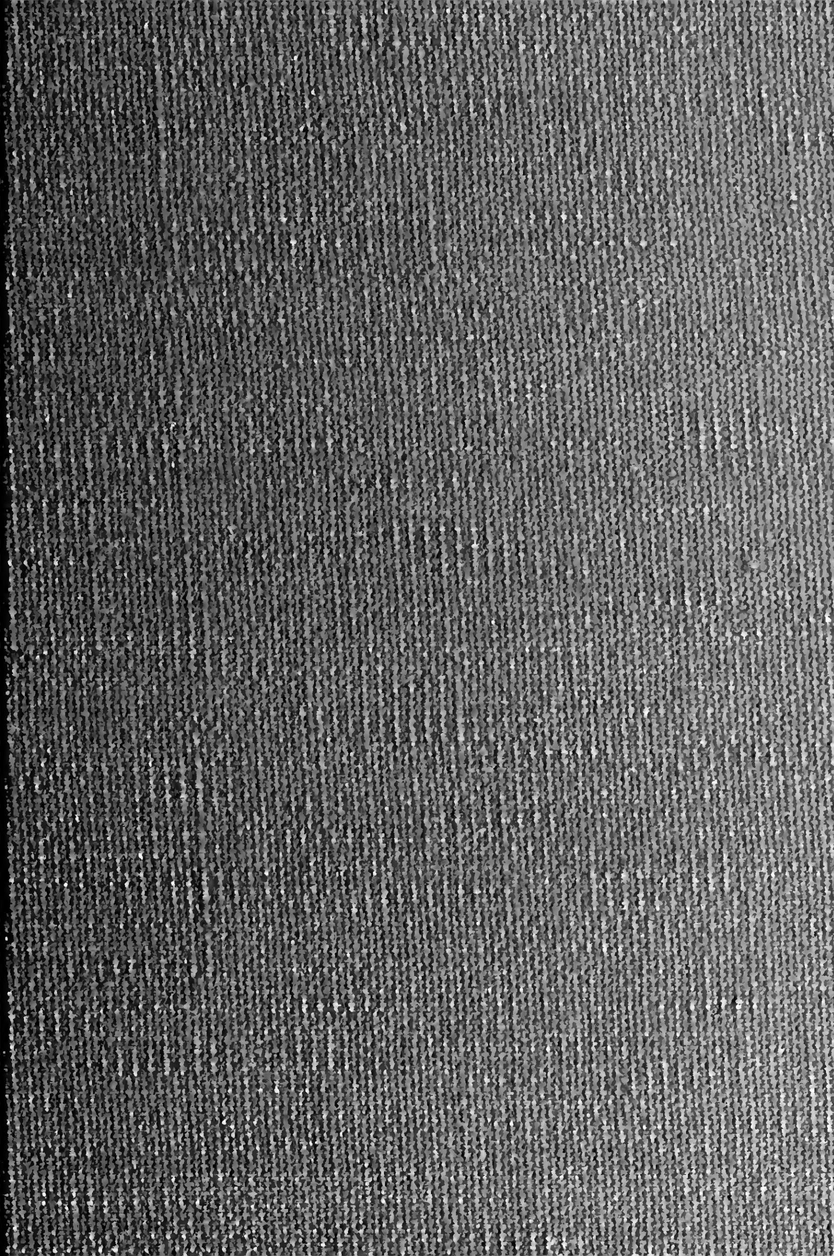

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A DIGEST

OF THE

LAW OF EVIDENCE

BY THE LATE

SIR JAMES FITZJAMES STEPHEN, BART., K.C.S.I., D.C.L.

ONE OF THE JUDGES OF THE HIGH COURT OF JUSTICE

FROM THE FIFTH EDITION (1899) OF SIR HERBERT STEPHEN, BART., OF THE INNER TEMPLE, BARRISTER-AT-LAW, CLERK OF ASSIZE FOR THE NORTHERN CIRCUIT, AND HARRY LUSHINGTON STEPHEN, OF THE INNER TEMPLE, ESQUIRE, BARRISTER-AT-LAW.

WITH BOTH GENERAL AMERICAN NOTES AND NOTES ESPECIALLY ADAPTED TO THE STATES OF NEW JERSEY, MARYLAND AND PENNSYLVANIA

BY

GEORGE E. BEERS

OF THE NEW HAVEN BAR; OF THE FACULTY OF THE YALE LAW SCHOOL; AUTHOR OF THE REVISION OF BALDWIN'S CONNECTICUT DIGEST, AND THE EDITIONS OF STEPHEN'S DIGEST FOR NEW YORK, OHIO, CONNECTICUT, ILLINOIS, MICHIGAN, ETC.

ASSISTED BY

ARTHUR L. CORBIN, B. A., LL. B.

OF THE FACULTY OF THE YALE LAW SCHOOL

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AMERICAN PREFACE

The present work is an attempt to adapt the English edition of Stephen's Digest to the needs of American lawyers generally, and the members of the profession in Pennsylvania, New Jersey and Maryland in particular. The fact that the profession has welcomed the previous editions of the work prepared by the editor of this edition leads him to hope that the present work may be found useful by those for whom it is intended.

The text of the English edition is here preserved intact, the American notes being arranged in two sets, those general, for all the States, and those local, for the members of the bar of the three States already mentioned. It is hoped that the book in this form may serve as a hand-book for court and office and a text for the student. The book is intended as a manual for ready reference and not as an extensive treatise. The arrangement adopted will enable the judge or counsel to find readily the English rule of Stephen on any given point, the trend of text-book authority, a few leading cases from his own State and from other States, and concrete illustrations from decided cases.

The editor wishes to express his appreciation of the laborious and efficient services of his colleague in the un-

dertaking, Mr. Arthur L. Corbin, without whose assistance the preparation of the work would have been impossible. The local notes are largely from his pen.

G. E. B.

42 Church St., New Haven, Conn., *August* 17, 1904.

PREFACE TO THE FIFTH EDITION

In preparing the present edition of this work we have attempted to follow as closely as possible the principles on which it was originally written twenty-five years ago. We have had to deal with the two new Acts of importance —the Prevention of Cruelty to Children Act, 1894, and the Criminal Evidence Act, 1898. It is not possible to incorporate the provisions of the former Act, relating to the evidence of children too young to be sworn, with the corresponding parts of the Criminal Law Amendment Act, 1885; and the result is that Article 123A has to take the form of a confused exception to the general rule, which, in fact, correctly represents the present state of the law with which it deals. The Criminal Evidence Act, 1898, is, from a draftsman's point of view, a more satisfactory measure, but for practical purposes it is necessary to treat that also as an exception to a rule which has been abolished.

We have incorporated in this edition a few new cases, of which the most important is *R.* v. *Lillyman,* [1896], 2 Q. B. 167. Our view of the effect of this case has necessitated a long note (Note V., and cf. pp. 11, 12), which we hope may meet with the assent of the profession generally.

All writers of law books depend largely upon one another, and as this Digest was designed to consist of the

most succinct statement of principles possible, we are perhaps more than usually indebted to other authors and editors. We have spared no pains in taking the fullest advantage of the labours of Mr. Pitt-Lewis, in his last edition of 'Taylor on Evidence,' and of those of Mr. Phipson in the second edition of his most useful work. We are also under a special obligation to Mr. William Wills. He has most generously allowed us to appropriate bodily the Table published by him at the end of his 'Lectures on the Law of Evidence,' and we have accordingly reprinted it with a few slight alterations. [As it refers exclusively to English statutory law it is not reprinted in this edition.] Only those who have themselves tried to prepare such a table can realize how great is the labour involved in its construction; and, after having begun this task, and discovered that we could not improve upon Mr. Wills's work, we are only too glad to take advantage of his kindness and republish his Table, instead of constructing a new one of which his must necessarily have been the foundation.

The total bulk of this work has been increased from 228 to 271 pages since the last edition. As this is a considerable growth in so small a book, it may be well to state that the increase in the text is five pages, in the notes five pages, and in the index nine pages. Mr. Wills's Table takes up twenty-four pages.

H. S.
H. L. S.

June 25, 1899.
4, PAPER BUILDINGS, TEMPLE.

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INTRODUCTION

In the years 1870-71 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 labour 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 connec-

tion, 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 enormous size and length of the standard works of reference is a proof of this. They consist of thousands of pages and refer to many thousand 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 favourable 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 labour 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 labour 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 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 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 question 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, from Gilbert and Peake to Taylor and Roscoe; 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 this 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 enter 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 the 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 a 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, 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 that 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 phrase 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 the 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 in arranging it I have applied this principle.

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 proven in such cases;

---

[1] See, *e. g.* that able and interesting book 'An Essay on Circumstantial Evidence,' by the late Mr. Wills, father of Mr. Justice Wills.

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.'

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.

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 specially 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.*)

* See Note I.

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 the marriage, an action of ejectment by a reversioner against a tenant *pur autre 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 (6th ed., 1872), 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 provision as this appears to me to belong not to the Law of Evidence, but to the law relating to medical men. It is a 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 in the case of estoppels by dealing 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 in those cases." [1]

Every one will express somewhat differently the principles which he draws from a number of illustrations, and

[1] *R.* v. *Bembridge*, 1783, 3 Doug. 332.

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 meanwhile the Courts can decide only upon cases as they actually occur, 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 favourable 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*

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[1] The 'Year Books' from 1307–1535, 228 years, would fill not more than twenty-five volumes of the 'Law Reports.'

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 favourably 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 generation or more 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 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 diffi-

cult to exaggerate the value of these studies, but their nature and use are liable to be misunderstood. This history of the Roman Law no doubt throws great light on the history of our own; 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 four short articles (106-109).

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

[1] For a reference to statutes dealing strictly with evidence, see Note XLVIII., *post*.

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 endeavoured 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 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.

LIST OF ENGLISH ABBREVIATIONS

A. & E. - - - - -	Adolphus & Ellis's Reports.
Atk. - - - - - -	Atkyns's Reports.
B. & A. - - - - -	Barnewall & Alderson's Reports.
B. & Ad. - - - - -	Barnewall & Adolphus's Reports.
B. & B. - - - - -	Broderip & Bingham's Reports.
B. & C. - - - - -	Barnewall & Cresswell's Reports.
B. & P. - - - - -	Bosanquet & Puller's Reports.
B. & S. - - - - -	Best & Smith's Reports.
B. N. P. - - - - -	Buller's Nisi Prius.
Beav. - - - - - -	Beavan's Reports.
Bell, C. C. - - - -	Bell's Crown Cases.
Best - - - - - -	Best on Evidence, 6th ed.
Bing. - - - - - -	Bingham's Reports.
Bing. N. C. - - - -	Bingham's New Cases.
Bligh - - - - -	Bligh's Reports, House of Lords.
Br. P. C. - - - -	Brown's Parliamentary Cases.
Buller, N. P. - - - -	Buller's Nisi Prius.
C. & F. - - - - -	Clark & Finnelly's Reports.
C. & J. - - - - -	Crompton & Jervis's Reports.
C. & Marsh. - - -	Carrington & Marshman's Reports.
C. & P. - - - - -	Carrington & Payne's Reports.
C. B. - - - - -	Common Bench Reports.
C. B. (N. S.) - - - -	Common Bench Reports. New Series.
C. M. & R. - - - -	Crompton, Meeson, & Roscoe's Reports.
Camp. - - - - - -	Campbell's Reports.
Car. & Kir. - - - -	Carrington & Kirwan's Reports.
Coke - - - - - -	Coke's Reports.
Cowp. - - - - -	Cowper's Reports.
Cox - - - - - -	Cox's Reports, Chancery.
Cox, C. C. - - - -	Cox's Criminal Cases.
D. (or Dears.) & B. -	Dearsley & Bell's Crown Cases.
Dears., or - - - Dearsley & P. - - - -	Dearsley's Crown Cases.
De G. & J. - - - -	De Gex & Jones's Reports.

De G. M. & G. - - De Gex, Macnaghten, & Gordon's Bankruptcy Cases.
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.

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

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

Gen. View Crim. Law Stephen's General View of the Criminal Law.
Godbolt - - - - - Godbolt's Reports, K. B.

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

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

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

K. & J. - - - - Kay & Johnson's Reports.
Keen - - - - - Keen's Reports, Chancery.

L. & C. - - - - Leigh & Cave's Crown Cases.
Leach - - - - - Leach's Crown Cases.

M. & G. - - - - Manning & Granger's Reports.
M. & K. - - - - Mylne & Keen's Reports.
M. & M. - - - - Moody & Malkin's Reports.
M. & R. - - - - Moody & Ryan's Reports.
M. & S. - - - - Maule & Selwyn's Reports.
M. & W. - - - - Meeson & Welsby's Reports.
Madd. - - - - - Maddock's Reports.
Man. & Ry. - - - Manning & Ryland's Reports.

McNally Ev. - - -	McNally's Rules of Evidence.
Moo. C. C. - - -	Moody's Crown Cases.
Moo. P. C. - - -	Moore's Privy Council Reports.
Mo. & Ro. - - -	Moody & Robinson's Reports.
N. C. - - - - -	Bingham's New Cases.
Pea. R. - - - -	Peake's Reports.
Phill. - - - - -	Phillip's Reports.
Ph. Ev. - - -	Phillips on Evidence, 10th ed.
Price - - - - -	Price's Reports.
Q. B. - - - - -	Queen's Bench Reports.
R. & R. - - - -	Russell & Ryan's Crown Cases.
Rep. - - - - -	Coke's Reports.
R. N. P., or - - - Roscoe, N. P. - -	Roscoe's Nisi Prius, 16th ed.
Russ. Cri. - - -	Russell on Crimes, 6th ed.
Russ. & Myl. - - -	Russell & Mylne's Reports, Chancery.
Selw. N. P. - - -	Selwyn's Nisi Prius.
Simon - - - - -	Simons' Reports.
Sim. (N. S.) - - -	Simons' Reports. New Series.
Sim. & Stu. - - -	Simon & Stuart's Reports.
S. L. C., or - - - Smith, L. C. - - -	Smith's Leading Cases, 10th ed.
Star. - - - - -	Starkie's Reports.
Starkie, or - - - Star. Ev. - - - -	Starkie on Evidence, 4th ed.
S. T., or St. Tri. - -	State Trials.
Swab. Ad. - - -	Swabey's Admiralty Reports.
Sw. & Tr., or - - Swa. & Tri., or - - S. & T. - - -	Swabey & Tristram's Reports, Probate and Divorce.
T. R. - - - - -	Term Reports.
T. E. - - - - -	Taylor on Evidence, 9th ed.
Tau. - - - -	Taunton's Reports.
Ve. - - - - -	Vesey's Reports.
Vin. Abr. - - -	Viner's Abridgment.
Wigram - - - - -	Wigram on Extrinsic Evidence.
Wills' Circ. Ev. - -	Wills on Circumstantial Evidence.
Wils., or - - - Wilson - - - - -	Wilson's Reports.

A DIGEST

OF THE

LAW OF EVIDENCE.

A DIGEST

OF 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 authorised 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.

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* See Note I.

"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:

"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.

"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.

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.

AMERICAN NOTE.

General.

Authorities.— 1 Greenleaf on Evidence (15th ed.), secs. 1, 14, 15, 33, 44, 49, 50; 1 Taylor on Evidence (Chamberlayne's 9th ed.), secs. 1, 70, 71, 109, 110, p. 2183.

"Evidence" defined.— Mr. Thayer defines the term evidence as "any matter of fact which is furnished to a legal tribunal," regarding the definition of the text as too narrow in that it excludes matters of fact demonstrated to the senses of the judge, as where a coat is put on in court to show its fit. Cases on Evidence, p. 2.

Evidence presented to senses of judge.— An instance of evidence not included in the definition of the text, but embraced by Mr. Thayer's definition quoted in the note to this article, occurs in *Brown* v. *Foster*, 113 Mass. 137, where, in a controversy over the fit of a coat, the coat is put on.

Mental condition.— Mental condition is to be established as a fact. *Wheelden* v. *Wilson*, 44 Me. 1; *State* v. *Lee*, 69 Conn. 197; *Chandler* v. *Barrett*, 21 La. Ann. 58, 99 Am. Dec. 701; *Titcomb* v. *Vantyle*, 84 Ill. 371; *Armstrong* v. *State*, 30 Fla. 170, 17 L. R. A. 484.

An alleged mental condition can be established by a mere preponderance of proof. *Greene* v. *Phœnix Mut. Life Ins. Co.*, 134 Ill. 310, 10 L. R. A. 576.

Where mental condition is in issue, evidence of condition before and after the time in question, if not too remote, is relevant. *White* v. *Graves*, 107 Mass. 325.

"Presumption" defined.— "The term 'presumption' is used to signify that which may be assumed without proof, or taken for granted." *Ward* v. *Metropolitan Life Ins. Co.*, 66 Conn. 238.

The conclusion or probable inference drawn in favor of the existence of one fact from others in proof is a legal presumption. *Tanner* v. *Hughes*, 53 Pa. St. (3 P. F. Smith) 289; *U. S.* v. *Scarcey* (D. C.) 26 Fed. R. 435.

"A presumption, or a probability — for in this connection these words mean the same thing — is an inference as to the existence or non-existence of one fact from the existence or non-existence of some other fact, founded on a previous experience of that connection." *Fay* v. *Reynolds*, 60 Conn. 220.

It is to be noted that the author uses the word "presumption" as referring to disputable presumptions of law only and treats "con-

clusive presumptions" under "conclusive proof." Presumptions of fact form no part of the law of evidence. They have "simply the force of an argument." *Ward* v. *Metropolitan Life Ins. Co.*, 66 Conn. 239 (citing Stephen's Digest).

Test of relevancy.— "The law furnishes no test of relevancy. For this it tacitly refers to logic and general experience,— assuming that the principles of reasoning are known to its judges and ministers, just as a vast multitude of other things are assumed as already sufficiently known to them." Thayer's Preliminary Treatise on Evidence, p. 265.

"Relevant" defined.— The definition of "relevant" of the text is adopted substantially in *Plumb* v. *Curtis*, 66 Conn. 166; *State* v. *Blake*, 69 Conn. 76, both of which cite Stephen's Digest.

Illustrations of relevant facts.— Upon the question as to whether a sale was in fraud of creditors, the declaration of the purchaser that he was not in condition to pay anything for the goods, is relevant. *Dale* v. *Gower*, 24 Me. (11 Shep.) 533. See also *Trull* v. *True*, 33 Me. 367.

Testimony as to the management and speed of an engine at a crossing is relevant upon the question of the management and speed, about a minute later, at a crossing three-quarters of a mile distant. *Lyman* v. *Boston & Maine R. R. Co.*, 66 N. H. 200, 11 L. R. A. 367.

In an action against a railroad company, for closing a street on which the plaintiff owned a lot, evidence of the amount of travel passing over the street is relevant. *Johnston* v. *Old Colony R. R. Co.*, 18 R. I. 642, 29 Atl. 594.

Testimony that a wife attended to all her husband's business is relevant on the question of her agency in a particular transaction. *Sanborn* v. *Cole*, 63 Vt. 590, 14 L. R. A. 210.

Evidence of extravagance is relevant in connection with other evidence in an embezzlement case. *Hackett* v. *King*, 8 Allen (Mass.), 144.

That an employer paid for the board of some of his employees at various places, and that such was his general custom, is relevant upon the issue of whether he is liable for the board of a particular employee at a particular place. *Dwight* v. *Brown*, 9 Conn. 89.

Testimony.— The term testimony refers to evidence given by witnesses and excludes documentary evidence. *Dibble* v. *Dimmick*, 143 N. Y. 549, 554.

Evidence presented to the senses of the triers.—A physical object, *e. g.*, a piece of iron, may, under proper circumstances, be exhibited to the jury. *King* v. *New York Central Railroad Co.*, 72 N. Y. 607.

Moral evidence.— Moral evidence is evidence sufficient to induce a belief upon which men would act in their own affairs. *Babcock* v. *Fitchburg R. R. Co.*, 140 N. Y. 308, 311.

Cumulative evidence.— Cumulative evidence is evidence of the same kind to the same point. *People* v. *Superior Court,* 10 Wend. 285, 294.

The fact that evidence is cumulative does not in many instances lessen its importance. *Abenheim* v. *Samuels,* 22 N. Y. St. R. 636, 5 N. Y. Supp. 117, 16 N. Y. St. R. 907.

Circumstantial evidence.— Circumstantial evidence is evidence of facts from which the existence of other facts may be inferred. *People* v. *Harris,* 136 N. Y. 423.

It is admissible both in civil and in criminal cases, and sometimes is the most convincing that can be had. *People* v. *Videto,* 1 Park. 603; *People* v. *Davis,* 46 N. Y. St. R. 213; 9 N. Y. Crim. 334; affirmed, on opinion below, in 135 N. Y. 646.

It is not error to refuse to charge that direct evidence is always the most satisfactory. *People* v. *Johnson,* 140 N. Y. 350, 55 N. Y. St. R. 783.

Difference between evidence and testimony.—*Jones* v. *Gregory,* 48 Ill. App. 228.

