills is the same as in respect to other instruments. Parol evidence is not received

Provided that any of the following matters may be proved—

(1) Fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, the fact that it is wrongly dated,[1] want or failure of consideration, or mistake in fact or law, or any other matter which, if proved, would produce any effect upon the validity of any document, or of any part of it, or which would entitle any person to any judgment, decree, or order relating thereto.[2]

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of the testator's oral declarations of intention, except in the special cases stated in the next article. *Williams* v. *Freeman*, 83 N. Y. 561; *Warren* v. *Gregg*, 116 Mass. 304; *Mackie* v. *Story*, 93 U. S. 589; *Wallize* v. *Wallize*, 55 Pa. St. 242; *Waldron* v. *Waldron*, 45 Mich. 350.]

[1] *Reffell* v. *Reffell*, L. R. 1 P. & D. 139; [*Shaughnessy* v. *Lewis*, 130 Mass. 355; *Barnet* v. *Abbott*, 53 Vt. 120; *Germania Bk.* v. *Distler*, 67 Barb. 333, 64 N. Y. 642.] Mr. Starkie extends this to mistakes in some other formal particulars. 3 Star. Ev. 787-8.

[2] Illustration (*c*); [Gr. Ev. i. §§ 284, 285; Wh. Ev. ii. §§ 930-935, 1009, 1054; *Hall* v. *Erwin*, 66 N. Y. 649; *Trambly* v. *Ricard*, 130 Mass. 259; *Rowand* v. *Finney*, 96 Pa. St. 192; *Paine* v. *Upton*, 87 N. Y. 327 (fraud, accident, and mistake); *Haughwout* v. *Garrison*, 69 N. Y. 339 (usury); *Sherman* v. *Wilder*, 106 Mass. 537 (illegality); *Anthony* v. *Harrison*, 14 Hun, 198, 74 N. Y. 613; *Eaton* v. *Eaton*, 35 N. J. L. 290 (want of consideration); so parol evidence is admissible to show the real consideration of a contract or deed, though different from that expressed (*Hebbard* v. *Haughian*, 70 N. Y. 54; *Baldwin* v. *Dow*, 130 Mass. 416; *Holmes' Appeal*, 79 Pa. St. 279; *Burnham* v. *Dorr*, 72 Me. 198); to show a deed to be a mortgage (*Morris* v. *Budlong*, 78 N. Y. 543; *Hassam* v. *Barrett*, 115 Mass. 256; *Logue's Appeal*, 104 Pa. St. 136; *Peugh* v. *Davis*, 96 U. S. 332; this is only true in *equity* in most States); to show a bill of sale of goods to be a chattel mortgage (*Smith* v. *Beattie*, 31 N. Y. 542; *Morgan's Assignees* v. *Shum*, 15 Wall. 105; *Booth* v. *Robinson*, 55 Md. 419; this is in *equity*, but not at *law*, *Philbrook* v. *Eaton*, 134 Mass. 398); that the signer of an unsealed non-negotiable instrument signed as agent, not as prineipal (*Nicoll* v. *Burke*, 78 N. Y. 580; *Lerned* v. *Jones*, 9 Allen, 419); to show the true relations of the parties signing an instrument as between themselves, as that they are co-sureties though they signed as makers, and *vice versa*, etc. (*Mansfield* v. *Edwards*, 136 Mass. 15; *Paul* v. *Rider*, 58 N. H. 119; *Hubbard* v. *Gurney*, 64 N. Y. 457; cf. *Graves* v. *Johnson*, 48 Ct. 160); that a writing purporting to be a contract was not intended as such (*Grierson* v. *Mason*, 60 N. Y. 394); to show which of two con-

(2) The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, if from the circumstances of the case the Court infers that the parties did not intend the document to be a complete and final statement of the whole of the transaction between them.[1]

(3) The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant, or disposition of property.[2]

(4) The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant, or disposition of property, provided that such agreement is not invalid under the Statute of Frauds, or otherwise.[3]

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temporaneous writings expresses the real intention of the parties (*Payson* v. *Lamson*, 134 Mass. 593); so receipts may be varied by parol (*Hildreth* v. *O'Brien*, 10 Allen, 104; *Hotchkiss* v. *Mosher*, 48 N. Y. 478; *Russell* v. *Church*, 65 Pa. St. 9; *Swain* v. *Frazier*, 35 N. J. Eq. 326); and there are many other like cases.]

[1] Illustrations (*d*), (*e*), and (*ee*); [Gr. Ev. i. § 284 *a*; *Juilliard* v. *Chaffee*, 92 N. Y. 529; *Willis* v. *Hulbert*, 117 Mass. 151; *Naumberg* v. *Young*, 44 N. J. L. 331; *Green* v. *Randall*, 51 Vt. 67; *Bradstreet* v. *Rich*, 72 Me. 233; *Bradshaw* v. *Combs*, 102 Ill. 428; but see *Mast* v. *Perace*, 58 Ia. 579; thus an independent collateral agreement may be shown by parol. *Van Brunt* v. *Day*, 81 N. Y. 251.]

[2] Illustrations (*f*) and (*g*); [*Juilliard* v. *Chaffee*, 92 N. Y. 529, 535; *Wilson* v. *Powers*, 131 Mass. 539; *Ottawa, etc. R. Co.* v. *Hall*, 1 Bradw. 612; *Wendlinger* v. *Smith*, 75 Va. 309; *Westman* v. *Krumweide*, 30 Minn. 313; *Michels* v. *Olmstead*, 14 F. R. 219. Some of the cases limit this rule to instruments not under seal, but others apply it to deeds as well. Id.; see *Brackett* v. *Barney*, 28 N. Y. 333.

But other conditions cannot be engrafted upon a writing by parol evidence (*Wilson* v. *Deen*, 74 N. Y. 531; *Allen* v. *Furbish*, 4 Gray, 504; *Holzworth* v. *Koch*, 26 O. St. 33); in Pennsylvania, however, a less stringent rule prevails, and such evidence is received. *Greenawalt* v. *Kohne*, 85 Pa. St. 369; cf. *Bonney* v. *Morrill*, 57 Me. 368.]

[3] Illustration (*h*); [Gr. Ev. i. §§ 302–304; *Homer* v. *Life Ins. Co.*, 67 N. Y. 478; *Meech* v. *Buffalo*, 29 N. Y. 198, 218; *Kennebec Co.* v. *Augusta Ins. Co.*, 6 Gray, 204, 207; *Pratt's Adm'rs* v. *U. S.*, 22 Wall. 496; *Allen* v. *Sowerby*, 37 Md. 410; generally the subsequent agreement requires a

(5) Any usage or custom by which incidents not expressly mentioned in any contract are annexed to contracts of that description; unless the annexing of such incident to such contract would be repugnant to or inconsistent with the express terms of the contract.[1]

Oral evidence of a transaction is not excluded by the fact that a documentary memorandum of it was made, if such memorandum was not intended to have legal effect as a contract, or other disposition of property.[2]

Oral evidence of the existence of a legal relation is not excluded by the fact that it has been created by a document, when the fact to be proved is the existence of the relationship itself, and not the terms on which it was established or is carried on.[3]

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new consideration (*Courtenay* v. *Fuller*, 65 Me. 156; *Malone* v. *Dougherty*, 79 Pa. St. 46; *Stewart* v. *Ketcltas*, 36 N. Y. 388, 392), but this is in some cases held unnecessary. *Burt* v. *Saxton*, 1 Hun, 551; *Brown* v. *Everhard*, 52 Wis. 205. As to the modification of a contract under seal, see *Canal Co.* v. *Ray*, 101 U. S. 522; *Coe* v. *Hobby*, 72 N. Y. 141; *Quigley* v. *De Haas*, 98 Pa. St. 292.

The authorities are conflicting as to whether a contract within the Statute of Frauds can be varied by a subsequent parol agreement. *Cummings* v. *Arnold*, 3 Met. 486; *Negley* v. *Jeffers*, 28 O. St. 90; *Hill* v. *Blake*, 97 N. Y. 216; *Organ* v. *Stewart*, 60 N. Y. 413, 419; *Swaine* v. *Seamens*, 9 Wall. 254, 272; *Packer* v. *Steward*, 34 Vt. 127, 130; see *Kribs* v. *Jones*, 44 Md. 396; *Long* v. *Hartwell*, 34 N. J. L. 116; Reed on St. of Frauds, ii. § 473.]

[1] *Wigglesworth* v. *Dallison*, and note thereto, S. L. C. 598–628; [Gr. Ev. i. §§ 294, 295; *Walls* v. *Bailey*, 49 N. Y. 464; *Barnard* v. *Kellogg*, 10 Wall. 383; *Page* v. *Cole*, 120 Mass. 37; *Burger* v. *Farmers' Ins. Co.*, 71 Pa. St. 422.]

[2] Illustration (*i*); [*Thomas* v. *Nelson*, 69 N. Y. 118; *Lathrop* v. *Bramhall*, 64 N. Y. 365; *Perrine* v. *Cooley's Exers*, 39 N. J. L. 449; *Irwin* v. *Thompson*, 27 Kan. 643.]

[3] Illustration (*j*); [*Widdifield* v. *Widdifield*, 2 Binn. 245; *Cutler* v. *Thomas*, 25 Vt. 73; see *Supples* v. *Lewis*, 37 Ct. 568. So various collateral facts about an instrument may be proved by parol; as, *e.g.*, the purpose or object for which it was given (*Brick* v. *Brick*, 98 U. S. 514; *Hutchins* v. *Hebbard*, 34 N. Y. 24); the reason why it was not indorsed

The fact that a person holds a public office need not be proved by the production of his written or sealed appointment thereto, if he is shown to have acted on it.[1]

Illustrations.

(*a*) A policy of insurance is effected on goods "in ships from Surinam to London." The goods are shipped in a particular ship, which is lost.

The fact that that particular ship was orally excepted from the policy cannot be proved.[2]

(*b*) An estate called Gotton Farm is conveyed by a deed which describes it as consisting of the particulars described in the first division of a schedule and delineated in a plan on the margin of the schedule.

Evidence cannot be given to show that a close not mentioned in the schedule or delineated in the plan was always treated as part of Gotton Farm, and was intended to be conveyed by the deed.[3]

(*c*) A institutes a suit against B for the specific performance of a contract, and also prays that the contract may be reformed as to one of its provisions, as that provision was inserted in it by mistake.

A may prove that such a mistake was made as would entitle him to have the contract reformed.[4]

(*d*) A lets land to B, and they agree that a lease shall be given by A to B.

Before the lease is given, B tells A that he will not sign it unless A promises to destroy the rabbits. A does promise. The lease is afterwards granted, and reserves sporting rights to A, but does not mention

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(*Bank* v. *Kennedy*, 17 Wall. 19); the fact that interest is included in a promissory note (*Clifton* v. *Litchfield*, 106 Mass. 34); and many like cases. *Exers of Shoenberger* v. *Hackman*, 37 Pa. St. 87; *Bower* v. *Hoffman*, 23 Md. 253; *Klein* v. *Russell*, 19 Wall. 433.]

[1] See authorities collected in 1 Ph. Ev. 449-50; T. E. s. 139; [Gr. Ev. i. §§ 83, 92; *Comm.* v. *Kane*, 108 Mass. 423; *Colton* v. *Beardsley*, 38 Barb. 29; *Lucier* v. *Pierce*, 60 N. H. 13; *Golder* v. *Bressler*, 105 Ill. 419, 428; cf. *Chapman Township* v. *Herrold*, 58 Pa. St. 106.]

[2] *Weston* v. *Eames*, 1 Tau. 115.

[3] *Barton* v. *Dawes*, 10 C. B. 261-265.

[4] Story's Equity Jurisprudence, chap. v., ss. 153-162; [Gr. Ev. i. § 296 *a*; *Howland* v. *Blake*, 97 U. S. 624; *Stockbridge Co.* v. *Hudson Co.*, 102 Mass. 45; *Bryce* v. *Lorillard Ins. Co.*, 55 N. Y. 240; *N. & W. Branch R. Co.* v. *Swank*, 105 Pa. St. 555; but equity will not reform a will. *Sherwood* v. *Sherwood*, 45 Wis. 35.]

the destruction of the rabbits. B may prove A's verbal agreement as to the rabbits.[1]

(*e*) A & B agree verbally that B shall take up an acceptance of A's, and that thereupon A and B shall make a written agreement for the sale of certain furniture by A to B. B does not take up the acceptance. A may prove the verbal agreement that he should do so.[2]

(*ee*) [A makes an oral assignment to B for a valid consideration of a portion of a debt due to A by a bank, and at the same time gives to B a check to enable him to draw the amount assigned. The check is not the contract between the parties and does not render parol evidence of the agreement inadmissible.][3]

(*f*) A & B enter into a written agreement for the sale of an interest in a patent, and at the same time agree verbally that the agreement shall not come into force unless C approves of it. C does not approve. The party interested may show this.[4]

(*g*) A, a farmer, agrees in writing to transfer to B, another farmer, a farm which A holds of C. It is verbally agreed that the agreement is to be conditional on C's consent. B sues A for not transferring the farm. A may prove the condition as to C's consent and the fact that he does not consent.[5]

(*h*) A agrees in writing to sell B 14 lots of freehold land and make a good title to each of them. Afterwards B consents to take one lot though the title is bad. Apart from the Statute of Frauds this agreement might be proved.[6]

(*i*) A sells B a horse, and verbally warrants him quiet in harness. A also gives B a paper in these words: "Bought of A a horse for 7*l.* 2*s.* 6*d.*"

B may prove the verbal warranty.[7]

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[1] *Morgan* v. *Griffiths*, L. R. 6 Ex. 70; and see *Angell* v. *Duke*, L. R. 10 Q. B. 174; [cf. *Carr* v. *Dooley*, 119 Mass. 296; *Lewis* v. *Seabury*, 74 N. Y. 409; *Chapin* v. *Dobson*, 78 N. Y. 74. The first English case *infra* is disapproved in *Naumberg* v. *Young*, 44 N. J. L. 331.]

[2] *Lindley* v. *Lacey*, 17 C. B. (N. S.) 578.

[3] [*Risley* v. *Phenix Bank*, 83 N. Y. 318.]

[4] *Pym* v. *Campbell*, 6 E. & B. 370; [cf. *Faunce* v. *Life Ins. Co.*, 101 Mass. 279; *Miller* v. *Gambie*, 4 Barb. 146.]

[5] *Wallis* v. *Littell*, 11 C. B. (N. S.) 369.

[6] *Goss* v. *Lord Nugent*, 5 B. & Ad. 58, 65; [see *Wiggin* v. *Goodrich*, 63 Me. 389.]

[7] *Allen* v. *Pink*, 4 M. & W. 140; [*Filkins* v. *Whyland*, 24 N. Y. 338; *Dunham* v. *Barnes*, 9 Allen, 352.]

(*j*) The question is, whether A gained a settlement by occupying and paying rent for a tenement. The facts of occupation and payment of rent may be proved by oral evidence, although the contract is in writing.[1]

ARTICLE 91.*

WHAT EVIDENCE MAY BE GIVEN FOR THE INTERPRETATION OF DOCUMENTS.

(1) Putting a construction upon a document means ascertaining the meaning of the signs or words made upon it, and their relation to facts.

(2) In order to ascertain the meaning of the signs and words made upon a document, oral evidence may be given of the meaning of illegible or not commonly intelligible characters, of foreign, obsolete, technical, local, and provincial expressions, of abbreviations, and of common words which, from the context, appear to have been used in a peculiar sense ;[2] but evidence may not be given to show that common words, the meaning of which is plain, and which do not appear from the context to have been used in a peculiar sense, were in fact so used.[3]

(3) If the words of a document are so defective or ambiguous as to be unmeaning, no evidence can be given to show what the author of the document intended to say.[4]

(4) In order to ascertain the relation of the words of a document to facts, every fact may be proved to which it refers, or

* See Note XXXIII.

[1] *R.* v. *Hull*, 7 B. & C. 611.

[2] [Illustrations (*a*) (*b*) (*c*) ; [Gr. Ev. i. §§ 280, 292 ; *Nelson* v. *Sun Ins. Co.*, 71 N. Y. 453 ; *Loom Co.* v. *Higgins*, 105 U. S. 580 ; *Houghton* v. *Watertown Ins. Co.*, 131 Mass. 300 ; *Mercer Co.* v. *McKee's Adm'r*, 77 Pa. St. 170; *Hatch* v. *Douglas*, 48 Ct. 116 ; *Walrath* v. *Whittekind*, 26 Kan. 482.]

[3] Illustration (*d*) ; [*Collender* v. *Dinsmore*, 55 N. Y. 200 ; *Moran* v. *Prather*, 23 Wall. 492 ; *Odiorne* v. *Marine Ins. Co.*, 101 Mass. 551.]

[4] Illustrations (*e*) and (*f*) ; [see *Heald* v. *Heald*, 56 Md. 303 ; *Palmer* v. *Albee*, 50 Ia. 429.]

may probably have been intended to refer,[1] or which identifies any person or thing mentioned in it.[2] Such facts are hereinafter called the circumstances of the case.[3]

(5) If the words of a document have a proper legal meaning, and also a less proper meaning, they must be deemed to have their proper legal meaning, unless such a construction would be unmeaning in reference to the circumstances of the case, in which case they may be interpreted according to their less proper meaning.[4]

(6) If the document has one distinct meaning in reference to the circumstances of the case, it must be construed accordingly, and evidence to show that the author intended to express some other meaning is not admissible.[5]

(7) If the document applies in part but not with accuracy or

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[1] See all the illustrations.

[2] Illustration (*g*); [Gr. Ev. i. §§ 286–290; *Coleman* v. *Manhattan Co.*, 94 N. Y. 229; *Cleverly* v. *Cleverly*, 124 Mass. 314; *Morris's Appeal*, 88 Pa. St. 368; *Chambers* v. *Watson*, 60 Ia. 339. Evidence of "surrounding circumstances" is received, to put the court in the position of the parties at the time when the instrument was drawn. Id.; *Bond's Appeal*, 31 Ct. 183; *Field* v. *Munson*, 47 N. Y. 221. As to the limitations of the doctrine, see *Brawley* v. *U. S.*, 96 U. S. 168; *Reed* v. *Ins. Co.*, 95 U. S. 23. Such evidence is not received when the meaning of the instrument is clear without it. *Veazie* v. *Forsaith*, 76 Me. 172; *Rapalye* v. *Rapalye*, 27 Barb. 610.

That proof may be given that the maker of the instrument habitually applied a nickname or peculiar designation used therein to a particular person or thing, see *Boggs* v. *Taylor*, 26 O. St. 604; *Ryerss* v. *Wheeler*, 22 Wend. 150; *Lanning* v. *Francis*, 35 N. J. Eq. 397; see Illustrations (*e*) and (*gg*).]

[3] As to proving facts showing the knowledge of the writer, and for an instance of a document which is not admissible for that purpose, see *Adie* v. *Clark*, L. R. 3 Ch. D. 134, 142.

[4] Illustration (*h*); [*Mowatt* v. *Carow*, 7 Pai. 328; *Crower* v. *Pinckney*, 3 Barb. Ch. 466; cf. *DeKay* v. *Irving*, 5 Den. 646.]

[5] Illustration (*i*); [*American Bible Soc.* v. *Pratt*, 9 Allen, 109; *Best* v. *Hammond*, 55 Pa. St. 409; *Drew* v. *Swift*, 46 N. Y. 204; *Jackson* v. *Sill*, 11 Johns. 201; *Cotton* v. *Smithwick*, 66 Me. 360; *Sherwood* v. *Sherwood*, 45 Wis. 357; *Fitzpatrick* v. *Fitzpatrick*, 36 Ia. 674; *Kurtz* v. *Hibner*, 55

not completely to the circumstances of the case, the Court may draw inferences from those circumstances as to the meaning of the document, whether there is more than one, or only one thing or person to whom or to which the inaccurate description may apply. In such cases no evidence can be given of statements made by the author of the document as to his intentions in reference to the matter to which the document relates, though evidence may be given as to his circumstances, and to his habitual use of language or names for particular persons or things.[1]

(8) If the language of the document, though plain in itself, applies equally well to more objects than one, evidence may be given both of the circumstances of the case and of statements made by any party to the document as to his intentions in reference to the matter to which the document relates.[2]

Ill. 514. The meaning of plain language in a will must be followed, though it make the will void. *Van Nostrand* v. *Moore*, 52 N. Y. 12.]

[1] Illustrations (*k*) (*l*) (*m*); [*Morse* v. *Stearns*, 131 Mass. 389; *N. Y. Inst. for Blind* v. *How's Exers*, 10 N. Y. 84; *St. Luke's Home* v. *Ass'n. for Females*, 52 N. Y. 191; *Griscom* v. *Evens*, 40 N. J. L. 402, 42 id. 579; *Dunham* v. *Averill*, 45 Ct. 61; *Button* v. *Amer. Tract Soc.*, 23 Vt. 336. In illustration of the rule *Falsa demonstratio non nocet*, see Gr. Ev. i. §§ 291, 301; *Bryce* v. *Lorillard Ins. Co.*, 55 N. Y. 240; *Parks* v. *Loomis*, 6 Gray, 467. The false part of the description is rejected and if sufficient remains to identify a particular person or thing, effect can be given to the instrument; otherwise it is void for uncertainty. Id.; *Fitzpatrick* v. *Fitzpatrick*, 36 Ia. 674.]

[2] Illustrations (*n*) (*o*); [Gr. Ev. i. §§ 289, 290, 297, 298; *St. Luke's Home* v. *Ass'n. for Females*, 52 N. Y. 191, 198; *Trustees* v. *Colegrove*, 4 Hun, 362; *Griscom* v. *Evens*, supra; *Bodman* v. *Amer. Tract. Soc.*, 9 Allen, 447; *Porter's Appeal*, 94 Pa. St. 332; *Morgan* v. *Burrows*, 45 Wis. 211. These are called cases of "latent ambiguity," or better of "equivocation." See Gr. Ev. i. § 289; *Tucker* v. *Seamen's Aid Soc.*, 7 Met. 188, 206. But many cases of this kind are resolved upon proof of "surrounding circumstances," without proof of oral statements of intention. *Putnam* v. *Bond*, 100 Mass. 58; *Ayers* v. *Weed*, 16 Ct. 291; *Tilton* v. *Amer. Bible Soc.*, 60 N. H. 377; *Tyler* v. *Fickett*, 73 Me. 410; *Sargent* v. *Adams*, 3 Gray, 72.]

(9) If the document is of such a nature that the Court will presume that it was executed with any other than its apparent intention, evidence may be given to show that it was in fact executed with its apparent intention.[1]

Illustrations.

(*a*) A lease contains a covenant as to "ten thousand" rabbits. Oral evidence to show that a thousand meant, in relation to rabbits, 1200, is admissible.[2]

(*b*) A sells to B "1170 bales of gambier." Oral evidence is admissible to show that a "bale" of gambier is a package compressed and weighing 2 cwt.[3]

(*c*) A, a sculptor, leaves to B "all the marble in the yard, the tools in the shop, bankers, mod tools for carving." Evidence to show whether "mod" meant models, moulds, or modelling-tools, and to show what bankers are, may be given.[4]

(*d*) Evidence may not be given to show that the word "boats," in a policy of insurance, means "boats not slung on the outside of the ship on the quarter."[5]

(*e*) A leaves an estate to K, L, M, etc., by a will dated before 1838. Eight years afterward A declares that by these letters he meant particular persons. Evidence of this declaration is not admissible. Proof that

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[1] Illustration (*f*). [This is called evidence "to rebut an equity" (*i.e.*, an equitable presumption), and oral statements of intention are provable. Gr. Ev. i. § 296; *Van Houten* v. *Post*, 33 N. J. Eq. 344; *Reynolds* v. *Robinson*, 82 N. Y. 103, 107; *Bank* v. *Fordyce*, 9 Pa. St. 275; cf. *Phillips* v. *McCombs*, 53 N. Y. 494.]

[2] *Smith* v. *Wilson*, 3 B. & Ad. 728; [see *Soutier* v. *Kellerman*, 18 Mo. 509; *Brown* v. *Brown*, 8 Met. 576. But except in special cases like these, the meaning of ordinary words cannot be varied. *Butler* v. *Gale*, 27 Vt. 739; *Mann* v. *Mann*, 14 Johns. 1.]

[3] *Gorrissen* v. *Perrin*, 2 C. B. (N. S.) 681; [see *Miller* v. *Stevens*, 100 Mass. 518 (meaning of "barrels"); *Confederate Note Case*, 19 Wall. 548 (of "dollars"); *Carey* v. *Bright*, 58 Pa. St. 70 (of "collieries"); *Dana* v. *Fiedler*, 12 N. Y. 40.]

[4] [*Goblet* v. *Beechy*, 3 Sim. 24; reversed on another ground in 2 R. & M. 624. This last decision is severely criticised in Wigram on Wills, 140, 187 (O'Hara's ed.); see *Ryerss* v. *Wheeler*, 22 Wend. 148, 153.]

[5] *Blackett* v. *Royal Exchange Co.*, 2 C. & J. 244.

A was in the habit of calling a particular person M would have been admissible.[1]

(*f*) A leaves a legacy to ——. Evidence to show how the blank was intended to be filled is not admissible.[2]

(*g*) Property was conveyed in trust in 1704 for the support of "Godly preachers of Christ's holy Gospel." Evidence may be given to show what class of ministers were at the time known by that name.[3]

(*gg*) [A leaves a legacy in his will to "The Home of the Friendless in New York." There is no institution of that name, but the legacy is claimed by the "American Female Guardian Society." Evidence may be given that this society has been commonly designated by the name used in the will, both by its officers and friends and by the testator, and that upon its circulars and business signs a name almost identical has been used.][4]

(*h*) A leaves property to his "children." If he has both legitimate and illegitimate children, the whole of the property will go to the legitimate children. If he has only illegitimate children, the property may go to them, if he cannot have intended to give it to unborn legitimate children.[5]

(*i*) A testator leaves all his estates in the county of Limerick and city of Limerick to A. He had no estates in the county of Limerick, but he had estates in the county of Clare, of which the will did not dispose. Evidence cannot be given to show that the words "of Clare" had been erased from the draft by mistake, and so omitted from the will as executed.[6]

(*j*) A leaves a legacy to "Mrs. and Miss Bowden." No such persons were living at the time when the legacy was made, but Mrs. Washburne, whose maiden name had been Bowden, was living, and had a daughter,

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[1] *Clayton* v. *Lord Nugent*, 13 M. & W. 200; see 205-6.

[2] *Baylis* v. *A. G.*, 2 Atk. 239; [see *Crooks* v. *Whitford*, 47 Mich. 283; *Wallize* v. *Wallize*, 55 Pa. St. 242; *Lefevre* v. *Lefevre*, 59 N. Y. 434, 441; cf. *Crocker* v. *Crocker*, 5 Hun, 587.]

[3] *Shore* v. *Wilson*, 9 C. & F. 365, 565-6; [see *Robertson* v. *Bullions*, 11 N. Y. 243, 259; *Goddard* v. *Foster*, 17 Wall. 143.]

[4] [*Lefevre* v. *Lefevre*, 59 N. Y. 434; see *Sutton* v. *Bowker*, 5 Gray, 416.]

[5] Wig. Ext. Ev., pp. 18 and 19, and note of cases. [*Appel* v. *Byers*, 98 Pa. St. 479; *Brower* v. *Bowers*, 1 Abb. Dec. 214; see *Gelston* v. *Shields*, 16 Hun, 154, 78 N. Y. 275.]

[6] *Miller* v. *Travers*, 8 Bing. 244; [see *Tucker* v. *Seamen's Aid Soc.*, 7 Met. 188; *Dunham* v. *Averill*, 45 Ct. 61.]

and the testatrix used to call them Bowden. Evidence of these facts was admitted.[1]

(*k*) A devises land to John Hiscocks, the eldest son of John Hiscocks. John Hiscocks had two sons, Simon, his eldest, and John, his second son, who, however, was the eldest son by a second marriage. The circumstances of the family, but not the testator's declarations of intention, may be proved in order to show which of the two was intended.[2]

(*l*) A devises property to Elizabeth, the natural daughter of B. B has a natural son John, and a legitimate daughter Elizabeth. The Court may infer from the circumstances under which the natural child was born, and from the testator's relationship to the putative father, that he meant to provide for John.[3]

(*m*) A leaves a legacy to his niece, Elizabeth Stringer. At the date of the will he had no such niece, but he had a great-great-niece named Elizabeth Jane Stringer. The Court may infer from these circumstances that Elizabeth Jane Stringer was intended; but they may not refer to instructions given by the testator to his solicitor, showing that the legacy was meant for a niece, Elizabeth Stringer, who had died before the date of the will, and that it was put into the will by a mistake on the part of the solicitor.[4]

(*n*) A devises one house to George Gord, the son of George Gord, another to George Gord, the son of John Gord, and the third to George Gord, the son of Gord. Evidence both of circumstances and of the testator's statements of intention may be given to show which of the two George Gords he meant.[5]

(*o*) A appointed "Percival ——, of Brighton, Esquire, the father," one of his executors. Evidence of surrounding circumstances may be given to show who was meant, and (probably) evidence of statements of intention.[6]

(*p*) A leaves two legacies of the same amount to B, assigning the same motive for each legacy, one being given in his will, the other in a codicil. The Court presumes that they are not meant to be cumulative,

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[1] *Lee* v. *Pain*, 4 Hare, 251–3; [Gr. Ev. i. § 291.]

[2] *Doe* v. *Hiscocks*, 5 M. & W. 363; [see *Smith* v. *Smith*, 1 Edw. Ch. 189, 4 Pai. 271; *Connolly* v. *Pardon*, 1 Pai. 291; *Thayer* v. *Boston*, 15 Gray, 347.]

[3] *Ryall* v. *Hannam*, 10 Beav. 536.

[4] *Stringer* v. *Gardiner*, 27 Beav. 35; 4 De G. & J. 468; [cf. *Gallup* v. *Wright*, 61 How. Pr. 286.]

[5] *Doe* v. *Needs*, 2 M. & W. 129.

[6] *In the goods of de Rosaz*, L. R. 2 P. D. 66.

but the legatee may show, either by proof of surrounding circumstances, or of declarations by the testator, that they were.[1]

ARTICLE 92.*

CASES TO WHICH ARTICLES 90 AND 91 DO NOT APPLY.

Articles 90 and 91 apply only to parties to documents, and their representatives in interest, and only to cases in which some civil right or civil liability dependent upon the terms of a document is in question. Any person other than a party to a document or his representative in interest may, notwithstanding the existence of any document, prove any fact which he is otherwise entitled to prove; and any party to any document or any representative in interest of any such party may prove any such fact for any purpose other than that of varying or altering any right or liability depending upon the terms of the document.[2]

Illustrations.

(*a*) The question is, whether A, a pauper, is settled in the parish of Cheadle. A deed of conveyance to which A was a party is produced, purporting to convey land to A for a valuable consideration. The parish appealing against the order was allowed to call A as a witness to prove that no consideration passed.[3]

(*b*) The question is, whether A obtained money from B under false pre-

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* See Note XXXIV.

[1] Per Leach, V. C., in *Hurst* v. *Leach*, 5 Madd. 351, 360–1. The rule in this case was vindicated, and a number of other cases both before and after it were elaborately considered by Lord St. Leonards, when Chancellor of Ireland, in *Hall* v. *Hall*, 1 Dru. & War. 94, 111–133. See, too, *Jenner* v. *Hinch*, L. R. 5 P. D. 106.

[2] [Gr. Ev. i. § 279; *Lowell Mf'g. Co.* v. *Safeguard Ins. Co.*, 88 N. Y. 591; *Stitt* v. *Huidekopers*, 17 Wall. 384; *Brown* v. *Cambridge*, 3 Allen, 474; *Wilson* v. *Sullivan*, 58 N. H. 260; *Burnham* v. *Dorr*, 72 Me. 198; *Needles* v. *Hamfan*, 11 Bradw. 303; *Burns* v. *Thompson*, 91 Ind. 146.]

[3] *R.* v. *Cheadle*, 3 B. & Ad. 833.

tences. The money was obtained as a premium for executing a deed of partnership, which deed stated a consideration other than the one which constituted the false pretence. B may give evidence of the false pretence, although he executed the deed mis-stating the consideration for the premium.[1]

[1] *R.* v. *Adamson*, 2 Moody, 286.

PART III.

PRODUCTION AND EFFECT OF EVIDENCE.

CHAPTER XIII.*

BURDEN OF PROOF.

ARTICLE 93.†

HE WHO AFFIRMS MUST PROVE.

WHOEVER desires any Court to give judgment as to any legal right or liability dependent on the existence or non-existence of facts which he asserts or denies to exist, must prove that those facts do or do not exist.[1]

ARTICLE 94.†

PRESUMPTION OF INNOCENCE.

If the commission of a crime is directly in issue in any proceeding, criminal or civil, it must be proved beyond reasonable doubt.[2]

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* See Note XXXV. † See Note XXXVI.

[1] 1 Ph. Ev. 552; T. E. (from Greenleaf), s. 337; Best, ss. 265-6; Starkie, 585-6; [Gr. Ev. i. § 74; Wh. Ev. i. §§ 353-357.]

[2] [In respect to trials for crime this rule is well-settled (*Miles* v. *U. S.*, 103 U. S. 304; *O'Connell* v. *People*, 87 N. Y. 377; *Nevling* v. *Comm.*, 98 Pa. St. 322; see "reasonable doubt" defined in *People* v. *Finley*, 38 Mich. 482; *State* v. *Gann*, 72 Mo. 374; *U. S.* v. *Wright*, 16 F. R. 112); but it is a general rule in civil cases that only a preponderance of evi-

The burden of proving that any person has been guilty of a crime or wrongful act is on the person who asserts it, whether the commission of such act is or is not directly in issue in the action.[1]

Illustrations.

(*a*) A sues B on a policy of fire insurance. B pleads that A burnt down the house insured. B must prove his plea as fully as if A were being prosecuted for arson.[2]

(*b*) A sues B for damage done to A's ship by inflammable matter

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dence is required to sustain a verdict. *Seybolt* v. *N. Y., etc. R. Co.*, 95 N. Y. 562; *Robinson* v. *Randall*, 82 Ill. 521.

There is much conflict of opinion in this country as to which of these rules applies in civil cases, where the commission of a crime is in issue. Thus in actions for libel or slander, where the defendant justifies a charge of crime, proof beyond a reasonable doubt is required in *Corbley* v. *Wilson*, 71 Ill. 209; *Merk* v. *Gelzhaeuser*, 50 Cal. 631; *Tucker* v. *Call*, 45 Ind. 31; *Polston* v. *See*, 54 Mo. 291; *Williams* v. *Gunnels*, 66 Ga. 521; cf. *Johnson* v. *Agr. Ins. Co.*, 25 Hun, 253; but only a preponderance of evidence in *Pell* v. *McGuinness*, 40 O. St. 204; *Ellis* v. *Buzzell*, 60 Me. 209; *Folsom* v. *Brawn*, 25 N. H. 114; *Peoples* v. *Evening News*, 51 Mich. 11. In insurance cases, similar to Illustration (*a*), the great weight of authority is against the English rule, and requires only a preponderance of evidence. *Blaeser* v. *Milwaukee Ins. Co.*, 37 Wis. 31; *Kane* v. *Hibernia Ins. Co.*, 39 N. J. L. 697; *Rothschild* v. *Amer. Ins. Co.*, 62 Mo. 356; *Behrens* v. *Germania Ins. Co.*, 58 Ia. 26; *Johnson* v. *Agr. Ins. Co.*, 25 Hun, 251, and see 95 N. Y. 569; *Schmidt* v. *N. Y., etc. Ins. Co.*, 1 Gray, 529, see 15 Gray, 413; *Farmers' Ins. Co.* v. *Gargett*, 42 Mich. 289, 292; see *Hills* v. *Goodyear*, 4 Lea, 233. And in many other civil cases involving a charge of crime, the rule of preponderance has been applied. *Roberge* v. *Burnham*, 124 Mass. 277; *Kendig* v. *Overhulser*, 58 Ia. 195; *Moreson* v. *Northwestern Ins. Co.*, 29 Minn. 107; *Weston* v. *Gravlin*, 49 Vt. 507; *Jones* v. *Greaves*, 26 O. St. 2; *Munson* v. *Atwood*, 30 Ct. 102; *Bullard* v. *Creditors*, 56 Cal. 600; for a valuable article as to the burden of proof in criminal cases, see 17 Am. Law Rev. 892.]

[1] [Gr. Ev. i. §§ 35, 78–80; *Whitney Arms Co.* v. *Barlow*, 68 N. Y. 34; *Davis* v. *Davis*, 123 Mass. 590; *Baker* v. *Fehr*, 97 Pa. St. 70.]

[2] *Thurtell* v. *Beaumont*, 1 Bing. 339; [generally denied in this country; see note 2, *supra*, and 10 Am. Law Rev. 642, 17 Am. Law Reg. N. S. 302.]

loaded thereon by B without notice to A's captain. A must prove the absence of notice.[1]

(*c*) The question in 1819 is, whether A is settled in the parish of a man to whom she was married in 1813. It is proved that in 1812 she was married to another person, who enlisted soon afterwards, went abroad on service, and had not been heard of afterwards. The burden of proving that the first husband was alive at the time of the second marriage is on the person who asserts it.[2]

ARTICLE 95.

ON WHOM THE GENERAL BURDEN OF PROOF LIES.

The burden of proof in any proceeding lies at first on that party against whom the judgment of the Court would be given if no evidence at all were produced on either side, regard being had to any presumption which may appear upon the pleadings. As the proceeding goes on, the burden of proof may be shifted from the party on whom it rested at first by his proving facts which raise a presumption in his favor.[3]

[1] *Williams* v. *East India Co.*, 3 Ea. 102, 198-9; [cf. *B. & A. R. Co.* v. *Shanly*, 107 Mass. 568.]

[2] *R* v. *Twyning*, 2 B. & A. 386. [It is said that the law, in cases like this, in a general way prefers the presumption of innocence to that of the continuance of life. Bishop, M. & D. i. § 453, 6th ed.; Gr. Ev. i. § 35; *In re Nesbit*, N. Y. Daily Reg., Mar. 12, 1885; see *Harris* v. *Harris*, 8 Bradw. 57; *Squire* v. *State*, 46 Ind. 459, see 86 Ind. 75; *Murray* v. *Murray*, 6 Or. 17; *People* v. *Feilen*, 58 Cal. 218; *In re Edwards*, 58 Ia. 431; *Dixon* v. *People*, 18 Mich. 84; *Kelly* v. *Drew*, 12 Allen, 107; cf. *R.* v. *Willshire*, 6 Q. B. D. 366; *Hyde Park* v. *Canton*, 130 Mass. 505.]

[3] 1 Ph. Ev. 552; T. E. ss. 338-9; Starkie, 586-7 & 748; Best, s. 268. [Gr. Ev. i. §§ 74-82; *Veiths* v. *Hagge*, 8 Ia. 163; *Wilder* v. *Cowles*, 100 Mass. 487, 490; *Baker* v. *Fehr*, 97 Pa. St. 70; *Heinemann* v. *Heard*, 62 N. Y. 448. Usually the plaintiff has the burden, for he must establish his cause of action when it is denied; and this is true, though it may require proof of negative propositions. *Roberts* v. *Chittenden*, 88 N. Y. 33; *Abbath* v. *Railway Co.*, 11 Q. B. D. 440. But when the defendant admits all the allegations of the complaint or declaration which require to be proved, and sets up an affirmative defence, he has the burden and

Illustrations.

(*a*) It appears upon the pleadings that A is indorsee of a bill of exchange. The presumption is that the indorsement was for value, and the party interested in denying this must prove it.[1]

(*b*) A, a married woman, is accused of theft and pleads not guilty.

The burden of proof is on the prosecution. She is shown to have been in possession of the stolen goods soon after the theft. The burden of proof is shifted to A. She shows that she stole them in the presence of her husband. The burden of proving that she was not coerced by him is shifted on to the prosecutor.[2]

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the right to open and close the case. *Murray* v. *N. Y. Life Ins. Co.*, 85 N. Y. 236.

The general burden of proof upon the main issue does not really shift from the party upon whom it rests at the beginning, but remains upon him throughout the trial (Gr. Ev. i. 74, n.; *Claflin* v. *Meyer*, 75 N. Y. 260, 264; *Heinemann* v. *Heard*, supra; *Central Bridge Corp.* v. *Butler*, 2 Gray, 132; thus in criminal cases it remains on the government throughout the trial, *Turner* v. *Comm.*, 86 Pa. St. 54; *State* v. *Wingo*, 66 Mo. 181; *Comm.* v. *Kimball*, 24 Pick. 366; *State* v. *Patterson*, 45 Vt. 308; *O'Connell* v. *People*, 87 N. Y. 377). But after he has given evidence, which, in the absence of further proof, would be sufficient to entitle him to recover, the other party may then give evidence in rebuttal or defence, whereupon the former may need to furnish additional evidence to complete the requisite proof of his allegations. And this successive adducing by each party of evidence in support of his side of the case is what is often called the "shifting of the burden." *Lamb* v. *Camden, etc. R. Co.*, 46 N. Y. 271; *Ogletree* v. *State*, 28 Ala. 693. Sometimes the party holding the affirmative upon the issue can establish a sufficient *prima facie* case by showing the mere occurrence of acts which raise a presumption in his favor. *Mullen* v. *St. John*, 57 N. Y. 567; *Phila., etc. R. Co.* v. *Anderson*, 94 Pa. St. 351; *Burnham* v. *Allen*, 1 Gray, 496. But ordinarily he must give sufficient evidence to prove all the material allegations of his case, regard being had to the different degrees of proof required in civil and criminal cases. *Marshall* v. *Davies*, 78 N. Y. 414; *Fed. St. etc. R. Co.* v. *Gibson*, 96 Pa. St. 83; *Comm.* v. *McKie*, 1 Gray, 61.]

[1] *Mills* v. *Barber*, 1 M. & W. 425; [*Harger* v. *Worrall*, 69 N. Y. 370; *Courney* v. *Macfarlane*, 97 Pa. St. 361; *Estabrook* v. *Boyle*, 1 Allen, 412; cf. *Smith* v. *Sac Co.*, 11 Wall. 139.]

[2] 1 Russ. Cri. 33; and 2, 337. [Some American cases hold that the recent possession of stolen goods raises a *legal* presumption of guilt.

(*c*) A is indicted for bigamy. On proof by the prosecution of the first marriage, A proves that at the time he was a minor. This throws on the prosecution the burden of proving the consent of A's parents.[1]

(*cc*) [A sues B for malicious prosecution and B pleads a denial. A must prove malice, and the want of probable cause, though the latter is a negative.][2]

(*cd*) [A is indicted for a crime and pleads not guilty. The burden is upon the prosecution to prove that he committed the act charged. He then gives evidence to show that he was insane when the act was committed. The prosecution may then give evidence to prove that he was sane, and if the entire evidence does not satisfy the jury of his sanity beyond a reasonable doubt, A must be acquitted.][3]

(*d*) A deed of gift is shown to have been made by a client to his solicitor. The burden of proving that the transaction was in good faith is on the solicitor.[4]

State v. *Kelly*, 73 Mo. 608; *Waters* v. *People*, 104 Ill. 544. Others hold that it only raises a presumption of *fact*, and is therefore only evidence of guilt for the jury and does not shift the burden. *State* v. *Hodge*, 50 N. H. 510; *Stover* v. *People*, 56 N. Y. 315; *Comm.* v. *McGorty*, 114 Mass. 299; *Ingalls* v. *State*, 48 Wis. 647; see *State* v. *Shaffer*, 49 Ia. 290; *People* v. *Swinford*, 57 Cal. 86; Wh. Cr. Ev. § 758 (9th ed.).]

[1] *R.* v. *Butler*, 1 R. & R. 61.

[2] [*Marks* v. *Townsend*, 97 N. Y. 590; *Good* v. *French*, 115 Mass. 201.]