Prima facie evidence defined in *Lovell* v. *Drainage District,* 159 Ill. 188; *McChesney* v. *Chicago,* 159 Ill. 223.

Changing rules of evidence.— The legislature has power to change the rules of evidence. Such changes affect matters of procedure only, do not impair the obligation of contracts or contravene any provision of the Constitution. *C., B. & Q. R. R. Co.* v. *Jones,* 149 Ill. 361; *Gage* v. *Caraher,* 125 Ill. 447, 451.

New Jersey.

Cumulative evidence.— Cumulative evidence means "additional evidence to support the same point, and which is of the same character with evidence already produced." *Manufacturing Co.* v. *Van Riper,* 33 N. J. L. 156.

Material evidence defined.— *Quick* v. *Lilly,* 3 N. J. Eq. 257.

Presumptions.— Presumptions of law and presumptions of fact distinguished. *Snediker* v. *Everingham,* 27 N. J. L. 150, 153; *Gulick* v. *Loder,* 13 N. J. L. 68, 72.

Circumstantial evidence — Instances.— *Berckmans* v. *Berckmans,* 16 N. J. Eq. 122, 17 N. J. Eq. 453; *Day* v. *Day,* 4 N. J. Eq. 444; *Adams* v. *Adams,* 17 N. J. Eq. 324.

Examples of irrelevant testimony.— *Wiley* v. *Railroad Co.*, 44 N. J. L. 247; *Fitzgerald* v. *Faunce*, 46 N. J. L. 599; *Temperance Hall Assn.* v. *Giles*, 33 N. J. L. 260; *Reed* v. *Pierson*, Pen. 681; *Bank* v. *Hann*, 3 Harr. 222.

Antenuptial incontinence irrelevant in divorce. *Hedden* v. *Hedden*, 21 N. J. Eq. 61.

Best evidence.— The testimony of a person as to his own signature is of no higher character as evidence than the testimony of another who is acquainted with his handwriting. *Lefferts* v. *State*, 49 N. J. L. 26.

Court equally divided.— All evidence should be admitted by an affirmative order of court, so that if the court are equally divided on a question of admitting evidence it should be excluded. *Jackson* v. *Miller*, 25 N. J. L. 90; *Jessup* v. *Cook*, 1 Hal. 434, 440; *Price* v. *Tallman*, Coxe 447. See *Kirby* v. *Coles*, 3 Green, 441.

Inadmissible testimony.— Where one puts in illegal evidence without objection he has no right to put in other illegal evidence to explain it. *Brand* v. *Longstreet*, 4 N. J. L. 325.

Admission of irrelevant evidence on the part of the State without objection is no reason for admitting similar evidence for the defendant. *Cook* v. *State*, 24 N. J. L. 843.

Maryland.

Rebutting evidence.— Rebutting evidence is that which shows that the evidence of the other party is not entitled to the force and effect which the law imputes to it *prima facie*. *Davis* v. *Hamblin*, 51 Md. 525.

Meeting irrelevant evidence.— The fact that one party introduces incompetent evidence does not authorize the other to introduce similar evidence. *Gorsuch* v. *Rutledge*, 70 Md. 272; *Walkup* v. *Pratt*, 5 H. & J. 56; *Railroad Co.* v. *Woodruff*, 4 Md. 255; *Mitchell* v. *Sellman*. 5 Md. 376.

When irrelevant evidence has been admitted over a party's objection, he is entitled to introduce evidence to explain or contradict it. *Lake Roland Ry. Co.* v. *Frick*, 86 Md. 273.

Affirmative and negative evidence. Affirmative evidence of a fact is entitled to more weight than negative. *Riswick* v. *Goodhue*, 50 Md. 57.

Best evidence rule.— The rule requiring the best evidence refers to quality and not to quantity, but does not exclude a weak witness

merely because a strong one might have been produced. A boundary may be proved by one who saw the line run as well as by the surveyor who did the work. *Richardson* v. *Milburn,* 17 Md. 67.

Pertinent evidence is admissible even though it is weak and inconclusive. *Fulton* v. *Maccracken,* 18 Md. 528.

Res inter alios.— Statements and acts of third parties not in the presence of a party are not deemed relevant as against him. *Baker* v. *Gunther,* 53 Md. 373; *Insurance Co.* v. *Carlin,* 58 Md. 336; *Swartz* v. *Chickering,* 58 Md. 290; *Basford* v. *Parran,* 8 Md. 360.

The statement of the consideration in a deed is not admissible against one not a party thereto to show the price paid. *Lake Roland Ry. Co.* v. *Frick,* 86 Md. 259.

Assurance of counsel as to relevancy.— Evidence that seems to be irrelevant will be admitted on the assurance of counsel that other evidence will be introduced later to render its relevancy clear; if counsel fails to do so, such evidence must be withdrawn from the jury. *Rosenstock* v. *Tormey,* 32 Md. 169; *Chelton* v. *State,* 45 Md. 564; *Baker* v. *Swann,* 32 Md. 355; *Beall* v. *McCulloh,* 27 Md. 651; *Bushman* v. *Morling,* 30 Md. 384; *Crawford* v. *Beall,* 21 Md. 208; *Atwell* v. *Miller,* 6 Md. 10.

Credible witness.— A "credible witness," as used in the statute of wills, means one competent to testify at the time he signs. *Estep* v. *Morris,* 38 Md. 424; *Higgins* v. *Carlton,* 28 Md. 115.

An "issue" defined.—*Barth* v. *Rosenfeld,* 36 Md. 617.

Experiments to test accuracy.— Evidence of experiments to show whether voices might be heard between two designated places is admissible. *Gambrill* v. *Schooley,* 95 Md. 260.

Objecting to evidence.— An objection to the admission of evidence should not be sustained if any part of such evidence offered is relevant. *Scarlett* v. *Acad. of Music,* 46 Md. 132.

Evidence offered for a special purpose.— Evidence need not be introduced for any special purpose, and is then admissible if relevant to any part of the issue; but if counsel states a special purpose, and the evidence is not admissible for that purpose, it will be excluded. *Byers* v. *Horner,* 47 Md. 23; *Conner* v. *Mt. Vernon Co.,* 25 Md. 55; *Nutwell* v. *Tongue,* 22 Md. 419; *McTavish* v. *Carroll,* 13 Md. 429; *Pegg* v. *Warford,* 7 Md. 582.

Limiting scope of evidence.— Evidence admitted for one purpose only cannot be used by the party for other purposes. *Emory* v. *Owings,* 3 Md. 178.

Contradicting pleadings.— Evidence in contradiction of the allegations in one's own pleadings is not admissible. *O'Brien* v. *Fowler*, 67 Md. 561; *Kribs* v. *Jones*, 44 Md. 396; *Wright* v. *Gilbert*, 51 Md. 146; *Turner* v. *Maddox*, 3 Gill, 190.

Mental condition, etc.— Direct evidence of a person is admissible as to his motive, belief, or intention. *Phelps* v. *Railroad Co*, 60 Md. 536.

Opinions of counsel.— Opinions of counsel are not evidence. *Dorsey* v. *Hammond*, 1 Har. & J. 190.

Questions by court.— Evidence may be brought out on motion of the court itself. *Fisher* v. *Fisher*, 95 Md. 314.

Pennsylvania.

Relevancy.— Where the admissibility of evidence depends upon the existence of a fact, the evidence will be received if there has been given any testimony from which the jury may infer the existence of the fact. *Blair* v. *Seaver*, 26 Pa. 274.

Evidence rejected for one purpose may be admitted for another. *Moore* v. *Smith*, 14 S. & R. 388; *O'Neil* v. *Whitecar*, 1 Phila. 446.

Evidence may be given of a fact that is badly pleaded. *Hill* v. *Hill*, 32 Pa. 511.

When a matter has been averred in the declaration unnecessarily or insufficiently, evidence may be given to support it. *Hake* v. *Fink*, 9 Watts, 336; *Thompson* v. *Barkley*, 27 Pa. 263; *Hobensack* v. *Hallman*, 17 Pa. 154; *Howell* v. *McCoy*, 3 Rawle, 256; *Edgar* v. *Boies*, 11 S. & R. 445; *Sommer* v. *Wilt*, 4 S. & R. 19.

If inadmissible evidence has been allowed to be given without objection, the jury may consider it. *McCullough* v. *Elder*, 8 S. & R. 181; *Weckerly* v. *Geyer*, 11 S. & R. 35.

The commonwealth is subject to the same rules of evidence as a citizen. Its evidence must be relevant, material, and the best attainable. *Ash's Estate*, 202 Pa. 422.

Material evidence is admissible even though unsupported it would be insufficient. *Haughey* v. *Strickler*, 2 W. & S. 411; *Com.* v. *Leeds*, 83 Pa. 453; *Brown* v. *Clark*, 14 Pa. 469.

Evidence of intention.— One may give testimony as to what his intention was. *Cullmans* v. *Lindsay*, 114 Pa. 166.

Testimony known to be untrue.— The judge and jury are not bound to accept testimony which they themselves know to be untrue. Where, on a motion for a new trial, testimony was offered to show

that a juryman had fallen asleep, it was no error to exclude it when the judge knew the facts himself. *Com.* v. *Jongrass*, 181 Pa. 172.

Latitude allowed.— Great latitude is allowed in admitting circumstantial evidence on the question of fraud. *Stewart* v. *Fenner*, 81 Pa. 177; *Burkholder* v. *Plank*, 69 Pa. 225; *Rees* v. *Jackson*, 64 Pa. 486.

Mental condition.— A wide scope allowed in admitting evidence of mental capacity. *Rouch* v. *Zehring*, 59 Pa. 74.

Evidence of hereditary taint is relevant. *Smith* v. *Kramer*, 5 Clark, 226.

Evidence in rebuttal.— When one party has introduced incompetent evidence it may be rebutted by the other. *Morris* v. *Travis*, 7 S. & R. 220.

Presumptions.— Presumption of fact and presumption of law defined. *Com.* v. *Frew*, 3 Pa. Co. Ct. 492.

A presumption must be based upon facts and not upon another presumption. *Welsh* v. *Railroad Co.*, 181 Pa. 461.

The conclusion or probable inference drawn in favor of the existence of one fact from others in proof is a legal presumption. *Tanner* v. *Hughes*, 53 Pa. 289.

Circumstantial evidence.— No inference can be drawn from circumstantial evidence unless the circumstances be themselves proved. They cannot be presumed. *Douglass* v. *Mitchell*, 35 Pa. 440; *Warren* v. *Com.*, 37 Pa. 45.

Circumstantial evidence compared as to weight with direct evidence. *Com.* v. *Harman*, 4 Pa. 269.

Circumstantial evidence is admissible if relevant. *Davenport* v. *Wright*, 51 Pa. 292.

Circumstantial evidence to establish the existence of a document. *Bright* v. *Allan*, 203 Pa. 386.

Positive and negative evidence.— As to their relative value, see *Hess* v. *Railroad Co.*, 181 Pa. 492.

Positive testimony of a fact is entitled to greater weight than negative evidence against it. *Urias* v. *Pennsylvania R. Co.*, 152 Pa. 326; *Floyd* v. *Phila. & R. R. Co.*, 162 Pa. 29.

Best evidence.— The best evidence in the power of the party must be produced. *Hamilton* v. *Van Swearingen*, Add. 48; *Bank* v. *Whitehill*, 16 S. & R. 89; *Bryant* v. *Stilwell*, 24 Pa. 314.

Corroborative evidence.— Evidence is not admissible to corroborate unless it also tends to prove the disputed fact. *Wollè* v. *Brown*, 4 Whart. 365.

Example of cumulative testimony.— *Wiley* v. *McGrath*, 194 Pa. 498.

Real evidence.— To prove malpractice, an injured limb was exhibited to the jury. *Fowler* v. *Sergeant*, 1 Grant, 355.

Experiments.— Proof of experiments to show the effect of powder on clothing is admissible. *Com.* v. *Sullivan*, 13 Phila. 410; *Sullivan* v. *Com.*, 93 Pa. 284.

A model of a scaffold may be used for illustration. *Geist* v. *Rapp*, 206 Pa. 411; *Hagan* v. *Carr*, 198 Pa. 606.

A handwriting expert may illustrate his meaning by a diagram, and counsel may refer to such diagram in argument, though such diagram is not evidence in itself. *Hagan* v. *Carr*, 198 Pa. 606.

Last paragraph.— *Rodgers* v. *Stophel*, 32 Pa. 111.

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.

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: the fact that A had received from B such provocation as would reduce A's offence to manslaughter.

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; the fact that C on his deathbed declared that C and not A murdered B would be deemed not to be relevant.

* See Note II.

AMERICAN NOTE.

General.

Authorities.— 1 Greenleaf on Evidence (15th ed.), secs. 49–55; McKelvey on Evidence, p. 126 *et seq.;* Thayer's Preliminary Treatise on Evidence, pp. 265, 266; *Trull* v. *True,* 33 Me. 367.

"Unless excluded by some rule or principle of law, all that is logically probative is admissible." Thayer's Preliminary Treatise on Evidence, p. 265.

"No precise and universal test of relevancy is furnished by the law. The question must be determined in each case according to the teachings of reason and judicial experience. Thayer's Cases on Evidence, pp. 2, 3. If the evidence conduces in any reasonable degree to establish the probability or improbability of the fact in controversy, it should go to the jury. *Ins. Co.* v. *Weide,* 11 Wall. 438, 440." *Plumb* v. *Curtiss,* 66 Conn. 166; *Ward* v. *Young,* 42 Ark. 542.

All relevant facts are admissible unless it is affirmatively shown that they are excluded by some rule of law.

"Evidence is admitted not because it is shown to be competent, but because it is not shown to be incompetent." *Plumb* v. *Curtis,* 66 Conn. 166.

Testimony which tends to support only a portion of the plaintiff's case is not thereby made irrelevant or incompetent. *Gardner* v. *Crenshaw,* 122 Mo. 79, 27 S. W. 612; *Bartlett* v. *Evarts,* 8 Conn. 527.

The admissibility of relevant evidence is not affected by the fact that it was obtained illegally or improperly. *Trask* v. *People,* 151 Ill. 523. As by a decoy letter. *Andrews* v. *U. S.,* 162 U. S. 420.

Facts interwoven with relevant facts are admissible. *St. Clair* v. *U. S.,* 154 U. S. 134, 149.

Remote evidence.— If evidence is of facts too remote to be material, the judge may exclude it. *White* v. *Graves,* 107 Mass. 325.

Collateral facts.— Irrelevant facts are sometimes called "collateral facts." 1 Greenleaf on Evidence (15th ed.), sec. 52, adopted in *Eaton* v. *Telegraph Co.,* 68 Me. 67; *Moore* v. *Richmond,* 85 Va. 538.

Must be relevant or deemed to be relevant.— *Johnson* v. *Carley,* 53 How. Pr. 326; *Whintringham* v. *Dibble,* 66 N. Y. 634; *Van Buren* v. *Wells,* 19 Wend. 203; *Fuller* v. *Clark,* 3 E. D. Smith, 302; *Aberhall* v. *Roach,* 3 E. D. Smith, 345, 11 How. Pr. 95.

Evidence is relevant, which tends to establish the issue. It is admissible if not excluded by some rule of evidence. *Platner* v. *Platner,* 78 N. Y. 90.

It is error to rule out evidence directly tending to support the issues. *Scholey* v. *Mumford*, 64 N. Y. 521; *Rumsey* v. *Cook*, 9 Hun, 129; *Hayes* v. *Ball*, 72 N. Y. 418. Such as evidence which tends to negative the defence. *Banks* v. *Carter*, 7 Daly, 417. Or to explain and thus defeat a *prima facie* case. *Richard* v. *Wellington*, 66 N. Y. 308; *Wallis* v. *Randall*, 16 Hun, 33, 81 N. Y. 164.

Evidence cannot be excluded on account of any defect in the pleadings, which can be cured by amendment. *Lathrop* v. *Godfrey*, 3 Hun, 739, 6 S. C. 96.

Evidence is competent if it tends to prove the issue. *K., P. & B. Co.* v. *Guthrie*, 64 Ill. App. 523; *Hough* v. *Cook*, 69 Ill. 581; *R., R., I. & St. L. R. R. Co.* v. *Rafferty*, 73 Ill. 58; *Evans* v. *George*, 80 Ill. 51; *Stastney* v. *Marschall*, 37 Ill. App. 137, 140.

Evidence to be admissible must be relevant. *Welch* v. *Zerger*. 29 Ill. App. 349; *Law* v. *Greenwood*, 30 Ill. App. 186; *Grubey* v. *Nat. Bank*, 35 Ill. App. 356; *Powell* v. *McCord*, 121 Ill. 330, 333; *Avery* v. *Moore*, 133 Ill. 74, 77; *Warner* v. *Crandall*, 65 Ill. 195; *Johnson* v. *Von Kettler*, 66 Ill. 63; *Gibson* v. *Troutman*, 9 Brad. 94; *Gulliher* v. *People*, 82 Ill. 145; *Johnson* v. *People*, 94 Ill. 505; *Hollaway* v. *Johnson*, 23 Ill. App. 331.

Evidence which tends to support some of the issues is competent. *Carter* v. *Carter*, 152 Ill. 434; *Hunter* v. *Harris*, 29 Ill. App. 200, 207.

Evidence not wholly irrelevant is admissible. *Hunter* v. *Harris*, 29 Ill. App. 200, 207.

Evidence admissible for one purpose may be admitted for that purpose. *Huthmacher* v. *Lowman*, 66 Ill. App. 448; *Marder* v. *Leavy*, 35 Ill. App. 420, 422.

Evidence competent against one of two defendants is admissible. *Consol. Ice M. Co.* v. *Keifer*, 134 Ill. 481, 494; *Crosby* v. *People*, 137 Ill. 325, 334.

The competency of evidence is not affected by the fact that it was obtained illegally. *Trask* v. *People*, 151 Ill. 523.

Preliminary inquiries.— Preliminary inquiries, although as to matters otherwise irrelevant, may be allowed. *Mapley* v. *Irwin*, 16 Ill. App. 363.

Preliminary questions, such as age, residence, and occupation, are admissible. *C. & A. R. R. Co.* v. *Lammert*, 12 Brad. 408.

Explanatory evidence.— Evidence necessary to explain evidence already in the case is admissible. *Overtoon* v. *C. & E. I. R. R. Co.*, 181 Ill. 323, 54 N. E. 898, reversing 80 Ill. App. 515.

Too remote.— Proof of value two years after is inadmissible. *Horner* v. *Zimmerman*, 45 Ill. 14.

New Jersey.

Relevancy defined.— To be relevant, evidence must be such as will assist in the determination of the issue. *Marsh* v. *Machine Co.*, 57 N. J. L. 36.

Relevancy for any one purpose.— Evidence admissible for one purpose cannot be excluded because not admissible for other purposes. *Trenton P. R. Co.* v. *Cooper*, 60 N. J. L. 219.

Irrelevant testimony.— Evidence of the value of a house is irrelevant to show the value of services in building it. *Jersey Co.* v. *Davison*, 29 N. J. L. 415.

A contract which has been declared void by a court of equity is inadmissible in a court of law. *Weart* v. *Hoagland*, 2 Zab. 517.

Meeting irrelevant evidence.— One may not introduce irrelevant evidence merely because the other party has done so. *Cook* v. *State*, 4 Zab. 843.

Penalties for refusal to answer.— Before penalties will be enforced against a witness for refusing to answer questions, their materiality must be established. *Ladenburg* v. *Railroad Co.*, 66 N. J. L. 187.

Former acquittal of crime.— In criminal cases a verdict of acquittal may be given in evidence on a plea of *autrefois acquit* even though no judgment was ever entered on the verdict. *West* v. *State*, 2 Zab. 213.

Raising collateral issues.— Evidence which tends to raise many collateral issues excluded. *Railroad Co.* v. *Doughty*, 2 Zab. 495.

Evidence admissible by statute.— Evidence may be made admissible by statutes which would otherwise have been deemed irrelevant. *Woodbridge* v. *Allen*, 43 N. J. L. 262.

Matters not pleaded.— Evidence is not competent if it relates only to matters not pleaded. *Vansciver* v. *Bryan*, 13 N. J. Eq. 434; *Marshman* v. *Conklin*, 21 N. J. Eq. 546; *Evans* v. *Huffman*, 5 N. J. Eq. 354.

Maryland.

Irrelevant evidence inadmissible.— Irrelevant matters not receivable in evidence. *Maslin* v. *Thomas*, 8 Gill, 18; *Dorsey* v. *Whipps*, 8 Gill, 457; *Green* v. *Caulk*, 16 Md. 556.

When a question seems irrelevant, and no promise is made to show its relevancy later on, it must be excluded. *Stewart* v. *Spedden*, 5 Md. 433.

In an action of replevin, evidence to show that the defendant had taken the benefit of the insolvent laws is irrelevant. *Basford* v. *Mills*, 6 Md. 385.

In slander, evidence of a breach of contract or of a distraint of goods or of a suit for trespass is not relevant. *Gambrill* v. *Schooley*, 95 Md. 260.