[3] [*Walker* v. *People*, 88 N. Y. 81; *State* v. *Bartlett*, 43 N. H. 224; *Chase* v. *People*, 40 Ill. 352; *Guetig* v. *State*, 66 Ind. 94. But in most of the States it is the rule that the defendant, to be acquitted, must prove his insanity by a preponderance of evidence. *Coyle* v. *Comm.*, 100 Pa. St. 573; *Comm.* v. *Eddy*, 7 Gray, 583; *Graves* v. *State*, 45 N. J. L. 203 and 347; *State* v. *Redemeier*, 71 Mo. 173; *State* v. *Heinrich*, 62 Ia. 414; *People* v. *Wilson*, 49 Cal. 13; *Bond* v. *State*, 23 O. St. 349; *Baccigalupo* v. *Comm.*, 33 Gratt. 807; *Boswell* v. *State*, 63 Ala. 307.

As to the defence of *alibi*, there is a like difference of opinion; that reasonable doubt is sufficient for acquittal, see *Walters* v. *State*, 39 O. St. 215; *Comm.* v. *Choate*, 105 Mass. 451; *Howard* v. *State*, 50 Ind. 190; cf. *Watson* v. *Comm.*, 95 Pa. St. 418; that preponderating evidence is required, see *State* v. *Hamilton*, 57 Ia. 596; cf. *Garrity* v. *People*, 107 Ill. 162.]

[4] 1 Story, Eq. Juris., s. 310, n. 1. Quoting *Hunter* v. *Atkins*, 3 M. & K. 113. [*Whitehead* v. *Kennedy*, 69 N. Y. 462; *Dunn* v. *Record*, 63 Me. 17; *Dale* v. *Dale*, 38 N. J. Eq. 274; *Cuthbertson's Appeal*, 97 Pa. St. 163.]

(*e*) It is shown that a hedge stands on A's land. The burden of proving that the ditch adjacent to it is not A's also is on the person who denies that the ditch belongs to A.[1]

(*f*) A proves that he received the rent of land. The presumption is that he is owner in fee simple, and the burden of proof is on the person who denies it.[2]

(*g*) A finds a jewel mounted in a socket, and gives it to B to look at. B keeps it, and refuses to produce it on notice, but returns the socket. The burden of proving that it is not as valuable a stone of the kind as would go in the socket is on B.[3]

(*h*) A sues B on a policy of insurance, and shows that the vessel insured went to sea, and that after a reasonable time no tidings of her have been received, but that her loss has been rumored. The burden of proving that she has not foundered is on B.[4]

ARTICLE 96.

BURDEN OF PROOF AS TO PARTICULAR FACT.

The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the burden of proving that fact shall lie on any particular person ;[5] but the burden may in the course of a case be shifted from one side to the other, and in considering the amount of evidence necessary to shift the burden of proof, the Court has regard to the opportunities of knowledge with respect to the fact to be proved which may be possessed by the parties respectively.[6]

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[1] *Guy* v. *West*, Selw. N. P. 1297.

[2] *Doe* v. *Coulthred*, 7 A. & E. 235 ; [*Burt* v. *Panjaud*, 99 U. S. 180 ; cf. *Whiton* v. *Snyder*, 88 N. Y. 299 ; *Linthicum* v. *Ray*, 9 Wall. 24.]

[3] *Armoury* v. *Delamirie*, 1 S. L. C. 357 ; [Gr. Ev. i. § 37 ; *Clark* v. *Miller*, 4 Wend. 628.]

[4] *Koster* v. *Reed*, 6 B. & C. 19 ; [see *Gordon* v. *Bowne*, 2 Johns. 150.]

[5] For instances of such provisions see T. E. ss. 345-6 ; [*Haskins* v. *Warren*, 115 Mass. 515 ; thus the defendant must prove the grounds of defence which he sets up, as usury, fraud, etc. *Haughwout* v. *Garrison*, 69 N. Y. 339 ; *Dodd* v. *Gloucester Ins. Co.*, 127 Mass. 151 ; *Gay* v. *Parpart*, 106 U. S. 679.]

[6] [*Harris* v. *White*, 81 N. Y. 532, 548 ; *Dederich* v. *McAllister*, 49 How.

Illustrations.

(*a*) A prosecutes B for theft, and wishes the Court to believe that B admitted the theft to C. A must prove the admission.

B wishes the Court to believe that, at the time in question, he was elsewhere. He must prove it.[1]

(*aa*) [A sues B for negligence causing damage. The burden of proving B's negligence rests upon A, but A need not prove the absence on his own part of contributory negligence; such negligence of A is to be proved by B as matter of defence.][2]

(*b*) A, a shipowner, sues B, an underwriter, on a policy of insurance on a ship. B alleges that A knew of and concealed from B material facts. B must give enough evidence to throw upon A the burden of disproving his knowledge; but slight evidence will suffice for this purpose.[3]

(*c*) In actions for penalties under the old game laws, though the plaintiff had to aver that the defendant was not duly qualified, and was obliged to give general evidence that he was not, the burden of proving any definite qualification was on the defendant.[4]

Pr. 351; see *G. W. R. Co.* v. *Bacon*, 30 Ill. 347. Thus it is held that in proceedings against a person who has been selling liquor or doing other acts without having the license prescribed by law, the burden is on him to prove that he has a license, not on the plaintiff to prove the want of a license. *People* v. *Nyce*, 34 Hun, 298; *Comm* v. *Brownbridge*, 1 Brews. (Pa.) 399; Mass. Pub. St. c. 214, s. 12.]

[1] [See p. 179, n. 3.]

[2] [*Indianapolis, etc. R. Co.* v. *Horst*, 93 U. S. 291; *Mallory* v. *Griffey*, 85 Pa. St. 275; *N. J. Exp. Co.* v. *Nichols*, 33 N. J. L. 434; *State* v. *B. & P. R. Co.*, 58 Md. 482; *MacDougall* v. *Central R. Co.*, 63 Cal. 431; *Biesching* v. *St. Louis Gas Co.*, 73 Mo. 219; but in some States A must prove B's negligence and that he was not himself negligent. *Hale* v. *Smith*, 78 N. Y. 480; *Mayo* v. *B. & M. R. Co.*, 104 Mass. 137; *Benson* v. *Titcomb*, 72 Me. 31; *Boree* v. *Danville*, 53 Vt. 183.]

[3] *Elkin* v. *Janson*, 13 M. & W. 655. See, especially, the judgment of Alderson, B., 663-6; [cf. *Claflin* v. *Meyer*, 75 N. Y. 260.]

[4] 1 Ph. Ev. 556, and cases there quoted. The illustration is founded more particularly on *R.* v. *Jarvis*, in a note to *R.* v. *Stone*, 1 Ea. 639, where Lord Mansfield's language appears to imply what is stated above. [See *Potter* v. *Deyo*, 19 Wend. 361; *Bliss* v. *Brainerd*, 41 N. H. 256.]

ARTICLE 97.

BURDEN OF PROVING FACT TO BE PROVED TO MAKE EVIDENCE ADMISSIBLE.

The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.

Illustrations.

(*a*) A wishes to prove a dying declaration by B.

A must prove B's death, and the fact that he had given up all hope of life when he made the statement.[1]

(*b*) A wishes to prove, by secondary evidence, the contents of a lost document.

A must prove that the document has been lost.[2]

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[1] [See Art. 26, *ante*.]

[2] [See Art 71, *ante*.]

CHAPTER XIV.

*ON PRESUMPTIONS AND ESTOPPELS.**

ARTICLE 98.

PRESUMPTION OF LEGITIMACY.

THE fact that any person was born during the continuance of a valid marriage between his mother and any man, or within such a time after the dissolution thereof and before the celebration of another valid marriage, that his mother's husband could have been his father, is conclusive proof that he is the legitimate child of his mother's husband, unless it can be shown

either that his mother and her husband had no access to each other at any time when he could have been begotten, regard being had both to the date of the birth and to the physical condition of the husband,

or that the circumstances of their access (if any) were such as to render it highly improbable that sexual intercourse took place between them when it occurred.[1]

Neither the mother nor the husband is a competent witness as to the fact of their having or not having had sexual intercourse with each other, nor are any declarations by them upon

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* See Note XXXV.

[1] [The presumption of legitimacy, it is said, "can only be rebutted by the most satisfactory and convincing proof that the husband was not the father of the child," or, as a number of the cases express it, "by proof beyond a reasonable doubt." *Cross* v. *Cross*, 3 Pai. 139; *Van Aernam* v. *Van Aernam*, 1 Barb. Ch. 375; *Phillips* v. *Allen*, 2 Allen, 453; *Hemmenway* v. *Towner*, 1 Id. 209; *Egbert* v. *Greenwalt*, 44 Mich. 245; *State* v. *Romaine*, 58 Ia. 46; *Patterson* v. *Gaines*, 6 How. (U. S.) 550; see *Hawes* v. *Draeger*, 23 Ch. D. 173; N. Y. Rev. St. i. 642.]

that subject deemed to be relevant facts when the legitimacy of the woman's child is in question, whether the mother or her husband can be called as a witness or not, provided that in applications for affiliation orders when proof has been given of the non-access of the husband at any time when his wife's child could have been begotten, the wife may give evidence as to the person by whom it was begotten.[1]

ARTICLE 99.

PRESUMPTION OF DEATH FROM SEVEN YEARS' ABSENCE.

A person shown not to have been heard of for seven years by those (if any) who if he had been alive would naturally have heard of him, is presumed to be dead, unless the circumstances of the case are such as to account for his not being heard of without assuming his death; but there is no presumption as to the time when he died, and the burden of proving his death at any particular time is upon the person who asserts it.[2]

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[1] *R.* v. *Luffe*, 8 Ea. 207; *Cope* v. *Cope*, 1 Mo. & Ro. 272–4; *Legge* v. *Edmonds*, 25 L. J. Eq. 125, see p. 135; *R.* v. *Mansfield*, 1 Q. B. 444; *Morris* v. *Davies*, 3 C. & P. 215. I am not aware of any decision as to the paternity of a child born say six months after the death of one husband, and three months after the mother's marriage to another. Amongst common soldiers in India such a question might easily arise. The rule in European regiments is that a widow not remarried within the year (it used to be six months) must leave the regiment: the result was and is that widowhoods are usually very short. [Gr. Ev. i. §§ 28, 344; *Abington* v. *Duxbury*, 105 Mass. 287; *Montgomery* v. *Montgomery*, 3 Barb. Ch. 132; *Tioga Co.* v. *South Creek T'p.*, 75 Pa. St. 433; *Dennison* v. *Page*, 29 Id. 420; *People* v. *Overseers, etc.*, 15 Barb. 286; *Chamberlain* v. *People*, 23 N. Y. 85, 88; *Mink* v. *State*, 60 Wis. 583; *Dean* v. *State*, 29 Ind. 483.]

[2] *McMahon* v. *McElroy*, 5 Ir. Rep. Eq. 1; *Hopewell* v. *De Pinna*, 2 Camp. 113; *Nepean* v. *Doe*, 2 S. L. C. 562, 681; *Nepean* v. *Knight*, 2 M. & W. 894, 912; *R.* v. *Lumley*, L. R. 1 C. C. R. 196; and see the caution of Lord Denman in *R.* v. *Harborne*, 2 A. & E. 544. All the cases are collected and considered in *In re Phené's Trust*, L. R. 5 Ch. App. 139. The doctrine is also much discussed in *Prudential Assurance Company* v. *Edmonds*, L. R. 2 App. Cas. 487. The principle is stated to the same effect

There is no presumption as to the age at which a person died who is shown to have been alive at a given time, or as to the order in which two or more persons died who are shown to have died in the same accident, shipwreck, or battle.[1]

ARTICLE 100.

PRESUMPTION OF LOST GRANT.[2]

When it has been shown that any person has, for a long period of time, exercised any proprietary right which might have had a lawful origin by grant or license from the Crown or from a private person, and the exercise of which might and naturally would have been prevented by the persons interested if it had not had a lawful origin, there is a presumption that such right had a lawful origin and that it was created by a proper instrument which has been lost.[3]

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as in the text in *Re Corbishley's Trusts*, L. R. 14 Ch. D. 846. [Gr. Ev. i. § 41; *Davie* v. *Briggs*, 97 U. S. 628; *O'Gara* v. *Eisenlohr*, 38 N. Y. 296; *Keller* v. *Stuck*, 4 Redf. 294; *Hyde Park* v. *Canton*, 130 Mass. 505; *Wentworth* v. *Wentworth*, 71 Me. 72; *Keech* v. *Rinehart*, 10 Pa. St. 240; *Cooper* v. *Cooper*, 86 Ind. 75; *State* v. *Henke*, 58 Ia. 457; *Hoyt* v. *Newbold*, 45 N. J. L. 219; *People* v. *Feilen*, 58 Cal. 218, 224; *Whiting* v. *Nicoll*, 46 Ill. 230; the last two cases maintain a rule somewhat different from the English.]

[1] *Wing* v. *Angrave*, 8 H. L. C. 183, 198; and see authorities in last note. [Gr. Ev. i. §§ 29, 30; *Newell* v. *Nichols*, 75 N. Y. 78; *Russell* v. *Hallett*, 23 Kan. 276; *Coye* v. *Leach*, 8 Met. 371; see *Fuller* v. *Linzee*, 135 Mass. 468.]

[2] The subject of the doctrine of lost grants is much considered in *Angus* v. *Dalton*, L. R. 3 Q. B. D. 84. This case is now (Feb. 1881) before the House of Lords. [It has since been decided and is reported in 6 App. Cas. 740; see *Lehigh R. Co.* v. *McFarlan*, 43 N. J. L. 605; *Ward* v. *Warren*, 82 N. Y. 265.]

[3] [Gr. Ev. i. §§ 46, 47; *Jackson* v. *McCall*, 10 Johns. 377; *Jackson* v. *Lunn*, 3 Johns. Cas. 109; *Carter* v. *Fishing Co.*, 77 Pa. St. 310; *Oaksmith's Lessee* v. *Johnston*, 92 U. S. 343. It is said in this last case that in this country there can seldom be occasion to presume a grant from the

Illustrations.

(*a*) The question is, whether B is entitled to recover from A the possession of lands which A's father and mother successively occupied from 1754 to 1792 or 1793, and which B had occupied (without title) from 1793 to 1809. The lands formed originally an encroachment on the Forest of Dean.

The undisturbed occupation for thirty-nine years raises a presumption of a grant from the Crown to A's father.[1]

(*b*) A fishing mill-dam was erected more than 110 years before 1861 in the River Derwent, in Cumberland (not being navigable at that place), and was used for more than sixty years before 1861 in the manner in which it was used in 1861. This raises a presumption that all the upper proprietors whose rights were injuriously affected by the dam had granted a right to erect it.[2]

(*c*) A builds a windmill near B's land in 1829, and enjoys a free current of air to it over B's land as of right, and without interruption till 1860. This enjoyment raises no presumption of a grant by B of a right to such a current of air, as it would not be natural for B to interrupt it.[3]

(*d*) No length of enjoyment (by means of a deep well), of water percolating through underground undefined passages, raises a presumption of a grant from the owners of the ground under which the water so percolates of a right to the water.[4]

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government, except in cases of very ancient possessions running back to colonial days, since, from the beginning of the century, a record has been preserved of all such grants.]

[1] *Goodtitle* v. *Baldwin*, 11 Ea. 488. The presumption was rebutted in this case by an express provision of 20 Ch. II. c. 3, avoiding grants of the Forest of Dean. See also *Doe* d. *Devine* v. *Wilson*, 10 Moo. P. C. 502.

[2] *Leconfield* v. *Lonsdale*, L. R. 5 C. P. 657.

[3] *Webb* v. *Bird*, 13 C. B. (N. S.) 841. [As to the reasons upon which this and the following decision are to be supported, see *Dalton* v. *Angus*, 6 App. Cas. 796, 798, 824. As the English doctrine that a right to light and air can be gained by prescription is generally discarded in this country, the decision in *Webb* v. *Bird* would apply *a fortiori*. See *Parker* v. *Foote*, 19 Wend. 309; *Gilmore* v. *Driscoll*, 122 Mass. 199.]

[4] *Chasemore* v. *Richards*, 7 H. L. C. 349; [*Chatfield* v. *Wilson*, 28 Vt. 49; *Wilson* v. *New Bedford*, 108 Mass. 265; *Frazier* v. *Brown*, 12 O. St. 294; *Roath* v. *Driscoll*, 20 Ct. 533; *Wheatly* v. *Baugh*, 25 Pa. St. 528; *Ellis* v. *Duncan*, 21 Barb. 230, 29 N. Y. 466; see *Phelps* v. *Nowlen*, 72 N. Y. 39.]

ARTICLE 101.*

PRESUMPTION OF REGULARITY AND OF DEEDS TO COMPLETE TITLE.

When any judicial or official act is shown to have been done in a manner substantially regular, it is presumed that formal requisites for its validity were complied with.[1]

When a person in possession of any property is shown to be entitled to the beneficial ownership thereof, there is a presumption that every instrument has been executed which it was the legal duty of his trustees to execute in order to perfect his title.[2] [3]

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* See Note XXXVII, and *Macdougall* v. *Purrier*, 3 Bligh, N. C. 433. *R.* v. *Cresswell*, L. R. 1 Q. B. D. (C. C. R.) 446, is a recent illustration of the effect of this presumption.

[1] [*Wood* v. *Morehouse*, 45 N. Y. 368; *State* v. *Potter*, 52 Vt. 33; *Cornett* v. *Williams*, 20 Wall. 226; *McMurray's Heirs* v. *Erie*, 59 Pa. St. 223; *Pells* v. *Webquish*, 129 Mass. 469; *Brownell* v. *Palmer*, 22 Ct. 107, 119. It is presumed that public officers perform their duty and do not exceed their lawful authority; also that corporations act within their lawful powers, etc. Id.; *Pringle* v. *Woolworth*, 90 N. Y. 502, 510; Gr. Ev. i. §§ 38, n., 40, n. As to similar presumptions from lapse of time, see Gr. Ev. i. § 20; *Hilton* v. *Bender*, 69 N. Y. 75.]

[2] *Doe* d. *Hammond* v. *Cooke*, 6 Bing. 174, 179; [*Jackson* v. *Cole*, 4 Cow. 587; *Jackson* v. *Moore*, 13 Johns. 513; Perry on Trusts, i. § 349, 3d ed.]

[3] [Other important presumptions are: (1) That a previously existing personal relation or state of things continues to exist, as *e.g.*, a relation between parties (*Eames* v. *Eames*, 41 N. H. 177); life (*Stevens* v. *McNamara*, 36 Me. 176); residence (*Greenfield* v. *Camden*, 74 Me. 56; *Nixon* v. *Palmer*, 10 Barb. 175); insanity (*State* v. *Wilner*, 40 Wis. 304; *Cook* v. *Cook*, 53 Barb. 180); status (*Kidder* v. *Stevens*, 60 Cal. 414); and many other matters. Gr. Ev. i. § 41; *Beckwith* v. *Phalen*, 65 N. Y. 322. The presumption is rebuttable. Its force and duration will be affected by the transient or permanent nature of the subject-matter. *Donahue* v. *Coleman*, 49 Ct. 464, and cases *supra*.

(2) That the regular course of business in a public office or in the course of trade or conduct of affairs is followed (Gr. Ev. i. §§ 38, 40); as that letters properly mailed reach their destination (see Art. 13, *ante*;

ARTICLE 102.*

ESTOPPEL BY CONDUCT.

When one person by anything which he does or says, or abstains from doing or saying, intentionally causes or permits another person to believe a thing to be true, and to act upon such belief otherwise than but for that belief he would have acted, neither the person first mentioned nor his representative in interest is allowed, in any suit or proceeding between himself and such person or his representative in interest, to deny the truth of that thing.[1]

When any person under a legal duty to any other person to conduct himself with reasonable caution in the transaction of any business neglects that duty, and when the person to whom the duty is owing alters his position for the worse because he is misled as to the conduct of the negligent person by a fraud, of which such neglect is in the natural course of things the proximate cause, the negligent person is not permitted to deny that

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* See Note XXXVIII.

Austin v. *Holland*, 69 N. Y. 571); that a bill or note found after circulation in the hands of the maker has been paid (*Garlock* v. *Geortner*, 7 Wend. 198; *Connelly* v. *McKean*, 64 Pa. St. 113); that a person having the possession of property is the owner. *Rawley* v. *Brown*, 71 N. Y. 85; *Vining* v. *Baker*, 53 Me. 544. These are disputable presumptions, and are often called presumptions of fact. (Id.)

(3) That a man intends the natural and probable consequences of his acts. *Filkins* v. *People*, 69 N. Y. 101; *Lanahan* v. *Comm.*, 84 Pa. St. 80.

(4) That a wife committing a crime (except treason, murder, and perhaps robbery), in the presence of her husband, acts under his coercion. This and the last presumption are disputable. *People* v. *Ryland*, 97 N. Y. 126; *State* v. *Shee*, 13 R. I. 535; *Comm.* v. *Gormley*, 133 Mass. 580.]

[1] [*Andrews* v. *Ætna Ins. Co.*, 85 N. Y. 334; *Viele* v. *Jackson*, 82 N. Y. 32; *Dickerson* v. *Colgrove*, 100 U. S. 578; *Morgan* v. *Railroad Co.*, 96 Id. 716; *Carroll* v. *M. & R. R. Corp.*, 111 Mass. 1; *Mutual Life Ins. Co.* v. *Morris*, 31 N. J. Eq. 583; *Slocumb* v. *Railroad Co.*, 57 Ia. 675.]

he acted in the manner in which the other person was led by such fraud to believe him to act.[1]

Illustrations.

(*a*) A, the owner of machinery in B's possession, which is taken in execution by C, abstains from claiming it for some months, and converses with C's attorney without referring to his claim, and by these means impresses C with the belief that the machinery is B's. C sells the machinery. A is estopped from denying that it is B's.[2]

(*b*) A, a retiring partner of B, gives no notice to the customers of the firm that he is no longer B's partner. In an action by a customer, he cannot deny that he is B's partner.[3]

(*c*) A sues B for a wrongful imprisonment. The imprisonment was wrongful, if B had a certain original warrant; rightful, if he had only a copy. B had in fact a copy. He led A to believe that he had the original, though not with the intention that A should act otherwise than he actually did, nor did A so act. B may show that he had only a copy and not the original.[4]

(*d*) A sells eighty quarters of barley to B, but does not specifically appropriate to B any quarters. B sells sixty of the eighty quarters to C. C informs A, who assents to the transfer. C being satisfied with this, says nothing further to B as to delivery. B becomes bankrupt. A cannot, in an action by C to recover the barley, deny that he holds for C on the ground that, for want of specific appropriation, no property passed to B.[5]

(*e*) A signs blank cheques and gives them to his wife to fill up as she wants money. A's wife fills up a cheque for £50 2*s.* so carelessly that room is left for the insertion of figures before the "50" and for the insertion of words before the "fifty." She then gives it to a clerk of A's to get it

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[1] [*Putnam* v. *Sullivan*, 4 Mass. 45; *Chapman* v. *Rose*, 56 N. Y. 137; *Ruddell* v. *Thalor*, 72 Ind. 533; *Ross* v. *Doland*, 29 O. St. 473; *Shirts* v. *Overjohn*, 60 Mo. 305; cf. *Nance* v. *Lary*, 5 Ala. 370; *Caulkins* v. *Whisler*, 29 Ia. 495.]

[2] *Pickard* v. *Sears*, 6 A. & E. 469, 474; [see *Thompson* v. *Blanchard*, 4 N. Y. 303; *Fall Riv. Bk.* v. *Buffinton*, 97 Mass. 500.]

[3] (Per Parke, B.) *Freeman* v. *Cooke*, 2 Ex. 661; [see *Austin* v. *Holland*, 69 N. Y. 571; *Lovejoy* v. *Spafford*, 93 U. S. 430.]

[4] *Howard* v. *Hudson*, 2 E. & B. 1.

[5] *Knights* v. *Wiffen*, L. R. 5 Q. B. 660. [This case has been criticised in this country. Kent's Comm. iii. 85, note 1 (13th ed.); see *Barnard* v. *Campbell*, 55 N. Y. 456.]

cashed. He writes 3 before "50" and "three hundred and" before "fifty." A's banker pays the cheque so altered in good faith. A cannot recover against the banker.[1]

(*f*) A carelessly leaves his door unlocked, whereby his goods are stolen. He is not estopped from denying the title of an innocent purchaser from the thief.[2]

ARTICLE 103.

ESTOPPEL OF TENANT AND LICENSEE.

No tenant, and no person claiming through any tenant, of any land or hereditament of which he has been let into possession, or for which he has paid rent, is, till he has given up possession, permitted to deny that the landlord had, at the time when the tenant was let into possession or paid the rent, a title to such land or hereditament;[3] and no person who came upon any land by the license of the person in possession thereof, is, whilst he remains on it, permitted to deny that such person had a title to such possession at the time when such license was given.[4]

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[1] *Young* v. *Grote*, 4 Bing. 253. [This case has been much considered of late and its authority is carefully limited to its special facts. *Greenfield Sav. Bk.* v. *Stowell*, 123 Mass. 196; *Lehman* v. *Central R. Co.*, 12 F. R. 595; *McGrath* v. *Clark*, 56 N. Y. 34; *Holmes* v. *Trumper*, 22 Mich. 427; cf. *Leas* v. *Wells*, 101 Pa. St. 57; *Yocum* v. *Smith*, 63 Ill. 321; see p. 160, n. 2, *ante*.]

[2] Per Blackburn, J., in *Swan* v. *N. B. Australasian Co.*, 2 H. & C. 181. See *Baxendale* v. *Bennett*, 3 Q. B. D. 525. The earlier cases on the subject are much discussed in *Jorden* v. *Money*, 5 H. & C. 209–16, 234–5. [Cf. *People* v. *Bank N. America*, 75 N. Y. 547; *Lowery* v. *Telegraph Co.*, 60 N. Y. 198.]

[3] *Doe* v. *Barton*, 11 A. & E. 307; *Doe* v. *Smyth*, 4 M. & S. 347; *Doe* v. *Pegg*, 1 T. R. 760 (note); [*Stott* v. *Rutherford*, 92 U. S. 107; *Prevot* v. *Lawrence*, 51 N. Y. 219; *Whalin* v. *White*, 25 N. Y. 462; *Gage* v. *Campbell*, 131 Mass. 566; Washb. R. P. i. 555–569, 4th ed.]

[4] *Doe* v. *Baytup*, 3 A. & E. 188; [*Glynn* v. *George*, 20 N. H. 114; *Towne* v. *Butterfield*, 97 Mass. 105.]

ARTICLE 104.

ESTOPPEL OF ACCEPTOR OF BILL OF EXCHANGE.

No acceptor of a bill of exchange is permitted to deny the signature of the drawer or his capacity to draw, or if the bill is payable to the order of the drawer, his capacity to endorse the bill, though he may deny the fact of the endorsement;[1] nor if the bill be drawn by procuration, the authority of the agent, by whom it purports to be drawn, to draw in the name of the principal,[2] though he may deny his authority to endorse it.[3] If the bill is accepted in blank, the acceptor may not deny the fact that the drawer endorsed it.[4]

ARTICLE 105.

ESTOPPEL OF BAILEE, AGENT, AND LICENSEE.

No bailee, agent, or licensee is permitted to deny that the bailor, principal, or licensor, by whom any goods were entrusted to any of them respectively, was entitled to those goods at the time when they were so entrusted.[5]

Provided that any such bailee, agent, or licensee, may show that he was compelled to deliver up any such goods to some person who had a right to them as against his bailor, principal, or licensor, or that his bailor, principal, or licensor, wrongfully and without notice to the bailee, agent, or licensee, ob-

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[1] *Garland* v. *Jacomb*, L. R. 8 Ex. 216; [*White* v. *Continental Nat. Bk.*, 64 N. Y. 316; *Hoffman* v. *Bank of Milwaukee*, 12 Wall. 181; *National Bank* v. *Bangs*, 106 Mass. 441.]

[2] *Sanderson* v. *Coleman*, 4 M. & G. 209.

[3] *Robinson* v. *Yarrow*, 7 Tau. 455.

[4] *L. & S. W. Bank* v. *Wentworth*, L. R. 5 Ex. D. 96. [See as to this article, Daniel, Neg. Inst., 1. §§ 532–541.]

[5] [*Sinclair* v. *Murphy*, 14 Mich. 392; *Osgood* v. *Nichols*, 5 Gray, 420; *Roberts* v. *Noyes*, 76 Me. 590; *Jackson* v. *Allen*, 120 Mass. 64, 79.]

tained the goods from a third person who has claimed them from such bailee, agent, or licensee.[1]

Every bill of lading in the hands of a consignee or endorsee for valuable consideration, representing goods to have been shipped on board a vessel, is conclusive proof of that shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading had actual notice at the time of receiving the same that the goods had not been in fact laden on board, provided that the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper or of the holder, or some person under whom the holder holds.[2]

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[1] *Dixon* v. *Hammond*, 2 B. & A. 313; *Crossley* v. *Dixon*, 10 H. L. C. 293; *Gosling* v. *Birnie*, 7 Bing. 339; *Hardman* v. *Wilcock*, 9 Bing. 382; *Biddle* v. *Bond*, 34 L. J. Q. B. 137, [6 B. & S. 225]; *Wilson* v. *Anderton*, 1 B. & Ad. 450. As to carriers, see *Sheridan* v. *New Quay*, 4 C. B. (N. S.) 618. [*The Idaho*, 93 U. S. 575; *Western Trans. Co.* v. *Barber*, 56 N. Y. 544; *King* v. *Richards*, 6 Whart. 418.]

[2] 18 & 19 Vict. c. 111, s. 3. [But it is held that a ship-owner is not estopped by the signature of a bill of lading by the master from showing that the goods or some of them were never actually put on board. *Brown* v. *Powell Co.*, L. R. 10 C. P. 562; see *McLean* v. *Fleming*, L. R. 2 Sc. App. 128.

The law of this country is not governed by statutes like the above. The general rules here in force are stated in *Sears* v. *Wingate*, 3 Allen, 103: "(1) The receipt in a bill of lading is open to explanation between the master and the shipper of the goods. (2) The master is estopped, as against a consignee who is not a party to the contract and as against an assignee of the bill of lading, when either has taken it for a valuable consideration upon the faith of the acknowledgments which it contains, to deny the truth of the statements to which he has given credit by his signature, so far as those statements relate to matters which are or ought to be within his knowledge. (3) When the master is acting within the limits of his authority, the owners are estopped in like manner with him; but it is not within the general scope of the master's authority to sign

CHAPTER XV.

*OF THE COMPETENCY OF WITNESSES.**

ARTICLE 106.

WHO MAY TESTIFY.

ALL persons are competent to testify in all cases except as hereinafter excepted.[1]

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* See Note XXXIX.

bills of lading for any goods not actually received on board." See also *Sch. Freeman* v. *Buckingham*, 18 How. (U. S.) 182; *The Delaware*, 14 Wall. 579, 602; *Meyer* v. *Peck*, 28 N. Y. 590; in *Armour* v. *Mich. C. R. Co.*, 65 N. Y. 111, the last proposition seems not to be approved.]

[1] [The common law rules disqualifying parties and persons interested in the event of the suit from being witnesses are now almost universally abolished. In some courts, however, special exceptions are still in force to a limited extent. See *U. S.* v. *Clark*, 96 U. S. 37; *Guldin's Adm'rs* v. *Guldin's Adm'rs*, 97 Pa. St. 411. And, moreover, there is established by statute in most States one important exception, prohibiting a party from testifying in an action against an executor or administrator concerning a transaction with the decedent. These statutes differ in details, but their general features may be well illustrated by the law of New York. This provides that, in a civil action or special proceeding, a party or person interested in the event (or a predecessor of such person) shall not be examined as a witness in his own behalf or interest (or in behalf of his successor in interest), against the executor, administrator, or survivor of a deceased person, or the committee of a lunatic (or the successor in interest of such decedent or lunatic), concerning a personal transaction or communication between the witness and the decedent or lunatic. Such testimony is, however, receivable if the executor, etc., is examined in his own behalf, or the testimony of the decedent or lunatic concerning the same transaction, etc., is given in evidence. N. Y. Code Civ. Pro. § 829. Thus in an action by an attorney against the executor of a deceased per-

ARTICLE 107.

WHAT WITNESSES ARE INCOMPETENT.[1]

A witness is incompetent if in the opinion of the judge he is prevented by extreme youth, disease affecting his mind, or any other cause of the same kind, from recollecting the matter on which he is to testify, from understanding the questions put to him, from giving rational answers to those questions, or from knowing that he ought to speak the truth.[2]

A witness unable to speak or hear is not incompetent, but may give his evidence by writing or by signs, or in any other manner in which he can make it intelligible ; but such writing

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son to recover for legal services, the plaintiff cannot be a witness and testify as to advice given by him to the decedent. *Brague* v. *Lord*, 67 N. Y. 495 ; see *Holcomb* v. *Holcomb*, 95 N. Y. 316 ; *Pope* v. *Allen*, 90 N. Y. 298.

The law of Congress is that in an action by or against an executor, etc., neither party shall testify against the other as to transactions with the decedent, unless called to testify thereto by the opposite party or required to do so by the court. U. S. Rev. St. § 858 ; *Potter* v. *National Bank*, 102 U. S. 163. As to the law of other States, see *Hamish* v. *Herr*, 98 Pa. St. 6 ; *Wells* v. *Wells*, 33 N. J. Eq. 4 ; *Downey* v. *Andrus*, 43 Mich. 65 ; Wh. Ev. i. §§ 466-477.]

[1] See Note XL. A witness under sentence of death was said to be incompetent in *R.* v. *Webb*, 11 Cox, 133, *sed quære*.

[2] [As to children, see Gr. Ev. i. § 367 ; *Comm.* v. *Mullins*, 2 Allen, 295 ; *Day* v. *Day*, 56 N. H. 316 ; *Draper* v. *Draper*, 68 Ill. 17 ; *Carter* v. *State*, 63 Ala. 52 ; *McGuire* v. *People*, 44 Mich. 286 ; *State* v. *Levy*, 23 Minn. 104 ; *State* v. *Scanlan*, 58 Mo. 204 ; *Jones* v. *People*, 6 Park. Cr. 126 ; as to persons of unsound mind, Gr. Ev. i. § 365 ; *Livingston* v. *Kreisted*, 10 Johns. 362 ; *Holcomb* v. *Holcomb*, 28 Ct. 177 ; *Coleman* v. *Comm.*, 25 Gratt. 865 ; *Kendall* v. *May*, 10 Allen, 59 ; as to intoxicated persons, to whom the same rules apply, *Hartford* v. *Palmer*, 16 Johns. 143 ; *Gould* v. *Crawford*, 2 Pa. St. 89. Even lunatics have been allowed to testify, if of sufficient understanding. *People* v. *N. Y. Hospital*, 3 Abb. N. C. 229 ; *Dist. of Col.* v. *Armes*, 107 U. S. 519 ; see 34 N. J. Eq. 427.]

must be written and such signs made in open Court.[1] Evidence so given is deemed to be oral evidence.[2]

ARTICLE 108.*

COMPETENCY IN CRIMINAL CASES.

In criminal cases the accused person and his or her wife or husband, and every person and the wife or husband of every person jointly indicted with him, is incompetent to testify.[3]

Provided that in any criminal proceeding against a husband or wife for any bodily injury or violence inflicted upon his or

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* See Note XLI.

[1] [Gr. Ev. i. § 366; Wh. Ev. i. §§ 406, 407; *Quinn* v. *Halbert*, 55 Vt. 224.]

[2] [Persons not believing in the existence of a God who will punish false swearing are also incompetent witnesses by common law. *Blair* v. *Seaver*, 26 Pa. St. 274; *People* v. *Matteson*, 2 Cow. 433; *Free* v. *Buckingham*, 59 N. H. 219; *Arnd* v. *Amling*, 53 Md. 192; *Clinton* v. *State*, 33 O. St. 27. But this disqualification has been removed in many States or rendered less stringent. Gr. Ev. i. §§ 368–371; Wh. Ev. i. §§ 395, 396; *Bush* v. *Comm.*, 80 Ky. 244. But in some States, where atheism no longer disqualifies, it may nevertheless be shown to affect the witness's credit. *Stanbro* v. *Hopkins*, 28 Barb. 265; *Searcy* v. *Miller*, 57 Ia. 613. It is the general rule, however, that the witness must not himself be examined as to his religious belief. (See all the cases.)

Infamous persons, *i.e.*, persons convicted of treason, felony, or the *crimen falsi*, are also incompetent witnesses at common law in the State of their conviction. The *crimen falsi* includes, in general, offenses tending to pervert the administration of justice through falsehood and fraud, as *e.g.*, perjury, forgery, bribery of witnesses, etc. Gr. Ev. i. §§ 372–376; Wh. Ev. i. § 397; *Schuylkill Co.* v. *Copley*, 67 Pa. St. 386; *Taylor* v. *State*, 62 Ala. 164; *State* v. *Randolph*, 24 Ct. 363. This disability may be removed by a reversal of the judgment or by pardon. Conviction by courts in other States, it is generally held, does not disqualify. Gr. Ev. i. §§ 376–378; *Sims* v. *Sims*, 75 N. Y. 466. But in many States, infamy no longer disqualifies, though it may be proved to affect credibility. Wh. Ev. i. § 397; N. Y. Code Civ. Pro. § 832; Mass. Pub. St., c. 169, § 19; *People* v. *McGloin*, 91 N. Y. 241; *U. S.* v. *Biebusch*, 1 F. R. 213; see Art. 130, *post*, note.]

[3] *R.* v. *Payne*, L. R. 1 C. C. R. 349, and *R.* v. *Thompson*, Id. 377.

her wife or husband, such wife or husband is competent and compellable to testify.[1] [2]

ARTICLE 109.

[HUSBAND AND WIFE IN CIVIL CASES—CASES OF ADULTERY.]

[In civil cases the lawful husband or wife of a party, or of a person whose interests are directly involved in the suit, is an

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[1] *Reeve* v. *Wood*, 5 B. & S. 364. Treason has been also supposed to form an exemption. See T. E. s. 1273. [These general rules of the common law are still in force in the different States, unless abolished or modified by statute. Gr. Ev. i. §§ 330, 334-346, 362; Wh. Cr. Ev. §§ 390-402, 427. But if a co-defendant be discharged from the record, as by the entry of a *nolle prosequi*, or by an acquittal, etc., he may be a witness against, and in some cases for, the others. Gr. Ev. i. § 363; Wh. Cr. Ev. § 445; *Linsday* v. *People*, 63 N. Y. 143; *State* v. *Jones*, 51 Me. 125; but not otherwise, *Kehoe* v. *Comm.*, 85 Pa. St. 127.

As to husband and wife, there were one or two other exceptions besides that stated in the text. Gr. Ev. i. §§ 342, 344.

But it is now provided by the laws of Congress and in many States, that the defendant may be a witness in his own behalf, though the qualification is generally added that his failure to testify shall not create any presumption against him. Act of Congress, Mar. 16, 1878; N. Y. Code Cr. Pro. § 393; Mass. Pub. St., c. 169, § 18, par. 3; Wh. Cr. Ev. §§ 428-436; see *Comm.* v. *Scott*, 123 Mass. 239; *Chambers* v. *People*, 105 Ill. 409; *People* v. *Courtney*, 94 N. Y. 490; *Showalter* v. *State*, 84 Ind. 562. So by the statutes of some States, persons jointly indicted may be witnesses for or against each other (*People* v. *Dowling*, 84 N. Y. 478; *Comm.* v. *Brown*, 130 Mass. 279; *State* v. *Barrows*, 76 Me. 401; Wh. Cr. Ev. § 445); or the husband or wife of the defendant may be a witness, except to disclose confidential communications. N. Y. Pen. Code, § 715. But generally husbands and wives of defendants are not compellable to be witnesses in criminal cases. Mass. Pub. St., c. 169, § 18, par. 2; Wh. Cr. Ev. §§ 400-403; *Gibson* v. *Comm.*, 87 Pa. St., 253; *People* v. *Langtree*, 64 Cal. 256.]

[2] [At this point Mr. Stephen adds the following English statutory qualifications: "The following proceedings at law are not criminal within the meaning of this article,—Trials of indictments for the non-repair of public highways, or bridges, or for nuisances to any public highway,

incompetent witness by the common law.[1] And even after the marriage is dissolved by the death of either party or by divorce, neither party thereto can testify as to the facts learned through the confidence of the marital relation, but may as to other facts.[2] These rules apply to proceedings instituted in consequence of adultery[3] as well as to other civil cases.][4]

river or bridge (40 & 41 Vict. c. 14); proceedings instituted for the purpose of trying civil rights only (Id.); proceedings on the Revenue side of the Exchequer Division of the High Court of Justice (28 & 29 Vict. c. 104, s. 34)."]

[1] [Gr. Ev. i. §§ 334-346; *Labaree* v. *Wood*, 54 Vt. 452; *Keep* v. *Griggs*, 12 Bradw. 511. But in collateral proceedings, not immediately affecting their mutual interest, the testimony of husband or wife might be received, though tending to criminate the other. Gr. Ev. i. § 342; see *post*, Art. 120, note.]

[2] [*Ratcliff* v. *Wales*, 1 Hill, 63; *Dickerman* v. *Graves*, 6 Cush. 308; *Robb's Appeal*, 98 Pa. St. 501; *Wottrich* v. *Freeman*, 71 N. Y. 601; *U. S.* v. *Guiteau*, 1 Mackey, 498; Bishop, M. & D. ii. § 723; but see *Rea* v. *Tucker*, 51 Ill. 110.]

[3] [Id. For a special rule in bastardy cases, see Art. 98, *ante*.]

[4] [The original article of Mr. Stephen, stating the present English law, is as follows:

"COMPETENCY IN PROCEEDINGS RELATING TO ADULTERY."

"In proceedings instituted in consequence of adultery, the parties and their husbands and wives are competent witnesses, provided that no witness in any (such ?) proceeding, whether a party to the suit or not, is liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness has already given evidence in the same proceeding in disproof of his or her alleged adultery. 32 & 33 Vict. c. 68, s. 3. (The word 'such' seems to have been omitted accidentally.)"

In this country also, by modern statutes, husband and wife are commonly allowed to testify, but special limitations are usually imposed in cases grounded upon adultery. Thus in New York, husband or wife cannot testify against the other in proceedings founded upon an allegation of adultery, except to prove the marriage; and in an action for criminal conversation plaintiff's wife cannot testify for him, but may for the defendant, except that she cannot disclose confidential communications between herself and her husband without his consent. Code Civ. Pro.

ARTICLE 110.

COMMUNICATIONS DURING MARRIAGE.

No husband is compellable to disclose any communication made to him by his wife during the marriage, and no wife is compellable to disclose any communication made to her by her husband during the marriage.[1]

ARTICLE 111.*

JUDGES AND ADVOCATES PRIVILEGED AS TO CERTAIN QUESTIONS.

It is doubtful whether a judge is compellable to testify as to anything which came to his knowledge in court as such judge.[2]

* See Note XLII.

§ 831. In other cases they may testify, but neither can disclose confidential communications without the consent of the other, if living. Id. §§ 828, 831. So in Massachusetts they may testify, except as to private conversations with each other. Pub. St., c. 169, § 18; *Raynes* v. *Bennett*, 114 Mass. 424. As to other States, see *Matthews* v. *Verex*, 48 Mich. 361; *Greenawalt* v. *McEnelley*, 85 Pa. St. 352; *Howard* v. *Brower*, 37 O. St. 402; *People* v. *Langtree*, 64 Cal. 256; *Wood* v. *Chetwood*, 27 N. J. Eq. 311; Wh. Ev. i. § 431; Bishop, M. & D. ii. §§ 282–285. But statutes removing the disability of parties to testify do not enable husband and wife to be witnesses; there must be special acts for this purpose. *Lucas* v. *Brooks*, 18 Wall. 436; Wh. Ev. i. § 430.]

[1] 16 & 17 Vict. c. 83, s. 3. It is doubtful whether this would apply to a widower or divorced person, questioned after the dissolution of the marriage as to what had been communicated to him whilst it lasted. [So under modern statutes in this country, it is the general rule that confidential communications between husband and wife cannot be disclosed by either. See Art. 109, note. As to the nature of such communications, see *Wood* v. *Chetwood*, 27 N. J. Eq. 311; *Fay* v. *Guynon*, 131 Mass. 31; *Bean* v. *Green*, 33 O. St. 444; *Perry* v. *Randall*, 83 Ind. 143; *Schmied* v. *Frand*, 86 Ind. 250; *U. S.* v. *Guiteau*, 1 Mackey, 498. That a person overhearing their conversations may testify, see *Comm.* v. *Griffin*, 110 Mass. 181; *State* v. *Hoyt*, 47 Ct. 518; contra, *Campbell* v. *Chace*, 12 R. I. 333.]