Where a corporation is an executor, threats made by an officer thereof against the contestants are irrelevant. *Berry* v. *Safe Deposit Co.*, 96 Md. 45.

Collateral facts are those that afford no reasonable inference of the existence of the fact to be proved. *Lee* v. *Tinges*, 7 Md. 215.

Evidence that the defendant was ignorant of the law he violated is irrelevant. *Grumbine* v. *State*, 60 Md. 355.

Another contract.— In an action on a contract for work done it is not permitted for defendant to prove that the plaintiff had another contract with a third person covering the same period. *Baker* v. *Gunther*, 53 Md. 373.

Example of irrelevant evidence.— *Donahue* v. *Shedrick*, 46 Md. 226.

Reason for excluding irrelevant evidence.— Irrelevant evidence is excluded because it consumes the public time, distracts the minds of the jurors, and is unfair to the opposite party since he could not have foreseen it and prepared to meet it. *Bloomer* v. *State*, 48 Md. 521.

Question irrelevant in part.— The question, "Can you tell how fast a car is coming at night, or are you different from other people?" is objectionable since it is irrelevant in part. *United Railways Co.* v. *Seymour*, 92 Md. 425.

Contradicting irrelevant testimony.— If irrelevant evidence has been introduced by one party that will be injurious to the other, he may contradict it. *Gorsuch* v. *Rutledge*, 70 Md. 272.

Irrelevant evidence cannot be introduced merely because such evidence was introduced by the opposite party. *Railroad Co.* v. *Woodruff*, 4 Md. 242; *Bannon* v. *Warfield*, 42 Md. 22; *Higgins* v. *Carlton*, 28 Md. 115; *Warner* v. *Hardy*, 6 Md. 525; *Walkup* v. *Pratt*, 5 H. & J. 51.

Immaterial evidence not admissible.— *Wyman* v. *Rae*, 11 Gill & J. 416.

Evidence of facts too remote.— In slander the details of a discharge in bankruptcy thirty years before are too remote to be deemed relevant. *Gambrill* v. *Schooley*, 95 Md. 260.

Evidence that is remote and collateral to the issue should be excluded. *Davis* v. *Calvert*, 5 G. & J. 269.

Relevancy defined.— All evidence from which there may be drawn a fair and reasonable inference of the existence of the fact to be tried is relevant. *Brooke* v. *Winters*, 39 Md. 505.

Weak relevant evidence.— Evidence if relevant is not to be excluded on the ground that it is weak and inconclusive. *Richardson* v. *Milburn*, 17 Md. 67.

Evidence relating to the issue is admissible, even though insufficient when standing alone. *Brooke* v. *Quynn*, 13 Md. 379.

Evidence will not be excluded as to a fact upon which issue has been joined, even though such fact does not constitute a legal bar to the action. *Mitchell* v. *Williamson*, 9 Gill, 72; *Shriner* v. *Lamborn*, 12 Md. 170.

Insanity.— As to what evidence is relevant to prove insanity, see *Spencer* v. *State*, 69 Md. 28.

Forgery.— On question of forgery of a bond the facts that the alleged signer is illiterate, that the subscribing witnesses lived sixty miles away and are of bad reputation, are relevant. *Sides* v. *Schnebly*, 3 Har. & McH. 243.

Assurance of counsel that evidence is relevant.— Evidence seemingly irrelevant may be admitted on assurance of counsel that his further evidence will show its relevancy. *Davis* v. *Calvert*, 5 G. & J. 269.

Relevancy to prove fraud.— On questions of fraud, the door is opened wide to the admission of testimony, though its relevancy be slight. *Davis* v. *Calvert*, 5 G. & J. 269.

Evidence relevant in rebuttal.— When a witness has testified that he recognized a person at a certain distance, testimony of others with equally good eyesight is relevant to show that they could not recognize any one at that distance. *Richardson* v. *State*, 90 Md. 109.

Order of proof.— A party may introduce his evidence, if relevant, in the order in which he sees fit, and he cannot be required to state in advance what his succeeding evidence will be. *Patterson* v. *Crowther*, 70 Md. 124; *Life Ins. Co.* v. *Dempsey*, 72 Md. 288.

When one's right to recover depends upon proving several facts, evidence as to any one of them is admissible irrespective of the order in which it is offered. *Mills* v. *Bailey*, 88 Md. 320; *Taylor* v. *State*, 79 Md. 130.

Pennsylvania.

Relevancy.— Evidence (not hearsay) having any bearing on the question in issue is admissible. *Pratt* v. *Richards Jewelry Co.*, 69 Pa. 53; *Fehley* v. *Barr*, 66 Pa. 196; *Trego* v. *Lewis*, 58 Pa. 463; *Stafford* v. *Henry*, 51 Pa. 514; *Tams* v. *Lewis*, 42 Pa. 402; *Tams* v. *Bullitt*, 35 Pa. 308; *Rodgers* v. *Stophel*, 32 Pa. 111; *Hill* v. *Scott*, 12 Pa. 168; *Lightner* v. *Wike*, 4 S. & R. 203; *Reigart* v. *Ellmaker*, 10 S. & R. 27.

Irrelevant evidence not admissible. *Tams* v. *Lewis*, 42 Pa. 402; *Bratton* v. *Mitchell*, 3 Pa. 44; *Spence* v. *Spence*, 4 Watts. 165; *Miller* v. *Frazier*, 3 Watts, 456; *Keller* v. *Leib*, 1 P. & W. 220; *Bailey* v. *Bailey*, 14 S. & R. 195; *Stewart* v. *Huntingdon Bank*, 11 S. & R. 267; *Leeds* v. *Com.*, 83 Pa. 453.

If facts are not relevant to the issue they are not admissible, even though other facts might be inferred from them which would support the issue. *Weidler* v. *Bank*, 11 S. & R. 134; *Kocher* v. *Bowman*, 10 Watts, 128.

Party offering must show relevancy.— The party offering evidence must show its relevancy. *Piper* v. *White*, 56 Pa. 90.

Latitude in fraud.— Great latitude is allowed in the admission of evidence on a question of fraud. *Paul* v. *Kunz*, 195 Pa. 207; *Snayberger* v. *Fahl*, 195 Pa. 336.

Assurance of counsel as to relevancy.— Evidence may be admitted in the discretion of the judge on the statement of counsel that its relevancy will later appear. No exception lies to the exercise of such discretion. *Weidler* v. *Bank*, 11 Serg. & R. 134.

Instances.— Testimony in contradiction of a witness' statements is admissible to discredit him, even though such statements were immaterial. *Batdorff* v. *Bank*, 61 Pa. 179.

Any evidence which tends to impeach the credibility of a witness is relevant. *Magehan* v. *Thompson*, 9 W. & S. 54.

To establish defense of insanity the prisoner's mental condition, before and after the act, is admissible. *Com.* v. *Gerade*, 145 Pa. 289.

Circumstantial evidence rendering the fact in issue more or less probable is relevant. *Johnson* v. *Com.*, 115 Pa. 369.

To prove a forgery, practice copies of the signature made by the supposed forger are relevant. *Pennsylvania Co. for Insurance* v. *Railroad* Co., 153 Pa. 160.

On question of forgery of a bill, evidence that at about the time

the bill is dated the signer tried to borrow money is relevant. *Stevenson* v. *Steward*, 11 Pa. 307.

Where the date of a receipt is in issue, the time the money was actually received is relevant. *Armstrong* v. *Burrows*, 6 Watts, 266.

Conviction for manslaughter irrelevant in ejectment. *Painter* v. *Drum*, 40 Pa. 467.

Evidence to show how facts might have existed hypothetically is not admissible. *Hart* v. *Evans*, 8 Pa. 13.

On cross-examination.— Irrelevant questions are permissible in the discretion of the court on cross-examination for testing the accuracy of the witness. *Clark* v. *Church*, 5 W. & S. 266.

Last paragraph.— *Nevling* v. *Com.*, 98 Pa. 322.

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.

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.

When a question as to the ownership of land depends on the application to it of a particular presumption capable of being rebutted, the fact that it does not apply to other

neighbouring pieces of land similarly situated is deemed to be relevant.

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.[1]

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

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

In the report of this case in the *Times* for March 8, 1856, the evidence of the witnesses on this point is thus given:—

"*William Fowkes*: My father got up [? went to] 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's statement could not

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.[2]

(*c*) The question was, whether A was guilty of the manslaughter of 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.[3]

(*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 that he owns the entire bed a little lower down than the spot in question is deemed to be relevant.[4]

(*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.[5]

AMERICAN NOTE.

General.

Authorities.— 1 Greenleaf on Evidence (15th ed.), sec. 108; McKelvey on Evidence, p. 277 *et seq.*; *Com.* v. *Hackett*, 2 Allen (Mass.), 136; *Haynes* v. *Rutter*, 24 Pick. (Mass.) 242; *Com.* v. *McPike*, 3 Cush. (Mass.) 181.

The rule of the text is included under the rule that *res gestæ* are admissible, that term being defined as "the circumstances, facts and

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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 was at the trial uncertain whether the person he saw was the butcher, though he was disposed to think so.

[2] *R.* v. *Bedingfield*, Suffolk Assizes, 1879, 14 Cox 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.

[3] *R.* v *Foster*, 1834, 6 C. & P. 325.

[4] *Jones* v. *Williams*, 1837, 2 M. & W. 326.

[5] *Doe* v. *Kemp*, 1831, 7 Bing. 332; 2 Bing. N. C. 102.

declarations which grow out of the main fact, are contemporaneous with it, and serve to illustrate its character." *Stirling* v. *Buckingham*, 46 Conn. 464, adopted in *Pinney* v. *Jones*, 64 Conn. 55, and *Norwalk* v. *Ireland*, 68 Conn. 14.

A transaction is not ended so long as the parties to it remain together, and anything, according to the usual course of proceeding, remains to be done. *Fifield* v. *Richardson*, 34 Vt. 410.

Declarations or acts antecedent to the transaction, and consequently forming no part thereof, are inadmissible. *Louisville & N. R. Co.* v. *Stewart*, 56 Fed. R. 808, 6 C. C. A. 147, 9 U. S. App. 564; *Young* v. *Keller*, 16 Mo. App. 550.

The whole of a transaction is admissible. *Ins. Co.* v. *Moseley*, 8 Wall. (U. S.) 379, 405; *Vicksburg & Meridian R. R. Co.* v. *O'Brien*, 119 U. S. 99, 105; *Peabody* v. *Dewey*, 153 Ill. 657; *Ward* v. *White*, 86 Va. 212, 19 Am. St. Rep. 883; *People* v. *Vernon*, 35 Cal. 49, 95 Am. Dec. 1; *Augusta Factory* v. *Barnes*, 72 Ga. 217, 53 Am. Rep. 838.

In determining the meaning of a deed, another deed, executed at the same time, between the same parties and relating to the same subject-matter, is admissible on the theory that the two form parts of one agreement. *Simonds* v. *Shields*, 72 Conn. 146.

In an action against a steamboat company, for personal injuries, the plaintiff may show that after he was taken from the water the captain treated him in an inhuman manner. "It was competent for the plaintiff to prove the whole transaction." *Hall* v. *Conn. River Steamboat Co.*, 13 Conn. 325. See also *Thomas* v. *Beck*, 39 Conn. 241.

In a suit against a municipal corporation to recover damages for the obstruction of a way by digging, it may be proved as part of the *res gestæ*, for whom those doing the work claimed to be working. *Wiley* v. *Portsmouth*, 64 N. H. 214, 9 Atl. 220.

Narration of past events.—A mere narration of past events, even though made soon after the transaction, is not admissible. *Knox* v. *Wheelock*, 54 Vt. 150; *Tabor* v. *Hardin*, 9 Ky. Law Rep. 491; *Traveler's Ins. Co.* v. *Sheppard*, 85 Ga. 751, 12 S. E. 18; *Hooper* v. *Carey*, 86 Ia. 494, 53 N. W. 415; *Rowland* v. *Phila., W. & B. R. R. Co.*, 63 Conn. 419; *Haynes* v. *Rutter*, 24 Pick. (Mass.) 242; *Lane* v. *Bryant*, 9 Gray (Mass.), 245; *Eastman* v. *B. & M. R. R. Co.*, 165 Mass. 342.

Authorities for first proposition of text.— *Waldele* v. *N. Y. C. R. R. Co.*, 95 N. Y. 274; *People* v. *Davis*, 56 N. Y. 91; *Eighmy* v.

People, 79 N. Y. 546; *Finkelstein* v. *Barnett*, 17 Misc. 564, 40 N. Y. Supp. 694, affirming 16 Misc. Rep. 488; *Boardman* v. *Lake Shore & Michigan Southern Railroad Co.*, 84 N. Y. 157; *People* v. *Zounek*, 49 N. Y. St. R. 642, 10 N. Y. Crim. 251; *Cassidy* v. *Uhlmann*, 66 N. Y. Supp. 670, 54 App. Div. 205.

The declarations to be admissible as part of the *res gestæ* must accompany the act and so harmonize with it as to be obviously part of the same transaction. *Moore* v. *Meacham*, 10 N. Y. 207, 210; *Waldele* v. *N. Y. C. & H. R. R. R. Co.*, 95 N. Y. 274; *Hallahan* v. *New York, Lake Erie Railroad Co.*, 102 N. Y. 194.

Patient's statement as to present condition.— In a trial for murder by poisoning, a physician, who was consulted by the deceased about thirty days before her death, may testify as to what she told him about her condition at the time, but not as to what she said about her previous symptoms. *People* v. *Foglesong*, 116 Mich. 556.

Declaration and acts part of the res gestæ.— In a case of trespass to the person based upon the forcible removal of the plaintiff from property occupied by herself and husband as a homestead, a writ of assistance directed against the husband, under which the defendant acted, is admissible in evidence not as a justification, but as a part of the *res gestæ*, and as bearing upon the question of damages. *Haviland* v. *Chase*, 116 Mich. 214.

Receipts or stubs thereof may be admissible in connection with proof of the delivery of wheat as part of the *res gestæ*. *Freese* v. *Arnold*, 99 Mich. 13.

In a suit against a street railway company for injuries received in a collision of an open car in the front of which the plaintiff was riding, with the car ahead of it, evidence as to what was done by the people on the rear end of the forward car when they saw the danger is admissible as part of the *res gestæ* on the question of the plaintiff's contributory negligence in jumping from the car. *Holman* v. *Union Street R. Co.*, 114 Mich. 208.

In an action for slander, evidence of an altercation so connected with the utterance of the alleged slanderous words as to form a part of the *res gestæ* is admissible as bearing upon the question of malice. *Provost* v. *Brueck*, 110 Mich. 136.

In an action for larceny the State may properly show that the respondent had his newspaper in one hand and the other was among the ladies' dresses feeling of their pockets, and that the witness called the attention of the officers to these movements,

causing the officers to watch the respondent. *People* v. *Machen,* 101 Mich. 400.

In a suit for goods sold, the defendant defends upon the ground that a greater quantity than the amount agreed upon was fraudulently put in the written order of the defendant, and evidence of the conversation and of the circumstances surrounding the transaction is admissible to prove the fraud. *Shrimpton & Sons* v. *Rosenbaum,* 106 Mich. 68.

It is competent to prove, for purposes of comparison, the weight and quality of wool shown to a witness by the defendant after the theft, and alleged to have been taken from his own sheep, such wool having been stored in the defendant's house, and where the stolen wool was afterwards proved to have been taken. *People* v. *Pitcher,* 15 Mich. 397.

In an action for a personal injury, it is competent to show the entire surroundings of the place where the injury occurred. *Le Beau* v. *Telephone, etc., Co.,* 109 Mich. 302.

A defendant sued for assault and battery may show how he was dressed at the time. *Kuney* v. *Dutcher,* 56 Mich. 308.

It is error to exclude plaintiff's testimony, in an indecent assault upon woman, that the defendant approached her with unchaste language, and had solicited sexual indulgence before the act was committed. *Mawich* v. *Elsey,* 47 Mich. 10.

Habits.—When the plaintiff in an action for personal injuries makes a claim for damages on account of probable earnings subsequent to the injury and it appears he was out of employment at the time he was hurt, evidence that for two or three years prior to the injury he had been in the habit of getting intoxicated, and that he had been proprietor of a hotel of bad reputation, is admissible and proper as bearing upon his probability of securing employment, and the character and duration of the same. *Kingston* v. *Ft. Wayne & E. R. Co.,* 112 Mich. 40.

New Jersey.

Res gestæ defined and discussed.—*Hunter* v. *State,* 40 N. J. L. 495, 536.

Declarations are admissible as part of *res gestæ* only when concomitant with the fact in issue and connected with it. *Blackman* v. *Railroad Co.,* 68 N. J. L. 1.

Contemporaneous statements.— Contemporaneous statements and writings characterizing and connected with acts which are in evidence are admissible. *Luse* v. *Jones,* 39 N. J. L. 707; *Frome* v. *Dennis,* 45 N. J. L. 515.

Acts and statements at or near the time of the transaction in question are admissible if caused by such transaction. *Hunter* v. *State,* 40 N. J. L. 495.

A paper writing not signed held admissible as part of the *res gestæ* to prove terms of a contract. *Freeman* v. *Bartlett,* 47 N. J. L. 33.

Declarations of murdered man.— In trial for homicide the immediate declaration of the deceased as to the cause of his death received as part of the *res gestæ. Donnelly* v. *State,* 26 N. J. L. 601.

Declarations of the accused.— Declarations of an accused made at the time of the offense or immediately before or after it may be admitted. *State* v. *Powell,* 2 Hal. 244.

Varying written contract.— Statements which are a part of the *res gestæ* are not admissible to vary a written contract. *Uhler* v. *Browning,* 28 N. J. L. 82.

Words of bystanders.— In case of affray, acts and words of bystanders at the time are part of the *res gestæ* and admissible. *Castner* v. *Sliker,* 33 N. J. L. 95, 507.

Instances.— Trespass. *Ogden* v. *Gibbons,* 2 South. 518, 536. Affray. *Castner* v. *Sliker,* 33 N. J. L. 95, 507. Sale and delivery of a horse. *Guild* v. *Aller,* 2 Harr. 310. Intention in establishing a residence or in removing. *Likens* v. *Clark,* 26 N. J. L. 207. Doings and sayings of an agent. *Allen* v. *Bunting,* 3 Harr. 299.

Loaded shells found in the same room in which a murder was committed admissible as part of the *res gestæ. State* v. *Hill,* 65 N. J. L. 627.

Conduct.— Evidence of conduct to show mental condition as part of the *res gestæ. Schlemmer* v. *State,* 51 N. J. L. 23.

Instances where the statements were held not to be a part of the same transaction: *Ferguson* v. *Reeve,* 1 Harr. 193; *Snover* v. *Blair,* 25 N. J. L. 94.

Narrative of past events.— In case of homicide, a narrative of the affair by the deceased, given a few minutes after the defendant had left, is not part of the *res gestæ. Estell* v. *State,* 51 N. J. L. 182.

Accidents.— Declarations of plaintiff in action for negligence, made some time after the accident but while still lying where injured and suffering acutely, admitted. *D., L. & W. Ry. Co.* v. *Ashley,* 67 Fed. 209.

Words spoken by driver to the horse in a runaway admissible as part of the *res gestæ*. *Trenton P. R. Co.* v. *Cooper*, 60 N. J. L. 219.

Maryland.

Time declarations were made.— Declarations of a sheriff offered as *res gestæ* to affect a sale by him must have been made at the time of the sale. *Miles* v. *Knott*, 12 G. & J. 442.

The circumstance to be proved may be part of one transaction even though it did not occur at the precise time when the principal fact occurred. *Handy* v. *Johnson*, 5 Md. 450.

Declarations of a party after signing a bond that he signed it with the understanding that there was to be a cosurety are not admissible as *res gestæ*. *Miller* v. *State*, 8 Gill, 141.

Statements made by the accused a few minutes after a murder, when he had had opportunity for reflection, are not part of the *res gestæ*. *Wright* v. *State*, 88 Md. 705.

Statements by a patient to her physician which were mere narrative of what occurred before he arrived are not admissible. *Hays* v. *State*, 40 Md. 633.

Declarations of agents.— Declarations by an agent made while transacting the principal's business and in connection therewith are admissible against the principal as part of the *res gestæ*. *Bradford* v. *Williams*, 2 Md. Ch. 1; *Thomas* v. *Sternheimer*, 29 Md. 268; *Franklin Bank* v. *Navigation Co.*, 11 G. & J. 28; *Union Banking Co.* v. *Gittings*, 45 Md. 181.

Letters as part of the res gestæ.— *Gaither* v. *Clarke*, 67 Md. 18; *Roberts* v. *Mattress Co.*, 46 Md. 374.

Res gestæ in assault and battery.— *Byers* v. *Horner*, 47 Md. 23.

Other crimes.— Proof of other crimes forming part of the same transaction is admissible. *Lamb* v. *State*, 66 Md. 285.

Reason for acting.— On trial for the abduction of children, the declarations of the mother at the time of leaving with the defendant that she was leaving voluntarily and was taking the children with her are admissible. *Robinson* v. *State*, 57 Md. 14.