[2] *R.* v. *Gazard*, 8 C. & P. 595. [A judge sitting alone to try a cause cannot be a witness on the same trial; nor when he sits with others and

It seems that a barrister cannot be compelled to testify as to what he said in court in his character of a barrister.[1]

his presence is necessary to a duly organized court, can he properly testify in the cause on trial. *Dabney* v. *Mitchell*, 66 Ala. 495; *People* v. *Miller*, 2 Park. Cr. 197; see *McMillen* v. *Andrews*, 10 O. St. 112. But if he does testify when he sits with others, and no exception is taken thereto, the judgment of the court is not invalidated. *People* v. *Dohring*, 59 N. Y. 374. These rules apply also to other judicial officers, as referees, etc. *Morss* v. *Morss*, 11 Barb. 510; see Gr. Ev. i. §§ 249, 364. A judge's testimony as to the grounds of a former decision rendered by him has also been excluded. *Agan* v. *Hey*, 30 Hun, 591; but see *Supples* v. *Cannon*, 44 Ct. 430; *Taylor* v. *Larkin*, 12 Mo. 103.

A justice may be a witness to verify his minutes in proving the testimony of a witness in a former case tried before him (*Huff* v. *Bennett*, 4 Sandf. 120, 6 N. Y. 337; *Zitske* v. *Goldberg*, 38 Wis. 216; *Welcome* v. *Batchelder*, 23 Me. 85; *Schall* v. *Miller*, 5 Whart. 156); or in proving the proceedings before him or the judgment rendered (*Pollock* v. *Hoag*, 4 E. D. Sm. 473; *Boomer* v. *Laine*, 10 Wend. 526; *McGrath* v. *Seagrave*, 2 Allen, 443; *Hibbs* v. *Blair*, 14 Pa. St. 413); but his entries, not so verified, are not good evidence. *Schafer* v. *Schafer*, 93 Ind. 586. So a justice may testify upon what papers process was issued by him (*Heyward's Case*, 1 Sandf. 701), or as to various collateral matters. *Highberger* v. *Stiffler*, 21 Md. 238; *Jackson* v. *Humphrey*, 1 Johns. 498.

Auditors, arbitrators, etc., may not give testimony to impeach their report or award. *Packard* v. *Reynolds*, 100 Mass. 153; *Ellison* v. *Weathers*, 78 Mo. 115; see *Briggs* v. *Smith*, 20 Barb. 409; *aliter*, in cases of fraud, *Withington* v. *Warren*, 10 Met. 431; *Pulliam* v. *Pensenean*, 33 Ill. 375. But arbitrators may testify as to matters openly occurring before them on the hearing, including admissions of a party, etc. (*Calvert* v. *Friebus*, 48 Md. 44; *Graham* v. *Graham*, 9 Pa. St. 254); or in support or explanation of their award, or as to collateral facts. Gr. Ev. ii. § 78; Wh. Ev. i. § 599; *Converse* v. *Colton*, 49 Pa. St. 346; *Hall* v. *Huse*, 10 Gray, 99.]

[1] *Curry* v. *Walter*, 1 Esp. 456. [A person is a competent witness in a case in which he is acting as attorney or counsel; but the practice is not approved and should only be resorted to in case of necessity. Gr. Ev. i. § 364; *Little* v. *McKeon*, 1 Sandf. 607; *Follansbee* v. *Walker*, 72 Pa. St. 228; *Potter* v. *Ware*, 1 Cush. 519; *Branson* v. *Caruthers*, 49 Cal. 374; *Morgan* v. *Roberts*, 38 Ill. 65.]

ARTICLE 112.

EVIDENCE AS TO AFFAIRS OF STATE.

No one can be compelled to give evidence relating to any affairs of State, or as to official communications between public officers upon public affairs, except with the permission of the officer at the head of the department concerned,[1] or to give evidence of what took place in either House of Parliament, without the leave of the House, though he may state that a particular person acted as Speaker.[2]

ARTICLE 113.

INFORMATION AS TO COMMISSION OF OFFENCES.

In cases in which the government is immediately concerned no witness can be compelled to answer any question, the answer to which would tend to discover the names of persons by or to whom information was given as to the commission of offences.

In ordinary criminal prosecutions it is for the judge to decide whether the permission of any such question would or would not, under the circumstances of the particular case, be injurious to the administration of justice.[3]

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[1] *Beatson* v. *Skene*, 5 H. & N. 838. [So in this country, the President, the governors of the several States, and their cabinet officers, are not bound to produce papers or disclose information committed to them, in a judicial inquiry, when *in their own judgment* the disclosure would on public grounds be inexpedient. *Appeal of Hartranft*, 85 Pa. St. 433; *Thompson* v. *German, etc. R. Co.*, 22 N. J. Eq. 111; *Totten* v. *U. S.*, 92 U. S. 105; Gr. Ev. i. § 251. Nor without permission of government can other persons be compelled to make such disclosures. See *Worthington* v. *Scribner*, 109 Mass. 487.]

[2] *Chubb* v. *Salomons*, 3 Car. & Kir. 77; *Plunkett* v. *Cobbett*, 5 Esp. 136.

[3] *R.* v. *Hardy*, 24 S. T. 811; *A. G.* v. *Bryant*, 15 M. & W. 169; *R.* v. *Richardson*, 3 F. & F. 693. [Gr. Ev. i. § 250; *U. S.* v. *Moses*, 4 Wash. C. C. 726; *State* v. *Soper*, 16 Me. 293; *Worthington* v. *Scribner*, 109 Mass.

ARTICLE 114.

COMPETENCY OF JURORS.

A petty juror may not[1] and it is doubtful whether a grand juror may[2] give evidence as to what passed between the jury-

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487. This last case maintains that the assent of the government is required before a witness can disclose such information, and *R.* v. *Richardson* is questioned.]

[1] *Vaise* v. *Delaval*, 1 T. R. 11; *Burgess* v. *Langley*, 5 M. & G. 722. [Gr. Ev. i. § 252 *a*; *Woodward* v. *Leavitt*, 107 Mass. 453; *Dalrymple* v. *Williams*, 63 N. Y. 361; *State* v. *Pike*, 65 Me. 111; *Hutchinson* v. *Consumers' Coal Co.*, 36 N. J. L. 24. It is a general rule that the testimony of jurors is not admissible to impeach their own verdict. *Bridgewater* v. *Plymouth*, 97 Mass. 382; *Williams* v. *Montgomery*, 60 N. Y. 648; *Meade* v. *Smith*, 16 Ct. 346; *People* v. *Doyell*, 48 Cal. 85; *Brown* v. *Cole*, 45 Ia. 601; for a full collection of cases, see 24 Am. Dec. 475; 12 Id. 142. But their testimony has been received to support or establish their verdict, or to exculpate them from alleged misconduct (*Peck* v. *Brewer*, 48 Ill. 54; *People* v. *Hunt*, 59 Cal. 430; *Clement* v. *Spear*, 56 Vt. 401; *Hutchinson* v. *Consumers' Coal Co.*, supra); or in denial or explanation of acts and declarations made by them outside of the jury room, which are relied upon to show bias or prejudice (*Woodward* v. *Leavitt*, supra); or to show the identity of the subject matter in different actions, when this is not disclosed by the record (*Stapleton* v. *King*, 40 Ia. 278; *Follansbee* v. *Walker*, 74 Pa St. 306; see *Packet Co.* v. *Sickles*, 5 Wall. 580); or to show a juror's acts while separated from his fellows (*Heffron* v. *Gallupe*, 55 Me. 563); or to show what testimony was given on a former trial (*Hewett* v. *Chapman*, 49 Mich. 4); and even in some States to impeach a verdict for grounds not essentially inherent therein. *Curtis* v. *Chicago, etc. R. Co.*, 32 Ia. 515; *Perry* v. *Bailey*, 12 Kan. 539. A juror may be a witness upon the same trial in which he is acting as juror. *Howser* v. *Comm.*, 51 Pa. St. 332; *People* v. *Dohring*, 59 N. Y. 374, 378.]

[2] 1 Ph. Ev. 140; T. E. s. 863. [It is the general rule in this country, that a grand juror cannot give such testimony. Gr. Ev. i. § 252; Wh. Ev. i. § 601; *People* v. *Hulbut*, 4 Den. 133; *State* v. *Fassett*, 16 Ct. 458; N. Y. Code Cr. Pro. § 265; Mass. Pub. St., c. 213, § 13. But grand jurors, it is now generally held, may testify whether a particular person did or did not give evidence before them (*Comm.* v. *Hill*, 11 Cush. 137), or who was the prosecutor (*Huidekoper* v. *Cotton*, 3 Watts, 56); or in im-

men in the discharge of their duties. It is also doubtful whether a grand juror may give evidence as to what any witness said when examined before the grand jury.

ARTICLE 115.*

PROFESSIONAL COMMUNICATIONS.

No legal adviser is permitted, whether during or after the termination of his employment as such, unless with his client's express consent, to disclose any communication, oral or documentary, made to him as such legal adviser, by or on behalf of his client, during, in the course, and for the purpose of his employment, whether in reference to any matter as to which a dispute has arisen or otherwise, or to disclose any advice given by him to his client during, in the course, and for the purpose of such employment. It is immaterial whether the client is or is not a party to the action in which the question is put to the legal adviser.[1]

* See Note XLIII.

peachment of a witness's credibility, may disclose his testimony before them, in order to show that it differed from that given before the petit jury (*Comm.* v. *Mead*, 12 Gray, 167; *State* v. *Benner*, 64 Me. 267; *State* v. *Wood*, 53 N. H. 484; *Gordon* v. *Comm.*, 92 Pa. St. 216; *Burdick* v. *Hunt*, 43 Ind. 381; N. Y. Code Cr. Pro. § 266); or to show a witness's perjury, confessions, etc. Id.; *U. S.* v. *Negro Charles*, 2 Cr. C. C. 76; Bishop Cr. Pr. i. §§ 857, 858 (3d ed.). It is also held in some States that in a direct proceeding to set aside or quash an indictment, the testimony of the grand jurors will be received, that twelve of their number did not concur in finding it (*Low's Case*, 4 Me. 439; *People* v. *Shattuck*, 6 Abb. N. C. 33; and so as to other grounds for quashing, see *U. S.* v. *Farrington*, 5 F. R. 343); but not, it seems, in a collateral proceeding (*People* v. *Hulbut*, supra); but the cases are in conflict on this point. See 16 Am. Dec. 281. Some States apply a still more liberal rule as to admitting the evidence of grand jurors. *Clanton* v. *State*, 13 Tex. App. 139; cf. *U. S.* v. *Farrington*, supra.]

[1] [Gr. Ev. i. §§ 237-246; Wh. Ev. i. §§ 576-594; N. Y. Code Civ. Pro. § 835; *Bacon* v. *Frisbie*, 80 N. Y. 394; *Root* v. *Wright*, 84 Id. 72; *Higbee* v. *Dresser*, 103 Mass. 523; *Conn. Life Ins. Co.* v. *Schaefer*, 94 U. S. 457;

This article does not extend to—

(1) Any such communication as aforesaid made in furtherance of any criminal purpose ; [1]

(2) Any fact observed by any legal adviser, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment, whether his attention was directed to such fact by or on behalf of his client or not ; [2]

(3) Any fact with which such legal adviser became acquainted otherwise than in his character as such.[3] The expression "legal

Burnham v. *Roberts*, 70 Ill. 19 ; *Earle* v. *Grout*, 46 Vt. 113 ; *McLellan* v. *Longfellow*, 32 Me. 494 ; *Cross* v. *Riggins*, 50 Mo. 335. The client's waiver may in some cases be implied, as well as express. *Blackburn* v. *Crawfords*, 3 Wall. 175, 192. But his becoming himself a witness in the case does not amount to a waiver. *Montgomery* v. *Pickering*, 116 Mass. 227 ; see *Duttenhofer* v. *State*, 34 O. St. 91. After the client's death his executor or administrator cannot waive. Gr. Ev. i. § 243 ; *Westover* v. *Ætna Life Ins. Co.*, 99 N. Y. 56.]

[1] *Follett* v. *Jefferyes*, 1 Sim. (N. S.) 17 ; *Charlton* v. *Coombes*, 32 L. J. Ch. 284 ; 4 Giff. 372. These cases put the rule on the principle, that the furtherance of a criminal purpose can never be part of a legal adviser's business. As soon as a legal adviser takes part in preparing for a crime, he ceases to act as a lawyer and becomes a criminal—a conspirator or accessory, as the case may be. [*People* v. *Blakely*, 4 Park. Cr. 176 ; *Dudley* v. *Beck*, 3 Wis. 274. The English decisions *supra* include cases of *fraud* within this exception ; but see *Bank of Utica* v. *Merseveau*, 3 Barb. Ch. 528, 598 ; cf. *Higbee* v. *Dresser*, 103 Mass. 523 ; *In re Chapman*, 27 Hun, 573.]

[2] [See Illustration (*a*).]

[3] [Gr. Ev. i. §§ 244, 245 ; Wh. Ev. i. §§ 588, 589 ; as, *e.g.*, facts which he learned before he became legal adviser, or after the relation ceased ; or while he was acting as friend, not as attorney (*Coon* v. *Swan*, 30 Vt. 6) ; so as to communications not relating to the professional employment. *Carroll* v. *Sprague*, 59 Cal. 655 ; *State* v. *Mewherter*, 46 Ia. 88. So an attorney may be required to testify as to many collateral matters ; as the name of his client (*Harriman* v. *Jones*, 58 N. H. 328), or his residence (*Alden* v. *Goddard*, 73 Me. 345), or his signature (*Brown* v. *Jewett*, 120 Mass. 215) ; or that in collecting a claim he acted for his client (*Mulford* v. *Muller*, 3 Abb. Dec. 330) ; or that he has the client's papers in his

adviser" includes barristers and solicitors,[1] their clerks,[2] and interpreters[2] between them and their clients. It does not include officers of a corporation through whom the corporation has elected to make statements.[3]

Illustrations.

(*a*) A, being charged with embezzlement, retains B, a barrister, to defend him. In the course of the proceedings, B observes that an entry has been made in A's account book, charging A with the sum said to have been embezzled, which entry was not in the book at the commencement of B's employment.

This being a fact observed by B in the course of his employment, showing that a fraud has been committed since the commencement of the proceedings, is not protected from disclosure in a subsequent action

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hands (see Art. 119); so as to communications which are not of a private nature, or which have ceased to be private (*Snow* v. *Gould*, 74 Me. 540), and many like matters. See p. 205, n. 1, *post*; *Comm.* v. *Goddard*, 14 Gray, 402; *Crosby* v. *Berger*, 11 Pai. 377.

A communication made to counsel by one party to a controversy while the others are present is not privileged from disclosure in a subsequent suit between such parties themselves. *Gulick* v. *Gulick*, 38 N. J. Eq. 402; *Britton* v. *Lorenz*, 45 N. Y. 51; see *Root* v. *Wright*, 84 N. Y. 72.]

[1] *Wilson* v. *Rastall*, 4 T. R. 753. As to interpreters, Ib. 756. [All attorneys and counsellors are included in this country.]

[2] *Taylor* v. *Foster*, 2 C. & P. 195; *Foote* v. *Hayne*, 1 C. & P. 545. Quære, whether licensed conveyancers are within the rule? Parke B., in *Turquand* v. *Knight*, 7 M. & W. 100, thought not. Special pleaders would seem to be on the same footing. [Gr. Ev. i. § 239; as to clerks, see *Sibley* v. *Waffle*, 16 N. Y. 180; *Jackson* v. *French*, 3 Wend. 337; but a law-student to whom a communication is made, not being the clerk or agent of the attorney, may be required to testify as to such communication (*Barnes* v. *Harris*, 7 Cush. 576; *Holman* v. *Kimball*, 22 Vt. 555), and so may a person who overhears a client's statements to his lawyer. *Hoy* v. *Morris*, 13 Gray, 519; *Cary* v. *White*, 59 N. Y. 336, 339; *Goddard* v. *Gardner*, 28 Ct. 172. A lawyer simply employed to draft deeds or other papers without giving legal advice is not generally within the rule of privilege. *Smith* v. *Long*, 106 Ill. 485; *Borum* v. *Fonts*, 15 Ind. 50; *Hatton* v. *Robinson*, 14 Pick. 416; but see *Linthicum* v. *Remington*, 5 Cr. C. C. 546.]

[3] *Mayor of Swansea* v. *Quirk*, L. R. 5 C. P. D. 106.

by A against the prosecutor in the original case for malicious prosecution.[1]

(*b*) A retains B, an attorney, to prosecute C (whose property he had fraudulently acquired) for murder, and says, "It is not proper for me to appear in the prosecution for fear of its hurting me in the cause coming on between myself and him; but I do not care if I give £10,000 to get him hanged, for then I shall be easy in my title and estate." This communication is not privileged.[2]

ARTICLE 116.

CONFIDENTIAL COMMUNICATIONS WITH LEGAL ADVISERS.

No one can be compelled to disclose to the Court any communication between himself and his legal adviser, which his legal adviser could not disclose without his permission, although it may have been made before any dispute arose as to the matter referred to.[3]

ARTICLE 117.*

CLERGYMEN AND MEDICAL MEN.

Medical men[4] and (probably) clergymen may be compelled

* See Note XLIV.

[1] *Brown* v. *Foster*, 1 H. & N. 736. [This case was so decided because the fact in question was not information communicated by the client, but knowledge which counsel acquired by his own observation. For a like rule, see *Patten* v. *Moor*, 29 N. H. 163; *Daniel* v. *Daniel*, 39 Pa. St. 191; *Hebbard* v. *Haughian*, 70 N. Y. 54.]

[2] *Annesley* v. *Anglesea*, 17 S. T. 1223–4.

[3] *Minet* v. *Morgan*, L. R. 8 Ch. App. 361, reviewing all the cases, and adopting the explanation given in *Pearse* v. *Pearse*, 1 De G. & S. 18–31, of *Radcliffe* v. *Fursman*, 2 Br. P. C. 514. [This rule applies though parties are now competent witnesses. *Hemenway* v. *Smith*, 28 Vt. 701; *Barker* v. *Kuhn*, 38 Ia. 392; *Bigler* v. *Reyher*, 43 Ind. 112; *Duttenhofer* v. *State*, 34 O. St. 91; *State* v. *White*, 19 Kan. 445; *Carnes* v. *Platt*, 15 Abb. Pr. (N. S.) 337. But in Massachusetts it is held that a party who offers himself as a witness at a trial cannot refuse to disclose his conversations with his counsel. *Inhab. of Woburn* v. *Henshaw*, 101 Mass. 193. That client may waive the privilege, see *Passmore* v. *Passmore's Estate*, 50 Mich. 626.]

[4] *Duchess of Kingston's Case*, 20 S. T. 572–3. As to clergymen, see Note XLIV.

to disclose communications made to them in professional confidence.[1]

ARTICLE 118.

PRODUCTION OF TITLE-DEEDS OF WITNESS NOT A PARTY.

No witness who is not a party to a suit can be compelled to produce his title-deeds to any property,[2] or any document the production of which might tend to criminate him, or expose

[1] [This is the general rule of the common law (Gr. Ev. i. § 247). But in a number of the States of this country, a different rule has been established by statute. In New York, *e.g.*, it is provided that a clergyman shall not be allowed to disclose a confession made to him in his professional character in the course of discipline enjoined by the rules or practice of his religious body (N. Y. Code Civ. Pro. § 833; see *People* v. *Gates*, 13 Wend. 311); and that a person duly authorized to practice physic or surgery shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity (Code Civ. Pro. § 834). But this privilege may be waived by the person confessing or the patient. This rule as to physicians applies to "information" obtained by them by their own observation or the statements of others, as well as to communications from the patient himself. *Edington* v. *Life Ins. Co.*, 67 N. Y. 185; *Grattan* v. *Life Ins. Co.*, 80 N. Y. 281; S. P. *Gartside* v. *Conn. Ins. Co.*, 76 Mo. 446; *Briggs* v. *Briggs*, 20 Mich. 34. But it does not prevent a physician from testifying upon a trial for murder as to the condition of the person injured whom he attended before death ensued (*Pierson* v. *People*, 79 N. Y. 424); nor in probate proceedings does it exclude the testimony of physicians to show the condition of the decedent as bearing upon his testamentary capacity, his representatives waiving the privilege. *Fraser* v. *Jennison*, 42 Mich. 206; but see *Westover* v. *Ætna Life Ins. Co.*, 99 N. Y. 56.

Similar statutes have been passed in Michigan, Wisconsin, Indiana, Iowa, Missouri, California, Oregon, etc. See *Conn. Ins. Co.* v. *Union Trust Co.*, 112 U. S. 250; *Guptill* v. *Verback*, 58 Ia. 98; as to clergymen, see *Gillooley* v. *State*, 58 Ind. 182.]

[2] *Pickering* v. *Noyes*, 1 B. & C. 263; *Adams* v. *Lloyd*, 3 H. & N. 351. [It is a rule of chancery practice that a party shall not be compelled to make discovery of his title deeds when they simply support his own title, but only when they support the title of his adversary; and a similar rule applies to other documents. Story, Eq. Jur., ii., § 1490; *Thompson* v. *Engle*, 3 Gr. Ch. (N. J.) 271; *Cullison* v. *Bossom*, 1 Md. Ch. 95. The same rule is applied in some States under modern statutes allowing

him to any penalty or forfeiture ;[1] but a witness is not entitled to refuse to produce a document in his possession only because its production may expose him to a civil action,[2] or because he has a lien upon it.[3] [4]

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the discovery and inspection of documents. *Meakings* v. *Cromwell*, 1 Sandf. 698 ; *Andrews* v. *Townshend*, 16 J. & Sp. 162 ; Mass. Pub. St., c. 167, s. 56 ; *Wilson* v. *Webber*, 2 Gray, 558 ; N. H. Gen. Laws, c. 228, s. 14 (ed. 1878) ; but see *Adams* v. *Porter*, 1 Cush. 170.

A person not a party to an action may by *subpœna duces tecum* be required to produce his private papers in evidence that are relevant to the issue (Wh. Ev. i. § 537 ; *Burnham* v. *Morrissey*, 14 Gray, 226, 240 ; *In re Dunn*, 9 Mo. App. 255 ; cf. *Davenbagh* v. *M'Kinnie*, 5 Cow. 27 (deed) ; *Lane* v. *Cole*, 12 Barb. 680 (docket book) ; *Bonesteel* v. *Lynde*, 8 How. Pr. 226, 352 (party subpœnaed to produce lease and inventory)), if they do not tend to criminate him or expose him to a penalty or forfeiture. But the court may relieve him from the obligation of giving them in evidence (though he must bring them into court), if this would be prejudicial to his rights and interests ; of this the court is to judge upon inspection (Gr. Ev. i. § 246 ; *Mitchell's Case*, 12 Abb. Pr. 249, 259 ; *In re O'Toole*, 1 Tucker, 39 ; *Bull* v. *Loveland*, 10 Pick. 9 ; so now as to a *party*, *Bonesteel* v. *Lynde*, 8 How. Pr. 226, 233 ; *Champlin* v. *Stoddart*, 17 W. D. 76 ; cf. *Cross* v. *Johnson*, 30 Ark. 396) ; and perhaps the rule in equity *supra* would be applied upon a *subpœna* both in law and equity.]

[1] *Whitaker* v. *Izod*, 2 Tau. 115 ; [*Byass* v. *Sullivan*, 21 How. Pr. 50 ; so as to discovery by a *party*, *Johnson* v. *Donaldson*, 18 Blatch. 287.]

[2] *Doe* v. *Date*, 3 Q. B. 609, 618 ; [Wh. Ev. i. § 537 ; *Bull* v. *Loveland*, 10 Pick. 9.]

[3] *Hope* v. *Liddell*, 7 De G. M. & G. 331 ; *Hunter* v. *Leathley*, 10 B. & C. 858 ; *Brassington* v. *Brassington*, 1 Sim. & Stu. 455. It has been doubted whether production may not be refused on the ground of a lien as against the party requiring the production. This is suggested in *Brassington* v. *Brassington*, and was acted upon by Lord Denman in *Kemp* v. *King*, 2 Mo. & Ro. 437 ; but it seems to be opposed to *Hunter* v. *Leathley*, in which a broker who had a lien on a policy for premiums advanced was compelled to produce it in an action against the underwriter by the assured who had created the lien. See *Ley* v. *Barlow* (Judgt. of Parke, B.) 1 Ex. 801. [See *Morley* v. *Green*, 11 Pai. 240 ; *Bull* v. *Loveland*, 10 Pick. 9.]

[4] [Mr. Stephen ends Art. 118 as follows : "No bank is compellable to produce the books of such bank, except in the case provided for in Art 37. (42 & 43 Vict. c. 11)." See note XLIX.]

ARTICLE 119.

PRODUCTION OF DOCUMENTS WHICH ANOTHER PERSON, HAVING POSSESSION, COULD REFUSE TO PRODUCE.

No solicitor,[1] trustee, or mortgagee can be compelled to produce (except for the purpose of identification) documents in his possession as such, which his client, *cestui que trust*, or mortgagor would be entitled to refuse to produce if they were in his possession ; nor can any one who is entitled to refuse to produce a document be compelled to give oral evidence of its contents.[2]

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[1] *Volant* v. *Soyer*, 13 C. B. 231 ; *Phelps* v. *Prew*, 3 E. & B. 431.

[2] *Davies* v. *Waters*, 9 M. & W. 608 ; *Few* v. *Guppy*, 13 Beav. 454. [Formerly when a party to a suit could not be required to give evidence, his legal adviser could likewise not be compelled to produce in evidence a deed or other document entrusted to him by his client, nor to disclose its contents. Notice to produce might be given him (see Art. 72, *ante*), and he might be examined as to the existence of the paper, and as to its being in his possession, so as to enable the other party to give secondary evidence of its contents (Gr. Ev. i. § 241 ; *Mitchell's Case*, 12 Abb. Pr. 249, 258 ; *Coveney* v. *Tannahill*, 1 Hill, 33 ; *Durkee* v. *Leland*, 4 Vt. 612 ; *Anon.*, 8 Mass. 370 ; *Lessee of Rhodes* v. *Selin*, 4 Wash. C. C. 715) ; and the same rule was applied to the agent of a party, as, *e.g.*, an officer of a corporation. *Bank of Utica* v. *Hillard*, 5 Cow. 419 ; *Westcott* v. *Atlantic Co.*, 3 Met. 282. In equity, however, it has been the rule that a party might, in some cases, be required to make discovery of his deeds and papers (see Art. 118, note 2), and, therefore, that his attorney would be bound to produce them, if they were in the latter's possession. *Wakeman* v. *Bailey*, 3 Barb. Ch. 482. And now that by modern statutes parties may be subpœnaed (see Art. 72, *ante*), it is in like manner declared that whatever papers a party must produce, his attorney must produce if he has them. *Mitchell's Case*, supra ; *Andrews* v. *Ohio, etc. R. Co.*, 14 Ind. 169 ; *Steed* v. *Cruise*, 70 Ga. 168 ; cf. *Moats* v. *Rymer*, 18 W. Va. 642. A client cannot combine with his attorney to keep papers from being produced by putting them in the latter's possession. *People* v. *Sheriff*, 29 Barb. 622. But papers which are professional communications are still protected. *Mitchell's Case*, supra ; *Mallory* v. *Benjamin*, 9 How. Pr. 419 ; *Hubbell* v. *Judd Oil Co.*, 19 Alb. L. J. 97 ; and see Art. 118, note 2 ; cf. *Pulford's Appeal*, 48 Ct. 247.

The agents of a telegraph company are bound to produce telegraphic messages upon a *subpœna duces tecum*. *Ex parte Brown*, 72 Mo. 83 ; *State* v. *Litchfield*, 58 Me. 267 ; *U. S.* v. *Hunter*, 15 F. R. 712 ; see p. 140. n. 1, *ante*.]

ARTICLE 120.

WITNESS NOT TO BE COMPELLED TO CRIMINATE HIMSELF.

No one is bound to answer any question if the answer thereto would, in the opinion of the judge, have a tendency to expose the witness [1] (or the wife or husband of the witness) [2] to any

[1] *R.* v. *Boyes*, 1 B. & S. 330; [Gr. Ev. i. §§ 451–453; Wh. Ev. i. §§ 533–541; N. Y. Code Civ. Pro. § 837; *Henry* v. *Salina Bk.*, 2 Den. 155, 1 N. Y. 83; *Comm.* v. *Nichols*, 114 Mass. 285; *Phelin* v. *Kenderdine*, 20 Pa. St. 354; *State* v. *Lonsdale*, 48 Wis. 348. The privilege is that of the witness and not of the party to the suit, and may be waived by the witness (*Cloyes* v. *Thayer*, 3 Hill, 564; *Comm.* v. *Shaw*, 4 Cush. 594; *Roady* v. *Finegan*, 43 Md. 490; *State* v. *Wentworth*, 65 Me. 234); and ceases to exist if the criminal prosecution is barred by the Statute of Limitations or otherwise (Wh. Ev. i. § 540; *People* v. *Kelley*, 24 N. Y. 74), or if the testimony cannot by statute be used against him (*U. S.* v. *McCarthy*, 18 F. R. 87; *Kendrick* v. *Comm.*, 78 Va. 490). The privilege is not always to be allowed when claimed, but only when it appears to the court from the nature of the examination that the witness is exposed to danger by the inquiry made; but this appearing, he need not show how the answer will criminate him. *In re Reynolds*, L. R. 20 Ch. D. 294; *Youngs* v. *Youngs*, 5 Redf. 505; see *Lamb* v. *Munster*, 10 Q. B. D. 110. If the witness discloses without objection part of a transaction criminating him, it is the general American rule that he must disclose the whole (*Comm.* v. *Pratt*, 126 Mass. 462; *People* v. *Freshour*, 55 Cal. 375; *Coburn* v. *Odell*, 10 Foster, 540; *State* v. *Fay*, 43 Ia. 651; see *Youngs* v. *Youngs*, supra), unless the partial disclosure is made under innocent mistake (*Mayo* v. *Mayo*, 119 Mass. 290). But in England a partial statement does not forfeit the privilege. *R.* v. *Garbett*, 1 Den. C. C. 236. Testimony given under compulsion of the court, contrary to the privilege, cannot be used against the witness. *Horstman* v. *Kaufman*, 97 Pa. St. 147; see Art. 23, *ante*.

When a *party* voluntarily becomes a witness and testifies as to any crime charged against him, it is held in many States that he may be cross-examined upon all facts relevant to that issue, and cannot refuse to testify. *Comm.* v. *Nichols*, 114 Mass. 285; *Roady* v. *Finegan*, 43 Md. 490; *State* v. *Ober*, 52 N. H. 459; *State* v. *Witham*, 72 Me. 531; *People* v. *Casey*, 72 N. Y. 393; see *People* v. *Brown*, Id. 571; *State* v. *Clinton*, 67 Mo. 380; *People* v. *Beck*, 58 Cal. 212; *State* v. *Red*, 53 Ia. 69]

[2] As to husbands and wives, see 1 Hale, P. C. 301; *R.* v. *Cliviger*, 2 T. R. 263; *Cartwright* v. *Green*, 8 Ve. 405; *R.* v. *Bathwick*, 2 B. & Ad.

criminal charge, or to any penalty or forfeiture which the judge regards as reasonably likely to be preferred or sued for; but no one is excused from answering any question only because the answer may establish or tend to establish that he owes a debt, or is otherwise liable to any civil suit, either at the instance of the Crown or of any other person.[1]

ARTICLE 121.

CORROBORATION, WHEN REQUIRED.[2]

When the only proof against a person charged with a criminal offence is the evidence of an accomplice, uncorroborated

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639; *R.* v. *All Saints, Worcester*, 6 M. & S. 194. These cases show that even under the old law which made the parties and their husbands and wives incompetent witnesses, a wife was not incompetent to prove matter which might tend to criminate her husband. *R.* v. *Cliviger* assumes that she was, and was to that extent overruled. As to the later law, see *R.* v. *Halliday*, Bell, 257. The cases, however, do not decide that if the wife claimed the privilege of not answering she would be compelled to do so, and to some extent they suggest that she would not. [To the same effect is *State v. Briggs*, 9 R. I. 361; see *State* v. *Bridgman*, 49 Vt. 202; *Royal Ins. Co.* v. *Noble*, 5 Abb. Pr. (N. S.) 54; *State* v. *Wilson*, 31 N. J. L. 77; *State* v. *Welch*, 26 Me. 30; *Comm.* v. *Sparks*, 7 Allen, 534; *Keep* v. *Griggs*, 12 Bradw. 511; p. 197, n. 1, *ante*.]

[1] 46 Geo. III. c. 37. See *R.* v. *Scott*, 25 L. J. M. C. 128, 7 C. C. C. 164, and subsequent cases as to bankrupts, and *Ex parte Scholfield*, L. R. 6 Ch. D. 230; [Gr. Ev. i. § 452; N. Y. Code Civ. Pro. § 837; *In re Kip*, 1 Pai. 601; *Bull* v. *Loveland*, 10 Pick. 9; *Lowney* v. *Perham*, 20 Me. 235.]

[2] [Mr. Stephen begins this article with the following special statutory rules of the English law: "No plaintiff in any action for breach of promise of marriage can recover a verdict, unless his or her testimony is corroborated by some other material evidence in support of such promise. 32 & 33 Vict. c. 68 s. 2. (*Quære*, is he bound to produce a document criminating himself; see *Webb* v. *East*, 5 Ex. D. 23 and 109).

"No order against any person alleged to be the father of a bastard child can be made by any justices, or confirmed on appeal by any Court of Quarter Session, unless the evidence of the mother of the said bastard child is corroborated in some material particular to the satisfaction

in any material particular, it is the duty of the judge to warn the jury that it is unsafe to convict any person upon such evidence, though they have a legal right to do so.[1]

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of the said justices or Court respectively. 8 & 9 Vict. c. 10, s. 6; 35 & 36 Vict. c. 6, s. 4."

Generally in this country the common-law rule applies in these cases and no corroboration is required. See as to breach of promise, *Homan* v. *Earle*, 53 N. Y. 267; *Wightman* v. *Coates*, 15 Mass. 1: as to bastardy, *State* v. *Nichols*, 29 Minn. 357; *State* v. *McGlothlen*, 56 Ia. 544; for a special rule in Massachusetts, see Mass. Pub. St., c. 85, s. 16; *Hawes* v. *Gustin*, 2 Allen, 402.

In some analogous cases corroboration is required. Thus in New York and some other States, seduction under promise of marriage is declared to be a crime, but no conviction can be had on the testimony of the female seduced, uncorroborated by other evidence. *Armstrong* v. *People*, 70 N. Y. 38; *Zabriskie* v. *State*, 43 N. J. L. 640; *Rice* v. *Comm.*, 100 Pa. St. 28; *State* v. *Tulley*, 18 Ia. 88; *State* v. *Timmens*, 4 Minn. 325; so in Iowa as to abduction, rape, etc. *State* v. *McGlothlen*, 56 Ia. 544.

So in some States it is a general rule not to grant a divorce on the uncorroborated testimony of the complainant (*Robbins* v. *Robbins*, 100 Mass. 150; *Tate* v. *Tate*, 26 N. J. Eq. 55; contra, *Flattery* v. *Flattery*, 88 Pa. St. 27); or the uncorroborated confessions of the defendant. *Lyon* v. *Lyon*, 62 Barb. 138; *Summerbell* v. *Summerbell*, 37 N. J. Eq. 603; *Evans* v. *Evans*, 41 Cal. 103; N. Y. Code Civ. Pro. § 1753.

For other cases, see next article.]

[1] 1 Ph. Ev. 93-101; T. E. ss. 887-91; 3 Russ. Cri. 600-611. [Gr. Ev. i. §§ 45, 380-382; *Stape* v. *People*, 85 N. Y. 390; *Watson* v. *Comm.*, 95 Pa. St. 418; *State* v. *Allen*, 57 Ia. 431; *U. S.* v. *Biebusch*, 1 McCrary, 42; *State* v. *Litchfield*, 58 Me. 267. But the cases differ as to the nature and extent of the corroboration required. (Id.; Gr. Ev. 1. § 381.) In New York it must tend to connect the defendant with the commission of the crime. Code Cr. Pro. § 399; S. P. *Comm.* v. *Holmes*, 127 Mass. 424; see *Hester* v. *Comm.*, 85 Pa. St. 139. It is said to be a rule of practice to warn the jury, not a rule of law (*Comm.* v. *Larrabee*, 99 Mass. 413), and discretionary with the court. *Ingalls* v. *State*, 48 Wis. 647.

As to persons who, like detectives, are only apparent accomplices and need no corroboration, see Gr. Ev. i § 382; *Campbell* v. *Comm.*, 84 Pa. St. 187; *State* v. *McKean*, 36 Ia. 343; *Comm.* v. *Graves*, 97 Mass. 114.

Upon the maxim *falsus in uno, falsus in omnibus*, the testimony of a

ARTICLE 122.

NUMBER OF WITNESSES.

In trials for high treason, or misprision of treason, no one can be indicted, tried, or attainted (unless he pleads guilty) except upon the oath of two lawful witnesses, either both of them to the same overt act, or one of them to one and another of them to another overt act of the same treason.[1] If two or more distinct treasons of divers heads or kinds are alleged in one indictment, one witness produced to prove one of the said treasons and another witness produced to prove another of the said treasons are not to be deemed to be two witnesses to the same treason within the meaning of this article.[2] [3]

If upon a trial for perjury the only evidence against the defendant is the oath of one witness contradicting the oath on which perjury is assigned, and if no circumstances are proved

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witness who has wilfully and knowingly sworn falsely as to a material point *may* be disregarded by the jury unless corroborated. *Smith* v. *Forbes*, 14 Bradw. 477; *O'Rourke* v. *O'Rourke*, 43 Mich. 58; *People* v. *Soto*, 59 Cal. 367; *Moett* v. *People*, 85 N. Y. 373; *Lemmon* v. *Moore*, 94 Ind. 40. But it is not a rule of law that they *must* so disregard it. Id.; *Comm.* v. *Billings*, 97 Mass. 405; *Pennsylvania Co.* v. *Conlan*, 101 Ill. 93; *Fierson* v. *Galbraith*, 12 Lea, 129.]

[1] [The law of this country is somewhat different, the U. S. Constitution providing that "no person shall be convicted of treason unless on the testimony of two witnesses to the *same overt act*, or on confession in open court." Art. 3, s. 3. A similar provision is found in many of the State constitutions as to treason against the State. Gr. Ev. i. § 255.]

[2] 7 & 8 Will. III. c. 3, ss. 2, 4; [Gr. Ev. i. § 256.]

[3] [At this point Mr. Stephen adds the following special rule of the English law: "This provision does not apply to cases of high treason in compassing or imagining the Queen's death, in which the overt act or overt acts of such treason alleged in the indictment are assassination or killing of the Queen, or any direct attempt against her life, or any direct attempt against her person, whereby her life may be endangered, or her person suffer bodily harm, or to misprision of such treason. 39 & 40 Geo. III. c. 93."]

which corroborate such witness, the defendant is entitled to be acquitted.[1] [2]

[1] 3 Russ. on Crimes, 77-86; [Gr. Ev. i. §§ 257-259; *Williams* v. *Comm.*, 91 Pa. St. 493; *People* v. *Stone*, 32 Hun, 41; *State* v. *Heed*, 57 Mo. 252; *Comm.* v. *Parker*, 2 Cush. 212; *U. S.* v. *Wood*, 14 Pet. 430.]

[2] [It is a chancery rule that where a bill is so framed as to compel an answer on oath and such answer denies the allegations of the bill, the uncorroborated evidence of one witness in support of the bill, will not be sufficient basis for a decree. Gr. Ev. i. § 260; *Morris* v. *White*, 36 N. J. Eq. 324; *Vigel* v. *Hopp*, 104 U. S. 441; *Campbell* v. *Patterson*, 95 Pa. St. 447; *Jones* v. *Abraham*, 75 Va. 465; *Mey* v. *Gulliman*, 105 Ill. 272. But in New York this rule no longer exists. *Stilwell* v. *Carpenter*, 62 N. Y. 639.

After some doubt, it is now held that a usage of business may be established by the testimony of one witness. *Robinson* v. *U. S.*, 13 Wall. 363; *Bissell* v. *Campbell*, 54 N. Y. 353; *Jones* v. *Hoey*, 128 Mass. 585; *Adams* v. *Pittsburgh Ins. Co.*, 95 Pa. St. 348.]

CHAPTER XVI.

OF TAKING ORAL EVIDENCE, AND OF THE EXAMINATION OF WITNESSES.

ARTICLE 123.

EVIDENCE TO BE UPON OATH, EXCEPT IN CERTAIN CASES.

ALL oral evidence given in any proceeding must be given upon oath, but if any person called as a witness refuses or is unwilling to be sworn from alleged conscientious motives, the judge before whom the evidence is to be taken may, upon being satisfied of the sincerity of such objection, permit such person, instead of being sworn, to make his or her solemn affirmation and declaration in the following words :—

"I, A B, do solemnly, sincerely, and truly affirm and declare that the taking of any oath is according to my religious belief unlawful, and I do also solemnly, sincerely, and truly affirm and declare," &c.[1]

[2] If any person called to give evidence in any Court of Justice,

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[1] 17 & 18 Vict. c. 125, s. 20 (civil cases) ; 24 & 25 Vict. c. 66 (criminal cases).

[2] 32 & 33 Vict. c. 68, s. 4 ; 33 & 34 Vict. c. 49. I omit special provisions as to Quakers, Moravians, and Separatists, as the enactments mentioned above include all cases. The statutes are referred to in T. E. s. 1254 ; R. N. P. 175–6. [Provisions similar to those set forth in this article have been generally adopted in this country by statute. Thus it is provided in the U. S. Revised Statutes (§ 1) that "the requirement of an 'oath' shall be deemed complied with by making affirmation in judicial form." So in New York, a solemn declaration or affirmation, in the following form, is administered to a person who declares that he has conscientious scruples against taking an oath : "You do solemnly, sincerely, and truly, declare and affirm," etc. Code Civ. Pro. § 847. Other States have like provisions. Under such laws a wilful false oath or affirmation constitutes perjury. Id. § 851 ; U. S. Rev. St. § 5392.]

whether in a civil or criminal proceeding, objects to take an oath, or is objected to as incompetent to take such an oath, such person must, if the presiding judge is satisfied that the taking of an oath would have no binding effect on his conscience, make the following promise and declaration :—

"I solemnly promise and declare that the evidence given by me to the Court shall be the truth, the whole truth, and nothing but the truth."

If any person having made either of the said declarations wilfully and corruptly gives false evidence, he is liable to be punished as for perjury.

ARTICLE 124.

FORM OF OATHS ; BY WHOM THEY MAY BE ADMINISTERED.

Oaths are binding which are administered in such form and with such ceremonies as the person sworn declares to be binding.[1]

Every person now or hereafter having power by law or by consent of parties to hear, receive, and examine evidence, is empowered to administer an oath to all such witnesses as are lawfully called before him.[2]

[1] 1 & 2 Vict. c. 105. For the old law, see *Omichund* v. *Barker*, 1 S. L. C. 455. [By the regular common-law form, the oath is administered upon the Gospels, the witness kissing the book, the usual formula repeated to him being, "You do swear that," etc.——"So help you God." But often, nowadays, the witness, instead of kissing the book, simply raises his hand while taking the oath. But the rule stated in this article is everywhere accepted. Thus a Mohammedan may be sworn on the Koran, a Brahmin or a Chinaman by the peculiar methods used in their countries, etc. See *People* v. *Jackson*, 3 Park. Cr. 590. But if such persons take the usual form of oath without objection, they are liable for perjury, if they wilfully swear falsely. Gr. Ev. i. § 371.

In some States, these general rules, more or less modified, are prescribed by statute. See N. Y. Code Civ. Pro. §§ 845-851 ; Mass. Pub. St., c. 169, §§ 13-18.]

[2] 14 & 15 Vict. c. 99, s. 16. [Similar statutes are generally in force in

ARTICLE 125.