Fraud.— Statements of a grantor, at the time of executing the deed, that its object is to defraud creditors, are admissible as *res gestæ*. *McDowell* v. *Goldsmith*, 2 Md. Ch. 370; *Cooke* v. *Cooke*, 29 Md. 538; *Groff* v. *Rohrer*, 35 Md. 327.

In a suit to vacate a deed for fraud, the declarations of the grantor to the conveyancer are admissible. *Sanborn* v. *Lang*, 41 Md. 107.

Accidents.— Declarations of the driver of a car half an hour after the accident are mere narrative and not admissible. *Dietrich* v. *Halls Springs Ry. Co.*, 58 Md. 347.

Statements made at a distance of several blocks from the scene of the accident are not *res gestæ*. *Baltimore* v. *Lobe*, 90 Md. 310.

When statements of parties concerned are part of the *res gestæ*. *B. & O. R. R. Co.* v. *Allison*, 62 Md. 479; *B. & O. R. R. Co.* v. *Good*, 75 Md. 526.

Pennsylvania.

Res gestæ defined.— *Coll* v. *Transit Co.*, 180 Pa. 618; *Van Eman* v. *Fidelity & Casualty Co.*, 201 Pa. 537.

What are *res gestæ* in homicide. *O'Mara* v. *Com.*, 75 Pa. 424.

Declarations of deceased admitted as *res gestæ* in trial for murder. *Com.* v. *Van Horn*, 188 Pa. 143.

Statements made at the time of the act are not *res gestæ* unless they have a necessary relation to the transaction. *In re Muller's Estate*, 159 Pa. 590.

Bystanders.— In case of affray, what was said or done by bystanders at the time is admissible as part of the *res gestæ*. *Walter* v. *Gernant*, 13 Pa. 515.

Time of declarations.— Declarations are not part of *res gestæ* unless contemporaneous with the act done. *Kidder* v. *Lovell*, 14 Pa. 214; *Banks* v. *Clegg*, 14 Pa. 390; *Grim* v. *Bonnell*, 78 Pa. 152; *Smith* v. *Emerson*, 43 Pa. 456; *Stauffer* v. *Young*, 39 Pa. 455.

Length of time after the event as affecting admissibility. *Hester* v. *Com.*, 85 Pa. 139.

Declarations made half an hour after an accident not part of the *res gestæ*. *Briggs* v. *Coal Co.*, 206 Pa. 564.

No fixed measure of time or distance from the main occurrence can be established. Each case depends upon its own circumstances. *Keefer* v. *Insurance Co.*, 201 Pa. 448.

Declarations of agents of a railroad company made after an accident not admitted as *res gestæ*. *Erie R. Co.* v. *Smith*, 125 Pa. 259.

Statements may be part of the *res gestæ* though made before the act. *Rinesmith* v. *Railway Co.*, 90 Pa. 262.

Illustrations.— Statements made by one injured alighting from a train while he was still lying on the platform where he fell. *Railroad Co.* v. *Lyons*, 129 Pa. 113.

Declarations of workmen during a fire that it was caused by their negligence. *Shafer* v. *Lacock*, 168 Pa. 497.

Declarations of an engineer, by whose negligence one was injured, made at the time of the injury. *Hanover R. Co.* v. *Coyle*, 55 Pa. 396. See also *Mullan* v. *Steamship Co.*, 78 Pa. 25.

Statements by one killed by an explosion made while covered with the fire. *Elkins* v. *McKean*, 79 Pa. 493.

Declarations of an injured child not admitted because too long after the event. *Bradford* v. *Downs*, 126 Pa. 622.

Declarations while wounds were being dressed after the crime held to be *res gestæ*. *Com.* v. *Werntz*, 161 Pa. 591.

In action for wife's services, her declarations during the service as to the terms thereof are admissible. *Hackman* v. *Flory*, 16 Pa. 196.

Instructions to an agent to deliver a message are part of the *res gestæ* if the message was delivered. *Featherman* v. *Miller*, 45 Pa. 96.

To show source of title, the correspondence with the business agent by whom the property was purchased is part of the *res gestæ*. *Hannis* v. *Hazlett*, 54 Pa. 133.

Action for deceit in a horse trade — all the circumstances of the transaction are admissible. *McLene* v. *Fullerton*, 4 Yeates, 522.

A record in a suit to which the defendant was not a party, as part of the *res gestæ*. *Patterson* v. *Anderson*, 40 Pa. 359.

Declarations of an agent at time of paying money as to the person for whom it is paid. *Levering* v. *Rittenhouse*, 4 Whart. 130.

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; but statements made by individual conspirators as to measures taken in the execution or

* See Note III.

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. 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 believing in the existence of the conspiracy to which they relate.

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.[6]

(*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 organised 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.[7]

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[6] *R.* v. *Blake*, 1844, 6 Q. B. 126.

[7] *R.* v. *Hardy*, 1794, 24 S. T. *passim*, but see particularly 451–3.

AMERICAN NOTE.

General.

Authorities.— 1 Greenleaf on Evidence (15th ed.), sec. 111; McKelvey on Evidence, p. 108; *Logan* v. *U. S.*, 144 U. S. 263; *Brown* v. *U. S.*, 150 U. S. 93; *Walls* v. *State,* 125 Ind. 400; *Com.* v. *Tivnon,* 8 Gray (Mass.), 375, 69 Am. Dec. 248; *Com.* v. *Scott*, 123 Mass. 235, 25 Am. Rep. 81; *Com.* v. *Smith,* 151 Mass. 491; *Com.* v. *Crowninshield,* 10 Pick. (Mass.) 497; *Com.* v. *Brown,* 14 Gray (Mass.), 419; *Com.* v. *Waterman,* 122 Mass. 43.

Authorities on the first paragraph of the text.— *State* v. *Soper,* 16 Me. 293, 33 Am. Dec. 665; *Aldrich* v. *Warren,* 16 Me. 465; *Lee* v. *Lamprey,* 43 N. H. 13; *Jacobs* v. *Shorey,* 48 N. H. 100; 97 Am. Dec. 586; *Jeune* v. *Joslyn,* 41 Vt. 478; *Cowles* v. *Coe,* 21 Conn. 235; *State* v. *Glidden,* 55 Conn. 78, 79; *Knower* v. *Cadden Clothing Co.,* 57 Conn. 222; *State* v. *Thompson,* 69 Conn. 720; *State* v. *Shields,* 45 Conn. 263.

The evidence described in this article comes in as part of the *res gestæ. State* v. *Soper,* 16 Me. 293, 33 Am. Dec. 665.

Subsequent statements as to measures.— The rule of the text as to statements made subsequently by individual conspirators, as to measures taken, is supported by *State* v. *Larkin,* 49 N. H. 39; *Com.* v. *Ingraham,* 7 Gray (Mass.), 46; *Moore* v. *Shields,* 121 Ind. 267; *Samples* v. *State,* 121 Ill. 547.

Acts done after the purpose of the conspiracy has been accomplished may be admissible. *Com.* v. *Scott,* 123 Mass. 235, 25 Am Rep. 81.

Civil and criminal cases.— The rule of this article applies to both civil and criminal cases. *Knower* v. *Cadden Clothing Co.*, 57 Conn. 222; *Lowe* v. *Dalrymple,* 117 Pa. St. 564; *Beeler* v. *Webb,* 113 Ill. 436; *People* v. *Parker,* 67 Mich. 222; *Goins* v. *State,* 46 Ohio St. 457.

Common purpose.— The things must have been said, done or written in the execution or furtherance of the common purpose. *Knower* v. *Cadden Clothing Co.*, 57 Conn. 222; *State* v. *McGee,* 81 Ia. 17.

The time when any one became a conspirator is immaterial; he is thereafter deemed a party-conspirator to all acts done by any conspirator in furtherance of the common purpose. *U. S.* v. *Johnson,* 26 Fed. Rep. 682; *Bonner* v. *State,* 107 Ala. 97.

Conversations between A and B, during the pendency of the criminal enterprise, although after the doing of the act which the parties conspired to commit, is admissible against C, the other conspirator, in a trial for conspiracy. *Com.* v. *Smith*, 151 Mass. 491. See also *Com.* v. *Crowninshield*, 10 Pick. (Mass.) 497; *Com.* v. *Brown*, 14 Gray (Mass.), 419; *Com.* v. *Waterman*, 122 Mass. 43.

Preliminary proof.— The rule of the text as to preliminary proof of the conspiracy is supported by *Knower* v. *Cadden Clothing Co.*, 57 Conn. 222.

As to last statement of text, see *Nudd* v. *Barrows*, 91 U. S. 426; *Spies* v. *People*, 122 Ill. 1, 3 Am. St. Rep. 320; *Logan* v. *U. S.*, 144 U. S. 263, 309; *Am. Fur Co.* v. *U. S.*, 2 Pet. 358, 365; *Lincoln* v. *Claflin*, 7 Wall. 132, 139; *Lent* v. *Shear*, 55 N. E. 2, 160 N. Y. 462. Judgment (Sup. 1897), 46 N. Y. Supp. 1095, reversed. *Ormsby* v. *People*, 53 N. Y. 472.

The existence of the common purpose is primarily to be passed upon by the court, for the purpose of deciding on the admissibility of the evidence, but is ultimately for the jury. *Com.* v. *Brown*, 14 Gray (Mass.), 419; *State* v. *Thompson*, 69 Conn. 729.

The court must be satisfied that there is sufficient evidence to warrant the jury in finding a combination. *Cowles* v. *Coe*, 21 Conn. 234; *Knower* v. *Cadden Clothing Co.*, 57 Conn. 223; *State* v. *Thompson*, 69 Conn. 720.

Reason of the rule.— The evidence comes in as part of the *res gestæ*. *Dewey* v. *Moyer*, 72 N. Y. 70; *Garnsey* v. *Rhodes*, 138 N. Y. 461.

Statements by conspirators.— *People* v. *McKane*, 143 N. Y. 455.

New Jersey.

Conspiracy defined.— *Johnson* v. *State*, 26 N. J. L. 321.

General authority.— After a combination to commit a fraud has been proved, statements made by one are admissible against the others though not present. *Patton* v. *Freeman*, Coxe, 113.

If one joins with other conspirators after they have partly consummated their plans, he adopts their prior acts and declarations. *Stewart* v. *Johnson*, 3 Harr. 87.

A paper written by one conspirator and signed only by the others is admissible. *State* v. *Preston*, 1 N. J. L. J. 117.

Counterfeiters.— Where there is concert among counterfeiters, the act of one in carrying out their design is evidence against the others,

and possession of counterfeit money by one is the possession of the others. *State* v. *Tomlin*, 29 N. J. L. 13, 24.

Actions to set aside conveyances to defraud creditors.— *Stewart* v. *Johnson*, 18 N. J. L. 87.

Declarations of the *particeps criminis* in adultery are not admissible. *Doughty* v. *Doughty*, 32 N. J. Eq. 32; *Berckmans* v. *Berckmans*, 16 N. J. Eq. 122.

Maryland.

Conspiracy.— The fact of conspiracy must be *prima facie* established to the satisfaction of the judge, and thereupon acts and declarations of each conspirator in pursuance of their plan are admissible against the others. *Bloomer* v. *State*, 48 Md. 521.

Two persons having conspired to commit a crime, statements and letters by one in furtherance thereof are admissible against both. *Hays* v. *State*, 40 Md. 633.

Pennsylvania.

General rule.— *Hinchman* v. *Richie*, Brightly 143; *Weil* v. *Cohn*, 4 Pa. Super. Ct. 443; *Com.* v. *Eberle*, 3 S. & R. 9; *Hartman* v. *Diller*, 62 Pa. 37; *Heine* v. *Com.*, 91 Pa. 145.

An overt act by one conspirator is admissible against the others. *Com.* v. *O'Brien*, 140 Pa. 555.

After having proved a concert to commit burglary, it is permissible to prove a conversation between one of the conspirators and the person whose house was invaded whereby the information upon which all three acted was obtained. *Com.* v. *Biddle*, 200 Pa. 640.

Conspiracy having been shown, every act and word of each conspirator in carrying out the scheme is admissible against the others. *Com.* v. *Kirkpatrick*, 15 Leg. Int. 268; *Burns* v. *McCabe*, 72 Pa. 309.

Declarations of confederates made in prisoner's presence just prior to the murder are admissible against him. *Com.* v. *Bubnis*, 197 Pa. 542.

Preliminary proof.— The existence of the conspiracy must be shown *prima facie* before the rule applies. *Com.* v. *O'Brien*, 140 Pa. 555; *Com.* v. *Zuern*, 16 Pa. Super. Ct. 588; *Donnelly* v. *Com.*, 6 Wkly. Notes Cas. 104; *Marshall* v. *Faddis*, 199 Pa. 397.

The community of purpose must be shown by evidence other than the acts or statements of one. *Benford* v. *Sanner*, 40 Pa. 9; *Helser* v. *McGrath*, 58 Pa. 458.

But only slight evidence is required. *McDowell* v. *Russell,* 37 Pa. 164; *Scott* v. *Baker,* 37 Pa. 330.

Declarations after the fact.— Declarations of one conspirator made after the consummation of their object are not admissible against the others. *Wagner* v. *Haak,* 170 Pa. 495; *Heine* v. *Com.,* 91 Pa. 145.

The admissions of one conspirator after the purpose has been carried out are not admissible against the others. *Com.* v. *Kirkpatrick,* 15 Leg. Int. 268; *Benford* v. *Sanner,* 40 Pa. 9.

Civil and criminal cases.— The rule of this article applies to both civil and criminal cases. *Lowe* v. *Dalrymple,* 117 Pa. 564.

Combinations to defraud.— Where a combination to defraud creditors has been shown, the statements of any one in the combination are evidence against the others. *McKee* v. *Gilchrist,* 3 Watts, 230; *Jackson* v. *Summerville,* 13 Pa. 359; *McCaskey* v. *Graff,* 23 Pa. 321; *Kelsey* v. *Murphy,* 26 Pa. 78; *Deakers* v. *Temple,* 41 Pa. 234; *Brown* v. *Parkinson,* 56 Pa. 336; *Confer* v. *McNeal,* 74 Pa. 112.

Where the garnishee and principal debtor are shown to have made a fraudulent combination, statements of one are admissible against the other. *Palmer* v. *Gilmore,* 148 Pa. 48; *Sommer* v. *Gilmore,* 160 Pa. 129.

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.

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

* See Note IV.; see also Article 88 as to the proof of ancient deeds.

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.[8]

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

The fact that A's ancestors granted leases of it is deemed to be relevant.[9]

(*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 have been used, no one had power to dedicate it to the public, are all deemed to be relevant.[10]

(*d*) The question is, whether A has a several fishery in a river. The proceedings in a possessory suit in the Irish Court of Chancery by the plaintiff's predecessor in title, and a decree in that suit quieting the plaintiff's predecessor in his title, is relevant, as showing possession and enjoyment of the fishery at the time of the suit.[11]

AMERICAN NOTE.

General.

Authorities.— 1 Greenleaf on Evidence (15th ed.), secs. 34, 53a; 1 Taylor on Evidence (Chamberlayne's 9th ed.), sec. 123; Abbott's Trial Evidence (2d ed.), p. 873.

Boston v. *Richardson,* 105 Mass. 351; *Gloucester* v. *Gaffney,* 8 Allen (Mass.), 11; *Berry* v. *Raddin,* 11 Allen (Mass.), 577; *Osgood*

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[8] *Rogers* v. *Allen,* 1808, 1 Camp. 309.

[9] *Doe* v. *Pulman,* 1842, 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.

[10] 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.

[11] *Neill* v. *Duke of Devonshire,* 1882, L. R. 8 App. p. 135, and see especially p. 147.

v. *Coates*, 1 Allen (Mass.), 77; *Brown* v. *Cantrell*, 62 Ga. 257; *Hayne* v. *Hermann*, 97 Cal. 259, 32 Pac. 171.

Evidence of the character indicated in the text is admissible as a part of the *res gestæ*. *Harriman* v. *Hill*, 14 Me. 127; *McDonald* v. *McDonald*, 136 Ind. 603, 36 N. E. 286.

On questions of title, declarations explanatory of acts of possession, and in disparagement of title, are admissible. *Parker* v. *Marston*, 34 Me. 386; *Bennett* v. *Camp*, 54 Vt. 36; *Hobbs* v. *Cram*, 22 N. H. 130; *Blount* v. *Homey*, 43 Mo. App. 644.

Mere declarations in favor of title, not explanatory of any act by one in possession, are not admissible. *Smith* v. *Martin*, 17 Conn. 401; *Morrill* v. *Titcomb*, 8 Allen (Mass.), 100; *Osgood* v. *Coates*, 1 Allen (Mass.), 77.

The fact of executing a chattel mortgage may thus be shown. *Chillingworth* v. *Eastern Tinware Co.*, 66 Conn. 313.

Statements, by one in possession of property, to the effect that it was his, and the fact that he offered to sell it, and repaired it at his own expense, are admissible on the question of title, being acts "while he was in the possession of it, which naturally and usually flow from and accompany the ownership of personal property." *Avery* v. *Clemons*, 18 Conn. 309.

Disputed boundaries.— As to what evidence is admissible to establish boundary through wild land, see *Hunt* v. *Jackson*, 19 N. Y. 279.

As to what evidence is admissible, to establish acquiescence in a practical location, see *Ratcliffe* v. *Gray*, 3 Keyes, 510, 4 Abb. Dec. 4.

New Jersey.

Judgments.— The existence of a judgment as a part of a chain of title may be shown even in controversies with third parties. *Den.* v. *Hamilton*. 7 Hal. 109.

Boundaries.— Where a boundary is doubtful the practical construction of the deed by the parties is competent evidence. *Haring* v. *Van Houten*, 2 Zab. 61; *Smith* v. *State*, 3 Zab. 130; *Stockham* v. *Browning*, 18 N. J. Eq. 390.

Acts of the parties.— Evidence of acts under a contract and acquiescence therein admitted to prove the existence of such contract. *Veghte* v. *Raritan Co.*, 19 N. J. Eq. 142.

Maryland.

Title.— To prove title in replevin acts of ownership over the property may be proved. *Smith* v. *Wood*, 31 Md. 293.

Rolls and debt-books are admitted to prove possession. *Carroll* v. *Norwood*, 1 H. & J. 167; *Gittings* v. *Hall*, 1 H. & J. 14.

A judgment is evidence as against anybody when it is a link in a chain of title. *Barney* v. *Patterson*, 6 Har. & J. 182; *House* v. *Wiles*, 12 G. & J. 338.

Pennsylvania.

Authorities.— *Sailor* v. *Hertzog*, 10 Pa. 296.

Books and papers of the land-office are admissible to prove title. *Goddard* v. *Gloninger*, 5 Watts, 209; *Struthers* v. *Reese*, 4 Pa. 129; *Dikeman* v. *Parrish*, 6 Pa. 210; *Vastbinder* v. *Wager*, 6 Pa. 339; *Strimpfler* v. *Roberts*, 18 Pa. 283.

Evidence that one insured certain goods is admissible to prove his title. *Dicken* v. *Winters*, 169 Pa. 126.

In action for negligence, evidence of the receipt of insurance money for loss by fire is admissible to prove ownership. *Grier* v. *Sampson*, 27 Pa. 183.

A deed is admissible to show that one is in possession under color of title, even though no title whatever was conveyed by the deed itself. *Dieze* v. *Fackler*, 7 Phila. 220, 223; *McCoy* v. *College*, 5 S. & R. 254.

The minutes of a canal company and its occupation of a canal for many years are admissible to prove its ownership. *Canal Co.* v. *Loyd*, 4 W. & S. 393.

The seizure of specific property in execution by one holding a judgment is admissible to prove his want of title otherwise. *Warner* v. *Scott*, 39 Pa. 274.

Assessment-books and tax receipts admissible on question of title. *Irvin* v. *Patchin*, 164 Pa. 51.

The acts and declarations of the owner of personal property are admissible against those claiming under him. *Caldwell* v. *Gamble*, 4 Watts, 292.

Judgments.— A judgment which is the basis of title to chattels is admissible. *Martin* v. *Rutt*, 127 Pa. 380.

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.

Illustrations.

(*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.[12]

(*b*) The question was, whether by the custom of the country a tenant-farmer not prohibited by his lease from doing so might pick and sell surface flints, minerals being reserved by his lease. The fact that under similar provisions in leases of neighbouring farms flints were taken and sold is deemed to be relevant.[13]

AMERICAN NOTE.

General.

Authorities.— 2 Greenleaf on Evidence (15th ed.), sec. 252; *Knowles* v. *Dow*, 22 N. H. 387, 403, 55 Am. Dec. 163; *First Nat. Bank* v. *Goodsell*, 107 Mass. 149; *Morse* v. *Woodworth*, 155 Mass.

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[12] *Muggleton* v. *Barnett*, 1856, 1 H. & N. 282; and see *Johnstone* v. *Lord Spencer*, 1885, 30 Ch. Div. 581. It was held in this case that a custom might be shown by uniform practice which was not mentioned in any custumal Court roll or other record. For cases of evidence of a custom of trade, see *Ex parte Powell, in re Mathews*, 1875, 1 Ch. D. 501; and *Ex parte Turquand, in re Parker*, 1885, 14 Q. B. D. 636. See too the Notes on *Wigglesworth and Dallison*, in 1 Smith's Leading Cases.