HOW ORAL EVIDENCE MAY BE TAKEN.

Oral evidence may be taken [1] (according to the law relating to civil and criminal procedure)—

In open court upon a final or preliminary hearing ; [2]

Or out of court for future use in court—

(*a*) upon affidavit,

(*b*) under a commission,[3]

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this country. See U. S. Rev. St. §§ 101, 183, 474, 1778, etc.; N. Y. Code Civ. Pro. § 843; Mass. Pub. St., c. 169, §§ 7, 12.]

[1] As to civil procedure, see Order XXXVII to Judicature Act of 1875; Wilson, pp. 264-7. As to criminal procedure, see 11 & 12 Vict. c. 42, for preliminary procedure, and the rest of this chapter for final hearings.

[2] [As to preliminary hearings in criminal cases, there are statutes in force in the several States of this country, providing for an examination before a magistrate into the circumstances of a charge against an accused person, and the prisoner may be examined, as well as witnesses for and against him. Bishop, Cr. Pro. §§ 225-239, 3d ed.; N. Y. Code Cr. Pro. §§ 188-221. So in civil cases, statutes in some States provide for the examination before trial of the parties to a cause, or of other persons whose testimony is material and necessary, and may otherwise be lost (see N. Y. Code Civ. Pro. §§ 870-886; Mass. Pub. St., c. 167, ss. 49-60); but the examination of a party before trial is not permissible in actions at law in the U. S. courts. *Ex parte* Fisk, 113 U. S. 713.]

[3] The law as to commissions to take evidence is as follows: The root of it is 13 Geo. III. c. 63. Section 40 of this Act provides for the issue of a commission to the Supreme Court of Calcutta (which was first established by that Act) and the corresponding authorities at Madras and Bombay to take evidence in cases of charges of misdemeanor brought against Governors, etc., in India in the Court of Queen's Bench. S. 42 applies to parliamentary proceedings, and s. 44 to civil cases in India. These provisions have been extended to all the colonies by 1 Will. IV. c. 22, and so far as they relate to civil proceedings to the world at large. 3 & 4 Vict. c. 105, gives a similar power to the Courts at Dublin.

[There are statutes in the several States of this country, providing for the issuing of commissions by a court or judge, by which commissioners are appointed to take the depositions of witnesses in other States or countries, for use in the particular State issuing the commission. The courts of the

(*c*) [1] before any officer of the Court or any other person or persons, appointed for that purpose by the Court or a judge [under due legal authority, or designated by statute, or selected by agreement of the parties.] [2]

Oral evidence taken in open court must be taken according

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foreign jurisdiction will usually aid such commissioners in obtaining the desired testimony, by compelling witnesses to come before them, etc., either upon principles of comity, or in accordance with their own local statutes making this their duty. Another mode of obtaining such evidence is by the issuing of "letters rogatory," which are in the form of a letter missive from a domestic to a foreign court, requesting it to procure and return the desired testimony, under promise of a like favor when required. Gr. Ev. i. § 320. Sometimes foreign courts will comply with such a request, but will not aid commissioners, and then the use of letters rogatory is necessary; but the usual practice is to issue a commission. See U. S. Rev. St. §§ 863-876; N. Y. Code Civ. Pro. §§ 887-920; Mass. Pub. St., c. 169, §§ 23-64; *Anonymous*, 59 N. Y. 313; *Stein* v. *Bowman*, 13 Pet. 209]

[1] [This paragraph is somewhat changed from the original, and the next one in the original is wholly omitted here, since they relate to the special provisions of English statutes. Their original form is as follows:

"(*c*) before any officer of the Court or any other person or persons appointed for that purpose by the Court or a judge under the Judicature Act, 1875, Order XXXVII, 4.

"Oral evidence taken upon a preliminary hearing may, in the cases specified in 11 & 12 Vict. c. 42, s. 17, 30 & 31 Vict. c. 35, s. 6, and 17 & 18 Vict. c. 104, s. 270, be recorded in the form of a deposition, which deposition may be used as documentary evidence of the matter stated therein in the cases and on the conditions specified in Chapter XVII."]

[2] [Commonly in this country, by the provisions of statutes or of rules of court, persons called variously referees, auditors, commissioners, examiners, etc., may be appointed by a judge or court to take testimony and report it for the information of the court; or such persons may be appointed or selected by the parties to act as judges in hearing and deciding causes (see N. Y. Code Civ. Pro. §§ 827, 1011-1026; Mass. Pub. St., c. 159, § 51; *Howe Machine Co.* v. *Edwards*, 15 Blatch. 402); masters in chancery perform similar duties. So statutes providing for the taking of testimony in special cases may designate by official name the persons before whom it may be taken. N. Y. Code Civ. Pro. § 899; U. S. Rev. St. § 863.]

to the rules contained in this chapter relating to the examination of witnesses.

[1] Oral evidence taken under a commission must be taken in the manner prescribed by the terms of the commission.

[2] Oral evidence taken under (*c*) must be taken in the same manner as if it were taken in open court; but the examiner has no right to decide on the validity of objections taken to particular questions, but must record the questions, the fact that they were objected to, and the answers given.[3]

[4] Oral evidence given on affidavit must be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief and the grounds thereof may be admitted.[5] The costs

[1] T. E. 491. [The mode of taking depositions is often prescribed by statute or by rules of court; it is sometimes provided that such regulations shall be annexed to the deposition. See U. S. Rev. St. §§ 863–868; Rules of the Federal Courts; N. Y. Code Civ. Pro. §§ 900–909. It is a general rule that such regulations must be carefully and precisely followed.]

[2] T. E. s. 1283; [see p. 217, n. 1, *ante*.]

[3] [So it is held in New York that a referee appointed to take evidence should take all that is offered, and has no power to pass upon objections, such power belonging to the court. *Scott* v. *Williams*, 14 Abb. Pr. 70; *Fox* v. *Moyer*, 54 N. Y. 125. A similar rule is adopted in the equity practice of the Federal Courts as to the taking of testimony by examiners. Rule 67 of the Equity Rules, U. S. Courts; see *Roberts* v. *Walley*, 14 F. R. 167. And other States have similar practice. *Brotherton* v. *Brotherton*, 14 Neb. 186; cf. *Jones* v. *Keen*, 115 Mass. 170. But referees, etc., having power to hear and determine issues, may decide upon objections to testimony. *Cincinnati* v. *Cameron*, 33 O. St. 336; N. Y. Code Civ. Pro. § 1018.]

[4] Judicature Act, 1875, Order XXXVII, 4.

[5] [So in New York and some other States, affidavits upon interlocutory motions may contain statements upon information and belief, but the sources of such information and the grounds of such belief should also be stated, and the reasons why the affidavit of a person having knowledge of the matter cannot be procured should usually appear. *Howe Co.* v. *Pettibone*, 74 N. Y. 68; *Pierson* v. *Freeman*, 77 Id. 589; *Bennett* v. *Edwards*, 27 Hun, 352; *State* v. *Foote*, 83 N. C. 102; *Mitchell* v. *Pitts*, 61

of every affidavit unnecessarily setting forth matters of hearsay or argumentative matter, or copies of or extracts from documents, must be paid by the party filing them.[1]

[2] When a deposition, or the return to a commission, or an affidavit, or evidence taken before an examiner, is used in any court as evidence of the matter stated therein, the party

Ala. 219. But affidavits merely stating belief, or information and belief, have, in many cases, been held insufficient. *Adams* v. *Merritt*, 10 Bradw. 275; *Hackett* v. *Judge, etc.*, 36 Mich. 334; *Murphy* v. *Purdy*, 13 Minn. 422; *Garner* v. *White*, 23 O. St. 192; *Thompson* v. *Higginbotham*, 18 Kan. 42.

Ex parte affidavits are evidence only when made so by some statute. *People* v. *Walsh*, 87 N. Y. 481. As to the difference between an affidavit and a deposition, see *Stimpson* v. *Brooks*, 3 Blatch. 456.]

[1] [An attorney who draws an affidavit is liable for costs if it contains irrelevant and scandalous matter, which is stricken out on motion. *McVey* v. *Cantrell*, 8 Hun, 522; cf. *Pitcher* v. *Clark*, 2 Wend. 631.]

[2] T. E. 491. *Hutchinson* v. *Bernard*, 2 Mo. & Ro. 1. [It is a general rule in this country that, if opportunity exists for so doing, objections to a deposition in respect to matters of form, or on the ground that it was irregularly or improperly taken, or that fraud was practiced, etc., should be raised when the interrogatories are framed, or upon the examination of the witness under the commission, or upon a motion to suppress the deposition; but objections to the competency of the witness, or to the relevancy or competency of any question or answer, may be made when the deposition is read in evidence. *York Co.* v. *Central R. Co.*, 3 Wall. 107; N. Y. Code Civ. Pro. §§ 910, 911; *Newton* v. *Porter*, 69 N. Y. 133; *Atlantic Ins. Co.* v. *Fitzpatrick*, 2 Gray, 279; *Palleys* v. *Ocean Ins. Co.*, 14 Me. 141; *Stowell* v. *Moore*, 89 Ill. 563; *Horseman* v. *Todhunter*, 12 Ia. 230; *Barnum* v. *Barnum*, 42 Md. 251. Objections to questions as leading relate to form, and should be taken before the trial. *Akers* v. *Demond*, 103 Mass. 318; *Hazlewood* v. *Heminway*, 3 T. & C. 787; *Crowell* v. *Western Reserve Bk.*, 3 O. St. 406; *Hill* v. *Canfield*, 63 Pa. St. 77; *Chambers* v. *Hunt*, 2 Zab. 552.

Answers which are not responsive may be objected to by either party. *Lansing* v. *Coley*, 13 Abb. Pr. 272; *Greenman* v. *O'Connor*, 25 Mich. 30; *Kingsbury* v. *Moses*, 45 N. H. 222. And where a party uses a deposition taken by his opponent, he makes it his own, and the adverse party may then object to answers given to questions which he himself propounded. *Hatch* v. *Brown*, 63 Me. 410.]

against whom it is read may object to the reading of anything therein contained on any ground on which he might have objected to its being stated by a witness examined in open court, provided that no one is entitled to object to the reading of any answer to any question asked by his own representative on the execution of a commission to take evidence.

ARTICLE 126.*

EXAMINATION IN CHIEF, CROSS-EXAMINATION, AND RE-EXAMINATION.

Witnesses examined in open court must be first examined in chief, then cross-examined, and then re-examined.[1]

Whenever any witness has been examined in chief, or has

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* See Note XLV.

[1] [The court may, in its discretion, order witnesses to withdraw from the court-room, so that they may not hear each other's testimony. If any witness disobeys the order, this may be observed upon to the jury to affect his credibility, and he is punishable for contempt; but the court cannot refuse to allow him to be examined, unless his disobedience was by the procurement, connivance, or other fault of the party calling him, in which case it may refuse or permit examination. This is now held by weight of authority. Gr. Ev. i. § 432; *Dickson* v. *State*, 39 O. St. 73; *Davis* v. *Byrd*, 94 Md. 525; *Davenport* v. *Ogg*, 15 Kan. 363; *Hey's Case*, 32 Gratt. 946; *Hubbard* v. *Hubbard*, 7 Or. 42; *People* v. *Boscovitch*, 20 Cal. 436. Another method is to have an officer of the court remove the witnesses.

A party's failure to call a witness who might be called, does not generally raise a presumption that his testimony would be unfavorable to such party. *Scovill* v. *Baldwin*, 27 Ct. 316; *Bleecker* v. *Johnston*, 69 N. Y. 309. But where the witness's testimony would be of vital importance in the case (as *e.g.*, if he were the only eye-witness of the facts), an unfavorable inference by the jury is warranted, especially if the adverse party has no legal right to call the witness. *People* v. *Hovey*, 92 N. Y. 554; *State* v. *Rodman*, 62 Ia. 456; *Rice* v. *Comm.*, 102 Pa. St. 408; *The Fred M. Laurence*, 15 F. R. 635.]

been intentionally sworn, or has made a promise and declaration as hereinbefore mentioned for the purpose of giving evidence,[1] the opposite party has a right to cross-examine him ;[2] but the opposite party is not entitled to cross-examine merely because a witness has been called to produce a document on a *subpœna duces tecum*, or in order to be identified.[3] After the cross-examination is concluded, the party who called the witness has a right to re-examine him.

The Court may in all cases permit a witness to be recalled either for further examination in chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and further re-examination respectively.[4]

If a witness dies, or becomes incapable of being further

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[1] [See Art. 123. As forms of affirmation different from the English are allowed in this country, this clause will need variation to adapt it to the local State law.]

[2] [In a few States of this country, a similar rule prevails, and a witness called to testify merely as to the formal execution of a written instrument, or as to other preliminary matter, etc., may be cross-examined as to all matters material to the issue. *Blackington* v. *Johnson*, 126 Mass. 21 ; *Beal* v. *Nichols*, 2 Gray, 262 ; *State* v. *Sayers*, 58 Mo. 585 ; *Linsley* v. *Lovely*, 26 Vt. 123 ; *Kibler* v. *McIlwain*, 16 S. C. 550 ; *Barker* v. *Blount*, 63 Ga. 423 ; *contra* in Missouri by statute as to the cross-examination of a defendant in a criminal case, *State* v. *Turner*, 76 Mo. 350. But in most States the rule is adopted that the cross-examination must be limited to matters stated upon the direct examination. See next article ; Gr. Ev. i. §§ 445-447 ; Wh. Ev. i. § 529.]

[3] [See note to 15 F. R. 726 ; *Aikin* v. *Martin*, 11 Pai. 499. The simple verification of a signature by a witness does not entitle the adverse party to see the document or to cross-examine the witness upon it, until it is offered in evidence. *Stiles* v. *Allen*, 5 Allen, 320.]

[4] [*Shepard* v. *Potter*, 4 Hill, 202 ; *Williams* v. *Sergeant*, 46 N. Y. 481 ; *Continental Ins. Co.* v. *Delpench*, 82 Pa. St. 225 ; *Comm.* v. *McGorty*, 114 Mass. 299 ; *State* v. *Rorabacher*, 19 Ia. 154 ; *Cummings* v. *Taylor*, 24 Minn. 429 ; *George* v. *Pilcher*, 28 Gratt. 300. It is a general rule that the order of proof is in the discretion of the trial court. *Platner* v. *Platner*, 78 N. Y. 90 ; *Hess* v. *Wilcox*, 58 Ia. 380.]

examined at any stage of his examination, the evidence given before he became incapable is good.[1]

If in the course of a trial a witness who was supposed to be competent appears to be incompetent, his evidence may be withdrawn from the jury, and the case may be left to their decision independently of it.[2]

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[1] *R.* v. *Doolin*, 1 Jebb. C. C. 123. The judges compared the case to that of a dying declaration, which is admitted though there can be no cross-examination. [By the weight of authority in this country, if the death of a witness in a *common-law action* precludes his cross-examination, his testimony given on the direct examination is not admitted (*People* v. *Cole*, 43 N. Y. 508; S. C. 2 Lans. 370; *Pringle* v. *Pringle*, 59 Pa. St. 281; *Sperry* v. *Moore's Estate*, 42 Mich. 353); unless the party had the opportunity of cross-examination before death occurred and did not choose to exercise it (*Bradley* v. *Mirick*, 91 N. Y. 293); where, however, the witness's testimony is substantially complete, though the examination was not wholly finished, it will be received. *Fuller* v. *Rice*, 4 Gray, 343. The English rule has been chiefly applied in *equity cases* (Gr. Ev. i. § 554; *Gass* v. *Stimson*, 3 Sumn. 98); and only a few have declared it applicable to common-law actions (*Forrest* v. *Kissam*, 7 Hill, 463; see *Sturm* v. *Atlantic Ins. Co.*, 63 N. Y. 77, 87; the New York cases contain contradictory expressions). Where the opportunity to cross-examine is lost by the misconduct of the witness, or through the fault of the party introducing him, or other like cause, his evidence in chief is rejected. *Hewlett* v. *Wood*, 67 N. Y. 394.

As to the effect of cross-examination being lost by the death of a *party*, see *Hay's Appeal*, 91 Pa. St. 265; *Comins* v. *Hetfield*, 12 Hun, 375, 80 N. Y. 261.]

[2] *R.* v. *Whitehead*, L. R. 1 C. C. R. 33. [Wh. Ev. i. § 393; Gr. Ev. i. §§ 421, 422; *Lester* v. *McDowell*, 18 Pa. St. 91; *State* v. *Damery*, 48 Me. 327; *Shurtleff* v. *Willard*, 19 Pick. 202; *Seeley* v. *Engell*, 13 N. Y. 542. But if the incompetency of the witness is known when he is called and sworn, objection should be made then, or it will ordinarily be deemed to be waived. *Monfort* v. *Rowland*, 38 N. J. Eq. 181; *Quin* v. *Lloyd*, 41 N. Y. 349; *Donelson* v. *Taylor*, 8 Pick. 390; *Watson* v. *Riskamire*, 45 Ia. 231; *Atchison, etc. R. Co.* v. *Stanford*, 12 Kan. 354; see *Motley* v. *Head*, 43 Vt. 633.

So incompetent or improper evidence may be stricken out or withdrawn from the jury after it has been admitted. *Stokes* v. *Johnson*, 57 N. Y. 673; *Specht* v. *Howard*, 16 Wall. 564; *Selkirk* v. *Cobb*, 13 Gray, 313.]

ARTICLE 127.

TO WHAT MATTERS CROSS-EXAMINATION AND RE-EXAMINATION MUST BE DIRECTED.

The examination and cross-examination must relate to facts in issue or relevant or deemed to be relevant thereto, but the cross-examination need not be confined to the facts to which the witness testified on his examination in chief.[1]

The re-examination must be directed to the explanation of matters referred to in cross-examination; and if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.[2]

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[1] [See Art. 126, note 2. But it is the rule in most of the States of this country that the cross-examination must be limited to the matters stated in the examination in chief; if the party cross-examining inquires as to new matter, he makes the witness so far his own. *Houghton* v. *Jones*, 1 Wall. 702; *People* v. *Oyer & Term. Court*, 83 N. Y. 436; *Hughes* v. *Westmoreland Co.*, 104 Pa. St. 207; *Hurlbut* v. *Meeker*, 104 Ill. 541; *Donnelly* v. *State*, 26 N. J. L. 463 & 601; *Aurora* v. *Cobb*, 21 Ind. 492; *Cokely* v. *State*, 4 Ia. 477; *Austin* v. *State*, 14 Ark. 555; *People* v. *Miller*, 33 Cal. 99; *State* v. *Smith*, 49 Ct. 376; *State* v. *Swayze*, 30 La. Ann. 1323; see preceding article. If the bounds of a proper cross-examination are not exceeded, the witness is deemed to be continually that of the party introducing him; but the extent to which such examination may go without overstepping proper bounds is somewhat differently defined in different States. See *Wilson* v. *Wagar*, 26 Mich. 452; *Haynes* v. *Ledyard*, 33 Id. 319; *Glenn* v. *Gleason*, 61 Ia. 28; and cases *supra*.

This rule does not limit cross-examination of the kind described in Art. 129. The rule there stated is commonly accepted in all States.]

[2] [Gr. Ev. i. § 467; *Gilbert* v. *Sage*, 5 Lans. 287, 57 N. Y. 639; *Dutton* v. *Woodman*, 9 Cush. 255; *U. S.* v. 18 *Barrels, etc.*, 8 Blatch. 475; *Somerville, etc. R. Co.* v. *Doughty*, 2 Zab. 495; *Koenig* v. *Bauer*, 57 Pa. St. 168. The general rule that the re-examination must relate to matters developed on the cross-examination is applied very strictly in some States (*Schaser* v. *State*, 36 Wis. 429), but in others the trial court may, in its discretion, allow the re-examination to extend to other matters. *Kendall* v. *Weaver*, 1 Allen, 277; *Clark* v. *Vorce*, 15 Wend. 193; see *Hemmens* v. *Bentley*, 32 Mich. 89. If part of a conversation be developed on the direct or cross-

ARTICLE 128.

LEADING QUESTIONS.

Questions suggesting the answer which the person putting the question wishes or expects to receive, or suggesting disputed facts as to which the witness is to testify, must not, if objected to by the adverse party, be asked in an examination in chief, or a re-examination, except with the permission of the Court, but such questions may be asked in cross-examination.[1]

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examination, the other party may, on the cross or re-direct, bring out such other parts of the same conversation as explain or qualify the portion already testified to, but not distinct and independent statements. *People* v. *Beach*, 87 N. Y. 508; *Walsh* v. *Porterfield*, 87 Pa. St. 376; *Comm.* v. *Keyes*, 11 Gray, 323; *Oakland Ice Co.* v. *Maxcy*, 74 Me. 294. In some States it is held that if one party, without objection, introduces irrelevant evidence, which is prejudicial to the other party, the latter may give evidence which goes directly to contradict it. *State* v. *Witham*, 72 Me. 531; *Mowry* v. *Smith*, 9 Allen, 67; *Furbush* v. *Goodwin*, 5 Fost. 425; see *Teague* v. *Irwin*, 134 Mass. 303.

The party who opens a case must, in general, introduce all the evidence to prove his side of the case before he closes; then after his adversary's evidence is given, he may give proof in reply or rebuttal. But it is in the discretion of the court to permit evidence to be given in reply which should properly have been given in chief. *Marshall* v. *Davis*, 78 N. Y. 414; *Young* v. *Edwards*, 72 Pa. St. 257; *Strong* v. *Connell*, 115 Mass. 575; *Graham* v. *Davis*, 4 O. St. 362; *State* v. *Alford*, 31 Ct. 40; *Babcock* v. *Babcock*, 46 Mo. 243; but see *Clayes* v. *Ferris*, 10 Vt. 112.]

[1] [Gr. Ev. i. §§ 434, 435, 445; Wh. Ev. i. §§ 499–504. But such questions may be allowed to be put on the direct examination when the witness appears hostile to the party introducing him, or when the examination relates to items, dates, or numerous details, where the memory ordinarily needs suggestion, or when it is necessary to direct the witness's attention plainly to the subject-matter of his testimony, etc. Id.; *People* v. *Mather*, 4 Wend. 229; *State* v. *Benner*, 64 Me. 267; *Hickins* v. *People's Ins. Co.*, 11 Fost. 238; *Doran* v. *Muller*, 78 Ill. 342; *U. S.* v. *Dickinson*, 2 McL. 325. It is discretionary with the court whether such questions shall be permitted. *Vrooman* v. *Griffiths*, 1 Keyes, 53; *Farmers' Ins. Co.* v. *Bair*, 87 Pa. St. 124; *York* v. *Pease*, 2 Gray, 282. As to what is a

ARTICLE 129.*

QUESTIONS LAWFUL IN CROSS-EXAMINATION.

When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend—

(1) To test his accuracy, veracity, or credibility; or

(2) To shake his credit, by injuring his character.

Witnesses have been compelled to answer such questions, though the matter suggested was irrelevant to the matter in issue, and though the answer was disgraceful to the witness; but it is submitted that the Court has the right to exercise a discretion in such cases, and to refuse to compel such questions to be answered when the truth of the matter suggested would not in the opinion of the Court affect the credibility of the witness as to the matter to which he is required to testify.[1]

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* See Note XLVI.

leading question, see *People* v. *Mather*, supra; *Harvey* v. *Osborn*, 55 Ind. 535; *Walker* v. *Dunspaugh*, 20 N. Y. 170; *People* v. *Parish*, 4 Den. 153.

In those States where a party by cross-examining a witness as to new matter makes the witness so far his own (see Art. 127, note 1), he cannot ask leading questions as to such new matter. *People* v. *Oyer & Term. Court*, 83 N. Y. 436; *Harrison* v. *Rowan*, 3 Wash. C. C. 580; contra, *Moody* v. *Rowell*, 17 Pick. 490; see Art. 126, note 2.]

[1] [It is a well-settled doctrine in this country that a witness may be cross-examined as to specific facts tending to disgrace or degrade him, for the purpose of impairing his credibility, though these facts are purely irrelevant and collateral to the main issue; also that the extent to which such questions may be allowed is to be determined by the discretion of the trial court, which commits no error unless it abuses its discretion; that the witness may claim the privilege of declining to answer, when the court allows such questions, but that when answers are called for which are material to the issue, there is no privilege. *Lohman* v. *People*, 1 N. Y. 379; *People* v. *Noelke*, 94 N. Y. 137; *Gutterson* v. *Morse*, 58 N. H. 165; *Comm.* v. *People*, 105 Mass. 163; *Storm* v. *U. S.*, 94 U. S. 76; *Rusling* v. *Bray*, 37 N. J. Eq. 174; *Marx* v. *Hilsendegen*, 46 Mich. 336; *Muller* v. *St. Louis Hospital Ass'n*, 73 Mo. 242; *Player* v. *Burlington, etc. R.*

In the case provided for in article 120, a witness cannot be compelled to answer such a question.

Illustrations.

(*a*) The question was whether A committed perjury in swearing that he was R. T. B deposed that he made tattoo marks on the arm of R. T., which at the time of the trial were not and never had been on the arm of A. B was asked and was compelled to answer the question whether, many years after the alleged tattooing, and many years before the occasion on which he was examined, he committed adultery with the wife of one of his friends.[1]

(*b*) [On the trial of A for stealing a horse, a witness B was asked on cross-examination whether he did not live with a woman who kept a house of ill-fame. The court against objection admitted the question, but informed the witness that he could answer or not as he chose.] [2]

(*c*) [Upon the trial of A for an assault, he became himself a witness and was asked on cross-examination whether he had not committed an assault upon another person at another time. This was objected to, but properly allowed by the trial court within its discretion.][3]

Co., 62 Ia. 723; *South Bend* v. *Hardy*, 98 Ind. 577, fully discussing the subject. In New York the exercise of discretion is also limited by the rule that the examination, when not pertinent to the issue, must relate to facts which tend to discredit the witness or impeach his moral character; and questions as to his having been indicted, arrested, accused, etc., for wrongful acts are, when properly excepted to, held improper, since these facts are consistent with innocence. *People* v. *Irving*, 95 N. Y. 541; cf. *Hayward* v. *People*, 96 Ill. 492. These general rules apply also to parties when they become witnesses. *People* v. *Casey*, 72 N. Y. 393; *Chambers* v. *State*, 105 Ill. 409; *Root* v. *Hamilton*, 105 Mass. 22; *Bissell* v. *Starr*, 32 Mich. 299; see Illustrations.

So a witness may be cross-examined as to facts showing his favor towards the party calling him, or his bias, malice, ill-will, prejudice, etc., against the opposite party. Here, also, the judge's discretion governs the range of examination. *Wallace* v. *Taunton St. Railway*, 119 Mass. 91; *Batdorff* v. *Farmers' Nat. Bk.*, 61 Pa. St. 179; *Schultz* v. *Third Av. R. Co.*, 89 N. Y. 242; *Howard* v. *Patrick*, 43 Mich. 121; see next article.]

[1] *R.* v. *Orton*. See summing-up of Cockburn, C. J., vol. ii. p. 719, etc.

[2] [*State* v. *Ward*, 49 Ct. 429; see *Real* v. *People*, 42 N. Y. 270, 272; the witness is not obliged to explain why he declines to answer. *Merluzzi* v. *Gleeson*, 59 Md. 214.]

[3] [*People* v. *Irving*, 95 N. Y. 541.]

(*d*) [Upon the tria of A for murder, he became himself a witness and was asked on cross-examination whether he had not once been arrested for an assault with intent to kill. The court against objection admitted the question, and the witness then answered without claiming his privilege. This was held a proper exercise of the court's discretion.][1]

(*e*) [A witness was asked on cross-examination in a civil action as to his belief in spiritualism. It was a proper exercise of discretion not to allow the question.][2]

ARTICLE 130.

EXCLUSION OF EVIDENCE TO CONTRADICT ANSWERS TO QUESTIONS TESTING VERACITY.

When a witness under cross-examination has been asked and has answered any question which is relevant to the inquiry only in so far as it tends to shake his credit by injuring his character, no evidence can be given to contradict him,[3] except in the following cases :—

(1) If a witness is asked whether he has been previously convicted of any felony or misdemeanor, and denies or does

[1] [*Hanoff* v. *State*, 37 O. St. 178 ; S. P. *Leland* v. *Knauth*, 47 Mich. 508 ; *People* v. *Manning*, 48 Cal. 335 ; contra, *People* v. *Crapo*, 76 N. Y. 288 ; see note 1, *supra*.]

[2] [*Free* v. *Buckingham*, 59 N. H. 219.]

[3] *A. G.* v. *Hitchcock*, 1 Ex. 91, 99-105. See, too, *Palmer* v. *Trower*, 8 Ex. 247. [Gr. Ev. i. § 449 ; *Conley* v. *Meeker*, 85 N. Y. 618 ; *People* v. *Knapp*, 42 Mich. 267 ; *Elliott* v. *Boyles*, 31 Pa. St. 65. It is a general rule as to all collateral and irrelevant inquiries, whether relating to character or not, that the answers given cannot be contradicted ; the cross-examining counsel is bound by the answers given ; the reason of the rule is that time may not be taken up with immaterial issues. *Shurtleff* v. *Parker*, 130 Mass. 293 ; *Hester* v. *Comm.*, 85 Pa. St. 139 ; *Leavitt* v. *Stansell*, 44 Mich. 267 ; *Sloan* v. *Edwards*, 61 Md. 89 ; *Moore* v. *People*, 108 Ill. 484 ; *State* v. *Benner*, 64 Me. 267 ; *Furst* v. *Second Av. R. Co.*, 72 N. Y. 542 ; see Illustrations (*a*) and (*b*).]

not admit it, or refuses to answer, evidence may be given of his previous conviction thereof.[1]

(2) If a witness is asked any question tending to show that he is not impartial, and answers it by denying the facts suggested, he may be contradicted.[2]

Illustrations.

(*a*) [On the trial of A for murder, a female witness B is asked on cross-examination whether she took things not belonging to her when she left a place where she had been at service. It cannot be shown by another witness that her answer is untrue.][3]

(*b*) [The question is whether two persons were jointly interested in buying and selling *cattle*. One of them becomes a witness and is questioned as to their being jointly interested in a particular purchase and sale of *horses*, and answers that they were. This answer cannot be contradicted.][4]

(*c*) [A witness called by A in a suit between A and B, testifies that he has never threatened revenge against B. He may be contradicted on this point by other testimony.][5]

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[1] 28 & 29 Vict. c. 18, s. 6. [At common-law, conviction for crime must be proved by the record thereof or by a duly authenticated copy, and not by cross-examination (Gr. Ev. i. §§ 375, 457; *Newcomb* v. *Griswold*, 24 N. Y. 298); and this is still the general rule in this country. *State* v. *Lewis*, 80 Mo. 110. So now, in some States, where conviction for crime no longer disqualifies a witness, but may be proved to affect credibility (see Art. 107, *supra*, note), proof must still be made by the record. Mass. Pub. St., c. 169, § 19; *Comm.* v. *Gorham*, 99 Mass. 420; Gen. Laws N. H., c. 228, § 27 (ed. 1878). But in other States, either the record may be used, or the witness may be cross-examined as to his conviction (Ill. Rev. St., c. 51, § 1 (ed. 1883); Neb. Code Civ. Pro. § 338; *Driscoll* v. *People*, 47 Mich. 413); and in some States his answers upon such examination may be contradicted. N. Y. Code Civ. Pro. 832; N. J. Rev., p. 378, § 1, 379, § 9; Wis. Rev. St., § 4073 (ed. 1878).]

[2] *A. G.* v. *Hitchcock*, 1 Ex. 91, pp. 100, 105; [Gr. Ev. i. § 450; *Day* v. *Stickney*, 14 Allen, 255; *Schultz* v. *Third Av. R. Co.*, 89 N. Y. 242; *Phenix* v. *Castner*, 108 Ill. 207; *Folsom* v. *Brawn*, 5 Fost. 114; *Geary* v. *People*, 22 Mich. 220; see Illustration (*c*).]

[3] [*Stokes* v. *People*, 53 N. Y. 164.]

[4] [*Farnum* v. *Farnum*, 13 Gray, 508.]

[5] [*Collins* v. *Stephenson*, 8 Gray, 438.]

ARTICLE 131.*

STATEMENTS INCONSISTENT WITH PRESENT TESTIMONY MAY BE PROVED.

Every witness under cross-examination in any proceeding, civil or criminal, may be asked whether he has made any former statement relative to the subject-matter of the action and inconsistent with his present testimony, the circumstances of the supposed statement being referred to sufficiently to designate the particular occasion, and if he does not distinctly admit that he has made such a statement, proof may be given that he did in fact make it.[1]

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* See Note XLVII.

[1] [A similar rule is in force here in most States. It only applies when the testimony to be contradicted is *relevant* to the issue. Gr. Ev. i. § 462; *Conrad* v. *Griffey*, 16 How. (U. S.) 38; *Hart* v. *Hudson River Bridge Co.*, 84 N. Y. 56; *Pittsburg, etc. R. Co.* v. *Andrews*, 39 Md. 329; *Haley* v. *State*, 63 Ala. 83, 85; *Lawler* v. *McPheeters*, 73 Ind. 577; *Bock* v. *Weigant*, 5 Bradw. 643; *Dufresne* v. *Weise*, 46 Wis. 290; *State* v. *Grant*, 79 Mo. 113; *Cole* v. *State*, 6 Baxt. 239; *People* v. *Devine*, 44 Cal. 452; *Horton* v. *Chadbourn*, 31 Minn. 322; *Sheppard* v. *Yocum*, 10 Or. 402; *State* v. *McLaughlin*, 44 Ia. 82. The rule applies to *parties*, when they become witnesses. *Kelsey* v. *Layne*, 28 Kan. 218. Usually the time and place of the supposed statement and the persons to whom or in whose presence it was made should be brought to the witness's attention in cross-examining him (see cases *supra*); but it is sufficient if the particular occasion is otherwise designated with reasonable certainty. *Mayer* v. *Appel*, 13 Bradw. 87; *Pendleton* v. *Empire, etc. Co.*, 19 N. Y. 13. The object is to give the witness a chance to explain the alleged inconsistency; if this be not done, the evidence offered to show the contradiction is not admissible. See Illustration (*a*) and cases *supra*. The rule is usually applied when the witness denies making the statement, but that it also applies when he does not recollect making it is declared in *Payne* v. *State*, 60 Ala. 80; Ind. Rev. St., § 508 (ed. 1881). But testimony as to matters of *fact* cannot be impeached by proving the expression of *opinions* inconsistent therewith. Gr. Ev. i. § 449; *Sloan* v. *Edwards*, 61 Md. 89; *Holmes* v. *Anderson*, 18 Barb. 420. As to the mode of questioning the impeaching

The same course may be taken with a witness upon his examination in chief, if the judge is of opinion that he is "adverse" (*i.e.* hostile) to the party by whom he was called, and permits the question.[1]

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witness, see *Sloan* v. *N. Y. C. R. Co.*, 45 N. Y. 125; *Farmers' Ins. Co.* v. *Bair*, 87 Pa. St. 124.

In some States, however, a witness's contradictory statements can be proved without thus calling his attention to them on cross-examination. *Comm.* v. *Hawkins*, 3 Gray, 463; *Wilkins* v. *Babbershall*, 32 Me. 184; *Cook* v. *Brown*, 34 N. H. 460; *Tomlinson* v. *Derby*, 43 Ct. 562. But he may be recalled to explain the alleged inconsistency. *Gould* v. *Norfolk Lead Co.*, 9 Cush. 338; *Hedge* v. *Clapp*, 22 Ct. 262; see *Harrison's Appeal*, 48 Ct. 202.

In Pennsylvania, it rests in the discretion of the trial court, whether the witness may be contradicted without being cross-examined as to the inconsistent statements (*Rothrock* v. *Gallaher*, 91 Pa. St. 108); and so in Vermont (*State* v. *Glynn*, 51 Vt. 577).]

[1] [This is by an English statute (see Note XLVII, Appendix), but it is a general rule of the common-law that a party cannot impeach his own witness, by proving either his general bad character or his former statements inconsistent with his testimony (*Adams* v. *Wheeler*, 97 Mass. 67), and this is still true in most States. Gr. Ev. i. § 442; *Pollock* v. *Pollock*, 71 N. Y. 137; *Cox* v. *Sayres*, 55 Vt. 24; *Stearns* v. *Merchants' Bk.*, 53 Pa. St. 490; *People* v. *Jacobs*, 49 Cal. 384. But he may prove the true facts of the case by other witnesses, though this may incidentally discredit the witness. *Coulter* v. *Amer. Exp. Co.*, 56 N. Y. 585; *Sewell* v. *Gardner*, 48 Md. 178; *Dowdell* v. *Wilcox*, 58 Ia. 199; *Smith* v. *Ehanert*, 43 Wis. 181; *Pa. R. Co.* v. *Fortney*, 90 Pa. St. 323. The rule has even been applied to the case where a party makes a witness his own by cross-examining him as to new matter. *Fairchild* v. *Bascom*, 35 Vt. 398; cf. *Green* v *Rice*, 1 J. & Sp. 292; *Artz* v. *Railroad Co.*, 44 Ia. 284; see Art. 127, note 1, *supra*. But where the witness is one whom the law obliges the party to call, as the subscribing witness to a deed or will, he may impeach him by showing contradictory statements (*Thornton's Exers.* v. *Thornton's Heirs*, 39 Vt. 122; *Shorey* v. *Hussey*, 32 Me. 579; but see *Whitaker* v. *Salisbury*, 15 Pick. 534); and so where the witness is also the opposing party. *Brubaker's Adm'r.* v. *Taylor*, 76 Pa. St. 83; N. H. Gen. Laws, c. 228, § 15 (ed. 1878); but see *Green* v. *Rice*, *supra*; *Warren* v. *Gabriel*, 51 Ala. 235. Even if the party calling a witness is surprised by testimony contrary to what was expected, he still cannot impeach the witness by

Illustration.

(*a*) [In a civil action a deposition of A, who was absent at sea, was read in evidence by the plaintiff The defendant then offered to prove by a witness B, that the latter had had a number of conversations with A several months after the deposition was taken, in which A made statements inconsistent with his testimony and said that what he had sworn to was false. The court would not receive B's testimony, because A, while being examined, had not been questioned about the alleged conversations, and had not, therefore, had an opportunity to explain the alleged contradictions. Had such opportunity been given, B's testimony would be receivable.][1]

ARTICLE 132.

CROSS-EXAMINATION AS TO PREVIOUS STATEMENTS IN WRITING.

A witness under cross-examination (or a witness whom the judge under the provisions of article 131 has permitted to be examined by the party who called him as to previous statements inconsistent with his present testimony) may be questioned as to previous statements made by him in writing, or reduced into writing, relative to the subject-matter of the cause without such writing being shown to him (or being proved in the first instance); but if it is intended to contradict him by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are

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evidence of his bad character or inconsistent statements; but he may examine the witness himself as to such statements, recalling them plainly to his mind, and thus make it apparent to the court that the witness disappoints him, and give the latter a chance to explain, if possible, the apparent inconsistency (*Bullard* v. *Pearsall*, 53 N. Y. 230; *Hemingway* v. *Garth*, 51 Ala. 530; cf. *Johnson* v. *Leggett*, 28 Kan. 591; *Stearns* v. *Merchants' Bk.*, 53 Pa. St. 490); so he may prove the truth by other evidence. Id.; *State* v. *Knight*, 43 Me. 11, 134.

There are statutes in some States, as in England, permitting a party to impeach his witness. Ind. Rev. St., § 507 (ed. 1881); Mass. Pub. St., c. 169, § 2; *Ryerson* v. *Abington*, 102 Mass. 526.]

[1] [*Stacy* v. *Graham*, 14 N. Y. 492; S. P. *Runyan* v. *Price*, 15 O. St. 1.]

to be used for the purpose of contradicting him. The judge may, at any time during the trial, require the document to be produced for his inspection, and may thereupon make such use of it for the purposes of the trial as he thinks fit.[1]

ARTICLE 133.

IMPEACHING CREDIT OF WITNESS.

The credit of any witness may be impeached by the adverse party, by the evidence of persons who swear that they, from their knowledge of the witness, believe him to be unworthy of credit upon his oath.[2] Such persons may not upon their exami-

[1] 17 & 18 Vict. c. 125, s. 24; and 28 Vict. c. 18, s. 5. I think the words in parenthesis represent the meaning of the sections, but in terms they apply only to witnesses under cross-examination—"Witnesses may be cross-examined," etc. [The statutory rule of this article is not followed in this country, but the former English rule, laid down in the *Queen's Case*, 2 B. & B. 286. The witness must not be questioned as to the statements made by him in a letter or other writing, without showing it to him. It should be exhibited to him, and he be asked whether he wrote it, and if he assents, the writing should then itself be read in evidence as the best evidence of its contents. Gr. Ev. i. §§ 463-465; *Morford* v. *Peck*, 46 Ct. 380; *Gaffney* v. *People*, 50 N. Y. 416; *De May* v. *Roberts*, 46 Mich. 160; *Glenn* v. *Gleason*, 61 Ia. 28; *Strong* v. *Lord*, 8 Bradw. 539; *State* v. *Stein*, 79 Mo. 330; *Horton* v. *Chadbourn*, 31 Minn. 322; *Leonard* v. *Kingsley*, 50 Cal. 628. But cross-examining counsel need not put it in evidence until he has opened his own case (*Romertze* v. *East River Bk.*, 49 N. Y. 577); but the court may vary this order of proof.

It is proper to ask a witness who has testified to the making of a contract, whether the contract was in writing, but then, if he assents, the contract should be identified. *Gregory* v. *Morris*, 96 U. S. 619.]

[2] [It is a well-settled rule in this country that a witness of the adverse party may be impeached by evidence from other persons of his bad general reputation in his own community. The impeaching witnesses must come from this community, and in examining any one of them the form of inquiry usually is to ask (1) whether he knows the general reputation in that community of the witness in question; then, if he assents, (2) what that reputation is, and (3) whether from such knowledge he would believe

nation in chief give reasons for their belief, but they may be asked their reasons in cross-examination, and their answers cannot be contradicted.[1]

such witness on his oath. Gr. Ev. i. § 461; *Sloan* v. *Edwards*, 61 Md. 89, 103; *Bogle's Exers* v. *Kreitzer*, 46 Pa. St. 465; *Wright* v. *Paige*, 3 Keyes, 581; in Massachusetts it is discretionary with the trial court whether the first question shall be asked, *Wetherbee* v. *Norris*, 103 Mass. 565. The inquiry must only be as to *general reputation*, not as to specific wrongful acts. *Wehrkamp* v. *Willet*, 4 Abb. Dec. 548; *Comm.* v. *Lawler*, 12 Allen, 585; see *Knode* v. *Williamson*, 17 Wall. 586. The reputation asked about must be in most States for *truth and veracity* (*Sargent* v. *Wilson*, 59 N. H. 396; *Shaw* v. *Emery*, 42 Me. 59; *Amidon* v. *Hosley*, 54 Vt. 25; *Quinsigamond Bk.* v. *Hobbs*, 11 Gray, 250; *State* v. *Randolph*, 24 Ct. 363; *Atwood* v. *Impson*, 20 N. J. Eq. 150; *Warner* v. *Lockerby*, 31 Minn. 421; *Hillis* v. *Wylie*, 26 O. St. 574; *U. S.* v. *Van Sickle*, 2 McL. 219; *Laclede Bk.* v. *Keeler*, 109 Ill. 385; *Bogle's Exers* v. *Kreitzer*, supra; *Lenox* v. *Fuller*, 39 Mich. 268; see *Teese* v. *Huntingdon*, 23 How. (U. S.) 2); but in some States it is for *general moral character* (*State* v. *Grant*, 79 Mo. 113; *Walton* v. *State*, 88 Ind. 9; *State* v. *Egan*, 59 Ia. 636); in New York either form is allowable (*Dollner* v. *Lintz*, 84 N. Y. 669; *Wright* v. *Paige*, 3 Keyes, 581); in California the question is as to truth, honesty, and integrity (*People* v. *Markham*, 64 Cal. 157). In most States also the third question (as to belief on oath) is asked (*U. S.* v. *Van Sickle*, 2 McL. 219; *Lyman* v. *Philadelphia*, 56 Pa. St. 488; *Hamilton* v. *People*, 29 Mich. 173, 184; *Titus* v. *Ash*, 4 Fost. 319; *Knight* v. *House*, 29 Md. 194; *Eason* v. *Chapman*, 21 Ill. 33; *Wilson* v. *State*, 3 Wis. 798; *Hillis* v. *Wylie*, 26 O. St. 575, which see for other cases); in New York and Illinois it is permissible, but not necessary, (*People* v. *Mather*, 4 Wend. 229; *Wright* v. *Paige*, 3 Keyes, 581; *Laclede Bk.* v. *Keeler*, 109 Ill. 385; and see *People* v. *Tyler*, 35 Cal. 553); but in a few States it is not allowable. *Walton* v. *State*, 88 Ind. 9; *State* v. *Rush*, 77 Mo. 519; cf. *King* v. *Ruckman*, 20 N. J. Eq. 316.

When a party is a witness he may be impeached like other witnesses. *Foster* v. *Newbrough*, 58 N. Y. 481; *Wright* v. *Hanna*, 98 Ind. 217; *People* v. *Beck*, 58 Cal. 212.

The inquiry may be as to the impeached witness's reputation either before or after the time of his own examination, as well as at the time, if not too remote. *Dollner* v. *Lintz*, 84 N. Y. 669; *Graham* v. *Chrystal*, 8 Abb. Dec. 263 *Amidon* v. *Hosley*, 54 Vt. 25.]

[1] 2 Ph. Ev. 503-4; T. E. ss. 1324-5. [An impeaching witness may be cross-examined as to his means of knowledge, the grounds of his unfavor-

No such evidence may be given by the party by whom any witness is called,[1] but when such evidence is given by the adverse party, the party who called the witness may give evidence in reply to show that the witness is worthy of credit.[2]

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able opinion, etc. (*People* v. *Mather*, 4 Wend. 229, 258; *Gulerette* v. *McKinley*, 27 Hun, 320; *Bates* v. *Barber*, 4 Cush. 107), or his own general reputation may be attacked (*Phillips* v. *Thorn*, 84 Ind. 84; *Starks* v. *People*, 5 Den. 106), or his contradictory statements proved (*State* v. *Lawlor*, 28 Minn. 216). So a sustaining witness may be cross-examined. *Stape* v. *People*, 85 N. Y. 390.]

[1] 17 & 18 Vict. c. 125, s. 2; and 28 Vict. c. 18, s. 3; [see page 230, note 1, *ante*.]

[2] 2 Ph. Ev. 504. [There are several modes of sustaining an impeached witness: (1) If his general reputation is impeached, other witnesses may be called from his community to show that such reputation is good, and (in most States) that they would believe him on oath. They are examined in much the same way as impeaching witnesses. *Hamilton* v. *People*, 29 Mich. 173, 184; *Sloan* v. *Edwards*, 61 Md. 89; *State* v. *Nelson*, 58 Ia. 298; *Comm.* v. *Ingraham*, 7 Gray, 146; *Morss* v. *Palmer*, 15 Pa. St. 51; *Stape* v. *People*, 85 N. Y. 390; see *Adams* v. *Greenwich Ins. Co.*, 70 N. Y. 166. The court may, in its discretion, limit the number of impeaching and of sustaining witnesses. *Bunnell* v. *Butler*, 23 Ct. 65; *Bissell* v. *Cornell*, 24 Wend. 354.

(2) If the witness is impeached by evidence of his inconsistent statements (see Art. 131), he may in a few States be sustained by evidence of his good general reputation for truth (*Sweet* v. *Sherman*, 20 Vt. 23; *Clark* v. *Bond*, 29 Ind. 555; *Isler* v. *Dewey*, 71 N. C. 14; *Haley* v. *State*, 63 Ala. 83); but in other States this is not permitted. *Brown* v. *Moores*, 6 Gray, 451; *Webb* v. *State*, 29 O. St. 351; *Wertz* v. *May*, 21 Pa. St. 274; *Frost* v. *McCargar*, 29 Barb. 617; *Sheppard* v. *Yocum*, 10 Or. 402, citing other cases. Such proof of good reputation has also been received to rebut evidence of the witness's conviction for crime (*Gertz* v. *Fitchburg R. Co.*, 137 Mass. 77; *Webb* v. *State*, 29 O. St. 351; *People* v. *Amanacus*, 50 Cal. 233), or to rebut evidence tending to charge him with crime or other moral turpitude (*Tedens* v. *Schumers*, 14 Bradw. 607; *People* v. *Ah Fat*, 48 Cal. 61; *Mosley* v. *Vermont, etc. Ins. Co.*, 55 Vt. 142; but see *People* v. *Gay*, 7 N. Y. 378); but it is not received to sustain a witness simply because the testimony of other witnesses has contradicted his own (*Atwood* v. *Dearborn*, 1 Allen, 483; *State* v. *Ward*, 49 Ct. 429; *Brown* v. *Campbell*, 86 Ind. 516; *Starks* v. *People*, 5 Den.

ARTICLE 134.

OFFENCES AGAINST WOMEN.

When a man is prosecuted for rape or an attempt to ravish, it may be shown that the woman against whom the offence was committed was of a generally immoral character, although she is not cross-examined on the subject.[1] The woman may in such a case be asked whether she has had connection with other men, but her answer cannot be contradicted.[2] She may also be asked whether she has had connection on other occasions with the prisoner, and if she denies it she (probably) may be contradicted.[3]

106; but see *Davis* v. *State*, 38 Md. 15); but in Virginia it seems to be received, in whatever way a witness may be impeached or contradicted. *George* v. *Pilcher*, 28 Gratt. 299.

(3) It is not in general permissible to support a witness by evidence that he has made former statements similar to his testimony. Gr. Ev. i. § 469; *Powers* v. *Cary*, 64 Me. 10; *Reed* v. *Spaulding*, 42 N. H. 114; *Conrad* v. *Griffey*, 11 How. (U. S.) 480; *Robb* v. *Hackley*, 23 Wend. 50; and cases *infra*. But when his testimony is charged to have been given under the influence of some improper or interested motive, or to be a recent fabrication, and in other like cases, it may be shown that he made similar statements before the motive existed, or before there could have been any inducement to fabricate. *Herrick* v. *Smith*, 13 Hun, 446; *Stolp* v. *Blair*, 68 Ill. 541; *Hester* v. *Comm.*, 85 Pa. St. 139; *Comm.* v. *Jenkins*, 10 Gray, 485; *People* v. *Doyell*, 48 Cal. 85; *State* v. *Hendricks*, 32 Kan. 559; see *State* v. *Dennin*, 32 Vt. 158. In some States such evidence seems to be received whenever it is attempted to discredit a witness by proof of his inconsistent statements. *Dodd* v. *Moore*, 92 Ind. 397; *State* v. *Grant*, 79 Mo. 113; see *Carter* v. *Carter*, 79 Ind. 466.]

[1] *R.* v. *Clarke*, 2 Star. 241.

[2] *R.* v. *Holmes*, L. R. 1 C. C. R. 334.

[3] *R.* v. *Martin*, 6 C. & P. 562, and remarks in *R.* v. *Holmes*, p. 337, per Kelly, C. B. [The cases in this country are agreed that the woman's bad general character for chastity may be proved by witnesses, and also that she may be examined as to her previous connection with the prisoner. Gr. Ev. iii. § 214; *Conkey* v. *People*, 1 Abb. Dec. 418; *Woods* v. *People*, 55 N. Y. 515; *State* v. *Forshner*, 43 N. H. 89; and cases *infra*.

ARTICLE 135.

WHAT MATTERS MAY BE PROVED IN REFERENCE TO DECLARATIONS RELEVANT UNDER ARTICLES 25–32.

Whenever any declaration or statement made by a deceased person relevant or deemed to be relevant under articles 25–32, both inclusive, or any deposition is proved, all matters may be proved in order to contradict it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness,

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But they disagree as to whether particular acts of connection with other men can be proved. In many States the right to prove such acts is denied, either by her own examination or by the evidence of witnesses (*Comm.* v. *Harris*, 131 Mass. 336; *State* v. *Forshner*, supra; *McCombs* v. *State*, 8 O. St. 643; *Richie* v. *State*, 58 Ind. 355; *State* v. *White*, 35 Mo. 500; *State* v. *Turner*, 1 Houst. C. C. 76), but in some States such proof is competent (*State* v. *Reed*, 39 Vt. 417, permitting it by cross-examination; *Benstine* v. *State*, 2 Lea, 169, holding both modes of proof allowable, and so *People* v. *Benson*, 6 Cal. 221; cf. *Strang* v. *People*, 24 Mich. 1). In New York the decisions are conflicting (*Woods* v. *People*, 55 N. Y. 515), but in a civil action for assault with intent to ravish, such evidence has been received in mitigation of damages. *Gulerette* v. *McKinley*, 27 Hun, 320; cf. *Watry* v. *Ferber*, 18 Wis. 501.

In actions for *seduction*, the woman's bad character for chastity may be shown (see Art. 57, note, *ante*), but she cannot be cross-examined as to acts of intercourse with other men than the seducer (*Hoffman* v. *Kemerer*, 44 Pa. St. 453; *Doyle* v. *Jessup*, 29 Ill. 460; *Smith* v. *Yaryan*, 69 Ind. 445; but see *Wandell* v. *Edwards*, 25 Hun, 498; *South Bend* v. *Hardy*, 98 Ind. 577, 582), unless a child is born and its paternity is in question; (see *Smith* v. *Yaryan*). But some cases hold that such acts may be proved by the testimony of the men themselves. Gr. Ev. ii. § 577; *Ford* v. *Jones*, 62 Barb. 484; *White* v. *Murtland*, 71 Ill. 250.

Upon an indictment for *adultery*, the woman's bad character for chastity may be proved. *Comm.* v. *Gray*, 129 Mass. 474.

In *bastardy* proceedings, as the fact of paternity is in question, the woman may be cross-examined as to intercourse with other men within the period of gestation, but not as to any prior time. *Holcomb* v. *People*, 79 Ill. 409; *Smith* v. *Yaryan*, supra.]

and had denied upon cross-examination the truth of the matter suggested.[1]

ARTICLE 136.

REFRESHING MEMORY.

A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the judge considers it likely that the transaction was at that time fresh in his memory.

The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct.[2]

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[1] *R.* v. *Drummond*, 1 Leach, 338; *R.* v. *Pike*, 3 C. & P. 598. In these cases dying declarations were excluded, because the persons by whom they were made would have been incompetent as witnesses, but the principle would obviously apply to all the cases in question. [Thus when dying declarations are offered in evidence, it may be shown that the deceased declarant was an atheist, to affect his competency or credibility (*State* v. *Elliott*, 45 Ia. 486; *Goodall* v. *State*, 1 Or. 333; *People* v. *Chin Mook Sow*, 51 Cal. 597; see p. 195, n. 2, *ante*), or his contradictory statements may be proved. *People* v. *Laurence*, 21 Cal. 368; cf. *Comm.* v. *Cooper*, 5 Allen, 495.

As to *depositions*, see Art. 131, *ante*, Illustration (*a*); *Keran* v. *Trice's Exers*, 75 Va. 690; *Dabney* v. *Mitchell*, 66 Ala. 495; *Wallace* v. *Wylie*, 28 Kan. 138; *Webster* v. *Mann*, 56 Tex. 119.]

[2] 2 Ph. Ev. 480, etc.; T. E. ss. 1264–70; R. N. P. 194–5. [There are three cases of *refreshing memory:* (1) Where the witness, by referring to the writing, is enabled to actually recollect the facts and can testify in reality from memory. The writing may be the original one made by himself, while the facts were fresh in mind (*Chamberlin* v. *Ossipee*, 60 N. H. 212; *Morrison* v. *Chapin*, 97 Mass. 72; *Selover* v. *Rexford's Exer*, 52 Pa. St. 308; *Welcome* v. *Batchelder*, 23 Me. 85; *Russell* v. *Hudson River R. Co.*, 17 N. Y. 134; *Mason* v. *Phelps*, 48 Mich. 126; *People* v. *Cotta*, 49 Cal. 166), or a copy thereof (*Hudnutt* v. *Comstock*, 50 Mich. 596; *Chicago, etc. R. Co.* v. *Adler*, 56 Ill. 344; *Huff* v. *Bennett*, 6 N. Y. 339; *Lawson* v. *Glass*, 6 Col. 134; so as to copy of copy, *Folsom* v. *Apple River Co.*, 41 Wis. 602; or a copy in a newspaper, *Comm.* v. *Ford*, 130 Mass. 64; *Clif-*

An expert may refresh his memory by reference to professional treatises.[1]

ARTICLE 137.

RIGHT OF ADVERSE PARTY AS TO WRITING USED TO REFRESH MEMORY.

Any writing referred to under article 136 must be produced

ford v. *Drake*, 14 Bradw. 75), or a writing made by another person. *State* v. *Miller*, 53 Ia. 209; *Hill* v. *State*, 17 Wis. 675; *Cameron* v. *Blackman*, 39 Mich. 108; *Marcly* v. *Shults*, 29 N. Y. 346; *Paige* v. *Carter*, 64 Cal. 489. It is not the writing, but the recollection of the witness, that is the evidence in the case. *Comm.* v. *Jeffs*, 132 Mass. 5; *Bigelow* v. *Hall*, 91 N. Y. 145; and cases *supra*.

(2) Where the witness, after referring to the writing, does not recollect the facts, and yet remembers that he made or saw the writing when the facts were fresh in his mind, and that it then stated the facts correctly. The writing may have been made by himself (*Dugan* v. *Mahoney*, 11 Allen, 573; *Howard* v. *McDonough*, 77 N. Y. 592; *Adae* v. *Zangs*, 41 Ia. 536; *Downer* v. *Rowell*, 24 Vt. 343; *Kelsea* v. *Fletcher*, 48 N. H. 282; see *Costello* v. *Crowell*, 133 Mass. 352), or by another person. *Davis* v. *Field*, 56 Vt. 426; *Chamberlain* v. *Sands*, 27 Me. 458; *Green* v. *Caulk*, 16 Md. 556; *Coffin* v. *Vincent*, 12 Cush. 98. In some States the writing is itself evidence in special cases, but not in other States. See Art. 137, note.

An analogous case is where the facts are such as naturally escape the memory, as items, dates, names, numerous details, etc., and a witness is allowed to use a memorandum thereof as an aid in testifying, which he knows and testifies to have been correctly made. *Howard* v. *McDonough*, 77 N. Y. 592; *King* v. *Faber*, 51 Pa. St. 387; *Pinney* v. *Andrus*, 41 Vt. 631; *Lawson* v. *Glass*, 6 Col. 134.

(3) Where the witness, after referring to the writing, neither recollects the facts, nor remembers having seen it before, and yet from seeing his handwriting therein (as in signature, contents, or both), is enabled to testify to its genuineness and correctness. Gr. Ev. i. § 437; *Martin* v. *Good*, 14 Md. 398; *Crittenden* v. *Rogers*, 8 Gray, 452; *Moots* v. *State*, 21 O. St. 653; cf *Parsons* v. *Mfr's. Ins. Co.*, 16 Gray, 463; *Cole* v. *Jessup*, 10 N. Y. 96. As to the writing being evidence, see next article, note.]

[1] *Sussex Peerage Case*, 11 C. & F. 114-17; [*People* v. *Wheeler*, 69 Cal. 581, 585; see Art. 35, note 2, *ante*.]

and shown to the adverse party if he requires it; and such party may, if he pleases, cross-examine the witness thereupon.[1]

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[1] See Cases in R. N. P. 195; [Gr. Ev. i. § 437; *Peck* v. *Valentine*, 94 N. Y. 571. This is the general rule both as to *Case* (1), stated in the preceding note (see Art. 136, note 2; *Comm.* v. *Jeffs*, 132 Mass. 5; *Peck* v. *Lake*, 3 Lans. 136; *Chute* v. *State*, 19 Minn. 271; *Duncan* v. *Seely*, 34 Mich. 369; *Stanwood* v. *McLellan*, 48 Me. 275; *McKivitt* v. *Cone*, 30 Ia. 455), and also as to *Case* (2). *Dugan* v. *Mahoney*, 11 Allen, 573; *Costello* v. *Crowell*, 133 Mass. 352; *Adae* v. *Zangs*, 41 Ia. 536; see *Davis* v. *Field*, 56 Vt. 426. The writing is not itself admitted in evidence (see cases cited). The object of cross-examination is to ascertain when and by whom the writing was made, whether it is such a writing as may properly be used for the purpose, whether the witness's memory is refreshed by every part of it, etc. *Chute* v. *State*, 19 Minn. 271; *Comm.* v. *Burke*, 114 Mass. 261. It is in the discretion of the trial court at what stage of the trial this examination shall be made (see last case). So when the witness, under *Case* (1), refers to the writing out of court, it has been held matter of judicial discretion whether he shall produce it in court. *Comm.* v. *Lanman*, 13 Allen, 563; see *Peck* v. *Lake*, 3 Lans. 136; *Trustees* v. *Bledsoe*, 5 Ind. 133.

A different rule is applied in some States in the special case where the witness himself made the writing when the facts were fresh in his mind, but cannot, upon now referring to it, testify to the facts from actual recollection; the original writing (but not a *copy*) is itself received in evidence, upon his authenticating its genuineness and correctness. *McCormick* v. *Pa. Cent. R. Co.*, 49 N. Y. 303, 315; *Kelsea* v. *Fletcher*, 48 N. H. 282; *Kent* v. *Mason*, 1 Bradw. 466; *Insurance Co.* v. *Weide*, 9 Wall. 677; see *Acklen's Exer.* v. *Hickman*, 63 Ala. 494. But the writing is not evidence, if the witness has present recollection. Id.; *Flood* v. *Mitchell*, 68 N. Y. 507.

In *Case* (3) the writing should be produced in court to examine the witness upon (Gr. Ev. i. § 437; *Hall* v. *Ray*, 18 N. H. 126; *Martin* v. *Good*, 14 Md. 398), but is often put in evidence itself, under other rules of the law of evidence. *Moots* v. *State*, 21 O. St. 653; *Crittenden* v. *Rogers*, 8 Gray, 452.

A writing made five months after the transaction and by request of a party was not allowed to be used to refresh memory (*Spring Garden Ins. Co.* v. *Evans*, 15 Md. 54; cf. *Swartz* v. *Chickering*, 58 Md. 290); so of one made twenty months afterwards. *Maxwell* v. *Wilkinson*, 113 U. S. 657.]

ARTICLE 138.

GIVING, AS EVIDENCE, DOCUMENT CALLED FOR AND PRODUCED ON NOTICE.

When a party calls for a document which he has given the other party notice to produce, and such document is produced to, and inspected by, the party calling for its production, he is bound to give it as evidence if the party producing it requires him to do so, and if it is or is deemed to be relevant.[1]

ARTICLE 139.

USING, AS EVIDENCE, A DOCUMENT, PRODUCTION OF WHICH WAS REFUSED ON NOTICE.

When a party refuses to produce a document which he has had notice to produce, he may not afterwards use the document as evidence without the consent of the other party.[2]

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[1] *Wharam* v. *Routledge*, 1 Esp. 235; *Calvert* v. *Flower*, 7 C. & P. 386; [Gr. Ev. i. § 563; *Ellison* v. *Cruser*, 40 N. J. L. 444; *Merrill* v. *Merrill*, 67 Me. 70; *Long* v. *Drew*, 114 Mass. 77; cf. *Stitt* v. *Huidekopers*, 17 Wall. 385; *Carr* v. *Gale*, 3 W. & M. 38; but in some States this rule is modified. *Austin* v. *Thompson*, 45 N. H. 113; *Rumsey* v. *Lovell*, Anth. N. P. 26.]

[2] *Doe* v. *Hodgson*, 12 A. & E. 135; but see remarks in 2 Ph. Ev. 270; [*Gage* v. *Campbell*, 131 Mass. 566; *Kingman* v. *Tirrell*, 11 Allen, 97; *Tyng* v. *U. S. Submarine, etc. Co.*, 1 Hun, 161.]

CHAPTER XVII.

OF DEPOSITIONS.

ARTICLE 140.

DEPOSITIONS BEFORE MAGISTRATES.

A DEPOSITION taken under 11 & 12 Vict. c. 42, s. 17, may be produced and given in evidence at the trial of the person against whom it was taken,

if it is proved (to the satisfaction of the judge) that the witness is dead, or so ill as not to be able to travel (although there may be a prospect of his recovery) ;[1]

(or, if he is kept out of the way by the person accused,)[2]

or, (probably, if he is too mad to testify,)[3] and

if the deposition purports to be signed by the justice by or before whom it purports to have been taken ; and

if it is proved by the person who offers it as evidence that it was taken in the presence of the person accused, and that he, his counsel, or attorney, had a full opportunity of cross-examining the witness ;

Unless it is proved that the deposition was not in fact signed by the justice by whom it purports to be signed,

(or, that the statement was not taken upon oath ;

or (perhaps) that it was not read over to or signed by the witness).[4]

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[1] *R.* v. *Stephenson*, L. & C. 165.

[2] *R.* v. *Scaife*, 17 Q. B. 773.

[3] Analogy of *R.* v. *Scaife*.

[4] I believe the above to be the effect of 11 & 12 Vict. c. 42, s. 17, as interpreted by the cases referred to, the effect of which is given by the words in parenthesis, also by common practice. Nothing can be more rambling or ill-arranged than the language of the section itself. See 1

If there is a prospect of the recovery of a witness proved to be too ill to travel, the judge is not obliged to receive the deposition, but may postpone the trial.[1]

ARTICLE 141.

DEPOSITIONS UNDER 30 & 31 VICT. C. 35, S. 6.

A deposition taken for the perpetuation of testimony in criminal cases,[2] under 30 & 31 Vict. c. 35, s. 6, may be produced and read as evidence, either for or against the accused, upon the trial of any offender or offence [3] to which it relates—

if the deponent is proved to be dead, or

if it is proved that there is no reasonable probability that the deponent will ever be able to travel or to give evidence, and

if the deposition purports to be signed by the justice by or before whom it purports to be taken, and

if it is proved to the satisfaction of the Court that reasonable notice of the intention to take such deposition was served upon the person (whether prosecutor or accused) against whom it is proposed to be read, and

that such person or his counsel or attorney had or might have had, if he had chosen to be present, full opportunity of cross-examining the deponent.[4]

Ph. Ev. 87-100; T. E. s. 448, etc. [Statutes providing for the taking of depositions are also found in the several States of this country. There is also a law of Congress on the subject. They resemble the English statutes in their general features. See U. S. Rev. St. §§ 863-875; N. Y. Code Civ. Pro. §§ 887-920; Gr. Ev. i. §§ 320-325; Art. 125, *ante*, and notes.]

[1] *R.* v. *Tait*, 2 F. & F. 553.

[2] [Statutes providing for the taking of depositions in criminal cases are found in some States. See N. Y. Code Cr. Pro. §§ 620-657; Maine Rev. St., c. 134, § 19 (ed. 1883); Bishop Cr. Pro., i. §§ 1198-1206 (3d ed.).]

[3] *Sic.*

[4] 30 & 31 Vict. c. 35, s. 6. The section is very long, and as the first part of it belongs rather to the subject of criminal procedure than to the subject of evidence, I have omitted it. The language is slightly altered.

ARTICLE 142.

DEPOSITIONS UNDER MERCHANT SHIPPING ACT, 1854.

[1] Whenever, in the course of any legal proceedings instituted in any part of her Majesty's dominions before any judge or magistrate or before any person authorized by law or by consent of parties to receive evidence, the testimony of any witness is required in relation to the subject-matter of such proceeding, any deposition that such witness may have previously made on oath in relation to the same subject-matter before any justice or magistrate in her Majesty's dominions, or any British consular officer elsewhere, is admissible in evidence, subject to the following restrictions :

1. If such proceeding is instituted in the United Kingdom or British possessions, due proof must be given that such witness cannot be found in that kingdom or possession respectively.

2. If such deposition was made in the United Kingdom, it is not admissible in any proceeding instituted in the United Kingdom.

3. If the deposition was made in any British possession, it is not admissible in any proceeding instituted in the same British possession.

4. If the proceeding is criminal, the deposition is not admissible unless it was made in the presence of the person accused.

I have not referred to depositions taken before a coroner (see 7 Geo. IV. c. 64, s. 4), because the section says nothing about the conditions on which they may be given in evidence. Their relevancy, therefore, depends on the common law principles expressed in article 32. They must be signed by the coroner ; but these are matters not of evidence, but of criminal procedure. [See *McLain* v. *Comm.*, 99 Pa. St. 86.]

[1] 17 & 18 Vict. c. 104, s. 270. There are some other cases in which depositions are admissible by statute, but they hardly belong to the Law of Evidence.

Every such deposition must be authenticated by the signature of the judge, magistrate, or consular officer before whom it was made. Such judge, magistrate, or consular officer must, when the deposition is taken in a criminal matter, certify (if the fact is so) that the accused was present at the taking thereof; but it is not necessary in any case to prove the signature or the official character of the person appearing to have signed any such deposition.

In any criminal proceeding the certificate aforesaid is (unless the contrary is proved) sufficient evidence of the accused having been present in manner thereby certified.

Nothing in this article contained affects any provision by Parliament or by any local legislature as to the admissibility of depositions or the practice of any court according to which depositions not so authenticated are admissible as evidence.

CHAPTER XVIII.

OF IMPROPER ADMISSION AND REJECTION OF EVIDENCE.

ARTICLE 143.

A NEW trial will not be granted in any civil action on the ground of the improper admission or rejection of evidence, unless in the opinion of the court to which the application is made some substantial wrong or miscarriage has been thereby occasioned in the trial of the action.[1]

If in a criminal case evidence is improperly rejected or admitted, there is no remedy, unless the prisoner is convicted, and unless the judge, in his discretion, states a case for the Court for Crown Cases Reserved; but if that Court is of opinion that any evidence was improperly admitted or rejected, it must set aside the conviction.[2]

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[1] Judicature Act, 1875, Order XXXIX, 3. [S. P. *Tenney* v. *Berger*, 93 N. Y. 524; *Hornbuckle* v. *Stafford*, 111 U. S. 389; *Wing* v. *Chesterfield*, 116 Mass. 353; *Girard Ins. Co.* v. *Marr*, 46 Pa. St. 504; *Ham* v. *Wisconsin, etc. R. Co.*, 61 Ia. 716.]

[2] [In this country, a rule similar to that just stated in respect to civil cases, is generally held applicable to criminal cases; but it is said that the rule should be "cautiously applied." *People* v. *Burns*, 33 Hun, 299; *State* v. *Kingsbury*, 58 Me. 238; *State* v. *McCaffrey*, 63 Ia. 479; *People* v. *Keith*, 50 Cal. 137; *State* v. *Alford*, 31 Ct. 40; Bishop, Cr. Pro., i. § 1276 3d ed.).]

APPENDIX OF NOTES.

NOTE I.

(TO ARTICLE 1.)

The definitions are simply explanations of the senses in which the words defined are used in this work. They will be found, however, if read in connection with my 'Introduction to the Indian Evidence Act,' to explain the manner in which it is arranged.

I use the word "presumption" in the sense of a presumption of law capable of being rebutted. A presumption of fact is simply an argument. A conclusive presumption I describe as conclusive proof. Hence the few presumptions of law which I have thought it necessary to notice are the only ones I have to deal with.

In earlier editions of this work I gave the following definition of relevancy:

"Facts, whether in issue or not, are relevant to each other when one is, or probably may be, or probably may have been—

the cause of the other;

the effect of the other;

an effect of the same cause;

a cause of the same effect:

or when the one shows that the other must or cannot have occurred, or probably does or did exist, or not;

or that any fact does or did exist, or not, which in the common course of events would either have caused or have been caused by the other;

provided that such facts do not fall within the exclusive rules con-

tained in chapters iii., iv., v., vi.; or that they do fall within the exceptions to those rules contained in those chapters." [1]

[1] [In the earlier editions Mr. Stephen also gave the following excellent illustrations of relevancy as thus defined:

"(*a*) A's death is caused by his taking poison. The administration of the poison is relevant to A's death as its cause. A's death is relevant to the poisoning as its effect.

"(*b*) A and B each eat from the same dish and each exhibit symptoms of the same poison. A's symptoms and B's symptoms are relevant to each other as effects of the same cause.

"(*c*) The question is, whether A died of the effects of a railway accident.

"Facts tending to show that his death was caused by inflammation of the membranes of the brain, which probably might be caused by the accident; and facts tending to show that his death was caused by typhoid fever, which would have nothing to do with the accident, are relevant to each other as possible causes of the same effect—A's death." [See *Pitts* v. *State*, 43 Miss. 472; *Comm.* v. *Ryan*, 134 Mass. 222; *Knox* v. *Wheelock*, 54 Vt. 150.]

"(*d*) A is charged with committing a crime in London on a given day. The fact that on that day he was at Calcutta is relevant, as proving that he could not have committed the crime.

"(*e*) The question is, whether A committed a crime.

"The circumstances are such that it must have been committed either by A, B, or C. Every fact which shows this, and every fact which shows that neither B or C committed it, or that either of them did or might have committed it, is relevant.

"(*f*) B, a person in possession of a large sum of money, is murdered and robbed. The question is, whether A murdered him. The fact that after the murder A was or was not possessed of a sum of money unaccounted for is relevant, as showing the existence or the absence of a fact which, in the common course of events, would be caused by A's committing the murder. A's knowledge that B was in possession of the money would be relevant as a fact, which, in the ordinary course of events, might cause or be one of the causes of the murder." [See *Comm.* v. *Sturtivant*, 117 Mass. 122; *Williams* v. *Comm.*, 29 Pa. St. 102; *Kennedy* v. *People*, 39 N. Y. 245.]

"(*g*) A is murdered in his own house at night. The absence of marks of violence to the house is relevant to the question, whether the murder was committed by a servant, because it shows the absence of an effect which would have been caused by its being committed by a stranger."]

This was taken (with some verbal alterations) from a pamphlet called 'The Theory of Relevancy for the purpose of Judicial Evidence, by George Clifford Whitworth, Bombay Civil Service. Bombay, 1875.'

The 7th section of the Indian Evidence Act is as follows: "Facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant."

The 11th section is as follows:

"Facts not otherwise relevant are relevant;

"(1) If they are inconsistent with any fact in issue or relevant fact;

"(2) If by themselves, or in connection with other facts, they make the existence or non-existence of any fact in issue, or relevant fact, highly probable or improbable."

In my 'Introduction to the Indian Evidence Act,' I examined at length the theory of judicial evidence, and tried to show that the theory of relevancy is only a particular case of the process of induction, and that it depends on the connection of events as cause and effect. This theory does not greatly differ from Bentham's, though he does not seem to me to have grasped it as distinctly as if he had lived to study Mill's Inductive Logic.

My theory was expressed too widely in certain parts, and not widely enough in others; and Mr. Whitworth's pamphlet appeared to me to have corrected and completed it in a judicious manner. I accordingly embodied his definition of relevancy, with some variations and additions, in the text of the first edition. The necessity of limiting in some such way the terms of the 11th section of the Indian Evidence Act may be inferred from a judgment by Mr. Justice West (of the High Court of Bombay), in the case of *R.* v. *Parbhudas and others*, printed in the 'Law Journal,' May 27, 1876. I have substituted the present definition for it, not because I think it wrong, but because I think it gives rather the principle on which the rule depends than a convenient practical rule.

As to the coincidence of this theory with English law, I can only say that it will be found to supply a key which will explain all that is said on the subject of circumstantial evidence by the writers who have

treated of that subject. Mr. Whitworth goes through the evidence given against the German, Müller, executed for murdering Mr. Briggs on the North London Railway, and shows how each item of it can be referred to one or the other of the heads of relevancy which he discusses.

The theory of relevancy thus expressed would, I believe, suffice to solve every question which can arise upon the subject; but the legal rules based upon an unconscious apprehension of the theory exceed it at some points and fall short of it at others.

NOTE II.

(TO ARTICLE 2.)

See 1 Ph. Ev. 493, &c.; Best, ss. 111 and 251; T. E. chap. ii. pt. ii.

For instances of relevant evidence held to be insufficient for the purpose for which it was tendered, on the ground of remoteness, see *R.* v. ———, 2 C. & P. 459; and *Mann* v. *Langton*, 3 A. & E. 699.

Mr. Taylor (s. 867) adopts from Professor Greenleaf the statement that "the law excludes on public grounds . . . evidence which is indecent or offensive to public morals, or injurious to the feelings of third persons." The authorities given for this are actions on wagers which the Court refused to try, or in which they arrested judgment, because the wagers were in themselves impertinent and offensive, as, for instance, a wager as to the sex of the Chevalier D'Eon (*Da Costa* v. *Jones*, Cowp. 729). No action now lies upon a wager, and I fear that there is no authority for the proposition advanced by Professor Greenleaf. I know of no case in which a fact in issue, or relevant to an issue, which the Court is bound to try can be excluded merely because it would pain some one who is a stranger to the action. Indeed, in *Da Costa* v. *Jones*, Lord Mansfield said expressly, "Indecency of evidence is no objection to its being received where it is necessary to the decision of a civil or criminal right" (p. 734). (See article 129, and Note XLVI). [See *Melvin* v. *Melvin*, 58 N. H. 569.]

NOTE III.

(TO ARTICLE 4.)

On this subject see also 1 Ph. Ev. 157–164; T. E. ss. 527–532;

Best, s. 508; 3 Russ. on Crimes, by Greaves, 161–7. (See, too, *The Queen's Case*, 2 Br. & Bing. 309–10.)

The principle is substantially the same as that of principal and accessory, or principal and agent. When various persons conspire to commit an offence, each makes the rest his agents to carry the plan into execution. (See, too, article 17, Note XI.)

NOTE IV.

(TO ARTICLE 5.)

The principle is fully explained and illustrated in *Malcolmson* v. *O'Dea*, 10 H. L. C. 593. See particularly the reply to the questions put by the House of Lords to the Judges, delivered by Willes, J., 611–22. [See *Boston* v. *Richardson*, 105 Mass. 351, 371.]

See also 1 Ph. Ev. 234–9; T. E. ss. 593–601; Best, s. 499.

Mr. Phillips and Mr. Taylor treat this principle as an exception to the rule excluding hearsay. They regard the statements contained in the title-deeds as written statements made by persons not called as witnesses. I think the deeds must be regarded as constituting the transactions which they effect; and in the case supposed in the text, those transactions are actually in issue. When it is asserted that land belongs to A, what is meant is, that A is entitled to it by a series of transactions of which his title-deeds are by law the exclusive evidence (see article 40). The existence of the deeds is thus the very fact which is to be proved.

Mr. Best treats the case as one of "derivative evidence," an expression which does not appear to me felicitous.

NOTE V.

(TO ARTICLE 8.)

The items of evidence included in this article are often referred to by the phrase "res gestæ," which seems to have come into use on account of its convenient obscurity. The doctrine of "res gestæ" was much discussed in the case of *Doe* v. *Tatham* (p. 79, &c.). In the course of the argument, Bosanquet, J., observed, "How do you translate res gestæ? gestæ, by whom?" Parke, B., afterward observed,

"The acts by whomsoever done are res gestæ, if relevant to the matter in issue. But the question is, what are relevant?" (7 A. & E. 353.) In delivering his opinion to the House of Lords, the same Judge laid down the rule thus: "Where any facts are proper evidence upon an issue" (*i.e.* when they are in issue, or relevant to the issue) "all oral or written declarations which can explain such facts may be received in evidence." (Same Case, 4 Bing. N. C. 548.) The question asked by Baron Parke goes to the root of the whole subject, and I have tried to answer it at length in the text, and to give it the prominence in the statement of the law which its importance deserves.

Besides the cases cited in the illustrations, see cases as to statements accompanying acts collected in 1 Ph. Ev. 152–7, and T. E. ss. 521, 528. I have stated, in accordance with *R.* v. *Walker*, 2 M. & R. 212, that the particulars of a complaint are not admissible; but I have heard Willes, J., rule that they were on several occasions, vouching Parke, B., as his authority. *R.* v. *Walker* was decided by Parke, B., in 1839. Though he excluded the statement, he said, "The sense of the thing certainly is, that the jury should in the first instance know the nature of the complaint made by the prosecutrix, and all that she then said. But for reasons which I never could understand, the usage has obtained that the prosecutrix's counsel should only inquire generally whether a complaint was made by the prosecutrix of the prisoner's conduct toward her, leaving the prisoner's counsel to bring before the jury the particulars of that complaint by cross-examination."

Baron Bramwell has been in the habit, of late years, of admitting the complaint itself. The practice is certainly in accordance with common sense.

NOTE VI.

(TO ARTICLES 10, 11, 12.)

Article 10 is equivalent to the maxim, "Res inter alios acta alteri nocere non debet," which is explained and commented on in Best, ss. 506–510 (though I should scarcely adopt his explanation of it), and by Broom ('Maxims,' 954–968). The application of the maxim to the Law of Evidence is obscure, because it does not show how unconnected transactions should be supposed to be relevant to each other. The meaning of the rule must be inferred from the exceptions to it

stated in articles 11 and 12, which show that it means, You are not to draw inferences from one transaction to another which is not specifically connected with it merely because the two resemble each other. They must be linked together by the chain of cause and effect in some assignable way before you can draw your inference.

In its literal sense the maxim also fails, because it is not true that a man cannot be affected by transactions to which he is not a party. Illustrations to the contrary are obvious and innumerable; bankruptcy, marriage, indeed every transaction of life, would supply them.

The exceptions to the rule given in articles 11 and 12 are generalized from the cases referred to in the illustrations. It is important to observe that though the rule is expressed shortly, and is sparingly illustrated, it is of very much greater importance and more frequent application than the exceptions. It is indeed one of the most characteristic and distinctive parts of the English Law of Evidence, for this is the rule which prevents a man charged with a particular offence from having either to submit to imputations which in many cases would be fatal to him, or else to defend every action of his whole life in order to explain his conduct on the particular occasion. A statement of the Law of Evidence which did not give due prominence to the four great exclusive rules of evidence of which this is one would neither represent the existing law fairly nor in my judgment improve it.

The exceptions to the rule apply more frequently to criminal than to civil proceedings, and in criminal cases the Courts are always disinclined to run the risk of prejudicing the prisoner by permitting matters to be proved which tend to show in general that he is a bad man, and so likely to commit a crime. In each of the cases by which article 12 is illustrated, the evidence admitted went to prove the true character of facts which, standing alone, might naturally have been accounted for on the supposition of accident—a supposition which was rebutted by the repetition of similar occurrences. In the case of *R.* v. *Gray* (Illustration (*a*)), there were many other circumstances which would have been sufficient to prove the prisoner's guilt, apart from the previous fires. That part of the evidence, indeed, seemed to have little influence on the jury. *Garner's Case* (Illustration (*c*), note) was an extraordinary one, and its result was in every way unsatisfactory. Some account of this case will be found in the evidence given by me before the Commission on Capital Punishments which sat in 1866.

NOTE VII.

(TO ARTICLE 13.)

As to presumptions arising from the course of office or business, see Best, s. 403; 1 Ph. Ev. 480–4; T. E. s. 147. The presumption, "Omnia esse rite acta," also applies. See Broom's 'Maxims,' 942; Best, ss. 353–365; T. E. s. 124, &c.; 1 Ph. Ev. 480; and Star. 757, 763.

NOTE VIII.

(TO ARTICLE 14.)

The unsatisfactory character of the definitions usually given of hearsay is well known. See Best, s. 495; T. E. ss. 507–510. The definition given by Mr. Phillips sufficiently exemplifies it: "When a witness, in the course of stating what has come under the cognizance of his own senses concerning a matter in dispute, *states the language of others which he has heard*, or produces papers which he identifies as being written by particular individuals, he offers what is called hearsay evidence. This matter may sometimes be the very matter in dispute," etc. (1 Ph. Ev. 143). If this definition is correct, the maxim, "Hearsay is no evidence," can only be saved from the charge of falsehood by exceptions which make nonsense of it. By attaching to it the meaning given in the text, it becomes both intelligible and true. There is no real difference between the fact that a man was heard to say this or that, and any other fact. Words spoken may convey a threat, supply the motive for a crime, constitute a contract, amount to slander, etc., etc.; and if relevant or in issue, on these or other grounds, they must be proved, like other facts, by the oath of some one who heard them. The important point to remember about them is that bare assertion must not, generally speaking, be regarded as relevant to the truth of the matter asserted.

The doctrine of hearsay evidence was fully discussed by many of the judges in the case of *Doe* d. *Wright* v. *Tatham* on the different occasions when that case came before the Court (see 7 A. & E. 313–408; 4 Bing. N. C. 489–573). The question was whether letters addressed to a deceased testator, implying that the writers thought him

sane, but not acted upon by him, could be regarded as relevant to his sanity, which was the point in issue. The case sets the stringency of the rule against hearsay in a light which is forcibly illustrated by a passage in the judgment of Baron Parke (7 A. & E. 385-8), to the following effect:—He treats the letters as "statements of the writers, not on oath, of the truth of the matter in question, with this addition, that they have acted upon the statements on the faith of their being true by their sending the letters to the testator." He then goes through a variety of illustrations which had been suggested in argument, and shows that in no case ought such statements to be regarded as relevant to the truth of the matter stated, even when the circumstances were such as to give the strongest possible guarantee that such statements expressed the honest opinions of the persons who made them. Amongst others he mentions the following:—"The conduct of the family or relations of a testator taking the same precautions in his absence as if he were a lunatic,—his election in his absence to some high and responsible office; the conduct of a physician who permitted a will to be executed by a sick testator; the conduct of a deceased captain on a question of seaworthiness, who, after examining every part of a vessel, embarked in it with his family; all these, when deliberately considered, are, with reference to the matter in issue in each case, mere instances of hearsay evidence—mere statements, not on oath, but implied in or vouched by the actual conduct of persons by whose acts the litigant parties are not to be bound." All these matters are therefore to be treated as irrelevant to the questions at issue.

These observations make the rule quite distinct, but the reason suggested for it in the concluding words of the passage extracted appears to be weak. That passage implies that hearsay is excluded because no one "ought to be bound by the act of a stranger." That no one shall have power to make a contract for another or commit a crime for which that other is to be responsible without his authority is obviously reasonable, but it is not so plain why A's conduct should not furnish good grounds for inference as to B's conduct, though it was not authorized by B. The importance of shortening proceedings, the importance of compelling people to procure the best evidence they can, and the importance of excluding opportunities of fraud, are considerations which probably justify the rule excluding hearsay; but Baron

Parke's illustrations of its operation clearly prove that in some cases it excludes the proof of matter which, but for it, would be regarded not only as relevant to particular facts, but as good grounds for believing in their existence.

NOTE IX.

(TO ARTICLE 15.)

This definition is intended to exclude admissions by pleading, admissions which, if so pleaded, amount to estoppels, and admissions made for the purposes of a cause by the parties or their solicitors. These subjects are usually treated of by writers on evidence ; but they appear to me to belong to other departments of the law. The subject, including the matter which I omit, is treated at length in 1 Ph. Ev. 308–401, and T. E. ss. 653–788. A vast variety of cases upon admissions of every sort may be found by referring to Roscoe, N. P. (Index, under the word *Admissions.*) It may perhaps be well to observe that when an admission is contained in a document, or series of documents, or when it forms part of a discourse or conversation, so much and no more of the document, series of documents, discourse or conversation, must be proved as is necessary for the full understanding of the admission, but the judge or jury may of course attach degrees of credit to different parts of the matter proved. This rule is elaborately discussed and illustrated by Mr. Taylor, ss. 655–665. It has lost much of the importance which attached to it when parties to actions could not be witnesses, but could be compelled to make admissions by bills of discovery. The ingenuity of equity draughtsmen was under that system greatly exercised in drawing answers in such a form that it was impossible to read part of them without reading the whole, and the ingenuity of the Court was at least as much exercised in countermining their ingenious devices. The power of administering interrogatories, and of examining the parties directly, has made great changes in these matters.

NOTE X.

(TO ARTICLE 16.)

As to admissions by parties, see *Moriarty* v. *L. C. & D. Railway*, L.

R. 5 Q. B. 320, per Blackburn, J. ; *Alner* v. *George*, 1 Camp. 392 ; *Bauerman* v. *Radenius*, 7 T. R. 663.

As to admissions by parties interested, see *Spargo* v. *Brown*, 9 B. & C. 938.