[13] *Tucker* v. *Linger*, 1882, L. R. 21 Ch. Div. 18; and see p. 37.

233, 29 N. E. 525; *Chateaugay Ore & Iron Co.* v. *Blake,* 144 U. S. 476; *Governor* v. *Withess,* 5 Gratt. (Va.) 24, 50 Am. Dec. 95; *Adams* v. *Pittsburg Iron Co.,* 95 Pa. St. 348, 40 Am. Rep. 662. But see 27 Am. & Eng. Encyclopædia of Law (1st ed.), p. 738.

To prove that a note executed by C, as treasurer of a town, was the note of the town,— Held, that evidence was admissible of votes passed by the town, from time to time, during a long period of years, authorizing its treasurers to borrow money, for the use of the town, and that the treasurers, under such votes, had generally given notes for the money borrowed, similar in form to that in question, which had always been paid by the town, by which also the treasurers' reports, mentioning these bonds, had always been accepted. *Bank of New Milford* v. *New Milford,* 36 Conn. 100.

The purchaser of a cemetery lot from the person who laid out the cemetery received a deed, from the language of which it was uncertain whether a title to the adjoining alleys passed or not. Held, that evidence was admissible in favor of the grantor that it was the custom in other cemeteries, both in the same town and elsewhere, for the original proprietors to have and retain the right of control, etc., over the alleys. *Seymour* v. *Page,* 33 Conn. 66.

Trade Customs.— As to proving customs of trade or business, see *Mathias* v. *O'Neill,* 94 Mo. 520, 6 S. W. 253; *Adams* v. *Pittsburgh Ins. Co.,* 95 Pa. St. 348, 40 Am. Rep. 662; *Chateaugay Iron Co.* v. *Blake,* 144 U. S. 476.

One witness enough.— A usage may be established by one witness. *Robinson* v. *U. S.,* 13 Wall. 363; *Sawtelle* v. *Drew,* 122 Mass. 228.

New Jersey.

Proof of business customs.— *Ocean Beach Assn.* v. *Brinley,* 34 N. J. Eq. 438.

The custom of an individual.— A testator's custom of canceling notes by cutting off his signature admitted to prove cancellation of his will in a similar manner. *Smock* v. *Smock,* 11 N. J. Eq. 156.

A factor's custom of entering in his books whether or not sales were guaranteed not admissible to prove that he did not guarantee a certain one. *Park* v. *Miller,* 27 N. J. L. 338.

Trade customs.— *Burton* v. *McKelway*, 2 Zab. 165; *Steward* v. *Scudder*, 4 Zab. 96; *Schenck* v. *Griffen*, 38 N. J. L. 463.

Custom giving a partner the right to interest on advances made to the firm. *Morris* v. *Allen*, 14 N. J. Eq. 44.

Maryland.

Proof of custom.— A custom cannot be proved by the testimony of a single person who knows of but a single instance. *Duvall* v. *Bank*, 9 G. & J. 31.

Question of fact.— Whether a custom exists is a question of fact for the jury. *Burroughs* v. *Langley*, 10 Md. 248; *B. & O. R. R. Co.* v. *Green*, 25 Md. 72.

A general business usage must be established as a fact and cannot be established by opinion evidence based upon a few instances in particular institutions. *Bank* v. *Swain*, 29 Md. 483.

Personal custom.— One's personal custom as to drawing deeds not admitted. *Pocock* v. *Hendricks*, 8 G. & J. 421.

Pennsylvania.

Custom.— Proof of an isolated instance is not enough to prove a custom and notice thereof. *Cope* v. *Dodd*, 13 Pa. 33; *Adams* v. *Insurance Co.*, 76 Pa. 411.

A custom in violation of morality and law is not admissible. *Holmes* v. *Johnson*, 42 Pa. 159.

A custom in a city to permit water from the roofs to flow across pavements not admissible in action for damages caused by a fall. *Brown* v. *White*, 202 Pa. 297.

One's custom of drawing notes differently when for different purposes admitted to show that a certain note was for goods sold. *Snyder* v. *Wertz*, 5 Whart. 163.

Evidence of a custom contrary to the common law not received. *Stoever* v. *Whitman*, 6 Binn. 416.

Trade customs.— As to proving customs of trade or business, see *Adams* v. *Pittsburgh Ins. Co.*, 95 Pa. 348, 40 Am. Rep. 662.

Custom of trading between plaintiff and deceased is admissible to prove a completed sale. *Cope's Estate*, 191 Pa. 589.

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 —

any fact which supplies a motive for such an act, or which constitutes preparation for it;[14]

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.[15]

Illustrations.

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

The facts that, at the instigation of A, B murdered C twenty-five years 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.[16]

(*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.[17]

(*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 favourable to himself, or that he destroyed or concealed things or papers, or prevented the presence or procured the

14 Illustrations (*a*) and (*b*).

15 Illustrations (*c*) (*d*) and (*e*).

16 *R.* v. *Clewes*, 1830, 4 C. & P. 221.

17 *R.* v. *Palmer*, 1856, printed report from Notes of Anglo Taylor and Gen. View, 230–272, *passim*.

absence of persons who might have been witnesses, or suborned persons to give false evidence, are deemed to be relevant.[18]

(*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.[19]

(*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,[20] as conduct subsequent to a fact in issue tending to show that it had not happened.

AMERICAN NOTE.

General.

Authorities.— Underhill on Evidence, sec. 9; McKelvey on Evidence, p. 146; 11 Am. & Eng. Encyclopædia of Law (2d ed.), p. 503 *et seq.*

Motive.— Facts supplying a motive may be shown in connection with other evidence. *State* v. *Palmer,* 65 N. H. 216; *Dodge* v. *Carroll,* 59 N. H. 237; *State* v. *Watkins,* 9 Conn. 52, 54; *Com.* v. *McCarthy,* 119 Mass. 354; *Com.* v. *Bradford,* 126 Mass. 42; *Com.* v. *Abbott,* 130 Mass. 472; *Com.* v. *Choate,* 105 Mass. 451; *Com.* v. *Hudson,* 97 Mass. 565; *Com.* v. *Vaughan,* 9 Cush. (Mass.) 594; *Scott* v. *People,* 141 Ill. 195; *Benson* v. *State,* 119 Ind. 488; *Tucker* v. *Tucker,* 74 Miss. 93. 32 L. R. A. 623; *State* v. *Glahn,* 97 Mo. 679; *Moore* v. *U. S.,* 150 U. S. 57; *Alexander* v. *U. S.,* 138 U. S. 353.

That the victim had been pressing the accused for payment of a debt is relevant, as showing motive, in a trial for murder. *Com.* v. *Webster,* 5 Cush. (Mass.) 295.

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[18] *R.* v. *Patch,* 1805, Wills Circ. Ev. (4th ed.) 239; *R.* v. *Palmer,* ub. sup. (*passim*).

[19] Common practice.

[20] *Moriarty* v. *London, Chatham and Dover Ry. Co.,* 1870, L. R. 5 Q. B. 314; compare *Grey* v. *Redman,* 1875, 1 Q. B. D. 161.

The fact of excessive insurance may be shown in the trial of the owner of a house, who is charged with unlawfully burning it, as it tends to supply a motive. *Com.* v. *McCarthy*, 119 Mass. 354; *State* v. *Cohn*, 9 Nev. 179.

Evidence of motive must not be too remote. *Com.* v. *Abbott*, 130 Mass. 472.

Threats.— Threats to do the act may be proved. *Caverno* v. *Jones*, 61 N. H. 623; *State* v. *Day*, 79 Me. 120; *State* v. *Bradley*, 64 Vt. 466, 24 Atl. 1053; *Mead* v. *Husted*, 49 Conn. 337; *State* v. *Hoyt*, 46 Conn. 330; *State* v. *Hawley*, 63 Conn. 49; *State* v. *Kallaher*, 70 Conn. 398; *State* v. *Fry*, 67 Ia. 475; *People* v. *Eaton*, 59 Mich. 559; *Com.* v. *Holmes*, 157 Mass. 233; *Com.* v. *Crowe*, 165 Mass. 140.

Remote and obscure allusions, by the accused, to the act in contemplation are admissible on a criminal prosecution, as tending to show an existing disposition or design. *State* v. *Hoyt*, 47 Conn. 538, 539.

The threats of third persons are not admissible. *State* v. *Beaudeaut*, 53 Conn. 536.

Preparation.— Acts of preparation may be proved. *Com.* v. *Choate*, 105 Mass. 451; *Com.* v. *Blair*, 126 Mass. 40; *Com.* v. *Robinson*, 146 Mass. 571, 16 N. E. 452; *People* v. *Hope*, 62 Cal. 291; *Spies* v. *People*, 122 Ill. 1; *McManus* v. *Com.*, 91 Pa. 57.

As tending to show whether a horse was sold with or without a warranty, the advertisement of the sale is admissible. *McGaughey* v. *Richardson*, 148 Mass. 608.

That the accused obtained the instruments with which the crime was committed may be proved. *Com.* v. *Roach*, 108 Mass. 289; *Com.* v. *Blair*, 126 Mass. 40.

Malice.— Declarations showing malice towards the victim are admissible. *Mead* v. *Husted*, 49 Conn. 337; *State* v. *Hoyt*, 46 Conn. 330; *Com.* v. *Goodwin*, 14 Gray (Mass.), 55; *Com.* v. *Holmes*, 157 Mass. 233.

Statement of intention.— And so is a declaration of intention to do the act. *Mills* v. *Sword Lumber Co.*, 63 Conn. 108.

But a declaration that one will not do a certain act is not admissible to show that he did not do it. *Fowler* v. *Madison*, 55 N. H. 171.

Sustaining text.— *Elwell* v. *Russell*, 71 Conn. 462.

Subsequent conduct.— The making of false statements after the alleged act, which would tend to give a wrong impression concerning the connection of the one sought to be held accountable with the act, may be shown. *State* v. *Reed*, 62 Me. 129; *State* v. *Benner*, 64 Me. 267;

Com. v. *Webster*, 5 Cush. (Mass.) 316, 52 Am. Dec. 711; *Com.* v. *Trefethen*, 157 Mass. 180, 31 N. E. 961, 24 L. R. A. 235; *State* v. *Reed*, 62 Me. 129.

And so may the fabrication of evidence. *State* v. *Williams*, 27 Vt. 226; *Lyons* v. *Lawrence*, 12 Ill. App. 53; *Heslop* v. *Heslop*, 82 Pa. 537.

And efforts to secure the absence of witnesses. *State* v. *Barron*, 37 Vt. 57; *State* v. *Nocton*, 121 Mo. 537; and attempts to bribe a juror. *Hastings* v. *Stetson*, 130 Mass. 76; *Taylor* v. *Gilman*, 60 N. H. 506; or to escape justice. *State* v. *Frederic*, 69 Me. 400; *State* v. *Palmer*, 60 N. H. 216, 20 Atl. 6; *Hickory* v. *U. S.*, 160 U. S. 408.

The subsequent conduct of the alleged victim may also be shown, *e. g.*, in assault with intent to procure an abortion. *State* v. *Lee*, 69 Conn. 186.

Willingness or unwillingness to be searched may be shown. *Riley* v. *Gourley*, 9 Conn. 161.

The accused, in order to meet evidence that he gave a false account of himself, cannot show that on other occasions he gave a true account. *Com.* v. *Goodwin*, 14 Gray (Mass.), 55.

Hiding or flight after the act, to avoid arrest, may be proved. *Com.* v. *Annis*, 15 Gray (Mass.), 197; *Com.* v. *Tolliver*, 119 Mass. 312; *Com.* v. *Brigham*, 147 Mass. 414.

Authorities on the last proposition of the text.— *Elwell* v. *Russell*, 71 Conn. 462; *Jewell* v. *Jewell*, 1 How. (U. S.) 219, 232; *Morris* v. *French*, 106 Mass. 326; *Banfield* v. *Whipple*, 10 Allen (Mass.), 27; *Mitchum* v. *State*, 11 Ga. 615, 621; *Taylor* v. *Gilman*, 60 N. H. 506; *Lovell* v. *Briggs*, 2 N. H. 218.

In a civil case the conduct of any one naturally influenced by the alleged act may be shown. Thus the question being whether a gift was made, the conduct of the alleged donee may be shown. *Brown* v. *Butler*, 71 Conn. 582.

Evidence of repairs after an accident has been held irrelevant on the issue of negligence. *A., T. & S. F. R. R. Co.* v. *Parker*, 53 Fed. Rep. 595, and cases cited.

Evading arrest.— It is competent to show that the accused attempted to evade the officers. *People* v. *Taylor*, 3 N. Y. Cr. 297.

Fabricating evidence.— That one has attempted to fabricate evidence for the purposes of defense may be shown. *People* v. *Bassford*, 3 N. Y. Cr. 219.

Bribing witnesses.— It is competent to show that an agent of a party employed to collect testimony and interview witnesses has

resorted to bribery even though he was not expressly authorized to employ such means. *Nowack* v. *Metropolitan St. Ry. Co.*, 166 N. Y. 433, 60 N. E. 32, reversing 66 N. Y. Supp. 533.

Evidence of bribery while admissible is not conclusive. It is proper to warn the jury not to give undue importance to such testimony. *Nowack* v. *Metropolitan St. Ry. Co.*, 166 N. Y. 433, 60 N. E. 32, reversing 66 N. Y. Supp. 533.

False or evasive testimony.— Falsehood and evasion by the accused are proper evidence upon the question of his guilt or innocence. *People* v. *Conroy*, 97 N. Y. 62, 80, 2 N. Y. Cr. 565, 33 Hun, 119.

New Jersey.

Motive.— To prove motive in trial for homicide the State may prove how much money deceased had. *Donnelly* v. *State*, 26 N. J. L. 610.

To show motive for murder the State may prove that the defendant and the wife of the deceased occupied the same room for two nights shortly after the murder. *State* v. *Abbatto*, 64 N. J. L. 658.

Intoxication may be shown on the question of intent or premeditation. *State* v. *Walker*, 7 N. J. L. J. 86; *State* v. *Agnew*, 10 N. J. L. J. 165.

Preparation.— Statements in preparation for an act are admissible with proof of the act. *Hunter* v. *State*, 40 N. J. L. 538.

Subsequent declarations.— Only when part of the *res gestæ* may subsequent declarations be introduced to explain a declaration against interest. *Guild* v. *Aller*, 17 N. J. L. 310.

Failure to testify.— Failure of an accused to become a witness may be considered by the jury. *Parker* v. *State*, 61 N. J. L. 308.

Failure to call witness.— Failure to call an alleged paramour to testify, although within easy reach, is significant of guilt. *Bibby* v. *Bibby*, 33 N. J. Eq. 56.

Nonproduction of evidence.— Nonproduction of material documents in one's possession raises a presumption against the possessor. *Eckel* v. *Eckel*, 49 N. J. Eq. 587.

Voluntary destruction of an instrument raises a presumption that it was unfavorable to party doing the act. *Jones* v. *Knauss*, 31 N. J. Eq. 609.

Threats.— *State* v. *Agnew*, 10 N. J. L. J. 165.

Uncommunicated threats of the deceased not admissible to support the claim of self-defense. *State* v. *Zellers*, 7 N. J. L. 220.

Maryland.

Intention.— One may testify as to his own intention where it is relevant. *Phelps* v. *Georges Creek Co.*, 60 Md. 536.

No evidence as to one's intention is permitted when the law raises a conclusive presumption concerning it from the acts themselves. *Lineweaver* v. *Slagle*, 64 Md. 465.

One may testify as to his motive for doing a certain thing where intention is material. *Trader* v. *Lowe*, 45 Md. 1.

Declarations of one accused of murder made before the crime are admissible to prove intent. *State* v. *Ridgely*, 2 Har. & McH. 120.

Evidence to show the motives and intentions of the parties and the real nature of a transaction is admissible. Threats and artifice. *Cook* v. *Carr*, 20 Md. 403.

Threats.— Threats and the purchase of ammunition by the deceased are not admissible on behalf of the accused when he did not know of either. *Turpin* v. *State*, 53 Md. 462.

State of mind in homicide.— The State may show that the accused was armed and vindictive shortly before the homicide. *Kernan* v. *State*, 65 Md. 253.

Malice.— To prove malice in an action for slander, letters written by defendant to plaintiff, though not published, are admissible. *Gambrill* v. *Schooley*, 95 Md. 260.

Motives of outsiders.— The motives of a third party who induced a witness for the State to leave the State for a bribe are not admissible. *Chelton* v. *State*, 45 Md. 560.

Failure to testify.— Failure to testify when accused of fraud raises a presumption against one. *Dawson* v. *Waltemeyer*, 91 Md. 328.

The prosecuting attorney may comment to the jury on the failure of the accused to deny as a witness the allegations of the State. *Brashears* v. *State*, 58 Md. 563.

Proving a fact by inferior evidence when better evidence is in the possession of the party warrants an inference that the latter would not be in favor of his contention. *Insurance Co.* v. *Evanns*, 9 Md. 1.

Criminal cases.— Refusal or neglect of a defendant in a criminal prosecution to testify raises no presumption against him. P. G. L. 1888, art. 35, § 3.

Preparation.— Proposition made by defendant to take an unfrequented path is admissible as showing preparation to commit a crime; it may be shown also that defendant had a pistol. *Garlitz* v. *State*, 71 Md. 293.

Pennsylvania.

Motive.— Jealousy as motive for murder. *McCue* v. *Com.*, 78 Pa. 185; *Com.* v. *McManus*, 143 Pa. 64. Other motives for murder. *Ettinger* v. *Com.*, 98 Pa. 338; *Sayres* v. *Com.*, 88 Pa. 291.

The admission by defendant of one adequate motive does not prevent proof of another by the State. *Com.* v. *Spink*, 137 Pa. 255.

Evidence to show that motive for murder was to secure life insurance held admissible. *Com.* v. *Clemmer*, 190 Pa. 202.

Evidence that defendant was a "Molly Maguire" is competent to show motive for murder. *Carroll* v. *Com.*, 84 Pa. 107; *Campbell* v. *Com.*, 84 Pa. 187; *McManus* v. *Com.*, 91 Pa. 57; *Hester* v. *Com.*, 85 Pa. 139.

Where a question relates to conduct, evidence as to motives, feeling, and natural instincts is admissible. *Allen* v. *Willard*, 57 Pa. 374.

In murder trial, evidence of the relation between accused and deceased's wife is admissible to show motive. *Com.* v. *Fry*, 198 Pa. 379; *Com.* v. *Ferrigan*, 44 Pa. 386; *Turner* v. *Com.*, 86 Pa. 54.

Possession by the defendant of property obtained by the crime is admissible. *Brown* v. *Com.*, 76 Pa. 319.

Preparation.— Acts of preparation may be proved. *McManus* v. *Com.*, 91 Pa. 57.

Subsequent conduct.— Subsequent conduct showing consciousness of guilt is admissible. *McCabe* v. *Com.*, 8 Atl. 45.

To show a purpose or design to hinder, delay, or defraud creditors in making a conveyance, declarations of the grantor subsequent to the conveyanee are admissible. *Boyer* v. *Weimer*, 204 Pa. 295.

Subsequent conduet to prove a conspiracy. *Respublica* v. *Hevice*, 2 Yeates, 114.

In action for *crim. con.* after giving evidence of adultery prior to separation subsequent adultery may be proved. *Sherwood* v. *Titman*, 55 Pa. 77.

Subsequent explanatory acts. *Reigart* v. *Ellmaker*, 10 S. & R. 27.

The State may prove the circumstances of making the arrest, including the fact that the defendant killed one of the officers. *Com.* v. *Biddle*, 200 Pa. 647.

Flight is evidence of guilt. *Com.* v. *Boschino*, 176 Pa. 103.

Subsequent precautions.— Precautions taken after an accident not admissible to prove prior negligence. *Elias* v. *Lancaster*, 203 Pa. 636; *Baran* v. *Read. Iron Co.*, 202 Pa. 274; *Hagar* v. *Wharton Twp.*, 200 Pa. 281.

In an action for damages caused by falling into a culvert, evidence showing that the culvert was repaired after the accident is not admissible. *Fisher* v. *Railroad Co.*, 182 Pa. 457.

In action for negligence at a crossing it is allowable to show that the defendant shortly after erected gates there. *Lederman* v. *Pennsylvania R. Co.*, 165 Pa. 118.

Fabrication of evidence.— Fabrication of evidence indicates guilt. *McMeen* v. *Com.*, 114 Pa. 300; *Com.* v. *Twitchell*, 1 Brewst. 551; *Heslop* v. *Heslop*, 82 Pa. 537.

It is admissible for one to show that the adverse party at a previous trial of the case attempted to suborn perjury and corrupt the jury. *McHugh* v. *McHugh*, 186 Pa. 197.

A plaintiff may be asked on cross-examination whether he did not at a previous trial of the case attempt to influence the jury corruptly. *Beck* v. *Hood*, 185 Pa. 32.

False statements as to what defendant did with his child are admissible to prove its murder. *Com.* v. *Johnson*, 162 Pa. 63.

Attention of jury may be called to contradictory statements of a prisoner in relation to the crime. *Cathcart* v. *Com.*, 37 Pa. 108.

Evidence that insured died of consumption in 1900 is admissible to prove that he made false statements in his application in 1899. *Murphy* v. *Insurance Co.*, 205 Pa. 444.

Failure to produce testimony.— Failure to produce evidence is not necessarily suppression thereof. *McCabe* v. *Com.*, 8 Atl. 45.

No presumption as to what a witness' testimony would be from failure to call him. *Com.* v. *McMahon*, 145 Pa. 413.

Flight.— Flight of a person charged with crime may be considered as indicating guilt. *Com.* v. *McMahon*, 145 Pa. 413; *Com.* v. *Roland*, 8 Phila. 606.

Threats.— A threat to rob is admissible on a trial for murder. *Com.* v. *Farrell*, 187 Pa. 408.

Threats and flight to show murder. *Com.* v. *Saiyards*, 158 Pa. 501.

Uncommunicated threats are admissible to show motive and intention. *Com.* v. *Keller*, 191 Pa. 122.

Threats made by defendant to kill A are not admissible on his trial for the killing of B. *Abernethy* v. *Com.*, 101 Pa. 322.

Threats are admissible though not made directly against the deceased. *Hopkins* v. *Com.*, 50 Pa. 9.

Threats and the commission of a previous offense may be proved in trial for the murder of a policeman. *Com.* v. *Major*, 198 Pa. 290.

Ability and opportunity.— Declarations indicating the defendant's ability to " shut anybody's wind off." *Com.* v. *Crossmire*, 156 Pa. 304.

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.[21]

In criminal cases the conduct of the person against whom the offence is said to have been committed, and in particular the fact that soon after the offence he made a complaint to persons to whom he would naturally complain, are deemed to be relevant. The terms of the complaint are irrelevant; except that in a case of rape or other sexual offence where the consent of the person against whom the offence was committed to the act charged as an offence is in issue, the terms of the complaint are relevant as showing that the conduct of such person was consistent with the denial of consent.[22]

When a person's conduct is in issue 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.[23]

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* See Note V.

21 Illustrations (*a*) 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*.

22 *R.* v. *Lillyman,* [1896], 2 Q. B. 167; see Illustration (*c*) and the note thereto.

23 *R.* v. *Edmunds,* 1833, 6 C. & P. 164; *Neil* v. *Jakle,* 1849, 2 C. & K. 709.

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.[24]

(*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.[25]

(*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 terms of the complaint, and the circumstances under which it was made, are relevant.[26]

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.

AMERICAN NOTE.

General.

Authorities.— 1 Greenleaf on Evidence (15th ed.), sec. 108; 2 Taylor on Evidence (Chamberlayne's 9th ed.), p. 391[46], sec. 581; Underhill on Evidence, sec. 52.

Statements accompanying act.— Authorities on the first paragraph of the text. *Hall* v. *Young*, 37 N. H. 134; *Carter* v. *Beals*, 44 N. H. 408; *Whittemore* v. *Wentworth*, 76 Me. 20; *Lund* v. *Tynsborough*, 9 Cush. (Mass.) 36, 41; *Kingsford* v. *Hood*, 105 Mass. 495; *Place* v. *Gould*, 123 Mass. 347; *Milford* v. *Bellingham*, 16 Mass. 108;

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24 *Rawson* v. *Haigh*, 1824, 2 Bing. 99; *Bateman* v. *Bailey*, 1794, 5 T. R. 512.

25 *Wright* v. *Doe* d. *Tatham*, 1837, 7 A. & E. 324–5 (*per* Denman, C. J.).

26 *R.* v. *Lillyman*, [1896], 2 Q. B. 167. The above illustration and that portion of the text which is founded on it, are intended to express the decision in this case; but see Note V. as to the difficulties to which it has given rise.

Deveney v. *Baxter*, 157 Mass. 9; *Bank* v. *Kennedy*, 17 Wall. 19, 24; *McDowell* v. *Goldsmith*, 6 Md. 319, 338, 61 Am. Dec. 305; *Hamilton* v. *State*, 36 Ind. 280, 10 Am. Rep. 22, *n.; Bagly* v. *Massie*, 38 Ala. 89, 79 Am. Dec. 82.

In order that evidence be admissible as part of the *res gestæ* the act which it characterizes, and of which it forms a part, must be admissible. *Pinney* v. *Jones*, 64 Conn. 550, 42 Am. St. Rep. 209.

Declarations made by one as he is leaving town, that he is going to a particular place for a particular purpose, are admissible in favor of his representatives, as a part of the *res gestæ*. *Douglas* v. *Chapin*, 26 Conn. 92.

Where the residence of one is in issue, a statement while travelling towards the place claimed on the trial as his residence, that he "was going home" to B, is admissible. *New Milford* v. *Sherman*, 21 Conn. 112.

In questions of domicil and the like, statements accompanying an act of removal are admissible. *Fulham* v. *Howe*, 62 Vt. 386; *Deer Isle* v. *Winterport*, 87 Me. 37; *Rudd* v. *Rounds*, 64 Vt. 432; *Viles* v. *Waltham*, 157 Mass. 542; *Johnson* v. *Sherwin*, 3 Gray (Mass.), 374.

Declarations of one paying money are admissible on an issue involving the application to be made of the payment. *Woodstock* v. *Clark*, 25 Vt. 308.

Where sanity is in question statements accompanying conduct are relevant. *Foster's Exrs.* v. *Dickerson*, 64 Vt. 233; *Barber's Appeal*, 63 Conn. 393.

The question being where the commanding officers of a company of soldiers on a steamboat were, and what they were doing to keep order at the time of a disturbance on board, evidence was offered of a conversation between a sergeant and commissioned officer in the saloon, referring to the disturbance as then going on upon deck, and the action to be taken to quiet it. Held, to be admissible on the question at issue, and as part of the *res gestæ*. *Flint* v. *Norwich & New York Transp. Co.*, 7 Blatchf. 543–547 (U. S. Circuit Court); affirmed in 13 Wall. 3.

Narrative of past events.— A narrative of past events is inadmissible. *Cottison* v. *Cottison*, 22 Pa. 375; *Robinson* v. *State*, 57 Md. 14. *Compare Mutual Life Ins. Co.* v. *Hillmon*, 145 U. S. 285; *Chicago, etc., R. Co.* v. *Chancellor*, 165 Ill. 438; *Baxter* v. *Camp*, 71 Conn. 246.

In an action for injuries caused by the bite of a dog, evidence of the declaration of the plaintiff that she had been bitten by the dog, made to her mother within five minutes of the injury, is but a narrative of a past event, and inadmissible as part of the *res gestæ*. *M'Carrick* v. *Kealy*, 70 Conn. 642.

Complaints.— The American authorities generally state the rule that the fact of complaint is relevant as applying only to prosecutions for rape and other offenses against women. American Law Review, vol. xiv, pp. 829–838; *Haynes* v. *Com.*, 28 Gratt. (Va.) 942, and the authorities at the head of this note.

In rape cases the fact of complaint may be shown. *State* v. *Carroll*, 67 Vt. 477; *Com.* v. *Phillips*, 162 Mass. 504; *Stevens* v. *People*, 158 Ill. 111; *People* v. *Stewart*, 97 Cal. 238; *Cross* v. *State*, 132 Ind. 65; *Parker* v. *State*, 67 Md. 329; *Lee* v. *State*, 74 Wis. 45; *Johnson* v. *State*, 17 Ohio, 593; *Oleson* v. *State*, 11 Neb. 276, 38 Am. Rep. 366.

A delay of weeks or months, if explained, does not render the fact of complaint inadmissible. *State* v. *Wilkins*, 66 Vt. 1.

Nor does that of more than a year. It simply affects the weight of the evidence. *State* v. *Byrne*, 47 Conn. 465, 466, 467.

The conduct of a woman subsequent to the commission of an alleged abortion may be shown in a prosecution against one for performing the abortion. *State* v. *Lee*, 69 Conn. 196.

Evidence of constancy in accusation is admissible. *State* v. *De Wolf*, 8 Conn. 99.

Terms of complaint irrelevant.— The terms of the complaint are irrelevant. *State* v. *Knapp*, 45 N. H. 148, 155.

In some States the converse of the rule of the text as to complaints in prosecutions for offenses against women has been held and the terms of the complaint are considered relevant. *State* v. *Kinney*, 44 Conn. 153, 26 Am. Rep. 436; *Burt* v. *State*, 23 O. St. 394; *Hill* v. *State*, 5 Lea (Tenn.), 725. See, also, *Benton* v. *Starr*, 58 Conn. 285. So where the complainant is a girl of tender years. *Harmon* v. *State*, 70 Wis. 448.

Statements of others.— Authorities on the rule of the text that statements made in the presence of one are admissible. *Johnson* v. *Day*, 78 Me. 224, 3 Atl. 647; *Morrill* v. *Richey*, 18 N. H. 295; *Ettinger* v. *Com.*, 98 Pa. 338; *Watt* v. *People*, 126 Ill. 9; *Conway* v. *State*, 118 Ind. 482; *B. & W. R. R. Co.* v. *Dana*, 1 Gray (Mass.), 83; *Com.* v. *Call*, 21 Pick. (Mass.) 515; *Waldridge* v. *Arnold*, 21 Conn. 424;

People v. *Shea,* 8 Cal. 538; *Knowlton* v. *Clark,* 25 Ind. 391; *Friend* v. *Hamill,* 34 Md. 298, 308. But see *Mattocks* v. *Lyman,* 16 Vt. 113.

The admissibility of statements made in the presence of a person under the last paragraph of the text, rests upon the theory that tacit acquiescence constitutes an admission. *Johnson* v. *Day,* 78 Me. 224; *Proctor* v. *Old Colony R. R. Co.,* 154 Mass. 251. The rule applies when the statements charge the commission of a crime. *State* v. *Reed,* 62 Me. 129; *Com.* v. *Galavan,* 9 Allen (Mass.), 271; *Com.* v. *Bailey,* 134 Mass. 527.

The rule does not apply where the circumstances are such that the person cannot speak, as where the statements are made in court. *State* v. *Boyle,* 13 R. I. 537; *Martin* v. *Capital Ins. Co.,* 85 Ia. 643. But see *Brainard* v. *Buck,* 25 Vt. 573, 60 Am. Dec. 291. But if the person were subsequently called as a witness, and had an opportunity to reply, the rule of the text is applicable. *Blanchard* v. *Hodgkins,* 62 Me. 119.

It has no application where a reply is not naturally called for. *Gale* v. *Lincoln,* 11 Vt. 152; *Hersey* v. *Barton,* 23 Vt. 685; *Pierce's Admr.* v. *Pierce,* 66 Vt. 369, 29 Atl. 364; *Drury* v. *Hervey,* 126 Mass. 519. If a reply is made it is admissible. *Com.* v. *Trefethen,* 157 Mass. 180.

It does not apply where the person cannot hear or comprehend the statements. *Tufts* v. *Charlestown,* 4 Gray (Mass.), 537. Such evidence may go to the jury with the evidence showing that the statement was not heard. *Mallen* v. *Boynton,* 132 Mass. 443; *Com.* v. *Sliney,* 126 Mass. 49.

It does not apply where the person has no knowledge of the interest affected by the claim of admission or of the facts. *Ware* v. *Ware,* 8 Me. 42; *Robinson* v. *Blen,* 20 Me. 109.

Complaints and exclamations of pain.— Complaints of pain and distress, at the time of an alleged injury, are competent. *Caldwell* v. *Murphy,* 11 N. Y. 416, 1 Duer, 233; *Werely* v. *Persons,* 28 N. Y. 344; *Matteson* v. *New York Central Railroad Co.,* 35 N. Y. 487, 62 Barb. 364; *Creed* v. *Hartman,* 8 Bos. 123; *Baker* v. *Griffin,* 10 Bos. 140; *Lewke* v. *Dry-Dock, East Broadway R. R. Co.,* 46 Hun, 283; *Powers* v. *West Troy,* 25 Hun, 561. And so are statements to an attending physician. *Cleveland* v. *New Jersey Steamboat Co.,* 5 Hun, 523; *Murphy* v. *New York Central Railroad Co.,* 66 Barb. 125. This has not been changed by the statute permitting the parties to be witnesses in their own behalf. *Hagenlocher* v. *Coney Island R. R. Co.,* 99 N. Y. 136.

Exclamations, "Take these splinters out of my leg! take these splinters out!" uttered immediately after the accident, are admissible, there being no splinters. *West* v. *Manhattan Ry. Co.*, 16 N. Y. St. R. 886, 121 N. Y. 654.

Res gestæ.— Evidence may come in as part of the *res gestæ*. *Wilson* v. *Genseal*, 113 Ill. 403, 405; *Black* v. *Wabash, etc., Co.*, 111 Ill. 351, 360; *Harding* v. *Harding*, 75 Ill. App. 590; *Healy* v. *People*, 163 Ill. 372.

Declarations are admissible if part of the *res gestæ*. *Paul* v. *Berry*, 78 Ill. 158; *Bushnell* v. *Wood*, 85 Ill. 88; *Caldwell* v. *Gowey*, 85 Ill. 611; *G. Accident Ins. Co.* v. *Gerrish*, 163 Ill. 625; *C. & E. I. R. R. Co.* v. *ChanceIor*, 165 Ill. 438, reversing 60 Ill. App. 525.

Declarations admissible as *res gestæ* may be in favor of the declarant. *Oliphant* v. *Liversidge*, 142 Ill. 160.

Illustration of res gestæ.— Statements made while doing an act are admissible as part of the *res gestæ*. *Medley* v. *People*, 49 Ill. App. 218.

Declarations by a person while going to a place are admissible on the issue of domicile. *Matzenbaugh* v. *People*, 194 Ill. 108, 62 N. E. 546.

Statements while removing a fence may be admissible. *Welch* v. *Louis*, 31 Ill. 446, 458.

The declarations of a tenant when making an entry may be admissible. *Hardisty* v. *Glenn*, 32 Ill. 62.

It is competent to prove the statement of the accused made when stolen property was found in his possession. *Bennett* v. *People*, 96 Ill. 602.

Statements accompanying payment may be admissible as *res gestæ*. *Rigg* v. *Cook*, 4 Gilm. 336.

The declarations of a grantor made at the time of making a deed may be admissible as *res gestæ*. *Lambe* v. *Manning*, 171 Ill. 612, 49 N. E. 509. See also *Penn. Co.* v. *McCaffrey*, 173 Ill. 169, 50 N. E. 713.

Entries made by bank officers on discounting and renewing a note are admissible as *res gestæ*. *Reynolds* v. *Summer*, 126 Ill. 58, 65.

Conduct of passengers on the occurring of an accident may be part of the *res gestæ*. *G. & C. U. R. R. Co.* v. *Fay*, 16 Ill. 558.

The existence of a common design may be part of the *res gestæ*. *Main* v. *McCarty*, 15 Ill. 441.

The books of a third party may be admitted when part of the *res gestæ* (*e. g.*, to show delivery). *C. & N. Ry. Co.* v. *Ingersol*, 65 Ill. 399.

Letters which are part of the *res gestæ* may be admitted. *Laurence* v. *Laurence*, 164 Ill. 367; *Carter* v. *Carter*, 152 Ill. 434: *Wineberg* v. *Nessel*, 56 Ill. App. 136.

In a personal injury case, the speed of the train and the fact of ringing a bell are admissible as part of the *res gestæ*. *Chicago G. T. Ry. Co.* v. *Kinnare*, 76 Ill. App. 394.

Statements of agents.— The statements of an agent may come in as *res gestæ*. *Summers* v. *H. S. B. & Co.*, 50 Ill. App. 382; *Pickett* v. *Madison County*, 14 Brad. 454.

Declarations of an agent while performing acts within the scope of his duty are admissible. *Matzenbaugh* v. *People*, 194 Ill. 108, 62 N. E. 546.

The declarations of officials while doing acts in behalf of a corporation are part of the *res gestæ*. *Maher* v. *Chicago*, 38 Ill. 266.

Evidence of what the flagman did and said at the time of the accident may be competent as part of the *res gestæ*. *Penn. Co.* v. *Rudel*, 100 Ill. 603.

The mere fact that an agent makes an exclamation while doing his duty does not prove that it is within the scope of his duty. *Mogk* v. *Chicago St. Ry. Co.*, 80 Ill. App. 411.

As to declarations of an agent after the act, see *D. & H. Canal Co.* v. *Mitchell*, 92 Ill. App. 577; *Druecker* v. *Sandusky Portland Cement Co.*, 92 Ill. App. 406.

Rape.— In rape cases the fact of complaint may be shown. *Stevens* v. *People*, 158 Ill. 111.

Attending physicians may testify as to statements indicating sufferings and sensations. *Salem* v. *Webster*, 192 Ill. 369, 61 N. E. 323, affirming 95 Ill. App. 120.

A physician present at the time of an accident may testify as to exclamations of pain. *Salem* v. *Webster*, 192 Ill. 369, 61 N. E. 323, affirming 95 Ill. App. 120.

Expression of pain and declarations made at the time of a transaction, or to a physician thereafter, are admissible. *West Chicago St. Ry. Co.* v. *Carr*, 170 Ill. 478, 48 N. E. 992, affirming 67 Ill. App. 530.

Statements to a physician making an examination with a view to suit are not admissible, unless the examination was made by procurement of the opposite party. *West Chicago St. Ry. Co.* v. *Carr*, 170 Ill. 478, 48 N. E. 992, affirming 67 Ill. App. 530.

Mere exclamations of pain the morning after the injury are inadmissible. *West Chicago St. Ry. Co.* v. *Kennelly*, 170 Ill. 508, 48 N. E. 996, affirming 66 Ill. App. 244.

A physician may testify as to complaints when they are part of the *res gestæ*. *West Chicago St. Ry. Co.* v. *Kennelly*, 170 Ill. 508, 48 N. E. 996, affirming 66 Ill. App. 244.

Statements of one who is injured, to be admissible, must have been made at the time of the accident. *C. W. D. Ry. Co.* v. *Becker*, 128 Ill. 548; *C., B. & Q. R. R. Co.* v. *Johnson*, 36 Ill. App. 565.

In a personal injury action, the statements of the victim at the time of the injury as to the nature of the injury are admissible. *Springfield Consolidated Ry. Co.* v. *Hoeffner*, 175 Ill. 634, 51 N. E. 884, affirming 71 Ill. App. 162.

New Jersey.

Statements accompanying act.— Contemporaneous writings and statements explaining evidential acts are also admissible. *Luse* v. *Jones*, 39 N. J. L. 707; *Frome* v. *Dennis*, 45 N. J. L. 515.

Statements in one's presence.— A statement accusing another of homicide, made in his presence, under circumstances rendering a reply expedient and proper is admissible, as also is the silence of the accused. *Donnelly* v. *State*, 26 N. J. L. 601.

Conversations in the presence of the defendant admissible against him. *State* v. *Brown*, 64 N. J. L. 414.

Purpose on leaving home.— When an act is part of the *res gestæ* statements explanatory thereof and concomitant therewith are admissible. Oral and written statements made on leaving home as to purpose and place of going admitted. *Hunter* v. *State*, 40 N. J. L. 495.

Conduct while making a declaration.— The conduct of a person while making a dying declaration is admissible on the question of credibility. *Donnelly* v. *State*, 26 N. J. L. 465.

Statements to physician.— Declarations of a patient as to his symptoms made to his physician, not for purpose of treatment but to enable the physician to form an opinion for the purpose of testifying, are not admissible in favor of the declarant. *Con. Traction Co.*

v. *Lambertson,* 60 N. J. L. 452; *D., L. & W. R. Co.* v. *Roalefs,* 70 Fed. 21.

Complaints.— The rule as applied to rape cases supported. *State* v. *Ivins,* 36 N. J. L. 233.

Maryland.

Statements accompanying act.— The true character and purpose of acts may be proved by the declarations accompanying them in point of time. *McDowell* v. *Goldsmith,* 6 Md. 319; *Robinson* v. *State,* 57 Md. 14; *Curtis* v. *Moore,* 20 Md. 93; *New Windsor* v. *Stocksdale,* 95 Md. 196.

A statement by a person as to his purpose in going, made just before boarding a train, held admissible as part of the *res gestæ* in an action for damages against the railroad company for his death. *B. & O. R. R. Co.* v. *Chambers,* 81 Md. 371.

Complaint in rape.— In rape cases the fact of complaint may be shown. *Parker* v. *State,* 67 Md. 329.

The details and circumstances of the rape cannot be proved by the declarations of the woman made after the injury. *Parker* v. *State,* 67 Md. 329.

Narrative of past events.— A narrative of past events is inadmissible. *Robinson* v. *State,* 57 Md. 14.

In breach of promise, the plaintiff may show that she communicated the fact of the engagement to her family. *Lewis* v. *Tapman,* 90 Md. 294.