See also on the subject of this article 1 Ph. Ev. 362–3, 369, 398 ; and T. E. ss. 669–671, 685, 687, 719 ; Roscoe, N. P. 71.

As to admissions by privies, see 1 Ph. Ev. 394–7, and T. E. (from Greenleaf), s. 712.

NOTE XI.

(TO ARTICLE 17.)

The subject of the relevancy of admissions by agents is rendered difficult by the vast variety of forms which agency assumes, and by the distinction between an agent for the purpose of making a statement and an agent for the purpose of transacting business. If A sends a message by B, B's words in delivering it are in effect A's ; but B's statements in relation to the subject-matter of the message have, as such, no special value. A's own statements are valuable if they suggest an inference which he afterwards contests because they are against his interest ; but when the agent's duty is done, he has no special interest in the matter.

The principle as to admissions by agents is stated and explained by Sir W. Grant in *Fairlie* v. *Hastings*, 10 Ve. 126–7.

NOTE XII.

(TO ARTICLE 18.)

See for a third exception (which could hardly occur now), *Clay* v. *Langslow*, M. & M. 45.

NOTE XIII.

(TO ARTICLE 19.)

This comes very near to the case of arbitration. See, as to irregular arbitrations of this kind. 1 Ph. Ev. 383 ; T. E. ss. 689–90.

NOTE XIV.

(TO ARTICLE 20.)

See more on this subject in 1 Ph. Ev. 326–8; T. E. ss. 702, 720–3; R. N. P. 66.

NOTE XV.

(TO ARTICLE 22.)

On the law as to Confessions, see 1 Ph. Ev. 401–423; T. E. ss. 796–807, and s. 824; Best, ss. 551–574; Roscoe, Cr. Ev. 38–56; 3 Russ. on Crimes, by Greaves, 365–436. Joy on Confessions reduces the law on the subject to the shape of 13 propositions, the effect of all of which is given in the text in a different form.

Many cases have been decided as to the language which amounts to an inducement to confess (see Roscoe, Cr. Ev. 40–3, where most of them are collected). They are, however, for practical purposes, summed up in *R.* v. *Baldry*, 2 Den. C. C. 430, which is the authority for the last lines of the first paragraph of this article.

NOTE XVI.

(TO ARTICLE 23.)

Cases are sometimes cited to show that if a person is examined as a witness on oath, his deposition cannot be used in evidence against him afterwards (see T. E. ss. 809 and 818, n. 6; also 3 Russ. on Cri., by Greaves, 407, etc.). All these cases, however, relate to the examinations before magistrates of persons accused of crimes, under the statutes which were in force before 11 & 12 Vict. c. 42.

These statutes authorized the examination of prisoners, but not their examination upon oath. The 11 & 12 Vict. c. 42, prescribes the form of the only question which the magistrate can put to a prisoner; and since that enactment it is scarcely possible to suppose that any magistrate would put a prisoner upon his oath. The cases may therefore be regarded as obsolete.

NOTE XVII.

(TO ARTICLE 26.)

As to dying declarations, see 1 Ph. Ev. 239–252; T. E. ss. 644–652;

Best, s. 505; Starkie, 32 & 38; 3 Russ. Cri. 250–272 (perhaps the fullest collection of the cases on the subject); Roscoe, Crim. Ev. 31–2. *R.* v. *Baker*, 2 Mo. & Ro. 53, is a curious case on this subject. A and B were both poisoned by eating the same cake. C was tried for poisoning A. B's dying declaration that she made the cake in C's presence, and put nothing bad in it, was admitted as against C, on the ground that the whole formed one transaction. [See *Brown* v. *Comm.*, 73 Pa. St. 321; *State* v. *Westfall*, 49 Ia. 328; *State* v. *Bohan*, 15 Kan. 407.]

NOTE XVIII.

(TO ARTICLE 27.)

1 Ph. Ev. 280–300; T. E. ss. 630–643; Best, 501; R. N. P. 63; and see note to *Price* v. *Lord Torrington*, 2 S. L. C. 328. The last case on the subject is *Massey* v. *Allen*, L. R. 13 Ch. Div. 558.

NOTE XIX.

(TO ARTICLE 28.)

The best statement of the law upon this subject will be found in *Higham* v. *Ridgway*, and the note thereto, 2 S. L. C. 318. See also 1 Ph. Ev. 252–280; T. E. ss. 602–629; Best, s. 500: R. N. P. 584.

A class of cases exists which I have not put into the form of an article, partly because their occurrence since the commutation of tithes must be very rare, and partly because I find a great difficulty in understanding the place which the rule established by them ought to occupy in a systematic statement of the law. They are cases which lay down the rule that statements as to the receipts of tithes and moduses made by deceased rectors and other ecclesiastical corporations sole are admissible in favor of their successors. There is no doubt as to the rule (see, in particular, *Short* v. *Lee*, 2 Jac. & Wal. 464; and *Young* v. *Clare Hall*, 17 Q. B. 537). The difficulty is to see why it was ever regarded as an exception. It falls directly within the principle stated in the text, and would appear to be an obvious illustration of it; but in many cases it has been declared to be anomalous, inasmuch as it enables a predecessor in title to make evidence in favor of his successor. This suggests that article 28 ought to be limited by a proviso

that a declaration against interest is not relevant if it was made by a predecessor in title of the person who seeks to prove it, unless it is a declaration by an ecclesiastical corporation sole, or a member of an ecclesiastical corporation aggregate (see *Short* v. *Lee*), as to the receipt of a tithe or modus.

Some countenance for such a proviso may be found in the terms in which Bayley, J., states the rule in *Gleadow* v. *Atkin*, and in the circumstance that when it first obtained currency the parties to an action were not competent witnesses. But the rule as to the endorsement of notes, bonds, etc., is distinctly opposed to such a view.

NOTE XX.

(TO ARTICLE 30.)

Upon this subject, besides the authorities in the text, see 1 Ph. Ev. 169–197; T. E. ss. 543–569; Best, s. 497; R. N. P. 50–54 (the latest collection of cases).

A great number of cases have been decided as to the particular documents, etc., which fall within the rule given in the text. They are collected in the works referred to above, but they appear to me merely to illustrate one or other of the branches of the rule, and not to extend or vary it. An award, *e.g.*, is not within the last branch of Illustration (*b*), because it "is but the opinion of the arbitrator, not upon his own knowledge" (*Evans* v. *Rees*, 10 A. & E. 155); but the detailed application of such a rule as this is better learnt by experience, applied to a firm grasp of principle, than by an attempt to recollect innumerable cases.

The case of *Weeks* v. *Sparke* is remarkable for the light it throws on the history of the Law of Evidence. It was decided in 1813, and contains *inter alia* the following curious remarks by Lord Ellenborough. "It is stated to be the habit and practice of different circuits to admit this species of evidence upon such a question at the present. That certainly cannot make the law, but it shows at least, from the established practice of a large branch of the profession, and of the judges who have presided at various times on those circuits, what has been the prevailing opinion upon this subject amongst so large a class of persons interested in the due administration of the law. It is stated to have been the practice both of the Northern and West-

ern Circuits. My learned predecessor, Lord Kenyon, certainly held a different opinion, the practice of the Oxford Circuit, of which he was a member, being different." So in the *Berkeley Peerage Case*, Lord Eldon said, "when it was proposed to read this deposition as a declaration, the Attorney-General (Sir Vicary Gibbs) flatly objected to it. *He spoke quite right as a Western Circuiteer*, of what he had often heard laid down in the West, and never heard doubted" (4 Camp. 419, A.D. 1811). This shows how very modern much of the Law of Evidence is. Le Blanc, J., in *Weeks* v. *Sparke*, says, that a foundation must be laid for evidence of this sort "by acts of enjoyment within living memory." This seems superfluous, as no jury would ever find that a public right of way existed, which had not been used in living memory, on the strength of a report that some deceased person had said that there once was such a right.

NOTE XXI.

(TO ARTICLE 31.)

See 1 Ph. Ev. 197–233; T. E. ss. 571–592; Best, 633; R. N. P. 49–50.

The *Berkeley Peerage Case* (Answer of the Judges to the House of Lords), 4 Camp. 401, which established the third condition given in the text; and *Davies* v. *Lowndes*, 6 M. & G. 471 (see more particularly pp. 525–9, in which the question of family pedigrees is fully discussed) are specially important on this subject.

As to declarations as to the place of births, etc., see *Shields* v. *Boucher*, 1 De G. & S. 49–58.

NOTE XXII.

(TO ARTICLE 32.)

See also 1 Ph. Ev. 306–8; T. E. ss. 434–447; Buller, N. P. 238, and following.

In reference to this subject it has been asked whether this principle applies indiscriminately to all kinds of evidence in all cases. Suppose a man were to be tried twice upon the same facts—*e.g.*, for robbery after an acquittal for murder, and suppose that in the interval between the two trials an important witness who had not been called

before the magistrates were to die, might his evidence be read on the second trial from a reporter's short-hand notes? This case might easily have occurred if Orton had been put on his trial for forgery as well as for perjury. I should be disposed to think on principle that such evidence would be admissible, though I cannot cite any authority on the subject. The common law principle on which depositions taken before magistrates and in Chancery proceedings were admitted seems to cover the case.

NOTE XXIII.

(TO ARTICLES 39–47.)

The law relating to the relevancy of judgments of Courts of Justice to the existence of the matters which they assert is made to appear extremely complicated by the manner in which it is usually dealt with. The method commonly employed is to mix up the question of the effect of judgments of various kinds with that of their admissibility, subjects which appear to belong to different branches of the law.

Thus the subject, as commonly treated, introduces into the Law of Evidence an attempt to distinguish between judgments *in rem*, and judgments *in personam* or *inter partes* (terms adapted from, but not belonging to, Roman law, and never clearly defined in reference to our own or any other system); also the question of the effect of the pleas of *autrefois acquit*, and *autrefois convict*, which clearly belong not to evidence, but to criminal procedure; the question of estoppels, which belongs rather to the law of pleading than to that of evidence; and the question of the effect given to the judgments of foreign Courts of Justice, which would seem more properly to belong to private international law. These and other matters are treated of at great length in 2 Ph. Ev. 1–78, and T. E. ss. 1480–1534, and in the note to the *Duchess of Kingston's Case* in 2 S. L. C. 777–880. Best (ss. 588–595) treats the matter more concisely.

The text is confined to as complete a statement as I could make of the principles which regulate the relevancy of judgments considered as declarations proving the facts which they assert, whatever may be the effect or the use to be made of those facts when proved. Thus the leading principle stated in article 40 is equally true of all judgments alike. Every judgment, whether it be *in rem* or *inter partes*, must

and does prove what it actually effects, though the effects of different sorts of judgments differ as widely as the effects of different sorts of deeds.

There has been much controversy as to the extent to which effect ought to be given to the judgments of foreign Courts in this country, and as to the cases in which the Courts will refuse to act upon them; but as a mere question of evidence, they do not differ from English judgments. The cases on foreign judgments are collected in the note to the *Duchess of Kingston's Case*, 2 S. L. C. 813–845. There is a convenient list of the cases in R. N. P. 201–3. The cases of *Godard* v. *Gray*, L. R. 6 Q. B. 139, *Castrique* v. *Imrie*, L. R. 4 E. & I. A. 414, [and *Abouloff* v. *Oppenheimer*, 10 Q. B. D. 295], are the latest leading cases on the subject.

NOTE XXIV.

(TO CHAPTER V.)

On evidence of opinions, see 1 Ph. Ev. 520–8; T. E. ss. 1273–81; Best, ss. 511–17; R. N. P. 193–4. The leading case on the subject is *Doe* v. *Tatham*, 7 A. & E. 313; and 4 Bing. N. C. 489, referred to above in Note VIII. Baron Parke, in the extracts there given, treats an expression of opinion as hearsay, that is, as a statement affirming the truth of the subject-matter of the opinion.

NOTE XXV.

(TO CHAPTER VI.)

See 1 Ph. Ev. 502–8; T. E. ss. 325–336; Best, ss. 257–263; 3 Russ. Cr. 299–304. The subject is considered at length in *R.* v. *Rowton*, 1 L. & C. 520. One consequence of the view of the subject taken in that case is that a witness may with perfect truth swear that a man, who to his knowledge has been a receiver of stolen goods for years, has an excellent character for honesty, if he has had the good luck to conceal his crimes from his neighbors. It is the essence of successful hypocrisy to combine a good reputation with a bad disposition, and according to *R.* v. *Rowton*, the reputation is the important matter. The case is seldom if ever acted on in practice. The question always

put to a witness to character is, What is the prisoner's character for honesty, morality, or humanity? as the case may be; nor is the witness ever warned that he is to confine his evidence to the prisoner's reputation. It would be no easy matter to make the common run of witnesses understand the distinction.

NOTE XXVI.

(TO ARTICLE 58.)

The list of matters judicially noticed in this article is not intended to be quite complete. It is compiled from 1 Ph. Ev. 458–67, and T. E. ss. 4–20, where the subject is gone into more minutely. A convenient list is also given in R. N. P. ss. 88–92, which is much to the same effect. It may be doubted whether an absolutely complete list could be formed, as it is practically impossible to enumerate everything which is so notorious in itself, or so distinctly recorded by public authority, that it would be superfluous to prove it. Paragraph (1) is drawn with reference to the fusion of Law, Equity, Admiralty, and Testamentary Jurisdiction effected by the Judicature Act.

NOTE XXVII.

(TO ARTICLE 62.)

Owing to the ambiguity of the word "evidence," which is sometimes used to signify the effect of a fact when proved, and sometimes to signify the testimony by which a fact is proved, the expression "hearsay is no evidence" has many meanings. Its common and most important meaning is the one given in article 14, which might be otherwise expressed by saying that the connection between events, and reports that they have happened, is generally so remote that it is expedient to regard the existence of the reports as irrelevant to the occurrence of the events, except in excepted cases. Article 62 expresses the same thing from a different point of view, and is subject to no exceptions whatever. It asserts that whatever may be the relation of a fact to be proved to the fact in issue, it must, if proved by oral evidence, be proved by direct evidence. For instance, if it were to be proved under article 31 that A_1 who died fifty years ago, said that he

had heard from his father B, who died 100 years ago, that A's grandfather C had told B that D, C's elder brother, died without issue, A's statement must be proved by some one who, with his own ears, heard him make it. If (as in the case of verbal slander) the speaking of the words was the very point in issue, they must be proved in precisely the same way. Cases in which evidence is given of character and general opinion may perhaps seem to be exceptions to this rule, but they are not so. When a man swears that another has a good character, he means that he has heard many people, though he does not particularly recollect what people, speak well of him, though he does not recollect all that they said.

NOTE XXVIII.

(TO ARTICLES 66 & 67.)

This is probably the most ancient, and is, as far as it extends, the most inflexible of all the rules of evidence. The following characteristic observations by Lord Ellenborough occur in *R.* v. *Harringworth*, 4 M. & S. 353:

"The rule, therefore, is universal that you must first call the subscribing witness; and it is not to be varied in each particular case by trying whether, in its application, it may not be productive of some inconvenience, for then there would be no such thing as a general rule. *A lawyer who is well stored with these rules would be no better than any other man that is without them*, if by mere force of speculative reasoning it might be shown that the application of such and such a rule would be productive of such and such an inconvenience, and therefore ought not to prevail; but if any general rule ought to prevail, this is certainly one that is as fixed, formal, and universal as any that can be stated in a Court of Justice."

In *Whyman* v. *Garth*, 8 Ex. 807, Pollock, C. B., said, "The parties are supposed to have agreed *inter se* that the deed shall not be given in evidence without his" (the attesting witness) "being called to depose to the circumstances attending its execution."

In very ancient times, when the jury were witnesses as to matter of fact, the attesting witnesses to deeds (if a deed came in question) would seem to have been summoned with, and to have acted as a sort of assessors to, the jury. See as to this, Bracton, fo. 38 *a*; Fortescue *de*

Laudibus, ch. xxxii. with Selden's note; and cases collected from the Year-books in Brooke's Abridgement, tit. *Testmoignes*.

For the present rule, and the exceptions to it, see 1 Ph. Ev. 242-261; T. E. ss. 1637-42; R. N. P. 147-50; Best, ss. 220, etc.

The old rule which applied to all attested documents was restricted to those required to be attested by law, by 17 & 18 Vict. c. 125, s. 26, and 28 & 29 Vict. c. 18, ss. 1 & 7.

NOTE XXIX.

(TO ARTICLE 72.)

For these rules in greater detail, see 1 Ph. Ev. 452-3, and 2 Ph. Ev. 272-289; T. E. ss. 419-426; R. N. P. 8 & 9.

The principle of all the rules is fully explained in the cases cited in the footnotes, more particularly in *Dwyer* v. *Collins*, 7 Ex. 639. In that case it is held that the object of notice to produce is "to enable the party to have the document in Court, and if he does not, to enable his opponent to give parol evidence . . . to exclude the argument that the opponent has not taken all reasonable means to procure the original, which he must do before he can be permitted to make use of secondary evidence" (p. 647-8).

NOTE XXX.

(TO ARTICLE 75.)

Mr. Phillipps (ii. 196) says, that upon a plea of *nul tiel* record, the original record must be produced if it is in the same Court.

Mr. Taylor (s. 1379) says, that upon prosecutions for perjury assigned upon any judicial document the original must be produced. The authorities given seem to me hardly to bear out either of these statements. They show that the production of the original in such cases is the usual course, but not, I think, that it is necessary. The case of *Lady Dartmouth* v. *Roberts*, 16 Ea. 334, is too wide for the proposition for which it is cited. The matter, however, is of little practical importance.

NOTE XXXI.

(TO ARTICLES 77 & 78.)

The learning as to exemplifications and office-copies will be found in the following authorities: Gilbert's Law of Evidence, 11-20; Buller,

Nisi Prius, 228, and following; Starkie, 256–66 (fully and very conveniently); 2 Ph. Ev. 196–200; T. E. ss. 1380–4; R. N. P. 112–15. The second paragraph of article 77 is founded on *Appleton* v. *Braybrook*, 6 M. & S. 39.

As to exemplifications not under the Great Seal, it is remarkable that the Judicature Acts give no Seal to the Supreme Court, or the High Court, or any of its divisions.

NOTE XXXII.

(TO ARTICLE 90.)

The distinction between this and the following article is, that article 90 defines the cases in which documents are exclusive evidence of the transactions which they embody, while article 91 deals with the interpretation of documents by oral evidence. The two subjects are so closely connected together, that they are not usually treated as distinct; but they are so in fact. A and B make a contract of marine insurance on goods, and reduce it to writing. They verbally agree that the goods are not to be shipped in a particular ship, though the contract mades no such reservation. They leave unnoticed a condition usually understood in the business of insurance, and they make use of a technical expression, the meaning of which is not commonly known. The law does not permit oral evidence to be given of the exception as to the particular ship. It does permit oral evidence to be given to annex the condition; and thus far it decides that for one purpose the document shall, and that for another it shall not, be regarded as exclusive evidence of the terms of the actual agreement between the parties. It also allows the technical term to be explained, and in doing so it interprets the meaning of the document itself. The two operations are obviously different, and their proper performance depends upon different principles. The first depends upon the principle that the object of reducing transactions to a written form is to take security against bad faith or bad memory, for which reason a writing is presumed as a general rule to embody the final and considered determination of the parties to it. The second depends on a consideration of the imperfections of language, and of the inadequate manner in which people adjust their words to the facts to which they apply.

The rules themselves are not, I think, difficult either to state, to understand, or to remember; but they are by no means easy to apply, inasmuch as from the nature of the case an enormous number of transactions fall close on one side or the other of most of them. Hence the exposition of these rules, and the abridgment of all the illustrations of them which have occurred in practice, occupy a very large space in the different text writers. They will be found in 2 Ph. Ev. 332–424; T. E. ss. 1031–1110; Star. 648–731; Best (very shortly and imperfectly), ss. 226–229; R. N. P. (an immense list of cases), 17–35.

As to paragraph (4), which is founded on the case of *Goss* v. *Lord Nugent*, it is to be observed that the paragraph is purposely so drawn as not to touch the question of the effect of the Statute of Frauds. It was held in effect in *Goss* v. *Lord Nugent* that if by reason of the Statute of Frauds the substituted contract could not be enforced, it would not have the effect of waiving part of the original contract; but it seems the better opinion that a verbal rescission of a contract good under the Statute of Frauds would be good. See *Noble* v. *Ward*, L. R. 2 Ex. 135, and Pollock on Contracts, 411, note (6). A contract by deed can be released only by deed, and this case also would fall within the proviso to paragraph (4).

The cases given in the illustrations will be found to mark sufficiently the various rules stated. As to paragraph (5) a very large collection of cases will be found in the notes to *Wigglesworth* v. *Dallison*, 1 S. L. C. 598–628, but the consideration of them appears to belong rather to mercantile law than to the Law of Evidence. For instance, the question what stipulations are consistent with, and what are contradictory to, the contract formed by subscribing a bill of exchange, or the contract between an insurer and an underwriter, are not questions of the Law of Evidence.

NOTE XXXIII.

(TO ARTICLE 91.)

Perhaps the subject-matter of this article does not fall strictly within the Law of Evidence, but it is generally considered to do so; and as it has always been treated as a branch of the subject, I have thought it best to deal with it.

The general authorities for the propositions in the text are the same as those specified in the last note ; but the great authority on the subject is the work of Vice-Chancellor Wigram on Extrinsic Evidence. Article 91, indeed, will be found, on examination, to differ from the six propositions of Vice-Chancellor Wigram only in its arrangement and form of expression, and in the fact that it is not restricted to wills. It will, I think, be found, on examination, that every case cited by the Vice-Chancellor might be used as an illustration of one or the other of the propositions contained in it.

It is difficult to justify the line drawn between the rule as to cases in which evidence of expressions of intention is admitted and cases in which it is rejected (paragraph 7, illustrations (*k*), (*l*), and paragraph 8, illustration (*n*)). When placed side by side, such cases as *Doe* v. *Hiscocks* (illustration (*k*)) and *Doe* v. *Needs* (illustration (*n*)) produce a singular effect. The vagueness of the distinction between them is indicated by the case of *Charter* v. *Charter*, L. R. 2 P. & D. 315. In this case the testator Forster Charter appointed "my son Forster Charter" his executor. He had two sons, William Forster Charter and Charles Charter, and many circumstances pointed to the conclusion that the person whom the testator wished to be his executor was Charles Charter. Lord Penzance not only admitted evidence of all the circumstances of the case, but expressed an opinion (p. 319) that, if it were necessary, evidence of declarations of intention might be admitted under the rule laid down by Lord Abinger in *Hiscocks* v. *Hiscocks*, because part of the language employed ("my son —— Charter") applied correctly to each son, and the remainder, "Forster," to neither. This mode of construing the rule would admit evidence of declarations of intention both in cases falling under paragraph 8, and in cases falling under paragraph 7, which is inconsistent not only with the reasoning in the judgment, but with the actual decision in *Doe* v. *Hiscocks*. It is also inconsistent with the principles of the judgment in the later case of *Allgood* v. *Blake*, L. R. 8 Ex. 160, where the rule is stated by Blackburn, J., as follows:—"In construing a will, the Court is entitled to put itself in the position of the testator, and to consider all material facts and circumstances known to the testator with reference to which he is to be taken to have used the words in the will, and then to declare what is the intention evidenced by the words used with reference to those facts and circumstances which were (or ought to have been) in

the mind of the testator when he used those words." After quoting Wigram on Extrinsic Evidence, and *Doe* v. *Hiscocks*, he adds: "No doubt, in many cases the testator has, for the moment, forgotten or overlooked the material facts and circumstances which he well knew. And the consequence sometimes is that he uses words which express an intention which he would not have wished to express, and would have altered if he had been reminded of the facts and circumstances. But the Court is to construe the will as made by the testator, not to make a will for him; and therefore it is bound to execute his expressed intention, even if there is great reason to believe that he has by blunder expressed what he did not mean." The part of Lord Penzance's judgment above referred to was unanimously overruled in the House of Lords; though the Court, being equally divided as to the construction of the will, refused to reverse the judgment, upon the principle "*præsumitur pro negante.*"

Conclusive as the authorities upon the subject are, it may not, perhaps, be presumptuous to express a doubt whether the conflict between a natural wish to fulfil the intention which the testator would have formed if he had recollected all the circumstances of the case; the wish to avoid the evil of permitting written instruments to be varied by oral evidence; and the wish to give effect to wills, has not produced in practice an illogical compromise. The strictly logical course, I think, would be either to admit declarations of intention both in cases falling under paragraph 7, and in cases falling under paragraph 8, or to exclude such evidence in both classes of cases, and to hold void for uncertainty every bequest or devise which was shown to be uncertain in its application to facts. Such a decision as that in *Stringer* v. *Gardiner*, the result of which was to give a legacy to a person whom the testator had no wish to benefit, and who was not either named or described in his will, appears to me to be a practical refutation of the principle or rule on which it is based.

Of course every document, whatever, must to some extent be interpreted by circumstances. However accurate and detailed a description of things and persons may be, oral evidence is always wanted to show that persons and things answering the description exist; and therefore in every case whatever, every fact must be allowed to be proved to which the document does, or probably may, refer; but if more evidence than this is admitted, if the Court may look at circumstances which

affect the probability that the testator would form this intention or that, why should declarations of intention be excluded? If the question is, "What did the testator say?" why should the Court look at the circumstances that he lived with Charles, and was on bad terms with William? How can any amount of evidence to show that the testator intended to write "Charles" show that what he did write means "Charles"? To say that "Forster" means "Charles" is like saying that "two" means "three." If the question is "What did the testator wish?" why should the Court refuse to look at his declarations of intention? And what third question can be asked? The only one which can be suggested is, "What would the testator have meant if he had deliberately used unmeaning words?" The only answer to this would be, he would have had no meaning, and would have said nothing, and his bequest should be *pro tanto* void.

NOTE XXXIV.

(TO ARTICLE 92.)

See 2 Ph. Ev. 364; Star. 726; T. E. (from Greenleaf), s. 1051. Various cases are quoted by these writers in support of the first part of the proposition in the article; but *R.* v. *Cheadle* is the only one which appears to me to come quite up to it. They are all settlement cases.

NOTE XXXV.

(TO CHAPTER XIII.)

In this and the following chapter many matters usually introduced into treatises on evidence are omitted, because they appear to belong either to the subject of pleading, or to different branches of Substantive Law. For instance, the rules as to the burden of proof of negative averments in criminal cases (1 Ph. Ev. 555, etc.; 3 Russ. on Cr. 276–9) belong rather to criminal procedure than to evidence. Again, in every branch of Substantive Law there are presumptions, more or less numerous and important, which can be understood only in connection with those branches of the law. Such are the presumptions as to the ownership of property, as to consideration for a bill of exchange, as to many of the incidents of the contract of insurance. Passing over all these, I have embodied in Chapter XIV those presump-

tions only which bear upon the proof of facts likely to be proved on a great variety of different occasions, and those estoppels only which arise out of matters of fact, as distinguished from those which arise upon deeds or judgments.

NOTE XXXVI.

(TO ARTICLE 94.)

The presumption of innocence belongs principally to the Criminal Law, though it has, as the illustrations show, a bearing on the proof of ordinary facts. The question, "What doubts are reasonable in criminal cases?" belongs to the Criminal Law.

NOTE XXXVII.

(TO ARTICLE 101.)

The first part of this article is meant to give the effect of the presumption, *omnia esse rite acta*, 1 Ph. Ev. 480, etc.; T. E. ss. 124, etc.; Best, s. 353, etc. This, like all presumptions, is a very vague and fluid rule at best, and is applied to a great variety of different subject-matters.

NOTE XXXVIII.

(TO ARTICLES 102–105.)

These articles embody the principal cases of estoppels *in pais*, as distinguished from estoppels by deed and by record. As they may be applied in a great variety of ways and to infinitely various circumstances, the application of these rules has involved a good deal of detail. The rules themselves appear clearly enough on a careful examination of the cases. The latest and most extensive collection of cases is to be seen in 2 S. L. C. 851–880, where the cases referred to in the text and many others are abstracted. See, too, 1 Ph. Ev. 350–3; T. E. ss. 88–90, 776, 778; Best, s. 543.

Article 102 contains the rule in *Pickard* v. *Sears*, 6 A. & E. 474, as interpreted and limited by Parke, B., in *Freeman* v. *Cooke*, 6 Bing. 174, 179. The second paragraph of the article is founded on the ap-

plication of this rule to the case of a negligent act causing fraud. The rule, as expressed, is collected from a comparison of the following cases: *Bank of Ireland* v. *Evans*, 5 H. L. C. 389; *Swan* v. *British and Australasian Company*, which was before three Courts, see 7 C. B. (N. S.) 448; 7 H. & N. 603; 2 H. & C. 175, where the judgment of the majority of the Court of Exchequer was reversed; and *Halifax Guardians* v. *Wheelwright*, L. R. 10 Ex. 183, in which all the cases are referred to. All of these refer to *Young* v. *Grote* (4 Bing. 253), and its authority has always been upheld, though not always on the same ground. The rules on this subject are stated in general terms in *Carr* v. *L. & N. W. Railway*, L. R. 10 C. P. 316–17.

It would be difficult to find a better illustration of the gradual way in which the judges construct rules of evidence, as circumstances require it, than is afforded by a study of these cases.

NOTE XXXIX.

(TO CHAPTER XV.)

The law as to the competency of witnesses was formerly the most, or nearly the most, important and extensive branch of the Law of Evidence. Indeed, rules as to the incompetency of witnesses, as to the proof of documents, and as to the proof of some particular issues, are nearly the only rules of evidence treated of in the older authorities. Great part of Bentham's 'Rationale of Judicial Evidence' is directed to an exposure of the fundamentally erroneous nature of the theory upon which these rules were founded; and his attack upon them has met with a success so nearly complete that it has itself become obsolete. The history of the subject is to be found in Mr. Best's work, book i. part i. ch. ii. ss. 132–188. See, too, T. E. 1210–57, and R. N. P. 177–81. As to the old law, see 1 Ph. Ev. 1, 104.

NOTE XL.

(TO ARTICLE 107.)

The authorities for the first paragraph are given at great length in Best, ss. 146–165. See, too, T. E. s. 1240. As to paragraph 2, see Best, s. 148; 1 Ph. Ev. 7; 2 Ph. Ev. 457; T. E. s. 1241. The concluding words of the last paragraph are framed with reference to the

alteration in the law as to the competency of witnesses made by 32 & 33 Vict. c. 68, s. 4. The practice of insisting on a child's belief in punishment in a future state for lying as a condition of the admissibility of its evidence leads to anecdotes and to scenes little calculated to increase respect either for religion or for the administration of justice. The statute referred to would seem to render this unnecessary. If a person who deliberately and advisedly rejects all belief in God and a future state is a competent witness, *à fortiori*, a child who has received no instructions on the subject must be competent also.

NOTE XLI.

(TO ARTICLE 108.)

At Common Law the parties and their husbands and wives were incompetent in all cases. This incompetency was removed as to the parties in civil, but not in criminal cases, by 14 & 15 Vict. c. 99, s. 2; and as to their husbands and wives, by 16 & 17 Vict. c. 83, ss. 1, 2. But sec. 2 expressly reserved the Common Law as to criminal cases and proceedings instituted in consequence of adultery.

The words relating to adultery were repealed by 32 & 33 Vict. c. 68, s. 3, which is the authority for the next article.

Persons interested and persons who had been convicted of certain crimes were also incompetent witnesses, but their incompetency was removed by 6 & 7 Vict. c. 85.

The text thus represents the effect of the Common Law as varied by four distinct statutory enactments.

By 5 & 6 Will. IV. c. 50, s. 100, inhabitants, etc., were made competent to give evidence in prosecutions of parishes for non-repair of highways, and this was extended to some other cases by 3 & 4 Vict. c. 26. These enactments, however, have been repealed by 37 & 38 Vict. c. 35, and c. 96 (the Statute Law Revision Acts, 1874), respectively. Probably this was done under the impression that the enactments were rendered obsolete by 14 & 15 Vict. c. 99, s. 2, which made parties admissible witnesses. A question might be raised upon the effect of this, as sec. 3 expressly excepts criminal proceedings, and a prosecution for a nuisance is such a proceeding. The result would seem to be, that in cases as to the repair of highways, bridges, etc., inhabitants and overseers are incompetent, unless, indeed, the Courts should hold that

they are substantially civil proceedings, as to which see *R.* v. *Russell*, 3 E. & B. 942.

NOTE XLII.

(TO ARTICLE 111.)

The cases on which these articles are founded are only Nisi Prius decisions: but as they are quoted by writers of eminence (1 Ph. Ev. 139; T. E. s. 859), I have referred to them.

In the trial of Lord Thanet, for an attempt to rescue Arthur O'Connor, Sergeant Shepherd, one of the special commissioners, before whom the riot took place in court at Maidstone, gave evidence, *R.* v. *Lord Thanet*, 27 S. T. 836.

I have myself been called as a witness on a trial for perjury to prove what was said before me when sitting as an arbitrator. The trial took place before Mr. Justice Hayes at York, in 1869.

As to the case of an advocate giving evidence in the course of a trial in which he is professionally engaged, see several cases cited and discussed in Best, ss. 184–6.

In addition to those cases, reference may be made to the trial of Horne Tooke for a libel in 1777, when he proposed to call the Attorney-General (Lord Thurlow), 20 S. T. 740. These cases do not appear to show more than that, as a rule, it is for obvious reasons improper that those who conduct a case as advocates should be called as witnesses in it. Cases, however, might occur in which it might be absolutely necessary to do so. For instance, a solicitor engaged as an advocate might, not at all improbably, be the attesting witness to a deed or will.

NOTE XLIII.

(TO ARTICLE 115.)

This article sums up the rule as to professional communications, every part of which is explained at great length, and to much the same effect, in 1 Ph. Ev. 105-122; T. E. ss. 832–9; Best, s. 581. It is so well established and so plain in itself that it requires only negative illustrations. It is stated at length by Lord Brougham in *Greenough* v. *Gaskell*, 1 M. & K. 98.

NOTE XLIV.

(TO ARTICLE 117.)

The question whether clergymen, and particularly whether Roman Catholic priests, can be compelled to disclose confessions made to them professionally, has never been solemnly decided in England, though it is stated by the text writers that they can. See 1 Ph. Ev. 109; T. E. ss. 837–8; R. N. P. 190; Starkie, 40. The question is discussed at some length in Best, ss. 583–4; and a pamphlet was written to maintain the existence of the privilege by Mr. Baddeley in 1865. Mr. Best shows clearly that none of the decided cases are directly in point, except *Butler* v. *Moore* (MacNally, 253–4), and possibly *R.* v. *Sparkes*, which was cited by Garrow in arguing *Du Barré* v. *Livette* before Lord Kenyon (1 Pea. 108). The report of his argument is in these words: "The prisoner being a Papist, had made a confession before a Protestant clergyman of the crime for which he was indicted; and that confession was permitted to be given in evidence on the trial" (before Buller, J.), "and he was convicted and executed." The report is of no value, resting as it does on Peake's note of Garrow's statement of a case in which he was probably not personally concerned; and it does not appear how the objection was taken, or whether the matter was ever argued. Lord Kenyon, however, is said to have observed: "I should have paused before I admitted the evidence there admitted."

Mr. Baddeley's argument is in a few words, that the privilege must have been recognized when the Roman Catholic religion was established by law, and that it has never been taken away.

I think that the modern Law of Evidence is not so old as the Reformation, but has grown up by the practice of the Courts, and by decisions in the course of the last two centuries. It came into existence at a time when exceptions in favor of auricular confessions to Roman Catholic priests were not likely to be made. The general rule is that every person must testify to what he knows. An exception to the general rule has been established in regard to legal advisers, but there is nothing to show that it extends to clergymen, and it is usually so stated as not to include them. This is the ground on which the Irish Master of the Rolls (Sir Michael Smith) decided the case of *Butler* v. *Moore* in 1802 (MacNally, Ev. 253–4). It was a demurrer to a rule to

administer interrogatories to a Roman Catholic priest as to matter which he said he knew, if at all, professionally only. The Judge said, "It was the undoubted legal constitutional right of every subject of the realm who has a cause depending, to call upon a fellow-subject to testify what he may know of the matters in issue; and every man is bound to make the discovery, unless specially exempted and protected by law. It was candidly admitted, that no special exemption could be shown in the present instance, and analogous cases and principles alone were relied upon." The analogy, however, was not considered sufficiently strong.

Several judges have, for obvious reasons, expressed the strongest disinclination to compel such a disclosure. Thus Best, C.J., said, "I, for one, will never compel a clergyman to disclose communications made to him by a prisoner; but if he chooses to disclose them I shall receive them in evidence" (*obiter*, in *Broad* v. *Pitt*, 3 C. & P. 518). Alderson, B., thought (rather it would seem as a matter of good feeling than as a matter of positive law) that such evidence should not be given. *R.* v. *Griffin*, 6 Cox, Cr. Ca. 219.

NOTE XLV.

(TO ARTICLES 126, 127, 128.)

These articles relate to matters almost too familiar to require authority, as no one can watch the proceedings of any Court of Justice without seeing the rules laid down in them continually enforced. The subject is discussed at length in 2 Ph. Ev. pt. 2, chap. x. p. 456, etc.; T. E. s. 1258, etc.; see, too, Best, s. 631, etc. In respect to leading questions it is said, "It is entirely a question for the presiding judge whether or not the examination is being conducted fairly." R. N. P. 182.

NOTE XLVI.

(TO ARTICLE 129.)

This article states a practice which is now common, and which never was more strikingly illustrated than in the case referred to in the illus-

tration. But the practice which it represents is modern; and I submit that it requires the qualification suggested in the text. I shall not believe, unless and until it is so decided upon solemn argument, that by the law of England a person who is called to prove a minor fact, not really disputed, in a case of little importance, thereby exposes himself to having every transaction of his past life, however private, inquired into by persons who may wish to serve the basest purposes of fraud or revenge by doing so. Suppose, for instance, a medical man were called to prove the fact that a slight wound had been inflicted, and been attended to by him, would it be lawful, under pretence of testing his credit, to compel him to answer upon oath a series of questions as to his private affairs, extending over many years, and tending to expose transactions of the most delicate and secret kind, in which the fortune and character of other persons might be involved? If this is the law, it should be altered. The following section of the Indian Evidence Act (1 of 1872) may perhaps be deserving of consideration. After authorizing, in sec. 147, questions as to the credit of the witness the Act proceeds as follows in sec. 148:—

"If any such question 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, the Court shall decide whether or not the witness shall be compelled to answer it, and may, if it thinks fit, warn the witness that he is not obliged to answer it. In exercising this discretion, the Court shall have regard to the following considerations:—

"(1) 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.

"(2) 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, the opinion of the Court as to the credibility of the witness on the matter to which he testifies.

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

NOTE XLVII.

(TO ARTICLE 131.)

The words of the two sections of 17 & 18 Vict. c. 125, meant to be represented by this article, are as follows :—

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

23. If a witness, upon cross-examination as to a former statement made by him relative to the subject-matter of the cause, and inconsistent with his present testimony, does not distinctly admit that he 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.

The sections are obviously ill-arranged ; but apart from this, s. 22 is so worded as to suggest a doubt whether a party to an action has a right to contradict a witness called by himself whose testimony is adverse to his interests. The words "he may, in case the witness shall, in the opinion of the judge, prove adverse, contradict him by other evidence," suggest that he cannot do so unless the judge is of that opinion. This is not, and never was, the law. In *Greenough* v. *Eccles*, 5 C. B. (N. S.), p. 802, Williams, J., says : "The law was clear that you might not discredit your own witness by general evidence of bad character ; but you might, nevertheless, contradict him by other evidence relevant to the issue ;" and he adds (p. 803) : "It is impossible to suppose that the Legislature could have really intended to impose any fetter whatever on the right of a party to contradict his own witness by other evidence relevant to the issue—a right not only established by authority, but founded on the plainest good sense."

Lord Chief Justice Cockburn said of the 22nd section : "There has

been a great blunder in the drawing of it, and on the part of those who adopted it." . . . "Perhaps the better course is to consider the second branch of the section as altogether superfluous and useless (p. 806)." On this authority I have omitted it.

For many years before the Common Law Procedure Act of 1854 it was held, in accordance with *Queen Caroline's Case* (2 Br. & Bing. 286–291), that a witness could not be cross-examined as to statements made in writing, unless the writing had been first proved. The effect of this rule in criminal cases was that a witness could not be cross-examined as to what he had said before the magistrates without putting in his deposition, and this gave the prosecuting counsel the reply. Upon this subject rules of practice were issued by the judges in 1837, when the Prisoner's Counsel Act came into operation. The rules are published in 7 C. & P. 676. They would appear to have been superseded by the 28 Vict. c. 18.

NOTE XLVIII.

The Statute Law relating to the subject of evidence may be regarded either as voluminous or not, according to the view taken of the extent of the subject.

The number of statutes classified under the head "Evidence" in Chitty's Statutes is 35. The number referred to under that head in the Index to the Revised Statutes is 39. Many of these, however, relate only to the proof of particular documents, or matters of fact which may become material under special circumstances.

Of these I have noticed a few, which for various reasons, appeared important. Such are: 34 & 35 Vict. c. 112, s. 19 (see article 11); 9 Geo. IV. c. 14, s. 1, amended by 19 & 20 Vict. c. 97, s. 13 (see article 17); 9 Geo. IV. c. 14, s. 3; 3 & 4 Will. IV. c. 42 (see article 28); 11 & 12 Vict. c. 42, s. 17 (article 33); 30 & 31 Vict. c. 35, s. 6 (article 34); 7 James I. c. 12 (article 38); 7 & 8 Geo. IV. c. 28, s. 11, amended by 6 & 7 Will. IV. c. 111; 24 & 25 Vict. c. 96, s. 116; 24 & 25 Vict. c. 99, s. 37 (see article 56); 8 & 9 Vict. c. 10, s. 6; 35 & 36 Vict. c. 6, s. 4 (article 121); 7 & 8 Will. III. c. 3, ss. 2–4; 39 & 40 Geo. III. c. 93 (article 122).

Many, again, refer to pleading and practice rather than evidence, in the sense in which I employ the word. Such are the Acts which en-

able evidence to be taken on commission if a witness is abroad, or relate to the administration of interrogatories.

Those which relate directly to the subject of evidence as defined in the Introduction, are the ten following Acts :—

1.

46 *Geo. III. c.* 37 (1 section ; see article 120). This Act qualifies the rule that a witness is not bound to answer questions which criminate himself, by declaring that he is not excused from answering questions which fix him with a civil liability.

2.

6 & 7 *Vict. c.* 85. This Act abolishes incompetency from interest or crime (4 sections ; see article 106).

3.

8 & 9 *Vict. c.* 113 : "An Act to facilitate the admission in evidence of certain official and other documents" (8th August, 1845 ; 7 sections).

S. 1, after preamble reciting that many documents are, by various Acts, rendered admissible in proof of certain particulars if authenticated in a certain way, enacts *inter alia* that proof that they were so authenticated shall not be required if they purport to be so authenticated. (Article 79.)

S. 2. Judicial notice to be taken of signatures of certain judges. (Article 58, latter part of clause 8.)

S. 3. Certain Acts of Parliament, proclamations, etc., may be proved by copies purporting to be Queen's printer's copies. (Article 81.)

S. 4. Penalty for forgery, etc. This is omitted as belonging to the Criminal Law.

Ss. 5, 6, 7. Local extent and commencement of Act.

4.

14 & 15 *Vict. c.* 99 : "An Act to amend the Law of Evidence," 7th August, 1851 (20 sections):—

S. 1 repeals part of 6 & 7 Vict. c. 85, which restricted the operation of the Act,

S. 2 makes parties admissible witnesses, except in certain cases. (Effect given in articles 106 & 108.)

S. 3. Persons accused of crime, and their husbands and wives, not to be competent. (Article 108.)

S. 4. The first three sections not to apply to proceedings instituted in consequence of adultery. Repealed by 32 & 33 Vict. c. 68. (Effect of repeal, and of s. 3 of the last-named Act given in article 109.)

S. 5. None of the sections above mentioned to affect the Wills Act of 1838, 7 Will. IV. & 1 Vict. c. 26. (Omitted as part of the Law of Wills.)

S. 6. The Common Law Courts authorized to grant inspection of documents. (Omitted as part of the Law of Civil Procedure.)