Statements of others.— Authority on the rule of the text that statements made in the presence of one are admissible. *Friend* v. *Hamill,* 34 Md. 298, 308.

Declarations by a wife in her husband's presence as to why a deposit was made in their joint names are admissible on the question of ownership. *Taylor* v. *Brown,* 65 Md. 366.

Pennsylvania.

Statements accompanying acts.— One's statements of intention at the time of making a settlement are admissible. *Bennett* v. *Hetherington,* 16 S. & R. 193; *Jones* v. *Brownfield,* 2 Pa. 55.

Declaration of one when taking possession admitted to show that the possession was adverse. *Miles* v. *Miles,* 8 W. & S. 135.

Conversation at the time of the assignment for benefit of creditors held admissible to show that certain property was excluded. *Wanner* v. *Landis,* 137 Pa. 61.

Declarations of a depositor admitted to show her intention in making a deposit in trust for another. *Merigan* v. *McGonigle,* 205 Pa. 321.

Statements of a prisoner at the time of his arrest are admissible. *Rhodes* v. *Com.,* 48 Pa. 396.

On a prosecution for murder it may be shown that deceased had a certain ten-dollar Confederate note; that accused after the murder had such a note in his possession and destroyed it, with his declarations at the time of destruction. *Com.* v. *Roddy,* 184 Pa. 274.

Where the issue is the existence of a lease, notices by the lessor to his employees and entries in his books showing receipt of rent are admissible. *Crooks* v. *Bunn,* 136 Pa. 368.

Narrative of past events.—A narrative of past events is inadmissible. *Cottison* v. *Cottison,* 22 Pa. 375.

Silence in the face of accusation.—*Ettinger* v. *Com.,* 98 Pa. 338.

The silence of an accused at a judicial inquiry into his guilt in the face of an accusation against him is no evidence of his guilt. *Com.* v. *Zorambo,* 205 Pa. 109.

Entries in a book to which plaintiff had constant access and over which he had control are admissible against him on the ground that he must have seen them and did not protest. *Ryder* v. *Jacobs,* 196 Pa. 386.

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 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.

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.[27]

(*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.

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.[28]

(*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.[29]

(*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.[30]

(*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.[31]

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[27] Common practice.

[28] *R.* v. *Barnard*, 1758, 19 St. Tri. 815, &c.

[29] *R.* v. *Lord George Gordon*, 1781, 21 St. Tri. 514, 515, 520, 529, 532, &c.

[30] *Lady Ivy's Case*, 1684, 10 St. Tri. 617, 618.

[31] *R.* v. *Donellan*, 1781, Wills Circ. Ev. 241; and see my 'History of the Criminal Law,' iii. 371.

(*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.[32]

AMERICAN NOTE.

General.

Authorities.— Underhill on Evidence, secs. 186, 215, 375; Abbott's Trial Evidence (2d ed.), p. 129; *State* v. *Witham*, 72 Me. 531 (Identity); *Dietsch* v. *Wiggins*, 15 Wall. (U. S.) 540, 546; *Bank* v. *Kennedy*, 17 Wall. (U. S.) 19, 24; *People* v. *Vernon*, 35 Cal. 49, 95 Am. Dec. 1.

Where two persons bear the same name, facts are admissible which tend to make it probable that one of them and not the other entered into the contract upon which the suit is brought. *Jones* v. *Parker*, 20 N. H. 31.

Evidence of the extravagance of the accused is relevant in connection with other evidence upon the question of whether or not he was guilty of embezzlement. *Hackett* v. *King*, 8 Allen (Mass.), 144.

Evidence of the expenditures of a husband is relevant upon the question of whether certain articles are necessaries for his wife. *Raynes* v. *Bennett*, 114 Mass. 424.

Relation of the parties.— *Roach* v. *Caldbeck*, 64 Vt. 593; *Craig's Appeal*, 77 Pa. 448; *Siberry* v. *State*, 133 Ind. 677.

In connection with other evidence.— Evidence, in itself inadmissible, may be rendered admissible by being offered in connection with other evidence which is admissible. *Gage* v. *Smith*, 27 Conn. 75; *State* v. *Stevens*, 65 Conn. 93; *Plumb* v. *Curtis*, 66 Conn. 154; *Canton* v. *Burlington*, 58 Conn. 283.

Rebutting evidence.— Where it is alleged that one has committed a trespass, and evidence is introduced that he was at the place, he may show in rebuttal that he was there for another purpose. *Prindle* v. *Glover*, 4 Conn. 266.

Evidence received on rebuttal, if not objected to, is before the court for any legitimate purpose. *Alling* v. *Forbes*, 68 Conn. 575.

As supporting the rule of the text as to rebutting evidence, see *Morris* v. *Spofford*, 127 Mass. 85.

On the question of whether a burner was lighted, evidence that on certain other occasions it was not lighted, is admissible to rebut tes-

[32] *Boyse* v. *Rossborough*, 1857, 6 H. L. C. 42–58.

timony that there was a custom to keep it lighted. *Wentworth* v. *Eastern R. R. Co.*, 143 Mass. 248.

Explanatory facts.— Authority on the first point in the text. *Hughes* v. *Gross*, 166 Mass. 61, 43 N. E 1031, 32 L. R. A. 620; *Martin* v. *State*, 104 Ala. 71.

Identity.— *Com.* v. *Whitman*, 121 Mass. 361; *Com.* v. *Irwin*, 107 Mass. 401; *McDonald* v. *Savoy*, 110 Mass. 49; *Robinson* v. *Litchfield*, 112 Mass. 28; *Com.* v. *Bush*, 112 Mass. 280; *Com.* v. *Snow*, 116 Mass. 47; *Com.* v. *Dorsey*, 103 Mass. 412; *Com.* v. *Campbell*, 155 Mass. 537.

The jury may find that "Asahel Moss, 2d," on the tax-books, is meant for Asahel Morse. *Litchfield* v. *Farmington*, 7 Conn. 100.

Where a bottle of beer is sent, labelled and sealed, by express, to an assayer, and the assayer testifies as to a bottle so labelled, there is no ground of exception so far as the point as to identity of the beer is concerned. *Com.* v. *Bentley*, 97 Mass. 551.

Testimony of the witness that he "thought" the person accused was the offender may be sufficient identification. *Com.* v. *Munsey*, 112 Mass. 287.

Testimony that the offender "looked pretty near like" the accused, is not sufficient identification. *Com.* v. *Snow*, 14 Gray (Mass.), 385.

Where there is testimony as to identification by voice, the accused, not being a witness, may not repeat something to the jury in rebuttal. *Com.* v. *Scott*, 123 Mass. 222. See also *Johnson* v. *Comm.*, 115 Pa. 369.

A witness who has heard the defendant talk but once, may testify as to identification by the voice, but the jury may be instructed not to convict upon that evidence alone. *Com.* v. *Williams*, 105 Mass. 62; *Com.* v. *Hayes*, 138 Mass. 185.

Positive direct evidence of the identity of the accused is not necessary if the jury are satisfied of the fact. *Com.* v. *Cunningham*, 104 Mass. 545.

Where one is asked who did a certain thing, an answer "that man" (pointing to the defendant) is proper. *Com.* v. *Whitman*, 121 Mass. 361.

Any person is a competent witness to testify as to the identity of persons, things or handwriting. *Com.* v. *Sturtivant*, 117 Mass. 122.

Upon the issue of identity the appearance of a person two years before and after the date in question is competent. *Com.* v. *Campbell*, 155 Mass. 537.

Fixing time.— It is admissible to prove the time when a certain occurrence, foreign to the case, took place, for the purpose of fixing by it the time when a certain act, within the case, was done. *Quintard* v. *Corcoran,* 50 Conn. 38.

A letter cannot be introduced to establish the time of its receipt. *Com.* v. *Burns,* 7 Allen (Mass.), 540.

Conversations, in order to be admissible to fix a date, must have reference to something which tends to establish it. *Fisk* v. *Cole,* 152 Mass. 335.

Illustration (g).— See *Mut. Life Ins. Co.* v. *Hillman,* 145 U. S. 285.

New Jersey.

Circumstances surrounding testator.— The situation and surroundings of a testator are admissible to enable the court to understand and apply the will. *Griscom* v. *Evens,* 40 N. J. L. 402; *Burnet* v. *Burnet,* 30 N. J. Eq. 595.

Explanatory maps.— When explanatory maps, not original evidence themselves, are admissible. *State* v. *Smith,* 68 N. J. L. 609.

A contract between plaintiff and defendant's intestate unenforceable because not in writing is admissible to show that certain service was not rendered as a gift. *Gay* v. *Mooney, Admr.,* 67 N. J. L. 27.

Maryland.

Explanatory facts.— *Divers* v. *Fulton,* 8 G. & J. 202; *Keedy* v. *Newcomer,* 1 Md. 241.

When a letter is admissible and refers to a certain memorandum, the memorandum is also admissible to explain the letter. *Barney* v. *Smith,* 4 H. & J. 485.

In a prosecution for causing abortion proof as to the character of the house where it occurred is admissible. *Hays* v. *State,* 40 Md. 633.

Relation of the parties.— Where a young woman is claiming compensation against the estate of her aunt for domestic services, it is proper to show the relation existing between the two persons, whether the claimant was sent to school, and whether the aunt employed other servants. *Gill* v. *Donovan,* 96 Md. 518.

Letters may be admissible to show the relation of the parties, though not competent evidence to prove facts stated therein. *Hardesty* v. *Harris,* 19 Md. 317.

Fixing time.— A witness may use an irrelevant transaction for the purpose of fixing the time of an occurrence. *Goodhand* v. *Benton,* 6 G. & J. 481.

Illustration (f).— *Griffith* v. *Diffenderffer*, 50 Md. 466.

Illustration (p).— *Jones* v. *Jones*, 45 Md. 144.

In rebuttal.— Testimony inadmissible in itself may be admissible by way of rebuttal. *Milburn* v. *State*, 1 Md. 1; *Armstrong* v. *Thruston*, 11 Md. 148.

Evidence allowed as rebuttal which would have been irrelevant alone. *Townshend* v. *Townshend*, 6 Md. 295.

Pennsylvania.

Authorities — Explanatory facts.— Any fact which forms a link in a chain of evidence may be proved. *Johnston* v. *Warden*, 3 Watts, 101; *Geisse* v. *Dobson*, 3 Whart. 34; *Haughey* v. *Strickler*, 2 W. & S. 411; *Wagenseller* v. *Immers*, 97 Pa. 465; *Phila. R. Co.* v. *Henrice*, 92 Pa. 431.

The commission of a burglary by the defendant is admissible to explain why an officer was in a certain house where he was killed by defendant. *Com.* v. *Major*, 198 Pa. 290.

Books given in evidence to explain the nature of a partnership interest. *Thommon* v. *Kalbach*, 12 S. & R. 238.

A written contract on a collateral matter was received for explanatory purposes. *Taylor* v. *Sattler*, 179 Pa. 451.

Where defendants accused of murder set up an alibi, the prosecution may explain the presence of the accused at the distant place by proof that they rode away on horses belonging to a certain person who found his horses and saddles gone. *Com.* v. *Roddy*, 184 Pa. 274.

A conversation between the witness and a third person is admissible if it is necessary to a correct understanding of relevant facts. *Harper* v. *Kean*, 11 S. & R. 280.

Identity.— *Udderzook* v. *Com.*, 76 Pa. 340.

Evidence of another crime may be given to prove identity. *Goersen* v. *Com.*, 99 Pa. 388.

Where there is testimony as to identification by voice, the accused, not being a witness, may not repeat something to the jury in rebuttal. See *Johnson* v. *Com.*, 115 Pa. 369.

Relation of the parties.— Evidence not relevant to the issue is admissible to explain how the issue arose and the relation of the parties to it. *Shuman* v. *Shuman*, 27 Pa. 90.

Declarations to show the relation of parties. *Postens* v. *Postens*, 3 W. & S. 127; *Koch* v. *Howell*, 6 W. & S. 350; *Kimmel* v. *McRight*, 2 Pa. 38; *Craig's Appeal*, 77 Pa. 448.

To show that one acted as agent in paying money, it may be proved that he was a man of little property himself. *Strimpfler* v. *Roberts*, 18 Pa. 283.

Relations of testator with persons said to have used undue influence may be shown. *Frew* v. *Clarke*, 80 Pa. 170; *Kenyon* v. *Ashbridge*, 35 Pa. 157.

Rebuttal.— Evidence may be admissible as rebuttal which would not have been admissible in itself. *Sidle* v. *Walters*, 5 Watts, 389; *Webb* v. *Lees*, 149 Pa. 13; *Reyenthaler* v. *Phila.*, 160 Pa. 195; *Seltzer* v. *Brundage*, 17 Atl. 9.

Inadmissible evidence received without objection may be rebutted by the same kind of evidence. *Baker* v. *Rorke*, 14 Pa. Co. Ct. 35; *McElheny* v. *Railroad Co.*, 147 Pa. 1. See *McCarthy* v. *Scanlon*, 176 Pa. 262. *Contra*, *Swank* v. *Phillips*, 113 Pa. 482.

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.

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 deemed to be irrelevant.[1]

(*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 deemed to be irrelevant[2] (unless it is shown that the beer sold to all is of the same brewing).[3]

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* See Note VI.

[1] *R.* v. *Cole.* 1 Phi. Ev. 508 (said to have been decided by all the Judges in Mich. Term, 1810).

[2] *Holcombe* v. *Hewson*, 1810, 2 Camp. 391.

[3] See Illustrations to Article 3.

AMERICAN NOTE.

General.

Authorities.— 1 Greenleaf on Evidence (15th ed.), secs. 52 and 53; Underhill on Evidence, sec. 8; Taylor on Evidence (Chamberlayne's 9th ed.), p. 2571[1]; *State* v. *Lapage*, 57 N. H. 245, 24 Am. Rep. 69; *Flagg* v. *Willington*, 6 Me. (6 Greenl.) 386; *Parker* v. *Poland Pub. Co.*, 69 Me. 173, 31 Am. Rep. 262; *Dodge* v. *Haskell*, 69 Me. 429; *Handley* v. *Call*, 27 Me. (14 Shep.) 35; *Staples* v. *Smith*, 48 Me. 470; *Hall* v. *Tribou*, 42 Me. 192; *McLoon* v. *Spaulding*, 62 Me. 315; *Tower* v. *Rutland*, 56 Vt. 28; *Keith* v. *Taylor*, 3 Vt. 153; *Nones* v. *Northouse*, 46 Vt. 587; *Whitney* v. *First Nat. Bank*, 55 Vt. 154, 45 Am. Dec. 598; *Harris* v. *Howard*, 56 Vt. 695; *Phelps* v. *Conant*, 30 Vt. 277; *Jones* v. *N. Y., N. H. & H. R. R. Co.*, 20 R. I. 210, 37 Atl. 1033, 11 Am. & Eng. R. Cas. (N. S.) 414, 3 Am. Neg. Rep. 496; *Hopkins* v. *Howard*, 20 R. I. 394, 39 Atl. 519; *Agulino* v. *N. Y., N. H. & H. R. R. Co.*, 21 R. I. 263, 43 Atl. 63, 6 Am. Neg. Rep. 199, 14 Am. & Eng. R. Cas. (N. S.) 314; *Stone* v. *Pendleton*, 21 R. I. 332, 43 Atl. 643; *Leighton* v. *Sargent*, 31 N. H. (11 Fost.) 119, 64 Am. Dec. 323; *True* v. *Sanborn*, 27 N. H. (7 Fost.) 383; *Filer* v. *Peebles*, 8 N. H. 226; *Mead* v. *Merrill*, 33 N. H. 437; *Foye* v. *Leighton*, 22 N. H. (2 Fost.) 71, 53 Am. Dec. 231; *Swampscott Machine Co.* v. *Walker*, 22 N. H. (2 Fost.) 457, 55 Am. Dec. 172; *Durkee* v. *India Mut. Ins. Co.*, 159 Mass. 514, 34 N. E. 1133; *Smith* v. *N. Y. & N. E. R. R. Co.*, 163 Mass. 569, 41 N. E. 110; *Elliott* v. *Lyman*, 3 Allen (Mass.), 110; *Kelliher* v *Miller*, 97 Mass. 71; *Howe* v. *Weymouth*, 155 Mass. 439, 29 N. E. 646; *Howe* v. *Whitehead*, 130 Mass. 268; *Gahagan* v. *Boston, etc., R. R. Co.*, 1 Allen (Mass.), 187, 79 Am. Dec. 724; *Dana* v. *Nat. Bank of Republic*, 132 Mass. 156; *Morris* v. *East Haven*, 41 Conn. 252; *Chapman* v. *Champion*, 2 Day (Conn.), 101; *Hoxie* v. *Home Ins. Co.*, 32 Conn. 21; *Gorham* v. *Gorham*, 41 Conn. 242; *Edwards* v. *Warner*, 35 Conn. 517; *Beach* v. *Catlin*, 4 Day (Conn.), 284; *Robbins* v. *Harvey*, 5 Conn. 335; *Hoadley* v. *M. Seward & Son Co.*, 71 Conn. 640, 42 Atl. 997; *Irving* v. *Shethar*, 71 Conn. 434, 42 Atl. 25; *Cunningham* v. *Fair Haven & Westville R. Co.*, 72 Conn. 244, 43 Atl. 1047, 6 Am. Neg. Rep. 427; *Anderson* v. *Cowles*, 72 Conn. 335; *State Bank* v. *Waterhouse*, 70 Conn. 76; *Boyd* v. *U. S.*, 142 U. S. 450; *Cole* v. *Com.*, 5 Gratt. (Va.) 606; *McKay* v. *Russell*, 3 Wash. 378, 28 Pac. 908; *Barney* v. *Rickard*, 157 U. S. 352; *Wise* v. *Acker-*

man, 76 Md. 375; *Rockford Gas-Light Co.* v. *Ernst*, 68 Ill. App. 300; *Lombar* v. *E. Tawas*, 86 Mich. 14; *Birmington R. Co.* v. *Alexander*, 93 Ala. 133; *District of Col.* v. *Armes*, 107 U. S. 519.

Instances.— Similar, but unconnected accidents, cannot be proved. *Hubbard* v. *R. R. Co.*, 39 Me. 506.

The question is, whether A sold meat improperly slaughtered and unwholesome.

The fact that A, several years previous to the sale complained of, had sold similar meat is irrelevant. *True* v. *Sanborn*, 27 N. H. (7 Fost.) 383.

The question is, whether there was sewer gas in a given house, connected with a public sewer, from which the inmates suffered.

The facts that the inmates of two other houses, situated on the same street and connected with the same public sewer, did not perceive the presence of sewer gas therein, and were not injuriously affected by it, are deemed irrelevant. *Bateman* v. *Rutland*, 70 Vt. 500, 41 Atl. 500.

The fact that a person sold proper goods to A does not, in itself, tend to prove that he sold proper goods to B, and is inadmissible. *Lake* v. *Clark*, 97 Mass. 346.

It is admissible in connection with the fact that the two sets of goods were alike. *Pike* v. *Fay*, 101 Mass. 134.

The question is whether A, a landlord, was liable in damages to B, his tenant, for personal injuries sustained by reason of a defect in a set of wooden steps belonging to the tenement. The fact that C had fallen on the same steps in the same manner, before the accident to B, is irrelevant. *Dean* v. *Murphy*, 169 Mass. 413, 48 N. E. 283.

The question is, whether A and B are jointly interested in trading in cattle. The fact that A and B were jointly interested in trading in horses is irrelevant. *Farnum* v. *Farnum*, 13 Gray (Mass.), 508.

In an action involving the question whether a certain loom attachment worked successfully, it is competent to show that it worked properly on another loom, evidence having previously been introduced that the two looms were alike. The similarity of the looms presented a question to be passed upon ultimately by the jury. *Brierly* v. *Mills*, 128 Mass. 291.

In an action for assault, similar assaults cannot be proved. *Mathews* v. *Terry*, 10 Conn. 459.

An information for adultery charged a single act of adultery in a single count. Held, that, having given evidence of one such act, the

State could not proceed to show other instances of the same crime committed with the same person at other times and places. *State* v. *Bates*, 10 Conn. 373.

A judgment in a civil action is not evidence, conclusive or otherwise, of the fact thereby established, in a subsequent criminal prosecution against one of the parties, in which the same question is again involved. *State* v. *Bradnack*, 69 Conn. 212.

On the trial of an action on the warranty of a horse, the plaintiff, who testified in his own behalf, was asked, on cross-examination, how many other purchases of horses he had made in the last twenty years, and tried to set aside on the ground that he had discovered defects in them. Held, to be inadmissible, as raising an outside and irrelevant issue. *Russell* v. *Cruttenden*, 53 Conn. 564.

The question is whether A was in such condition as to require the appointment of a guardian to manage her estate. The fact that A had been very imprudent ten years or more before the filing of the petition by the overseer of the poor is irrelevant. *Hopkins* v. *Howard*, 29 R. I. 394, 39 Atl. 519.

The question is, whether A, a testator, was insane.