S. 7. Mode of proving proclamations, treaties, etc. (Article 84.)

S. 8. Proof of qualification of apothecaries. (Omitted as part of the law relating to medical men.)

Ss. 9, 10, 11. Documents admissible either in England or in Ireland, or in the colonies, without proof of seal, etc., admissible in all. (Article 80.)

S. 12. Proof of registers of British ships. (Omitted as part of the law relating to shipping.)

S. 13. Proof of previous convictions. (Omitted as belonging to Criminal Procedure.)

S. 14. Certain documents provable by examined copies or copies purporting to be duly certified. (Article 79, last paragraph.)

S. 15. Certifying false documents a misdemeanor. (Omitted as belonging to Criminal Law.)

S. 16. Who may administer oaths. (Article 125.)

S. 17. Penalties for forging certain documents. (Omitted as belonging to the Criminal Law.)

S. 18. Act not to extend to Scotland. (Omitted.)

S. 19. Meaning of the word "Colony." (Article 80, note 1.)

S. 20. Commencement of Act.

5.

17 & 18 *Vict. c.* 125. The Common Law Procedure Act of 1854 contained several sections which altered the Law of Evidence.

S. 22. How far a party may discredit his own witness. (Articles 131, 133; and see Note XLVII.)

S. 23. Proof of contradictory statements by a witness under cross-examination. (Article 131.)

S. 24. Cross-examination as to previous statements in writing. (Article 132.)

S. 25. Proof of a previous conviction of a witness may be given. (Article 130 (1).)

S. 26. Attesting witnesses need not be called unless writing requires attestation by law. (Article 72.)

S. 27. Comparison of disputed handwritings. (Articles 49 and 52.)

After several Acts, giving relief to Quakers, Moravians, and Separatists, who objected to take an oath, a general measure was passed for the same purpose in 1861.

6.

24 & 25 *Vict. c.* 66 (1st August, 1861, 3 sections) :—

S. 1. Persons refusing to be sworn from conscientious motives may make a declaration in a given form. (Article 123.)

S. 2. Falsehood upon such a declaration punishable as perjury. (Do.)

S. 3. Commencement of Act.

7.

28 *Vict. c.* 18 (9th May, 1865, 10 sections) :—

S. 1. Sections 3—8 to apply to all courts and causes criminal as well as civil.

S. 3. Re-enacts 17 & 18 Vict. c. 125, s. 22.
S. 4. " " " s. 23.
S. 5. " " " s. 24.
S. 6. " " " s. 25.
S. 7. " " " s. 26.
S. 8. " " " s. 27.

The effect of these sections is given in the articles above referred to by not confining them to proceedings under the Common Law Procedure Act, 1854.

The rest of the Act refers to other subjects.

8.

31 & 32 *Vict. c.* 37 (25th June, 1868, 6 sections) :—

S. 1. Short title.

S. 2. Certain documents may be proved in particular ways. (Art. 83, and for schedule referred to, see note to the article.)

S. 3. The Act to be in force in the colonies. (Article 83.)

S. 4. Punishment of forgery. (Omitted as forming part of the Criminal Law.)

S. 5. Interpretation clauses embodied (where necessary) in article 83.

S. 6. Act to be cumulative on Common Law. (Implied in article 73.)

9.

32 & 33 *Vict. c.* 68 (9th August, 1869 ; 6 sections) :—

S. 1. Repeals part of 14 & 15 Vict. c. 99, s. 4, and part of 16 & 17 Vict. c. 83, s. 2. (The effect of this repeal is given in article 109 ; and see Note XLI.)

S. 2. Parties competent in actions for breach of promise of marriage, but must be corroborated. (See articles 106 and 121.)

S. 3. Husbands and wives competent in proceedings in consequence of adultery, but not to be compelled to answer certain questions. (Article 109.)

S. 4. Atheists rendered competent witnesses. (Articles 106 and 123.)

S. 5. Short title.

S. 6. Act does not extend to Scotland.

10.

33 & 34 *Vict. c.* 49 (9th August, 1870 ; 3 sections) :—

S. 1. Recites doubts as to meaning of "Court" and "Judge" in s. 4 of 32 & 33 Vict. c. 68, and defines the meaning of those words. (The effect of this provision is given in the definitions of "Court" and "Judge" in article 1, and in s. 125.)

S. 2. Short title.

S. 3. Act does not extend to Scotland.

These are the only Acts which deal with the Law of Evidence as I have defined it. It will be observed that they relate to three subjects only—the competency of witnesses, the proof of certain classes of documents, and certain details in the practice of examining witnesses. These details are provided for twice over, namely, once in 17 & 18

Vict. c. 125, ss. 22–27, both inclusive, which concern civil proceedings only; and again in 28 Vict. c. 18, ss. 3–8, which re-enacts these provisions in relation to proceedings of every kind.

Thus, when the Statute Law upon the subject of Evidence is sifted and put in its proper place as part of the general system, it appears to occupy a very subordinate position in it. The ten statutes above mentioned are the only ones which really form part of the Law of Evidence, and their effect is fully given in twenty[1] articles of the Digest, some of which contain other matter besides.

[NOTE XLIX.]

[The following are the original Articles 36, 37, and 38 of Mr. Stephen, transferred from the body of the work:]

ARTICLE 36. ENTRIES IN BANKERS' BOOKS.

A copy of any entry in a banker's book must in all legal proceedings be received as *primâ facie* evidence of such entry, and of the matters, transactions, and accounts therein recorded (even in favor of a party to a cause producing a copy of an entry in the book of his own bank.[2])

Such copies may be given in evidence only on the condition stated in article 71 (*f*).

The expression 'Bankers' books' includes ledgers, day-books, cash books, account books, and all other books used in the ordinary business of the bank.

The work "Bank" is restricted to banks which have duly made a return to the Commissioners of Inland Revenue,

Savings banks certified under the Act relating to savings banks, and

Post-office savings banks.

The fact that any bank has duly made a return to the Commissioners of Inland Revenue may be proved in any legal proceeding by the production of a copy of its return verified by the affidavit of a partner or officer of the bank, or by the production of a copy of a newspaper purporting to contain a copy of such return published by the Commissioners of Inland Revenue.

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[1] 1, 49, 52, 58, 72, 79, 80, 81, 83, 84, 106, 108, 109, 120, 121, 123, 125, 131, 132, 133.

[2] *Harding* v. *Williams*, L. R. 14 Ch. D. 197.

The fact that any such savings bank is certified under the Act relating to savings banks may be proved by an office or examined copy of its certificate. The fact that any such bank is a post-office savings bank may be proved by a certificate purporting to be under the hand of Her Majesty's Postmaster-General or one of the secretaries of the Post Office.[1]

ARTICLE 37. BANKERS NOT COMPELLABLE TO PRODUCE THEIR BOOKS.

A bank or officer of a bank is not in any legal proceeding to which the bank is not a party, compellable to produce any banker's book, or to appear as a witness to prove the matters, transactions, and accounts therein recorded, unless by order of a Judge of the High Court made for special cause (or by a County Court Judge in respect of actions in his own court.)[2]

ARTICLE 38. JUDGE'S POWERS AS TO BANKERS' BOOKS.

On the application of any party to a legal proceeding, a Court or Judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings. Such order may be made either with or without summoning the bank, or any other party, and must be served on the bank three clear days (exclusive of Sundays and Bank holidays) before it is to be obeyed, unless the Court otherwise directs.

[Upon this subject of bankers' books, Mr. Stephen says in Art. 71 (*f*) that secondary evidence is admissible, "when the document is an entry in a banker's book, proof of which is admissible under article 36." He also adds: "In case (*f*) the copies cannot be received as evidence unless it be first proved that the book in which the entries copied were made was at the time of making 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 and control of the bank, which proof may be given orally or by affidavit by a partner or officer of the bank, and that the copy has been examined with the original entry and is correct, which proof must be given by some person who has examined

[1] 42 & 43 Vict. c. 2.

[2] 42 & 43 Vict. c. 11.

the copy with the original entry, and may be given orally or by affidavit. 42 & 43 Vict. c. 11, ss. 3, 5."]

[NOTE L.]

[The following are the original Articles 76, 80–84 of Mr. Stephen, transferred from the body of the work:]

ARTICLE 76. GENERAL RECORDS OF THE REALM.

Any record under the charge and superintendence of the Master of the Rolls for the time being, may be proved by a copy certified as a true and authentic copy by the deputy keeper of the records or one of the assistant record keepers, and purporting to be sealed or stamped with the seal of the Record Office. (1 & 2 Vict. c. 94, ss. 1, 12, 13.)

ARTICLE 80. DOCUMENTS ADMISSIBLE THROUGHOUT THE QUEEN'S DOMINIONS.

If by any law in force for the time being any document is admissible in evidence of any particular either in Courts of Justice in England and Wales, or in Courts of Justice in 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, that document is also admissible in evidence to the same extent and for the same purpose, without such proof as aforesaid, in any Court or before any judge in any part of the Queen's dominions except Scotland.[1]

ARTICLE 81. QUEEN'S PRINTERS' COPIES.

The contents of Acts of Parliament, not being public Acts, may be proved by copies thereof purporting to be printed by the Queen's printers;

[1] Consolidates 14 & 15 Vict. c. 99, ss. 9, 10, 11, 19. Sec. 9 provides that documents admissible in England shall be admissible in Ireland; sec. 10 is the converse of 9; sec. 11 enacts that documents admissible in either shall be admissible in the "British Colonies;" and sec. 19 defines the British Colonies as including India, the Channel Islands, the Isle of Man, and "all other possessions" of the British Crown, wheresoever and whatsoever. This cannot mean to include Scotland, though the literal sense of the words would perhaps extend to it.

The journals of either House of Parliament ; and

Royal proclamations,

may be proved by copies thereof purporting to be printed by the printers to the Crown or by the printers to either House of Parliament.[1]

ARTICLE 82. PROOF OF IRISH STATUTES.

The copy of the statutes of the kingdom of Ireland enacted by the Parliament of the same prior to the union of the kingdoms of Great Britain and Ireland, and printed and published by the printer duly authorized by King George III. or any of his predecessors, is conclusive evidence of the contents of such statutes.[2]

ARTICLE 83. PROCLAMATIONS, ORDERS IN COUNCIL, ETC.

The contents of any proclamation, order, or regulation issued at any time by Her Majesty or by the Privy Council, and of any proclamation, order, or regulation issued at any time by or under the authority of any such department of the Government or officer as is mentioned in the first column of the note[3] hereto, may be proved in all or any of the modes hereinafter mentioned ; that is to say—

---

[1] 8 & 9 Vict. c. 113, s. 3. Is there any difference between the Queen's printers and the printers to the Crown ?

[2] 41 Geo. III. c. 90, s. 9.

[3]

COLUMN 1.	COLUMN 2.
Name of Department or Officer.	Names of Certifying Officers.
The Commissioners of the Treasury.	Any Commissioner, Secretary, or Assistant Secretary of the Treasury.
The Commissioners for executing the Office of Lord High Admiral.	Any of the Commissioners for executing the Office of Lord High Admiral or either of the Secretaries to the said Commissioners.
Secretaries of State.	Any Secretary or Under-Secretary of State.
Committee of Privy Council for Trade.	Any Member of the Committee of Privy Council for Trade or any Secretary or Assistant Secretary of the said Committee.

(1) By the production of a copy of the Gazette purporting to contain such proclamation, order, or regulation :

(2) By the production of a copy of such proclamation, order, or regulation purporting to be printed by the Government printer, or, where the question arises in a Court in any British colony or possession, of a copy purporting to be printed under the authority of the legislature of such British colony or possession :

(3) By the production, in the case of any proclamation, order, or regulation issued by Her Majesty or by the Privy Council, of a copy or extract purporting to be certified to be true by the Clerk of the Privy Council or by any one of the Lords or others of the Privy Council, and, in the case of any proclamation, order, or regulation issued by or under the authority of any of the said departments or officers, by the production of a copy or extract purporting to be certified to be true by the person or persons specified in the second column of the said note in connection with such department or officer.

Any copy or extract made under this provision may be in print or in writing, or partly in print and partly in writing.

No proof is required of the handwriting or official position of any person certifying, in pursuance of this provision, to the truth of any copy of or extract from any proclamation, order, or regulation.[1]

Subject to any law that may be from time to time made by the legislature of any British colony or possession, this provision is in force in every such colony and possession.[2]

ARTICLE 84.

FOREIGN AND COLONIAL ACTS OF STATE, JUDGMENTS, ETC.

All proclamations, treaties, and other acts of state of any foreign

The Poor Law Board.	Any Commissioner of the Poor Law Board or any Secretary or Assistant Secretary of the said Board.
The Postmaster General.	Any Secretary or Assistant Secretary of the Post Office (33 & 34 Vict. c 79, s. 21.)

(Schedule to 31 & 32 Vict. c. 37. See also 34 & 35 Vict. c. 70, s. 5.)

[1] 31 & 32 Vict. c. 37, s. 2.

[2] *Ibid*, s. 3.

state, or of any British colony, and all judgments, decrees, orders, and other judicial proceedings of any Court of Justice in any foreign state or in any British colony, and all affidavits, pleadings, and other legal documents filed or deposited in any such Court, may be proved either by examined copies or by copies authenticated as hereinafter mentioned; that is to say—

If the document sought to be proved be a proclamation, treaty, or other act of state, the authenticated copy to be admissible in evidence must purport to be sealed with the seal of the foreign state or British possession to which the original document belongs;

And if the document sought to be proved be a judgment, decree, order, or other judicial proceeding of any foreign Court, in any British possession, or an affidavit, pleading, or other legal document filed or deposited in any such Court, the authenticated copy to be admissible in evidence must purport either to be sealed with the seal of the foreign or other Court to which the original document belongs, or, in the event of such Court having no seal, to be signed by the judge, or, if there be more than one judge, by any one of the judges of the said Court, and such judge must attach to his signature a statement in writing on the said copy that the court whereof he is a judge has no seal;

If any of the aforesaid authenticated copies purports to be sealed or signed as hereinbefore mentioned, it is admissible in evidence in every case in which the original document could have been received in evidence, without any proof of the seal where a seal is necessary, or of the signature, or of the truth of the statement attached thereto, where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement.[1]

Colonial laws assented to by the governors of colonies, and bills reserved by the governors of such colonies for the signification of her Majesty's pleasure, and the fact (as the case may be) that such law has been duly and properly passed and assented to, or that such bill has been duly and properly passed and presented to the governor, may be proved (*primâ facie*) by a copy certified by the clerk or other proper officer of the legislative body of the colony to be a true copy of

[1] 14 & 15 Vict. c. 99, s. 7.

any such law or bill. Any proclamation purporting to be published by authority of the governor in any newspaper in the colony to which such law or bill relates, and signifying her Majesty's disallowance of any such colonial law, or her Majesty's assent to any such reserved bill, is *primâ facie* proof of such disallowance or assent.[1]

[1] 28 & 29 Vict. c. 63, s. 6. "Colony" in this paragraph means "all her Majesty's possessions abroad" having a legislature, "except the Channel Islands, the Isle of Man, and India." "Colony" in the rest of the article includes those places.

INDEX.

(The numbers refer to pages.)

Abatement, judgment of, not a bar, 87.
Abortion, dying declarations in trials for, 62.
Abbreviations, when judicially noticed, 123.
explainable by parol evidence, 167.
Acceptor of bill of exchange, estoppel of, 191.
Accession of President, or other executive, judicially noticed, 120, 121.
Accidental or intentional acts, distinguished by evidence of system, 33, 34.
Accomplice, testimony of, when requiring corroboration, 210, 211.
nature of corroboration needed, 211.
apparent accomplices need no corroboration, 211.
Account rendered, correctness admitted by not objecting, 40.
Acquiescence, effect of as admission, 19, 40.
effect of as confession of crime, 18, 52.
Acts of Parliament, recitals in as evidence, 79, 80.
when public, judicially noticed, 118.
not public, how proved, 286.
Acts of state, proved by recitals in statutes, etc., 79, 80.
proof of, 150, 151.
proof of foreign, 151, 152, 288.
Administrator, bound by admissions of intestate, 41.
admissions of, 42, 47.
effect of appointing upon estate of living person, 85.
party cannot testify against, as to transactions with decedent, 193.
Admiralty Courts, judicially noticed, 121.
effect of judgments in, condemning ships as prize, 90, 91.
Admissions defined, 39.
how proved, 39.
no evidence required of facts admitted, 125.
aliter, in trials for felony, 125.
whole of admission to be brought out, 39, 255.
who may make, and when, 40–44.

(The numbers refer to pages.)

Admissions (*continued*).
implied from acts and conduct, 40.
as from silent acquiescence, 18, 19, 40.
from act of landlord in making repairs, 40.
entries in partnership books evidence against partner, 40.
no admission implied from failure to answer a letter, 40.
made incidentally, 40.
made in pleading or in giving former evidence, 40.
judgment as an admission, 94, 96.
oral admission received with caution, 40.
when conclusive, 40.
of a nominal party, 41.
of assignor after assignment, against assignee, 41.
of a person interested in the event, 41.
of deputy-sheriff as against sheriff, 41.
of privies in blood, in law, or in estate, 41.
of intestate competent against administrator, 41.
of testator competent against executor, 41.
of husband competent against widow claiming dower, 41.
of ancestor competent against heir, 41.
of grantor competent against grantee, 41, 42.
of landlord competent against tenant, 42.
of devisor competent against devisee, 42.
of assignor of chattels competent against assignee, 43.
aliter, in New York as to assignments for value, 43.
declarations of landowner showing the character of his possession, competent, 42.
of party to a proceeding, 42.
of person suing, or being sued, in a representative character, 42.
of executor or administrator, 42.
of agents and persons jointly interested with parties, 45, 256.
of partners or joint-debtors or contractors, 45, 46, 49.
effect of admissions after dissolution of partnership, 46.
effect of upon claims barred by Statute of Limitations, 46.
of husband and wife, 45, 49.
of member of corporation, 45.
of attorneys and counsellors, 46, 47, 49.
of persons having a common interest, 47.
of executor or administrator, as against co-executor or co-administrator, heirs, etc., 47.
of one tenant in common as against another, 47.

(The numbers refer to pages.)

Admissions (*continued*).
of one devisee as against another, 47.
of defendants in tort cases, 47.
of strangers, 50.
of judgment debtor as against sheriff, 50.
of bankrupt as against assignee, 50.
of person expressly referred to, 51.
of person interested or privy must be made while interest continues, 43.
of grantor after parting with possession not competent against grantee, 43.
so of assignor of chattels or *choses* in action, 43.
effect of when made "without prejudice" or in offers of compromise, 51, 52.
of contents of document, effect of, 128.
of execution of document, effect of, 132.
of loss of document, 136.
of existence of marriage, 111.
burden of proof to show admission, 181.
Adultery, in trials for, woman's bad character for chastity provable, 236.
evidence of similar acts competent to show disposition, 31.
marriage not provable by cohabitation and repute, 111.
competency of husband and wife as witnesses in proceedings for, 196, 197.
Affairs of State, privilege of witness concerning, 200.
Affidavits, when admissible as evidence, 216, 219.
statements on information and belief, when permissible in, 218.
costs of affidavit containing improper matter, by whom payable, 218, 219.
objections to, when to be made, 219, 220.
Affirmation, when made by witness instead of taking an oath, 214, 215.
Age, a matter of pedigree, 74.
evidence of opinion concerning, 101.
Agency, Agent. (See Principal and Agent.)
Alibi, defence of, 6, 247.
what proof required of, 179.
burden of proof, on whom, 181.
Alien, effect of judgment naturalizing, 85.
Almanac, as evidence, 83, 125.
Alteration of documents, presumption as to, 157.
material alteration by party avoids instrument, 157.

(The numbers refer to pages.)

Alteration (*continued*).
if alteration innocent, recovery may be had on original consideration, 157.
aliter, if alteration be fraudulent, 157.
by mutual consent, does not avoid, 157
by a stranger, effect of, 157.
called a "spoliation," 158.
of deed, may avoid covenants, but does not divest title, 157.
of deeds and other documents, when presumed to be made, 158, 159.
question as to time of making and by whom, etc., generally for jury, 158.
of will, when presumed to be made, 159.
what are material alterations, and what immaterial, 159, 160.
materiality a question for the court, 160.
immaterial alterations do not avoid, 160.
filling blanks in documents, effect of, 160.
Ambiguity in documents, parol evidence to explain, 167, 169.
patent ambiguity, 167.
latent ambiguity, 169.
Ancestor, admissions of bind heir, 41.
Ancient deeds and wills, competency of as evidence, 72.
presumption as to, 156.
Ancient lights, doctrine of, rejected in this country, 186.
Animals, evidence to show *scienter*, 30.
Arbitrators, competency of as witnesses, 199.
Arson, proof of required as a defence in insurance cases, 176.
Art, matters of, provable by opinion evidence, 103.
Assault and battery, evidence of character irrelevant in trials for, 115.
indecent, woman's bad character for chastity relevant, 116.
evidence of her connection with other men, competency of, 236.
Assignor and assignee of personal property, admissions of. (See Admissions.)
Atheists, competency of, as witnesses, 195.
dying declarations of, 61, 237.
Attachment suits, effect of judgments in, 90, 100.
Attested documents, proof of execution of, 130–134, 156, 264. (See Document.)
Attesting witness. (See Subscribing Witness.)
Attorney, admissions by, 46, 47, 49.
status and signature of, judicially noticed, 119.
not producing client's document on notice, secondary evidence admissible, 136.

(The numbers refer to pages.)

Attorney (*continued*).
must prove good faith as to gift from client, 179.
competency of, as witness in suit in which he is attorney, 199.
privileged from testifying as to professional communications from client, 202–205.
clerks and interpreters also privileged, 203, 204.
but not a law student, not being clerk, 204.
nor a lawyer acting merely as conveyancer, 204.
nor officers of a corporation, 204.
privilege does not cover communications to effect a crime, 203.
nor knowledge which attorney acquires by his own observation, 203, 205.
nor facts which he learns otherwise than as legal adviser, 203.
nor communications not of a private nature, 204.
nor facts of a collateral nature, 203, 204.
communications made while all parties are present, not privileged in suits between themselves, 204.
client privileged from testifying as to communications to attorney, 205.
attorney only compellable to produce documents which client could be compelled to produce, 208.
documents amounting to professional communications, privileged, 202, 208.
Auditors, competency of, as witnesses, 199.
power of, to take testimony, 217.

Bad faith, provable by similar acts or declarations, 28.
Bailee, estopped to deny bailor's title, 191.
but may show delivery of goods by him to real owner, 191.
Bankers' books, competency of entries in, 83, 284.
what are such books, 284.
bankers not compellable to produce, 285.
judge's powers as to, 285.
entries in, how proved, 285.
Bankrupt, admissions of, 50.
Barrister, admissions by, 46, 47.
competency of, as witness, 199.
privilege as to professional communications, 202–205. (See Attorney.)
Bastardy proceedings, marriage provable by cohabitation and repute, 111.

(The numbers refer to pages.)

Bastardy proceedings (*continued*).
corroboration of mother's evidence, when required, 210, 211.
paternity, when provable by woman's evidence, 184, 236.
when mother may be cross-examined as to connection with other men, 236.
Belief, when witness may testify to his, 127.
Bentham, influence of, in reforming law of evidence, x., xii., xix.
Bias, witness may be cross-examined as to facts showing, 226.
may be contradicted if he denies such facts, 228.
Bigamy, in trials for, marriage not provable by cohabitation and repute, 111.
Bill of exchange, admissions of holder of, 43.
indorsement of payment on, effect of, as evidence, 67, 68.
estoppel of acceptor, 191.
Bill of lading, receipt in open to explanation, 192.
shipmaster signing, when estopped to deny shipment, 192.
Bill of sale, shown by parol evidence to be a mortgage, 162.
Birth, as matter of pedigree, 73.
Blanks in documents, effect of filling, 160.
Bodily feelings, expressions of, provable, 32.
Bond, indorsement of payment on, effect of, as evidence, 67, 68.
Book entries, in partnership books evidence against partner, 40.
made in course of business, admissibility of, 63–66.
books of original entry only admissible, 65.
effect of transcribing charges, 65.
made by party himself, competency of, 64.
in public books and records, relevancy of, 80.
in corporation books, 81.
in bank-books, 83, 284, 285.
Books, medical, scientific, etc., as evidence, 82, 83. (See Book entries.)
price current lists, annuity tables, almanac, gazetteer, etc., 83.
reading books to jury, 82, 83.
Boundaries of estates, declarations concerning, 72.
of public highways, etc., 73.
Breach of promise of marriage, woman's bad character for chastity provable, 116.
corroboration of plaintiff's evidence, when required, 210, 211.
Burden of proof:
rests on person asserting or denying a state of facts, 175.
general burden on party against whom, in the absence of evidence, judgment would be given, 177.

(The numbers refer to pages.)

Burden of proof (*continued*).
or upon party against whom pleadings raise a presumption, 177.
is on plaintiff when his cause of action is denied, 177.
even though his cause of action involves negative averments, 177.
as in an action for malicious prosecution, 179.
is on defendant when he admits cause of action and sets up affirmative defence, 177.
party having burden has right to open and close the case, 178.
burden remains on him throughout the trial, 178.
in criminal cases rests on the government, 178.
meaning of "shifting of the burden," 178.
party having burden must prove all material allegations, 178.
may sometimes make out *prima facie* case by showing mere occurrence of injury, 178.
burden of proof in criminal case, when defence of insanity is made, 179.
how affected by presumption from the recent possession of stolen goods, 178.
or in case of gift by client to solicitor, 179.
or by presumption of innocence as conflicting with the presumption of continuance of life, 177.
in trials for crime, proof of guilt required beyond reasonable doubt, 175, 179.
in civil actions, only preponderance of evidence required, 175.
aliter, in some civil actions involving a charge of crime, 176.
as in libel and slander cases in some States, 176.
in insurance cases involving charge of arson, only preponderance required in this country, 176.
aliter, in England, 176.
as to particular fact, 180.
defendant must prove grounds of defence, 180.
as the defence of insanity or *alibi* in criminal cases, 179, 181.
extent of proof required, 179.
in negligence suits, plaintiff proves defendant's negligence, and defendant that of plaintiff, 181.
but in some States plaintiff must prove his own freedom from negligence, 181.
one party must prove the other's admissions, 181.
burden on person having special opportunities of knowledge, 180, 181.

(The numbers refer to pages.)

Burden of proof (*continued*).
person charged with acting without legal license must prove that he has one, 181.
burden on party introducing evidence to prove preliminary facts on which its admission depends, 182.
Business, course of. (See Course of Business.)
usages of. (See Custom.)

Cabinet officers, *status* of, judicially noticed, 119.
Carefulness, habit of, not provable to show care on a particular occasion, 34.
whether system or course of business may be shown to prove carefulness, 33, 34.
Cause of action, not to be split, 86, 89.
burden of proof to establish. (See Burden of Proof.)
Certificates, as evidence, 145.
Certified copy of document, as evidence, 145, 146.
Chancery, discovery in. (See Discovery.)
corroborative evidence in chancery suits. (See Witness.)
examiners in U. S. courts cannot pass on objections to testimony, 218.
Character, evidence of, generally irrelevant, xiii., 113.
good or bad, in criminal cases, when relevant, 6, 113.
in trials for rape, adultery, etc., woman's bad character for chastity provable, 235, 236.
character for quarrelsomeness, when provable, 14.
means reputation as distinguished from disposition, 114, 116, 262.
in civil cases, generally irrelevant, 114, 115.
as in actions for assault and battery, 115.
or upon a promissory note, 115.
or for negligence, 115.
or where fraud is charged, 115.
in some civil actions, relevant, 115.
as in actions for libel or slander, 115.
or for malicious prosecution, 115.
or for criminal conversation, seduction, etc., 116.
of witness, when and how provable. (See Witness.)
Charter of corporation, when judicially noticed, 117.
Charts, statements in, when relevant, 81, 82.
Chattels, value of, how provable, 102.
Chattel mortgage, bill of sale shown to be by parol evidence, 162.

(The numbers refer to pages.)

Children, dying declarations of, 61.
competency of as witnesses, 194.
Circumstantial evidence, proof of conspiracy by, 11.
illustrations of, 15, 16, 21, 22, 247.
Civil divisions of State, judicially noticed, 122.
also their relative positions, 122.
Clergymen, privilege of as to confidential communications, 205, 275.
Clerks, of court, judicially noticed, 119.
of lawyers, privileged from disclosing professional communications, 204.
Cohabitation and repute, as evidence of marriage, 111.
Colonial acts of state, proof of in English courts, 288.
Commissioners, power of to take testimony, 217.
Commissions to take depositions. (See Deposition.)
Common law, of forum judicially noticed, 117.
of other States and countries, how provable, 103, 104.
Communications during marriage, privileged, 196–198.
of client to legal adviser, privileged, 202–205. (See Attorney.)
to clergymen and physicians, when privileged, 205, 206, 275.
Comparison of handwritings. (See Opinion, Evidence of.)
Competency of witnesses. (See Witness.)
Complaints in cases of rape, evidence of, 17, 19, 251.
particulars of complaint not generally provable, 17, 19, 251.
Compromise, effect of offers of, as admissions, 51, 52.
Conclusions of law, witness cannot testify to, 127.
Conclusive proof, definition of, 4, 246.
Conditions in documents, when provable by parol evidence, 163.
Conduct after an act, effect of as evidence, 14, 15, 16.
statements affecting conduct provable, 18.
Confessions, defined, 52.
how different from admissions, 52.
by silent acquiescence, 18, 52.
caused by inducement, threat, or promise, effect of, 52, 57.
extrajudicial must be corroborated by proof of *corpus delicti*, 53.
aliter, as to judicial confession, 58.
whole confession to be brought out, 53.
of one of several defendants, effect of, 10, 53.
admissibility of determined by judge, 54.
when voluntary and when involuntary, 54.
effect of when made to person in authority, 53–55.
to person not in authority, 55.

(The numbers refer to pages.)

Confessions (*continued.*)
who is person in authority, 56.
by prisoner in custody, 55.
effect of when made after impression of hope or fear is removed, 56.
facts discovered by means of involuntary confessions, when provable, 56.
effect of when made under oath, 57, 58, 209.
or under promise of secrecy, 59.
or when obtained by deception, 59.
when made by drunken person, 59.
or when made in answer to questions, 59.
or when made without warning being given of the consequences, 59.
Congress, acts of judicially noticed in State courts, 118.
Consideration of document, provable by parol, 162.
want of, also so provable, 162.
Conspirators, acts and declarations of, when relevant, 10.
confessions of, 10, 53.
proof of conspiracy, 11.
Construction of documents. (See Interpretation and Construction, etc.)
Contract, written, how far modifiable by parol evidence, 162-165. (See Oral Evidence.)
Contradiction of witness, when allowed. (See Witness.)
Conveyancers, privilege of as to professional communications, 204.
Conviction for crime, as affecting competency of witness. (See Infamous Persons.)
Copy of document, sometimes primary evidence, 128.
usually secondary evidence, 135.
as exemplifications, 135, 144.
examined copies, 135, 143.
office copies, 135, 144, 145.
certified copies, 135, 145, 146.
counterparts, 135, 139.
these are sometimes primary evidence, 128.
letter-press copies, 129.
photographic copies, 129.
admissibility of copies to show handwriting, 110, 111.
Corporation, admissions of member, when competent against, 45.
books of as evidence, 81.
may be served with *subpœna duces tecum*, 140, 208.

(The numbers refer to pages.)

Corporation (*continued*).
agent of, whether compellable to produce corporate books in evidence, 140, 208.
charter of, when judicially noticed, 117.
Corpus delicti, when confessions must be corroborated by proof of, 53.
Corroboration, of confessions by proof of *corpus delicti*, 53.
of ancient documents, 156.
of witnesses, when required. (See Witness.)
Costs of affidavit containing improper matter, by whom payable, 219.
Counsellor. (See Attorney ; Barrister.)
Counterfeit money, uttering of, similar acts to show knowledge, 29.
Counterparts, which primary, and which secondary evidence, 128, 135, 139.
County, population of, judicially noticed, 122.
so of county officers, 120.
Course of business, provable to show particular act within it, 35–37.
presumed to be followed, 187.
when provable, to show care or negligence in doing particular act, 33, 34.
declarations made in, 63–66. (See Book Entries.)
Courts, rules, records, officers, and terms of, judicially noticed, 119, 120.
seals of, when judicially noticed, 121.
existence of, when noticed by other courts, 119.
of admiralty jurisdiction, judicially noticed, 121.
of States, notice acts of Congress, 118.
of U. S., notice State laws, 118.
Credit, of witness, impeaching. (See Witness.)
Crime, burden of proof in trials for. (See Burden of Proof.)
one crime not provable by evidence that accused committed another, 24, 25.
aliter, when one forms the motive or preparation for the other, or they are parts of a general scheme, etc., 25, 34, 35.
must be proved beyond reasonable doubt, 175.
evidence of character in trials for, when relevant, 113. (See Character.)
conviction for crime, disqualifies witness, when. (See Infamous Persons.)
competency of defendant as witness, 195.
of husband or wife of defendant, 195.
preliminary examination of prisoner before committing magistrate, 216. (See Confession ; Dying Declarations, etc.)

(The numbers refer to pages.)

Crimen falsi, defined, 195.
Criminal conversation, in actions for, woman's unchaste reputation provable, 116.
marriage not provable by cohabitation and repute, 111.
Criminating documents or evidence, witness not compellable to produce or give, 207, 209. (See Witness.)
Cross-examination, of witness. (See Witness.)
of party in criminal cases, 209.
of party in civil cases, 226.
Custom, evidence of facts showing, 13.
provable by parol evidence to affect writing, 164.
provable by one witness, 13, 213.
public or general, declarations concerning, 71–73.
of business, judicially noticed, 118.

Damages, evidence of opinion concerning, not relevant, 102.
aliter, as to value of property, services, etc., 102.
and in cases of taking by eminent domain, 102.
Date of document, presumption as to, 153.
true date may be proved by parol, 162.
Deaf and dumb persons, competency of as witnesses, 194, 195.
Death, as matter of pedigree, 73, 74, 76.
presumption of from seven years' absence, 184.
order of death when several persons perish in same calamity, how established, 185.
of witness before his examination is concluded, effect of, 221.
Deceased persons, relevancy of their declarations, 59–78. (See Declarations.)
Declarations, provable when part of the *res gestæ*. (See *Res Gestæ*.)
of conspirators, when provable, 10.
in presence of a person, when provable, 18.
concerning domicil, 18, 19.
as to bodily and mental feelings, provable, 32.
of deceased attesting witness, irrelevant, 38.
amounting to admissions. (See Admissions.)
of owner of land characterizing his possession, 42.
amounting to confessions. (See Confessions.)
by persons since deceased, 59–78.
dying declarations, 60–62. (See Dying Declarations.)
made in course of business or professional duty. (See Course of Business.)

(The numbers refer to pages.)

Declarations (*continued*).
declarations against interest, 66–70.
nature of the interest required, 66, 68.
whole of declaration relevant, though it contains matter of charge and discharge, 67.
effect of declarant's having a limited interest in property, 67.
effect of indorsement of payment on bond, bill, note, etc., 67, 68.
by testators as to contents of will, 70, 71.
as to public and general rights, 71–73.
must be made *ante litam motam*, 75.
as to pedigree, 73–76. (See Pedigree.)
of deceased persons, how impeachable, 236.
Decree of court, as evidence of public and general rights, 73.
of executive, judicially noticed, 121.
Deed, as evidence of public and general rights, 73.
presumptions as to sealing and delivery of, 154. (See Seal.)
proof of execution of, 133, 134.
ancient, presumption as to, 156.
effect of alteration of, 157–159. (See Alteration.)
when provable by parol evidence to be a mortgage, 162.
production of by witness, whether compellable, 206–208.
Definitions, general, 3.
Demand, provable orally, though made in writing, 138.
Depositions, may be taken under a commission, 216.
methods prescribed by commission must be followed, 218.
commissioners, how enabled to obtain evidence, 217.
when taken under letters rogatory, 217.
objections to, what may be made and when, 219, 236, 237.
motion to suppress, 219.
before magistrates in England, 241.
under 30 & 31 Vict. c. 35, s. 6, 242.
under Merchant Shipping Act, 1854 (England), 243, 244.
Deputy-sheriff, admissions of, when competent against sheriff, 41.
Detectives, testimony of does not require corroboration, 211.
Devisee, admissions of do not bind another devisee, 47.
Devisor, admissions of bind devisee, 42.
Discontinuance, judgment of not a bar, 87.
Discovery, of title-deeds and other papers by party, when required, 206–208.
Dismissal of complaint, judgment of not a bar, 86.

(The numbers refer to pages.)

Divorce, effect of judgment granting, 85.
corroboration of complainant's evidence, when required, 211.
power of court to order physical examination in suits for, 128.
Document, definition of, 3.
evidence to show genuineness of, relevant, 20.
documentary evidence defined, xiv., 3.
proof of contents of, 127–152.
must generally be proved by primary evidence, 129.
what constitutes primary evidence, xiv., 127.
in case of duplicates, 128, 139.
in case of counterparts, 128, 139.
in case of lithographed or photographed documents, 129.
in case of telegrams, 129.
contents provable by admissions, 128.
provable by secondary evidence in many cases, 135–139.
what constitutes secondary evidence, xiv., 135.
exemplifications, examined copies, office copies, certified copies, 135.
other copies, 135.
counterparts in some cases, 135.
oral testimony of contents, 135.
when secondary evidence may be given, 135–139.
when opponent does not produce document on notice, 136.
when stranger, having privilege, does not produce on *subpœna*, 136.
when document is destroyed or lost, 136.
how loss provable, 136, 182.
when original is not easily movable, or is out of jurisdiction, 137.
when original is public document, 137.
when party has been deprived of original by fraud, 137.
when mode of proof is authorized by statute, 137.
when originals are numerous documents, not conveniently examinable in court, 137, 139.
in case of collateral writings, 138.
(For other cases, see Notice to Produce Documents; Public Documents.)
rule as to there being degrees of secondary evidence, 138.
attested, proof of execution of, 130–134, 264.
proof by handwriting when witness is unprocurable, 130.

(The numbers refer to pages.)

Document (*continued*).
when instrument is destroyed, or the party will testify to execution, 132.
in case of wills, 131.
when party has admitted execution, 132.
cases in which attesting witness need not be called, 132.
when document is not produced on notice given, 133.
when opponent produces it and claims interest under it, 133.
when opponent is public officer, bound to procure the execution, 133.
when document is recorded deed, etc., 133, 134.
when document is ancient, 156.
proof when attesting witness denies the execution, 134.
unattested, proof of execution of, 134.
presumptions as to, 153-160. (See Presumptions.)
modification of by oral evidence, 161-167. (See Oral Evidence.)
interpretation of, 167-174. (See Interpretation and Construction.)
production of by witness, when compellable, 140, 207, 208. (See *Subpœna duces tecum*; Witness; Attorney.)
criminating, witness not compellable to produce, 207.
admissible throughout the Queen's dominions, how proved, 286.
Dogs, injuries by, evidence to show *scienter*, 30.
Domicil, evidence of declarations concerning, 18, 19.
of infant, how provable, 21.
Drunkenness, effect of upon the competency of a witness, 194.
upon the admissibility of confessions, 59.
Duplicate documents, each is primary evidence, 128, 139.
one admissible in evidence without notice to produce the other, 141.
Duress, effect of admissions under, 52.
effect of confessions under, 54, 55.
may be shown by parol to avoid written instrument, 162.
Dying declarations, 60-62.
only competent in trials for homicide, 60.
not competent in cases of abortion, unless the trial be for homicide caused thereby, 62.
must relate to cause of death, etc., 60.
not competent evidence of prior or subsequent occurrences, 60.
must state facts, not opinions, 60.
competent, though obtained by leading questions, solicitation, etc., 60.
may be expressed by signs, 60.
not excluded by constitutional provision, 60.

(The numbers refer to pages.)

Dying declarations (*continued*).
declarant must be under sense of impending death, 61.
how this may be shown, 61.
effect of hope existing, 61.
sense of impending death equivalent to an oath, 61.
declarant must be competent to take an oath, 61.
declarant need not die immediately, 61.
effect of making the declaration in writing, as a deposition, etc., 61, 62.
how oral declarations may be proved, 62.
burden of proof to render declarations admissible, 182.
declarations impeachable, as if declarant were a living witness, 236.
as by proving him to be an atheist, 237.

Election, days of, judicially noticed, 121.
Eminent domain, opinion-evidence competent as to value of land not taken, 102.
Entries in books. (See Book-entries ; Books ; Bankers' Books.)
Equity. (See Chancery.)
Equivocation, parol evidence to explain, 169. (See Oral Evidence.)
Escape, of person charged with crime, provable, 16.
Estoppel, by judgment. (See Judgment.)
by conduct, xvi., xvii., 188, 189.
elements of estoppel *in pais*, 188, 189.
of tenant to deny landlord's title, 190.
of licensee to deny licensor's title, 190, 191.
of acceptor of bill of exchange, 191.
of bailee to deny bailor's title, 191.
of agent to deny principal's title, 191.
of shipmaster signing bill of lading to deny the shipment, 192.
Evidence, definition of, 3.
laws of, defined, xii.
oral, 3, 126. (See Oral Evidence.)
documentary, 3, 127–160. (See Document.)
presumptive, 4, 246. (See Presumption.)
of facts in issue and relevant facts, xiii., 5.
relevancy of, and the different kinds of relevant evidence. (See Relevancy ; *Res gestæ* ; Conspirators ; Title ; Custom ; Character ; Opinion ; Hearsay ; Admissions ; Confessions ; Declarations ; Document ; Judgment, etc.)
circumstantial, illustrations of, 15, 16, 21, 22, 247.

(The numbers refer to pages.)

Evidence (*continued*).
improper admission of, not a ground for a new trial, unless it occasion substantial injury, 245.
offensive to public morals, received when relevant, 249.
in former proceeding, when relevant, 76-79.
grounds of its admission in civil cases, 77, 78.
" " " in criminal cases, 79.
how such evidence may be proved, 78.
such evidence not excluded by constitution, 77.
evidence given by party, when relevant, 78.
Examination, of witnesses. (See Witness.)
of prisoner before committing magistrate in criminal cases, 216.
of parties before trial in civil cases, 216.
not allowed in actions at law in U. S. courts, 216.
of person by physicians, power of court to order, 128.
Examined copy, defined, 143.
is secondary evidence, 135.
Examiners, power of, to take evidence, 217.
when without power to pass on objections to evidence, 218.
Execution of documents, proof of. (See Document.)
Executive, accession of, judicially noticed, 120, 121.
Executor, bound by admissions of testator, 41.
admissions of, 42, 47.
effect of judgment appointing, 85.
party to suit cannot testify against, as to transactions with decedent, 193.
Exemplification, defined, 144.
is secondary evidence, 135.
Experts and non-experts, testimony of. (See Opinion, Evidence of.)
Explanatory facts, relevancy of, 16, 19.
Expressions of bodily and mental feeling, provable, 32.
Extra-judicial confessions. (See Confessions.)

Fact, definition of, 3.
" Facts in issue," definition of, xiii., 4.
admissible in evidence, 5.
" Facts relevant to the issue," definition of, xiii., 4, 246, 247.
admissible in evidence, 5. (See Relevancy.)
Falsa demonstratio, parol evidence to explain, 168, 169.
False pretences, obtaining goods by, evidence of similar acts to show knowledge, 29, 30.

(The numbers refer to pages.)

Falsus in uno, falsus in omnibus, effect of maxim, 211, 212.
Federal courts, take judicial notice of State laws, 118.
Feelings, bodily and mental, declarations concerning, competent, 32.
Felony, in trials for, prisoner's admissions do not dispense with proof, 125.
Fire caused by locomotive; evidence of fires caused by other locomotives admissible, 27.
Flight, of an accused person, provable, 16.
Foreign acts of state, proof of in English courts, 288.
courts, seals of, when judicially noticed, 121.
law, provable by expert testimony, 103, 104.
by printed volumes or authenticated copies, 104, 151, 152.
effect of not proving, 104.
provable in trial court, not in appellate court, 104.
when judicially noticed, 118.
judgments, effect of as *res adjudicata*, 99, 100.
records, how proved, 151, 152, 288.
Forfeiture, evidence exposing to, privilege of witness, 207, 209.
Former proceeding, evidence in, when relevant, 76–79.
Fraud, when judgment is impeachable for, 99, 100.
in written instrument, provable by parol, 162.
in trials for, defendant's good character irrelevant, 115.

Gazetteer, as evidence, 83.
General rights, defined, 72.
declarations concerning, 71, 72.
Geographical features of State, judicially noticed, 122.
Good faith, provable by similar acts or declarations, 28.
Governor of State, accession of, judicially noticed, 120.
Grand jurors, competency of as witnesses, 201, 202.
Grantor of land, admissions of bind grantee, 41.
but only if made before the grant, 43.
Grounds of opinion, when relevant, 112.
Guardian, effect of judgment appointing, 85.

Habit, whether provable by evidence of repeated acts, 34.
whether provable to show commission of a particular act, 34.
Handwriting, evidence of, 108–110. (See Opinion, Evidence of.)
comparison of handwritings, 109,
in proving execution of attested documents, 130. (See Document.)
Hearsay evidence, not relevant, 38, 253–255, xiii.

(The numbers refer to pages.)

Hearsay evidence (*continued*).
defined, 38, 253.
exceptions to this rule are
statements, forming part of *res gestæ*. (See *Res Gestæ*.)
admissions, 39–52 (See Admissions.)
confessions, 52–59. (See Confessions.)
dying declarations, 60–62. (See Dying Declarations.)
declarations made in course of business, 63–66. (See Course of Business.)
declarations against interest, 66–70. (See Declarations.)
declarations by testator as to contents of will, 70.
declarations as to public and general rights, 71–73.
declarations as to pedigree, 75–76. (See Pedigree.)
evidence given in former proceeding, 76–79. (See Evidence.)
Heir, bound by admissions of ancestor, 41.
Historical works, statements in as evidence, 81.
matters of public history judicially noticed, 123.
but not of private history, 123.
Homicide, insanity as a defence in trials for, 5, 179.
alibi as a defence, 6, 179, 181.
good character of the defendant, when provable, 6, 113.
evidence of threats in trials for, 14.
circumstantial evidence of, 22, 247.
dying declarations in trials for, 60–63. (See Dying Declarations.)
Hostile witness, impeachment of, 229.
Husband and wife:
admissions of husband bind widow claiming dower, 41.
admissions of either as agent bind the other, 45, 49.
wife committing crime in husband's presence presumed to act under his coercion, 188.
neither can testify as to absence of marital intercourse, 183.
in bastardy cases, right of wife to testify by whom child was begotten, 184.
competency of as witnesses in criminal cases, 195.
" " " civil cases, 196.
cannot disclose confidential communications, 196, 197, 198.
cannot, in general, give evidence criminating each other, 209, 210.

Identity, evidence of, 20, 101.
Illegality, provable by parol to avoid written instrument, 162.
Impeachment of witness. (See Witness.)

(The numbers refer to pages.)

Impotence, power of court to order examination of person to ascertain, 128.
Impression, when witness may testify to his, 126.
Incest, in trials for, marriage not provable by cohabitation and repute, 111.
Incompetent testimony, though admitted may be withdrawn, 22e.
witnesses, who are. (See Witness.)
Indecent evidence, when admissible, 249.
Indemnitors, how affected by judgment against principal, 94, 95.
Indorsement of payment on bond, bill, note, etc., effect of as evidence, 67, 68.
capacity to indorse, when party estopped to deny, 191.
Infamous persons, competency of as witnesses, 195.
what makes a person infamous, 195.
crimen falsi defined, 195.
infamy must generally be proved by the record, 228.
but in some States proof by cross-examination permitted, and witness's answer may be contradicted, 228.
Information as to commission of offences, witness privileged from disclosing, 200.
In rem, judgments as estoppels, 90.
Insanity as a defence in criminal cases, 5, 179.
of testator provable by subscribing witnesses, 101.
of other persons, how provable, 101, 106.
presumed to continue when it has existed, 187.
competency of insane persons as witnesses, 194.
Insurance, expert testimony competent as to the materiality of circumstances affecting the risk, 106, 107.
in trials concerning defence of arson, how proved, 176.
Intent, provable by similar acts or declarations, 28.
when witness may testify to his, 127.
parol evidence of, when admissible to aid in the construction of documents, 167–170.
Interest, declarations against, 66–70. (See Declarations.)
as affecting competency of witnesses, 193.
Interlocutory motions, affidavits in, 218, 219.
Interpretation and construction of documents, 167–174.
construction defined, 167.
oral evidence competent to explain foreign, obsolete, technical, etc., expressions, 167, 170.
to explain abbreviations, illegible characters, words used in special sense, 167, 170.

(The numbers refer to pages.)

Interpretation (*continued*).
to identify persons and things referred to in document, 168, 171.
but not to show meaning of common words, 167, 170.
nor the intent of an unintelligible document, 167, 171.
evidence of surrounding circumstances receivable, 168, 169, 171.
proper legal meaning preferred to one that is less proper, 168, 171.
document having plain meaning not to be explained by parol, 168, 171.
oral evidence of intention not competent in cases of *falsa demonstratio*, 168, 169, 171.
oral evidence of intention competent in cases of "equivocation," or "latent ambiguity," 169, 172.
or to rebut an equity, 170, 173.
stranger to document may give parol evidence varying it, 173.
Interpreter, admissions of, 51.
privileged from disclosing communications to lawyer, 204.
Irish statutes, proof of, 287.
Issue, definition of, 4.
evidence must be relevant to, 5.

Joint contractors, admissions of, 45, 46.
effect of admission in removing bar of the Statute of Limitations, 46, 48.
effect of judgment against one, 94.
Joint debtors, admissions of, 45, 46. (See Joint Contractors.)
Journals of legislature, not judicially noticed, 118, 119.
proof of, 150, 151.
Judge, definition of, 3.
decides on admissibility of evidence, 5, 54.
minutes of, to prove evidence in former proceeding, 78.
when judgment is conclusive in favor of, 97.
competency of as witness, 198, 199.
Judgment, defined, 83.
how proved. (See Public Documents.)
relevancy of, 83–99.
conclusive proof of its legal effect, 84.
effect of judgment, condemning ship as prize, 84, 91.
of judgment, appointing executor, guardian, receiver, etc., 85.
of judgment of divorce, 85.
of judgment naturalizing an alien, 85.

(The numbers refer to pages.)

Judgment (*continued*).
how far conclusive of facts forming ground of judgment, 86–89.
conclusive as to facts actually decided, 86.
whether appearing on the record or not, 86.
parol evidence admitted to show what was decided, 86.
conclusive as to matters which might have been litigated, 86.
single cause of action not to be split, 86, 89.
defences not set up in one action cannot be afterwards sued on, 86, 89.
aliter, as to set off and recoupment, 87.
not conclusive unless rendered on the merits, 87.
judgment of nonsuit not conclusive, 86.
so of discontinuance, 87.
so of judgment of abatement, 87.
verdict, without judgment, not a bar, 87.
judgment on demurrer, when conclusive, 87.
judgment by confession or default, conclusive, 87.
interlocutory order not conclusive, 87.
aliter, as to final orders on merits in special proceedings, 87.
judgment bars suit in court of concurrent jurisdiction, 87.
statements in, irrelevant as between strangers, except in admiralty cases, 90, 91.
judgments *in rem* and their effect, 90.
of forfeiture, 90, 91.
as to personal *status*, 90.
in attachment suits, 90, 100.
effect of not pleading judgment as estoppel, 92.
may be conclusive though given in evidence without pleading, 92.
irrelevant as between strangers, 93–96.
and between parties and privies when the issue is different, 93, 95.
not binding on parties as to matters not passed upon, 93.
nor as to matters incidentally cognizable, 93.
judgment against person individually, not binding on him in a representative character, 93.
effect of judgment against one tort-feasor, upon the others, 93, 94.
of judgment against one joint-contractor, 94.
of judgment against principal, upon surety or indemnitor, 94, 95.
effect of judgment as admission, 94, 96.
effect of, to prove matters of public and general right, 73, 96.
conclusive in favor of judge, 97.
so as to jurisdictional facts which court has power to decide, 97.

(The numbers refer to pages.)

Judgment (*continued*).
impeachable for lack of jurisdiction, 97, 98.
judgment of superior domestic court not impeachable collaterally, 98.
in some cases, lack of jurisdiction available as equitable defence, 98.
judgments of inferior courts, etc., impeachable, 98.
impeachable by showing its reversal, 98.
effect of pending appeal from judgment, 98.
impeachable by stranger for fraud, 99.
foreign judgments and those of sister States, effect of, 99, 100, 262.
impeachable for lack of jurisdiction, fraud, etc., 99, 100.
proof of, 147, 148, 151.
Judicial confession. (See Confessions.)
Judicial notice, of what facts taken, 117–124.
taken of common and statute law, corporate charters, etc., 117.
of the laws of antecedent government, 117.
Federal judges notice laws of States, 118.
State courts notice Acts of Congress, 118.
of the legislature, its sessions, etc., 118.
of customs of business, and customs enforced by courts, 118, 119.
of domestic courts, their judges, records, rules, terms, etc., 119, 120, 122.
of the *status* and signatures of court officers, 119.
of the constitution of the government, the accession of the executive and his signature, 120, 121.
status of public officers, of sheriffs, marshals, etc., 120.
of foreign states, their seals, and the law of nations, 120–122.
of foreign admiralty courts and their seals, 121.
of seals of State, of domestic courts, of notaries public, 121–123.
of proclamations, treaties, executive decrees, etc., 121.
of days of election, 121.
of the extent of the country, its civil divisions, geographical features, etc., 121, 122, 124.
of public matters concerning the government, 121, 122, 124.
of matters happening in the course of nature, 123, 124.
of the divisions of time, the meaning of words and abbreviations, 123, 124.
of matters of general knowledge and experience, 124.
notice not taken of private statutes, nor city ordinances, 117.
nor of transactions in legislative journals, 118, 119.

(The numbers refer to pages.)

Judicial notice (*continued*).
nor of pendency of another action, 119.
nor of *status* of sheriff's deputy, 120.
nor of seals of foreign municipal courts or of foreign officers, 121.
nor of orders of military commander, nor private executive acts, 121.
nor matters of private history, 123.
no evidence need be given of facts judicially noticed, 125.
nor of facts admitted, 125.
judge may refer to books, etc., to ascertain matters requiring notice, 125.
Jurisdiction, of court, when judgment impeachable for lack of, 97–100.
of surrogate to appoint administrator upon estate of living person, 85.
Jurors, grand and petit, competency of as witnesses, 201.

Knowledge, provable by similar acts or declarations, 28.

Land, application of presumption to question of ownership of, 7, 8.
title to, how provable, 12.
value of, how provable, 26, 102.
admissions concerning. (See Admissions.)
Landlord and tenant:
landlord's admissions bind tenant, 42.
tenant estopped to deny landlord's title, 190.
admissions of tenant in common do not bind co-tenant, 47.
Lascivious cohabitation, in trials for, marriage not provable by cohabitation and repute, 111.
Latent ambiguity, parol evidence to explain, 169.
Law, common and statute, judicially noticed, 117.
of nations, judicially noticed, 121.
foreign, how proved, 103, 104, 149–152.
Lawyers. (See Attorney; Barrister.)
Leading questions, nature of, 224.
not permitted on the examination in chief or on re-examination, 224.
except when witness is hostile, 224.
or the examination relates to items, details, etc., 224.
or when necessary to direct witness's attention to subject-matter, 224.
or when court allows them, 224.
permitted on cross-examination, 224.
but not in some States, when counsel inquires as to new matter, 225.

(The numbers refer to pages.)

Lease, as evidence of public and general rights, 73.
Legatee, admissions of do not bind co-legatee, 47.
Legislative journals, when judicially noticed, 118, 119.
proof of, 150, 151.
Legitimacy of children, presumed from birth in wedlock, 186.
Letter-press copies of writings, are secondary evidence, 129.
relevancy of, to show handwriting, 110.
Letters, mailing of, raises presumption of delivery, 36, 187.
failure to answer, no admission of their contents, 40.
Letters rogatory, when issued for the taking of depositions, 217.
Libel, evidence of similar statements to show malice, 30.
evidence of plaintiff's bad character relevant, 115.
aliter, as to reports and particular acts of misconduct, 115.
amount of proof required in justifying charge of crime, 176.
License, burden of proof to show possession of, 181.
licensee of property estopped to deny licensor's title, 190, 191.
Lien on document, as excusing witness from producing, 207.
Life, continuance of, presumed, 187.
when presumption of death arises, 184.
Limitations. (See Statute of Limitations).
Liquors, intoxicating quality of, when judicially noticed, 124.
Lost grant, presumption of, 185.
Lunatic, competency of as witness, 194.

Malice, provable by similar acts or declarations, 28.
in cases of libel and slander, 30.
Malicious prosecution, in trials for, plaintiff's bad character relevant, 116.
plaintiff must prove malice and want of probable cause, 179.
Maps, competency of as evidence, 81, 82.
to prove public and general rights, 73.
Maritime courts, judicially noticed, 121.
Market-reports, as evidence, 83.
Marriage, as matter of pedigree, 73, 74.
opinions as to existence of, when relevant, 111.
provable by admissions, 111.
communications during, privileged, 196–198.
in trials for breach of promise, woman's bad character relevant, 116.
corroboration of plaintiff's evidence, when required, 210, 211.
Marshal, *status* and signature of, judicially noticed, 120.
aliter, as to his deputy, 120.
Masters in chancery, duties of, 217.

(The numbers refer to pages.)

Material alterations, defined, 159, 160.
effect of, 158, 160.
Measures, weights and, judicially noticed, 123.
Medical men. (See Physician.)
Medical treatises, as evidence, 82.
Memorandum, does not exclude parol evidence of transaction, 138, 164.
Memory, refreshing. (See Refreshing Memory.)
Mental feelings, expressions of, provable, 32.
Messages of executive, judicially noticed, 121.
Misprision of treason, two witnesses needed in trials for, 212.
Mistake, provable by parol to avoid written instrument, 162.
Moneys, judicially noticed, 123.
Mortgage, parol evidence received to show deed or bill of sale to be a mortgage, 162.
Motions, affidavits used in making and their contents, 216, 218, 219.
Motive, evidence of, 13, 14, 15.
Murder. (See Homicide.)

Naturalization, effect of judgment of, 85.
Negligence, not provable by evidence of prior acts of negligence, 26.
aliter, in some States, 34.
whether system or course of business may be shown to prove negligence, 33, 34.
in trial for, habit of carefulness irrelevant, 34, 115.
burden of proof to show negligence and contributory negligence, 181.
New trial, not granted for improper admission or rejection of evidence, unless party be prejudiced thereby, 245.
Nicknames, in document, explainable by parol evidence, 168.
Non-experts, evidence of opinion by. (See Opinion, Evidence of).
Nonsuit, judgment of, not a bar, 86.
Northampton tables, as evidence, 83.
Notary, book entries of, as evidence, 63.
seal of, judicially noticed, 121.
Notice to produce documents, object of, 265.
secondary evidence admissible, upon failure to produce, 135.
but not unless due notice be given, 139.
notice may be given to party or his attorney, 139.
must be given a sufficient time beforehand, 140.
and must describe document, 140.

(The numbers refer to pages.)

Notice to produce documents (*continued*).
secondary evidence admissible without notice :
when the document is itself a notice, 141.
when the action seeks it in the opponent's possession, 141.
when the opponent has obtained it from person subpœnaed, 141.
when the opponent has the document in court, 141.
when there are duplicate originals, 141.
notice to be given though party notified is absent from State, 141.
party calling for and inspecting document, bound to give it in evidence, if required by other party, 240.
party refusing to produce when duly notified, cannot use document as evidence without consent, 240.
Notices, provable orally, though given in writing, 138.
Number of witnesses, 212. (See Witness).

Oath, confessions made under, effect of, 57, 58.
witness to be under, 214.
or may affirm, 214, 215.
form of, 215.
wilful false oath constitutes perjury, 214, 215.
Objects, shown to jury as evidence, 127.
Office, right to, shown by person's acting as officer, 36, 165.
Office-copy of document, defined, 144, 145.
when admissible in evidence, 144, 145.
is secondary evidence, 135.
Officers, of court, judicially noticed, 119.
public, judicially noticed, 120.
presumed to perform their official duties, 187.
Opinion, evidence of, generally irrelevant, xiii., 100.
of subscribing witnesses as to testator's sanity, relevant, 101.
of non-experts as to sanity or insanity, when relevant, 101.
of non-experts as to matters within common comprehension, 101, 106, 107.
of experts as to insanity, 106.
evidence of, as to damages, 102.
as to value of property, services, etc., 102.
of experts on points of science or art, relevant, 103–107.
"science or art" defined, 103.
as to foreign law, or the law of sister States, 103, 104.
other modes of proving such laws, 104, 149–152.
effect of not proving such laws, 104.
expert usually a lawyer, 104.

(The numbers refer to pages.)

Opinion (*continued*).
as to matters within common knowledge, irrelevant, 103.
competency of expert, determinable by judge, 104, 105.
opinion of expert as to existence of facts, irrelevant, 105, 106.
knowledge of expert tested by standard treatises, 83.
when questions to expert must be in hypothetical form, 105.
mode of framing such question, 105.
opinion of expert as to effect of evidence, irrelevant, 105.
so as to matter of legal or moral obligation, 105.
opinion of expert as to materiality of circumstances affecting insurance risk, 106, 107.
relevancy of facts bearing upon opinions of experts, 107.
as to handwriting, when relevant, 106, 108.
what qualifies a person to testify as to handwriting, 108, 109.
comparison of writings, when permitted, 109, 110.
collateral writings, when admissible as standards, 110.
letter-press copies and photographic copies, when used, 110, 111.
signature made in court, when used as a standard, 110.
as to existence of marriage, when relevant, 111.
grounds of opinion, relevancy of, 112.
opinion-evidence to be given by person having the opinion, 126.
witness may testify to his impression, belief, etc., 126.
Oral admissions, effect of, 40.
Oral evidence, defined, 3.
proof by, 126.
must be direct, 126.
relevant to show grounds of judgment, 86.
not relevant to add to, vary, or contradict a writing, xiv., 161, 266.
but relevant to show fraud, mistake, illegality, want of consideration, etc., 162.
and that deed or bill of sale is a mortgage, 162.
and that signer of instrument is agent, not principal, 162.
and to show true relations of parties to an instrument, 162.
and to vary receipts, 163.
and to show the existence of a distinct oral agreement, 163.
or an oral agreement forming a condition precedent, 163.
or a subsequent oral agreement to rescind or modify, 163.
and to show usage or custom, 164.
oral evidence of transaction receivable, though memorandum made, 138, 164.

(The numbers refer to pages.)

Oral evidence (*continued*).
legal relation created by writing, provable by parol, 164.
that person is public officer, provable by parol, 36, 165.
contract may be reformed in equity by parol, 164.
oral evidence competent to explain foreign, obsolete, technical, etc., expressions, 167, 170.
to explain abbreviations, illegible characters, etc., 167, 170.
to identify persons and things referred to in document, 168, 171.
to show "surrounding circumstances," 168, 169, 171.
but not to explain document having plain meaning, 168, 171.
nor to show intention in cases of *falsa demonstratio*, 168, 169, 171, 268.
but competent to show intention in cases of "equivocation," or "latent ambiguity," 169, 172, 268, 269.
and to rebut an equity, 170, 173.
stranger to document may vary it by parol, 173.
mode of taking oral evidence, 214–240. (See Witness.)
may be taken in open court on preliminary or final hearing, 216.
preliminary examination of prisoner in criminal cases, 216.
examination of parties and witnesses before trial in civil cases, 216.
parties not examined before trial in suits at law in U. S. courts, 216.
may be taken out of court on affidavit, 216, 218. (See Affidavit.)
or in taking depositions under a commission, 216–218.
or before officers of the court or other persons duly appointed or selected, 217.
as referees, auditors, examiners, etc., 217.
Order of court, as evidence of public and general rights, 73.
effect of as *res adjudicata*, 87.
Orders in council, proof of, 287.
Ordinances, municipal, not judicially noticed, 117.
of state, judicially noticed, 121.

Parol evidence to vary a writing. (See Oral Evidence.)
Partners, admissions of one bind the others, 45, 49.
effect of admissions after dissolution, 46.
retiring partner giving no notice, estopped to deny that he is partner, 189.
entries in partnership books evidence against partner, 40.

(The numbers refer to pages.)

Part-owners of ship, admissions of. 49.
Party, admissions of. (See Admissions.)
book entries made by, relevancy of, 64.
competency of, as witness, 193.
may be subpœnaed, 140, 208. (See Witness; *Subpœna duces tecum.*)
voluntarily becoming witness in criminal case may be fully cross-examined, 209.
as witness in other cases may be cross-examined like other witnesses, 226.
impeachment of, as witness, 233.
examination of, before trial in civil suits, 216.
not allowed in U. S. courts, in actions at law, 216.
Payment, provable without producing receipt, 138.
indorsement of on bond, bill, note, etc., effect of, as evidence, 67, 68.
Pedigree, declarations concerning, 73.
what constitutes pedigree, 73.
includes birth, marriage, death, and the time and place thereof, 73.
aliter, in this country, as to place, 74.
who may be a declarant, 74.
declarations only competent when pedigree is in issue, 74.
a person's age matter of pedigree, 74.
how declarations may be made, 74, 76.
must be made *ante litem motam*, 75.
declarations of neighbors, friends, etc., incompetent, 74.
Penalty, evidence exposing to, privilege of witness concerning, 207, 209.
Perjury, in trials for, evidence required to corroborate witness, 212, 213.
wilful false testimony, violating witness's oath or affirmation, constitutes, 214, 215.
Petit jurors, competency of, as witnesses, 201.
Photographs, as evidence, 128, 129.
photographic copies, when primary and when secondary evidence, 129.
" " when used to show handwriting, 111.
Physical examination of a party, power of court to order, 128.
Physician, privilege of as witness as to professional communications, 205, 206.
examination of party by, power of court to order, 128.
Plans of land, as evidence, 82.
Pleading, admissions made in, 40.
of judgment, whether necessary or not, 92.

(The numbers refer to pages.)

Possession, of property raises presumption of ownership, 188.
of property after crime committed, provable, 16, 28, 247.
raises presumption of guilt, 178, 179.
Preparation, evidence of, relevant, 14.
Preponderance of evidence, required in civil cases, 176. (See Burden of Proof.)
to prove insanity and *alibi* in criminal cases, 179.
President, accession of, judicially noticed, 120.
Presumption, definition of, 4.
what presumptions belong to the law of evidence, xv., xvi.
conclusive, 4, 246.
disputable, 4, 246.
instances of, 187, 188.
as to neighboring pieces of land, when relevant, 7, 8.
of the delivery of letters from mailing them, 36, 187.
of innocence when crime is charged, 175, 179.
when preferred to that of continuance of life, 177.
of guilt from recent possession of stolen goods, 178, 179.
that person receiving rent of land, is owner, 180.
of damages against wrongdoer, 180.
of legitimacy of children from birth in wedlock, 183.
of death from seven years' absence, 184.
of the order of death, when persons perish in the same calamity, 185.
of lost grant, 185.
of a right by prescription to light and air, 186.
of a right to percolating waters, 186.
of regularity in the performance of official acts, 187, 271.
of deeds to complete title, 187.
of the delivery of a deed, found in the grantee's hands, 155.
of the continuance of a state of things once existing, 187.
as a personal relation, 187.
continuance of life, 187.
residence, 187.
insanity, 187.
of the observance of the regular course of business, 187.
that a man intends the natural consequences of his acts, 188.
that a wife committing crimes in her husband's presence, acts under his coercion, 188.
from failure to call a witness, 220.
as to documents, 153-160.
as to date, 153.

(The numbers refer to pages.)

Presumption (*continued*).
as to stamp, 154.
as to sealing and delivery of deeds, 153. (See Seals.)
as to ancient documents, 156.
as to alterations. (See Alteration.)
equitable presumption as to document may be rebutted by parol evidence, 170, 173.
burden of proof rests on party against whom presumption exists, 177.
Previous conviction, relevancy of, in prosecutions for receiving stolen goods, 28, 29.
Price current list, as evidence, 83.
Primary evidence, defined, xiv., 127. (See Document.)
Principal and agent:
admissions of agent bind principal, 45.
parol evidence competent to show that signer of instrument signed as agent, not as principal, 162.
agent estopped to deny principal's title, 191.
agency shown by person's acting as agent on other occasions, 36.
Principal and surety:
principal's admissions do not bind surety, 48.
effect of judgment against principal, 94, 95.
parol evidence competent to show parties to instrument to be co-sureties, 162.
alteration of document by principal's consent may avoid it as to surety, 157.
Private rights, declarations concerning, 72.
Privies, admissions by, 41, 42. (See Admissions.)
Privilege of witnesses. (See Witness.)
Privileged communications between husband and wife, 196, 197, 198.
between attorney and client, 202-205. (See Attorney.)
between clergyman and person confessing, 206.
between physician and patient, 206.
Prize, effect of judgment of, 84, 91.
Proclamations, recitals in as evidence, 79, 80.
judicially noticed, 121.
proof of, 150, 151, 287.
Professional communications. (See Privileged Communications.)
Promissory note, admissions of holder of, 44.
indorsement of payment on, effect of as evidence, 67, 68.
Proof. (See Evidence.)
conclusive, definition of, 4.

(The numbers refer to pages.)

Proof (*continued*).
order of discretionary with court, 221.
burden of. (See Burden of Proof.)
Property, value of not provable by that of similar articles, 26.
facts showing rights of, or exercise of rights, 12, 250.
Public affairs, privilege of witness as to disclosing, 200.
Public documents, proof of, 142–152.
by producing document itself, 142.
by examined copy, 143.
by exemplification, 144.
by office copy, 144, 145.
by certified copy, 145, 146.
by officially printed copy, 149.
of Revised Statutes of U. S., 149.
of State statutes, 104, 149, 150.
proof of general records of the nation or State, 143.
of records of the several American States, 147, 148.
of statutes of any State or Territory, 104, 150.
of proclamations, acts of state, legislative journals, etc., 150.
of foreign written laws, records, etc., 104, 151, 152.
English and Irish public documents, proof of, 286–290.
Public facts, recitals of as evidence, 79, 80.
Public laws, when judicially noticed, 117, 118.
Public officers. (See Officers.)
Public records, entries in as evidence, 80.
Public rights, defined, 72.
declarations concerning, 71, 72.
Publication of will, 71.

Quarrelsome character of person, when provable, 14.
Queen's printers' copies of Acts of Parliament, as evidence, 286.

Rape, evidence of woman's complaint in trials for, 17, 19, 251.
particulars of complaint not generally provable, 17, 19.
evidence of her bad reputation for chastity, competent, 235.
evidence of her previous connection with the prisoner or other persons, competency of, 235, 236.
Reading books to jury, whether permissible, 82, 83.
Rebuttal, evidence in, when given, 224.
Receipt, not necessary as evidence to prove payment, 138.
may be varied by parol evidence, 163.

(The numbers refer to pages.)

Receiver, effect of judgment appointing, 85.
Receiving stolen goods, similar acts relevant to show knowledge, 29.
Recitals of public facts, in statutes, proclamations, etc., when relevant, 79.
Records, public. (See Public Documents; Public Records.)
Record books of courts, judicially noticed, 119.
Recoupment, matter of may be set up in defence, or sued on independently, 87.
Re-examination of witness. (See Witness.)
Referee, competency of as witness, 199.
power of to take testimony, decide causes, etc., 217.
appointed to take evidence, cannot pass upon objections, 218.
aliter, when he acts as judge to decide causes, 218.
Refreshing memory of witness:
witness may use writing made at or near time of transaction, 237.
three cases of refreshing memory, 237, 238.
writing not itself competent evidence, generally, 238, 239.
aliter, in some States as to writing made by witness, when he has no present recollection of the facts, 238, 239.
opposite party allowed to inspect writing, and may cross-examine thereon, 239.
object of cross-examination, 239.
writing made several months after transaction, not allowed to be used, 239.
Registers, public, entries in as evidence, 80.
Rejection of evidence, improper, not a ground for a new trial, unless party prejudiced thereby, 245.
Relationship of parties, evidence of, 20.
Relevancy, definition of, xiii., 4, 246–249. (See Evidence.)
relevant facts admissible in evidence, 5.
except when too remote, 5.
of facts forming part of the *res gestæ*, 6, 16. (See *Res Gestæ*.)
of facts and declarations of conspirators, 10, 11.
of facts showing title, 12.
of facts showing custom, 13.
of facts showing motive, preparation, subsequent conduct, explanatory statements, 13, 14, 15.
of complaints, statements in person's presence, etc., 16.
of facts necessary to explain or introduce relevant facts, 19.
of similar but unconnected facts, 24–28, xiii., 251.
of acts showing intention, good faith, etc., 28–33.

(The numbers refer to pages.)

Relevancy (*continued*).
of facts showing system, 33, 34.
of facts showing course of business, 35–37.
of hearsay evidence, 38. (See Hearsay.)
of admissions, 39–52. (See Admissions.)
of confessions, 52–59. (See Confessions.)
of statements of deceased persons, 59–79. (See Declarations.)
of statements in public documents and records, 79, 80.
of statements in historical and scientific works, maps, etc., 81, 82.
of statements in judgments, 83–99.
of evidence of opinion. (See Opinion, Evidence of.)
of evidence of character. (See Character, Evidence of.)
Remoteness of evidence, excludes it, 5, 14.
Rent of land, person receiving presumed to be owner, 180.
Reports, law, as evidence, 83, 104.
Reputation, evidence of. (See Character, Evidence of.)
Res adjudicata. (See Judgment.)
Res gestæ, doctrine of, 6, 7, 16, 250, 251.
when acts or declarations will form a part of, 7.
illustrations of doctrine, 9, 18, 19, 21, 41.
declarations of conspirators, 10, 11.
expressions of bodily and mental feeling, 32.
declarations of landowner as to nature of his claim, 42.
declarations of agents in course of agency, 45.
declarations of principal as affecting surety, 48.
declarations made in course of business, etc., 63–66.
Resemblance of child to parent, evidence of, 23.
Rights, public and general, declarations concerning, 71–73.
private, declarations concerning, 72.
Roman law, compared with common-law, xx.
Rules of court, judicially noticed, 119, 120.

Sanity, of testator, provable by subscribing witnesses, 101.
of other persons, whether provable by evidence of opinion, 101.
Science, matters of, provable by opinion-evidence, 103.
Scientific treatises, competency of as evidence, 82.
Seal, of States, of admiralty courts, of notaries, etc., judicially noticed, 120, 121, 123.
but not, those of foreign municipal courts, or of foreign officers, 121.
English seals recognized in English courts, 123.
of a deed, presumed to be that of party signing, 155.

(The numbers refer to pages.)

Seal (*continued*).
instrument without seal not a deed, though it allege a sealing, 155.
if deed be recorded without a seal, sealing may be presumed, 155.
Secondary evidence, defined, xiv., 135. (See Document.)
Seduction, plaintiff's bad character irrelevant in trials for, 115.
aliter, as to woman's bad character, 116, 236.
under promise of marriage, is a crime, 211.
corroboration of woman's evidence in trials for, when required, 211.
woman cannot generally be cross-examined as to connection with other men, 236.
Senator, *status* of, judicially noticed, 120.
Set-off, may be set up in defence or sued on independently, 87.
Sheriff, when bound by admissions of deputy, 41.
status and signature of, judicially noticed, 120.
aliter, as to his deputy, 120.
Shipmaster, when estopped to deny bill of lading signed by him, 192.
Signatures, of judges and public officers, judicially noticed, 119, 120, 122.
proof of, to show execution of document, 130, 131.
made in court, when used as standards of comparison, 110.
Similar facts to those in issue, generally irrelevant, xiii., 24–26, 251.
illustrations of rule, 24–26.
but relevant when they are the effects of the same cause, acting under like conditions, 24, 26, 27.
relevant to show the quality of an act, 24, 26, 27.
relevant to show intention, knowledge, good or bad faith, malice, etc., 28–33.
relevant to show system, 33–35.
Slander, evidence of similar statements to show malice, relevant, 30.
evidence of plaintiff's bad character relevant, 115.
aliter, as to reports and particular acts of misconduct, 115.
amount of proof required in justifying charge of crime, 176.
Solicitor. (See Attorney.)
Special proceeding, effect of order in, 87.
Splitting cause of action, not permissible, 86, 89.
Spoliation, distinguished from alteration, 158.
Stamp in documents, presumption as to, 154.
State affairs, privilege of witness as to disclosing, 200.
Statements, forming part of *res gestæ*. (See *Res Gestæ*.)
in presence of a person, when provable, 18.
of deceased persons, when relevant, 59. (See Declarations.)

(The numbers refer to pages.)

Statements (*continued*).
in books, documents, and records, when relevant, 79-99. (See Judgment.)
inconsistent statements of witness, when provable, 229, 230, 234.
Statute, recitals in as evidence, 79, 80.
of forum, judicially noticed, 117, 118.
aliter, as to private statutes, 117.
of other States or countries, how provable, 103, 104, 149, 150, 151.
Statute of Frauds, contract within, how far modifiable by parol evidence, 163, 164, 267.
Statute of Limitations, effect of admissions by one partner or joint contractor in removing the bar of, 46, 48.
effect of indorsement of payment on bond, bill, note, etc., in removing bar of the statute, 67, 68.
effect of prosecution being barred, upon the privilege of witness as to criminating evidence, 209.
Stolen goods, receiving, facts relevant to show knowledge, 29.
Strangers to suit, admissions by, 50.
effect of judgment upon, 90, 93. (See Judgment.)
Suborning of witnesses, effect of as evidence, 15, 16.
Subpœna duces tecum, is a compulsory writ, 140.
penalties for disobeying, 140.
on whom served, 140.
may now be served on party to action or on corporation, 140, 208.
witness compellable to produce his private papers, 207.
not privileged from producing papers on which he has a lien, or which would expose him to civil liability, 207.
but court may relieve him of this duty, 207.
attorney or agent compellable to produce papers which client could be required to produce, 208.
aliter, as to other papers, 208.
witness not compellable to produce papers that would criminate him, 207.
or would expose him to a penalty or forfeiture, 207.
when privileged witness withholds document, secondary evidence admissible, 136, 208.
aliter, when witness not privileged withholds it, 140.
agents of telegraph company compellable to produce messages, 140, 208.
witness not cross-examinable, when merely called to produce paper on *subpœna*, 221.

(The numbers refer to pages.)

Subscribing witness, who is, 130.
proof of execution of document attested by, 130. (See Document.)
deceased, declarations of irrelevant, 38.
to will, may testify as to his opinion of testator's sanity, 101.
Supreme Court of Justice (England), rules of practice in judicially noticed, 120.
does not notice rules of inferior courts, 121.
signatures of its judges judicially noticed, 122.
Surety. (See Principal and Surety.)
Surrogate, power of to appoint administrator on estate of living person, 85.
Sustaining of impeached witness. (See Witness.)
System, provable by evidence of similar acts, 33-35.

Technical words, explained by parol evidence, 167.
Telegrams, as evidence, whether primary or secondary, 129.
presumption of delivery from sending, 37.
agent of telegraph company required to produce on *subpœna duces tecum*, 140, 208.
Tenant. (See Landlord and Tenant.)
Terms of court, judicially noticed, 119.
Testamentary disposition, shown by similar statements, 33.
Testator, admissions of, 41.
declarations of as to contents of will, 70.
sanity or insanity provable by subscribing witness, 101.
intention of, when shown by parol evidence, 169, 170.
Threats, evidence of, when relevant, 14.
Time, divisions of, judicially noticed, 123, 124.
Title, evidence of facts showing, 12.
Title-deeds. (See Deed.)
Tort, admissions of defendant in actions for, effect of, 47.
effect of judgment against one tort-feasor, 93, 94.
Trade, usages of. (See Custom.)
Treason, two witnesses needed in trials for, 212.
Treaties, when judicially noticed, 121.
proof of, 288, 289.
Treatises, medical, scientific, etc., as evidence, 82.
Trustee, privilege as to producing documents in evidence, 208.

Undue influence in making will, 21.
when charged, testamentary intention may be shown by prior statements, 33.

(The numbers refer to pages.)

United States, public documents of, how provable, 143.
Revised Statutes of, provable by officially printed copy, 149.
no examination of party before trial in U. S. courts in suits at law, 216.
examiners in equity in U. S. courts cannot pass on objections to testimony, 218.
Usage. (See Custom.)
Uttering counterfeit money, similar acts to show knowledge, 29.

Value of property, not provable by that of similar articles, 26.
provable by expert testimony, 102.
Verdict, as evidence of public and general rights, 73.
without judgment thereon, not a bar, 87.

Wagers, evidence in actions upon, 249.
War, existence of judicially noticed, 122, 124.
Weights and measures, judicially noticed, 123.
Wife. (See Husband and Wife.)
Will, proof of undue influence in making of, 21, 33.
proof of contents by testator's declarations, 70, 71.
publication of, 71.
subscribing witness to. (See Subscribing Witness.)
ancient, presumption as to, 156.
alterations in, when presumed to be made, 159.
parol evidence not admissible to vary, 161, 162.
but testator's intention may be shown by parol in cases of "equivocation," or to rebut an equity, 169, 170, 172.
Witness, suborning, effect of as evidence, 15, 16.
may testify to his impression, intent, or belief, but not to a conclusion of law, 127.
when to be served with *subpœna duces tecum*. (See *Subpœna duces tecum*.)
effect of his withholding document, when so served, 136, 140, 208.
subscribing witness. (See Subscribing Witness.)
competency of witnesses, 193–206.
of parties and persons interested, 193. (See *Subpœna duces tecum*.)
of children, 194.
of persons of unsound mind, 194.
of intoxicated persons, 194.
of deaf and dumb persons, 194, 195.

(The numbers refer to pages.)

Witness (*continued*).
of atheists, 195.
of infamous persons, 195.
infamy how proved, 228.
of defendant in criminal cases, 195.
of husband and wife in criminal cases, 195.
" " " civil cases, 196.
cannot disclose confidential communications, 196, 197, 198.
cannot in general give evidence criminating each other, 209, 210.
of judges, referees, auditors, arbitrators, 198, 199, 274.
of attorney or counsel in same case, 199.
of grand and petit jurors, 201.
of lawyers, their agents and interpreters, as to professional communications, 202–205. (See Attorney.)
of clergymen and physicians, 205, 206, 275.
privilege of witnesses:
as to public affairs or communications between public officers, 200.
as to information concerning the commission of offences, 200.
as to confidential communications between husband and wife, 196, 198.
as to professional communications between attorney and client, 202–205. (See Attorney.)
between clergyman and person confessing, 205, 206.
between physician and patient, 205, 206.
as to producing documents or giving oral evidence, tending to criminate or to expose to a penalty or forfeiture, 206, 207, 209, 210.
as to producing documents on which witness has a lien, 207.
as to producing title-deeds and private papers in evidence, 206, 208. (See *Subpœna duces tecum.*)
no privilege as to testimony exposing witness to civil liability, 207.
corroboration of witnesses, when required:
in actions for breach of promise of marriage, 210, 211.
in bastardy proceedings, 210, 211.
in cases of seduction under promise of marriage, 211.
in suits for divorce, 211.
to support the evidence of an accomplice, 210, 211. (See Accomplice.)

(The numbers refer to pages.)

Witness (*continued*).
to support the evidence of a witness *falsus in uno*, 211, 212.
in trials for perjury, 212, 213.
in chancery cases, to support the bill, 213.
number of witnesses required:
in cases of treason, two or more required, 212.
in cases of perjury, more than the evidence of one needed, 212, 213.
custom may be proved by one, 13, 213.
examination of witnesses:
witness to be under oath, 214.
mode of administering oath, 215.
allowed to affirm, when, 214, 215.
wilful false testimony, violating oath or affirmation, perjury, 214, 215.
witness may give evidence in court or out of court, 216–219. (See Oral Evidence; Affidavit; Deposition.)
examination in court, order of, 220.
witnesses, when ordered to withdraw from the court, 220.
effect of their refusal, 220.
presumption from party's failure to call a particular witness, 220.
order of proof discretionary with trial court, 221.
witness's death or incapacity before examination is concluded, generally excludes evidence taken, 221, 222.
aliter, in England and in some cases in this country, 221, 222.
effect of death of a *party* before examination is concluded, 222.
evidence of witness, who is found to be incompetent during examination, may be withdrawn, 222.
so incompetent testimony, though admitted, may be withdrawn, 222.
in some States, irrelevant evidence may be contradicted by party prejudiced, 224.
examination in chief, 220.
must relate to facts in issue or relevant facts, 223.
leading questions not generally permitted, 224. (See Leading Questions.)
party opening case must develop his whole case in chief, 224.
but court may permit evidence in rebuttal which should have been given in chief, 224.

(The numbers refer to pages.)

Witness (*continued*).
cross-examination, 220, 221.
to be confined to matter testified to in chief, 223.
aliter, in England and some American States, 221, 223.
leading questions permitted on, 224.
aliter, in some States when the cross-examination relates to new matter, 225.
questions permitted which test accuracy, veracity, or credibility, 225.
irrelevant inquiries permitted as to specific facts, tending to disgrace, 225, 277.
extent of such examination discretionary with court, 225.
witness may claim privilege of not answering, 225.
but *material* questions as to disgracing facts *must be* answered, 225.
in N. Y. questions as to witness's being indicted, arrested, etc., not allowable, 226.
these rules apply to parties as witnesses, 226.
answers to irrelevant or collateral inquiries cannot be contradicted, 227.
except when the answers deny bias, 228.
or in England and some States, when the answers deny conviction for crime, 227, 228.
but conviction usually provable only by record, and not by cross-examination, 228.
answers to inquiries relevant to the issue may be contradicted, 229.
but witness must on cross-examination be given a chance to explain the alleged contradictory statement, 229.
in some States, this is not necessary, 230.
cross-examination as to previous statements in writing, how made, 231, 232.
in this country, writing exhibited to witness for authentication, and then itself read in evidence, 232.
extent of cross-examination of women in trials for rape, seduction, and in bastardy cases, 235, 236.
re-examination, 221.
is for explanation of matters referred to in cross-examination, 223.
whole conversation may be brought out, 223, 224.

(The numbers refer to pages.)

Witness (*continued*).
leading questions not permitted on, 224.
witness allowed to be recalled for further examination, 221.
impeachment of witnesses:
party cannot impeach his own witness, 230, 234.
nor opposing witness whom he makes his own by cross-examining as to new matter, 230.
but may prove facts of case by other witnesses, 230.
and may impeach witness whom law obliges him to call, 230.
party surprised by his witness may examine him as to his contradictory statements, 231.
in England and some States, party may impeach his witness, 230, 231.
party may impeach adversary's witness, 232–234.
by showing by other witnesses his bad general reputation, 232.
number of impeaching witnesses may be limited by court, 234.
mode of examining such witnesses, 232, 233.
general reputation inquired into, not specific wrong acts, 233.
in some States only reputation for truth and veracity provable, 233.
in others, it may relate to general moral character, 233.
whether impeaching witness would believe impeached witness on oath, inquired into in some States, 233.
by showing his former statements contradicting his testimony, 229. (See Cross-examination, *supra.*)
party impeached like other witnesses, 233.
impeaching witness may himself be cross-examined or impeached, 233, 234.
impeached witness may be sustained by party calling him, 234, 235.
by showing by other witnesses his good general reputation, 234.
to rebut evidence of his bad reputation, 234.
or to rebut evidence of his conviction for crime, 234.
or to rebut evidence tending to charge him with crime or moral turpitude, 234.

(The numbers refer to pages.)

Witness (*continued*).
but he cannot be so sustained because the testimony of other witnesses is contrary to his, 234.
or when he is impeached by proof of inconsistent statements, 234.
aliter, in some States, 234.
witness cannot be supported by proving that he made former statements similar to his testimony, 235.
unless fabrication is charged against him, and he made them before the motive existed, 235.
but in some States, such evidence is received to rebut evidence of inconsistent statements, 235.
refreshing memory of witnesses. (See Refreshing Memory.)
Women, offences against, evidence competent on trials for, 235, 236. (See Rape ; Seduction ; Adultery ; Bastardy.)
Words, defective or ambiguous in documents, evidence to explain, 167-169.

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