Letters of B, who was proved to be insane, offered for the purpose of showing that insane persons might rationally write and converse, are irrelevant on the question of A's sanity. *Ware* v. *Ware*, 8 Me. (8 Greenl.) 42.

The question is, what wages A, a carpenter, was to receive per day.

Evidence of what wages other carpenters received in other towns in another State, is irrelevant. *Noyes* v. *Fitzgerald*, 55 Vt. 49.

Similar crimes.—Under Illustration (*a*) see *Dodge* v. *Haskell*, 69 Me. 429; *State* v. *Renton*, 15 N. H. 169, 174; *State* v. *Wentworth*, 37 N. H. 197, 209; *Reed* v. *Spaulding*, 42 N. H. 114–124; *State* v. *Lapage*, 57 N. H. 245; *State* v. *Hopkins*, 50 Vt. 316; *State* v. *Kelley*, 65 Vt. 531, 27 Atl. 203, 36 Am. Rep. 884. The fact that the accused has committed similar frauds or crimes is incompetent. *Jordan* v. *Osgood*, 109 Mass. 457; *Costelo* v. *Crowell*, 139 Mass. 588; *Com.* v. *Call*, 21 Pick. (Mass.) 522; *Com.* v. *Wilson*, 2 Cush. (Mass.) 590; *Com.* v. *Campbell*, 7 Allen (Mass.), 541, 83 Am. Dec. 705; *Jordan* v. *Osgood*, 109 Mass. 457; *Com.* v. *Jackson*, 132 Mass. 16, 19, 44 Am. Rep. 299, *note*; *Miller* v. *Curtis*, 158 Mass. 129; *Janzen* v. *People*, 159 Ill. 440; *Boyd* v. *U. S.*, 142 U. S. 450; *Shaffner* v. *Com.*, 72 Pa. 60.

Limitations of the rule.— In Best's Principles of Evidence (Chamberlayne's 5th ed.), p. 488*n*, it is said:

"The grounds of the rule are, therefore, entirely practical; viz.: (1) to prevent multiplicity of collateral issues, confusing the jury and acting as a surprise upon the parties; (2) to provide that a man shall not be convicted of one crime by evidence that he has committed another. *Hubbard* v. *R. R. Co.*, 39 Me. 506. This being the case, there may be said to exist in the United States, a strong tendency to limit the rule in civil causes. This relaxation appears most commonly in the numerous cases where the necessary proof of liability consists in strengthening a *possible* into a *probable* cause by elimination of all complicating circumstances; in other words, by establishing the desired relation of cause and effect through the inductive process of tracing the same effect through a variety of instances where the cause for which legal liability is claimed is the only constant force."

Where the question is as to whether certain facts were the result of alleged causes, other effects of the causes may be shown.

The following cases illustrate the limitations of the rule of the text:

Value.— On questions of value, evidence as to similar property is relevant. *Norton* v. *Willis*, 73 Me. 580; *Warren* v. *Wheeler*, 21 Me. 484; *Fogg* v. *Hill*, 21 Me. 529; *Snow* v. *B. & M. R. R. Co.*, 65 Me. 230; *Thornton* v. *Campton*, 18 N. H. 20; *March* v. *R. R. Co.*, 19 N. H. 376; *Concord R. R. Co.* v. *Greely*, 23 N. H. 242; *Hoit* v. *Russell*, 56 N. H. 559; *White* v. *R. R. Co.*, 30 N. H. 188; *Hildreth* v. *Fitts*, 53 Vt. 684; *Clemons* v. *Clemons*, 68 Vt. 77; *Cross* v. *Wilkins*, 43 N. H. 332; *Melvin* v. *Bullard*, 35 Vt. 268; *Haven* v. *County Comrs.*, 155 Mass. 467; *Pierce* v. *Boston*, 164 Mass. 92; *Lyman* v. *Boston*, 164 Mass. 99; *Bowditch* v. *Boston*, 164 Mass. 107; *Newsome* v. *Davis*, 133 Mass. 343; *Elmore* v. *Johnson*, 143 Ill. 573; *Mayor of Baltimore* v. *Smith Co.*, 80 Md. 458; *St. Louis, etc., R. Co.* v. *Clark*, 121 Mo. 169. But the valuation of the tax assessors is irrelevant. *Concord Land & Water-Power Co.* v. *Clough*, 69 N. H. 609, 45 Atl. 565.

Evidence is admissible touching the value of the same property at other times, and that of similar property. *Beach* v. *Clark*, 51 Conn. 200; *Freeman's Appeal*, 71 Conn. 708; *Abbott* v. *Wyse*, 15 Conn. 260. And evidence of its selling price is admissible. *Sanford* v. *Peck*, 63 Conn. 494.

But a tax assessment is inadmissible. *Martin* v. *N. Y. & N. E. R. R. Co.*, 62 Conn. 331, 343, 25 Atl. 239.

Evidence of the value of real estate at a certain date is relevant upon the question of its value about a year later. *Freeman's Appeal,* 71 Conn. 708.

One sent by the plaintiff, a physician, as a substitute to attend the defendant, testified on his direct examination as to the reasonableness of the plaintiff's charges. Held, that upon his cross-examination he might be asked whether his own charges for the same services were reasonable, and how much they were. *Sayles* v. *Fitzgerald,* 72 Conn. 392.

In a suit by an attorney for fees for advice and trial in the Superior Court, having testified that his charges were reasonable, he was asked, on cross-examination, what his customary charges per day were for trying cases before a justice of the peace. Held, no error to admit the question, but that it tended to furnish a legitimate standard of comparison. *Phelps* v. *Hunt,* 43 Conn. 198. See also *Robbins* v. *Harvey,* 5 Conn. 341.

The opinion of an expert as to the value of other land in the vicinity is irrelevant. *Beale* v. *Boston,* 166 Mass. 53.

In order to render the selling price of goods admissible, to prove the value of others, the similarity of the two lots must be established. *Haven* v. *County Comrs.,* 155 Mass. 467; *Berney* v. *Dinsmore,* 141 Mass. 42.

But an unaccepted offer to purchase or sell is irrelevant. *Winnisimmet Co.* v. *Grueby,* 111 Mass. 543; *Wood* v. *Ins. Co.,* 126 Mass. 316; *Davis* v. *Charles River Branch R. R. Co.,* 11 Cush. (Mass.) 506.

And the valuation of an assessor is irrelevant. *Thompson* v. *Boston,* 148 Mass. 387; *Anthony* v. *R. R. Co.,* 162 Mass. 60, 37 N. E. 780.

A witness as to the value of land, before expressing an opinion as to its value, should show that he is familiar with sales of similar property and the prices paid therefor. *Cochrane* v. *Commonwealth,* 175 Mass. 299, 56 N. E. 610; *Phillips* v. *Marblehead,* 148 Mass. 326, 19 N. E. 547.

Highway injuries.— In suits for injuries on the highway, evidence as to the condition of the road about the same time, a short distance from the exact spot, is admissible. *Kent* v. *Lincoln,* 32 Vt. 591.

Evidence that other horses had been frightened at the same obstacle is admissible. *Darling* v. *Westmoreland,* 52 N. H. 401; *Crocker* v. *McGregor,* 76 Me. 282; *Gordon* v. *Boston, etc., R. R. Co.,* 58 N. H. 396.

In suits for injuries on the highway, evidence as to the condition of the road about the same time, a short distance from the exact spot, is admissible. *Bailey* v. *Trumbull,* 31 Conn. 581.

The question is, whether a particular place in the roadbed of a street-railway company was defective and in need of repairs. The fact that other places in the roadbed were in want of repairs is deemed irrelevant. *Cunningham* v. *Fair Haven & Westville R. R. Co.*, 72 Conn. 244, 6 Am. Neg. Rep. 427, 43 Atl. 1047.

Where the use of a road made by the plaintiff's intestate was otherwise than passing along it in the usual way, it was held, that the court properly charged the jury that the fact that other persons had passed and repassed for several years over the highway at the place in question without accident, was not evidence that the town had performed its duty in making the highway reasonably safe. *Lutton* v. *Vernon*, 62 Conn. 8.

In suits for injuries on the highway, evidence as to the condition of the road about the same time, a short distance from the exact spot, is admissible. *Collins* v. *Dorchester*, 6 Cush. (Mass.) 396.

Negligence.— Evidence of negligence on previous occasions is not admissible in suits for negligence. *Parker* v. *Portland Pub. Co.*, 69 Me. 173, 31 Am. Rep. 262. See, also, *Bremner* v. *Newcastle*, 83 Me. 415.

A party cannot show that he was not negligent upon one occasion, by proving that he was careful on other occasions. *Laufer* v. *Bridgeport Traction Co.*, 68 Conn. 475.

It is a general rule that a party charged with negligent conduct will not be allowed to show that such conduct was common or customary among those engaged in an occupation similar to his own, or among those placed in like circumstances and owing the same duties. *Bassett* v. *Shares*, 63 Conn. 43.

Evidence of negligence on previous occasions is not admissible in suits for negligence. *Robinson* v. *Fitchburg & W. R. R. Co.*, 7 Gray (Mass.), 92; *Maguire* v. *Middlesex R. R. Co.*, 115 Mass. 239; *Whitney* v. *Gross*, 140 Mass. 232; *Lane* v. *Boston & Albany R. R. Co.*, 112 Mass. 455.

Similar contracts inadmissible to show the making of a like contract.— *Lowenstein* v. *Lombard, Ayres & Co.* (Sup. 1897), 45 N. Y. Supp. 286. 58 N. E. 44, 164 N. Y. 324, 333.

Illustration (a).— See *People* v. *Flanigan*, 42 App. Div. 318, 39 N. Y. Supp. 101; *People* v. *Fitzgerald*, 156 N. Y. 253, 50 N. E. 846, reviewing 20 App. Div. 139; *People* v. *Freeman*, 25 App. Div. 583, 50 N. Y. Supp. 984; *People* v. *McLoughlin*, 150 N. Y. 365, 386, 44 N. E. 1017; *People* v. *Drake*, 10 N. Y. Cr. 31; *Coleman* v. *People*, 55 N. Y. 81; *People* v. *Corbin*, 56 N. Y. 363; *People* v. *Gibbs*, 93

N. Y. 471; *People* v. *Sharp*, 107 N. Y. 427, 14 N. E. 319, 1 Am. St. Rep. 851; *People* v. *Dowling*, 84 N. Y. 486; *People* v. *Greenwall*, 108 N. Y. 301; *Phillips* v. *People*, 57 Barb. 354; *People* v. *White*, 14 Wend. 111; *People* v. *Keepers* (Sup.), 8 N. Y. Cr. 146, 14 N. Y. Supp. 66; *People* v. *Justices of Court of Spec. Sessions*, 10 Hun, 158; *Boland* v. *People*, 19 Hun, 80; *People* v. *Drake*, 65 Hun, 331, 20 N. Y. Supp. 228; *People* v. *Hurlburt*, 92 Hun, 46, 36 N. Y. Supp. 867; *People* v. *Dibble*, 3 Abb. Dec. 518, 5 Park. Cr. 28; *Hall* v. *People*, 6 Park. Cr. 671.

New Jersey.

Illustration (a).— Commission of other crimes of like nature not admissible to prove that defendant would be likely to commit the one in question. *Bullock* v. *State*, 65 N. J. L. 557; *State* v. *Sprague*, 64 N. J. L. 419; *Ryan* v. *State*, 60 N. J. L. 552; *Parks* v. *State*, 59 N. J. L. 573; *Meyer* v. *State*, 59 N. J. L. 310; *State* v. *Raymond*, 53 N. J. L. 260; *Leonard* v. *State*, 60 N. J. L. 8.

Other offenses are not provable merely to show that defendant would be *likely* to commit a crime. *Clark* v. *State*, 47 N. J. L. 556.

Actions for criminal conversation.— In action for criminal conversation the defendant may be asked on cross-examination as to intercourse with plaintiff's wife prior to her marriage. *Foulks* v. *Archer*, 31 N. J. L. 58.

Divorce.— Antenuptial incontinence not admissible to prove subsequent adultery. *Hedden* v. *Hedden*, 21 N. J. Eq. 61.

Burning of insured buildings.—Evidence that five years previously insured buildings belonging to defendant were burned not admissible to prove that defendant set fire to another insured building. *State* v. *Raymond*, 53 N. J. L. 260.

Libel.— In libel, other publications are irrelevant. *Schenck* v. *Schenck*, Spen. 208, 213.

Negligence — Dangerous areaway.— In damage suit for injury caused by falling into an areaway, the defendant may not show that such areas as this were common and that more than 10,000 people had passed this one every year without accident. *Temperance Hall Assn.* v. *Giles*, 33 N. J. L. 260.

Previous intoxication.— Evidence as to whether plaintiff in an action for damages was intoxicated on occasions previous to the injury is not admissible. *Shelly* v. *Brunswick Traction Co.*, 65 N. J. L. 639.

Value of land.— Value of land may be shown by proof of sales of other land in the vicinity, but only when there is a substantial

similarity between the properties. *Laing* v. *United N. J. R. & C. Co.*, 54 N. J. L. 576.

Impossibility of selling one lot of standing timber is no evidence as to the value of another lot. *Wiley* v. *Railroad Co.*, 44 N. J. L. 247.

To show value in condemnation proceedings, evidence that land near by has been offered at a certain price is not admissible. *Montclair Ry. Co.* v. *Benson*, 36 N. J. L. 557.

Amount of damage.— To show amount of damage caused by a railroad to land it is not competent to show that in other localities land increased in value because of proximity to the road. *Railroad Co.* v. *Doughty*, 22 N. J. L. 495.

Incompetency of workman.— To show incompetency of a workman in a suit brought by him for breach of contract of employment, the defendant is not limited to work done for the defendant. *Match Co.* v. *Swett*, 61 N. J. L. 457.

Other similar grants and conveyances not admissible. *Fitzgerald* v. *Faunce*, 46 N. J. L. 599.

Rates charged by other insurance companies admitted. *Martin* v. *Fire Ins. Co.*, 42 N. J. L. 46.

Maryland.

Authority.— *Wise* v. *Ackerman*, 76 Md. 375.

Value.— To show value of land, evidence of the prices paid for similar land near by within a short time is admissible. *Baltimore* v. *Smith*, 80 Md. 458.

Prices obtained for the land at previous sales are admissible to prove its present value. *Baltimore* v. *Brick Co.*, 80 Md. 458.

In action for breach of contract to buy certain goods, evidence of the price plaintiff got from others for similar goods is not admissible. *Eckenrode* v. *Chemical Co.*, 55 Md. 51.

To prove value, evidence of the price of similar goods in the neighborhood is admissible. *Williamson* v. *Dillon*, 1 H. & G. 444.

Value at a different place.— Price of cotton at Baltimore not admitted to show amount of loss at Bremen. *Lazard* v. *Transportation Co.*, 78 Md. 1.

To show value at one place it is admissible to show value at another. *Williamson* v. *Dillon*, 1 H. & G. 444.

Value at a different time.— The value of insured goods on February 23d admitted to show their value on July 23d. *Insurance Co.* v. *Traub*, 83 Md. 524.

Other crimes.— Evidence of prisoner's being armed and in a vicious humor just before the offense is admissible even though it incidentally discloses another crime. *Kernan* v. *State*, 65 Md. 253.

Proof of other crimes is not generally admissible. *Lamb* v. *State*, 66 Md. 285.

To show innocence one cannot show that on other occasions he had opportunities to violate the law but did not do so. *Archer* v. *State*, 45 Md. 33.

Other fires.— To prove that a fire was set by sparks from an engine it is permissible to show that other fires have been set by sparks from other engines of the railroad. *Annapolis R. Co.* v. *Gantt*, 39 Md. 115. *B. & S. R. Co.* v. *Woodruff*, 4 Md. 254, is no longer authority.

Other contracts.— The terms of other similar contracts are not admissible. *Kriete* v. *Myer*, 61 Md. 558.

Insanity in the family.— When evidence has been introduced tending to show that a testator was insane, it may be shown that other members of the family were afflicted in similar manner. *Berry* v. *Safe Deposit Co.*, 96 Md. 45.

Custom of doing things.— The custom of a justice of the peace in relation to his manner of drawing up deeds is not admissible. *Pocock* v. *Hendricks*, 8 G. & J. 421.

To prove the number of acres of grain put in by a person, it is not permitted to prove the number of acres he commonly put in. *Keedy* v. *Newcomer*, 1 Md. 241.

Pennsylvania.

Res inter alios.— *Res inter alios actæ* not admissible. *Rose* v. *Klinger*, 8 W. & S. 178; *Oram* v. *Rothermel*, 98 Pa. 300.

In action for contract price of gas furnished, the prices specified in contracts with third persons are immaterial. *Philadelphia Co.* v. *Park Bros.*, 138 Pa. 346.

To prove that defendant had epileptic fits, it is not relevant that his child has such fits. *Hall* v. *Com.*, 12 Atl. 163.

Intoxication of the prisoner is not provable by the condition of a companion who had taken the same number of drinks. *Com.* v. *Cleary*, 135 Pa. 64.

Similar dealings with other firms not admissible. *Sharp* v. *Emmet*, 5 Whart. 288.

Other crimes.— Evidence of other crimes not admissible. *Com.* v. *Mellert*, 2 Woodw. Dec. 342; *Com.* v. *Saulsbury*, 152 Pa. 554.

Other crimes may be incidentally referred to in proving a confederacy. *Com.* v. *Biddle* (No. 2), 200 Pa. 647.

Another crime may be proved incidentally, as when the defendant killed one of the officers when he was arrested for the crime in question. *Com.* v. *Biddle*, 200 Pa. 647.

Other criminal acts, intended to prevent conviction, may be given in evidence. *Cover* v. *Com.*, 8 Atl. 196.

Under illustration (a) see *Shaffner* v. *Com.*, 72 Pa. 60.

Other crimes may be relevant if they show the same general purpose. *Brown* v. *Com.*, 76 Pa. 319; *Kramer* v. *Com.*, 87 Pa. 299; *Goersen* v. *Com.*, 99 Pa. 388.

Value at other times and places.— An offer to purchase is not admissible to prove value. *Negley* v. *Lindsay*, 67 Pa. 217.

Value at a different place not admitted to show amount of damage from breach of contract, because circumstances were not similar. *Fessler* v. *Love*, 48 Pa. 407; *Hill* v. *Canfield*, 56 Pa. 454.

Evidence of value eight years before is too remote. *Miller* v. *Water Co.*, 148 Pa. 429.

The best evidence of the market price of land is not the price paid for other land in the neighborhood. *Railroad Co.* v. *Rose*, 74 Pa. 362. Such evidence as to particular sales is not admissible. *Railroad Co.* v. *Hiester*, 40 Pa. 53; *Railroad Co.* v. *Patterson*, 107 Pa. 461; *Railroad Co.* v. *Vance*, 115 Pa. 325; *Railroad Co.* v. *Ziemer*, 124 Pa. 560.

Value of services may be proved by prices paid for similar services. *Holman* v. *Fesler*, 7 W. & S. 313.

Other fires set by sparks.— To prove that a fire was caused by sparks from an engine, it may be shown that other fires occurred that day because of sparks from the same engine. *Thomas* v. *Railroad Co.*, 182 Pa. 538.

To prove that a barn was fired by sparks from an engine it may be shown that it was common for sparks to set fire to adjoining woods. *Railroad Co.* v. *Stranahan*, 79 Pa. 405; *Albert* v. *N. Cent. R. Co.*, 98 Pa. 316.

Miscellaneous.— That a husband turned his wife out once is no evidence that he did so again. *Lentz* v. *Wallace*, 17 Pa. 412.

As against a judgment creditor to show that his judgment was confessed by fraud, it is not admissible to show that the debtor had confessed another judgment for fraudulent purposes. *Miller* v. *McAlister*, 178 Pa. 140.

The terms of previous contracts of sale between the parties admitted to prove the terms of the one in question. *Lelar* v. *Brown*, 15 Pa. 215; *Trego* v. *Lewis*, 58 Pa. 463.

To prove the correctness of one entry in a book, other entries in the same book may be proved. *Young* v. *Com.*, 28 Pa. 501.

To prove that a note was raised in amount, it is proper to admit a card showing practice work in the alteration of figures. *Wheeler* v. *Ahlers*. 189 Pa. 138.

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 or is deemed to be relevant to the issue; 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.

[4] 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

* See Note VI.

[4] 34 & 35 Vict. c. 112, s. 19 (language slightly modified). This enactment overrules to a strictly limited extent *R.* v. *Oddy*, 1851, 2 Den. C. C. 264, and practically supersedes *R.* v. *Dunn*, 1826, 1 Moo. C. C. at p. 150, and *R.* v. *Davis*, 1833, 6 C. & P. 177. See Illustrations.

property to be stolen which forms the subject of the proceedings 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 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.

The fact that the prisoner was within twelve months in possession of other stolen property than that to which the charge applies, is not deemed to be relevant, unless such property was found in his possession at or soon after the time when the proceedings against him were taken.[5]

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.[6]

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

[5] *R.* v. *Carter*, 1884, 12 Q. B. D. 522; and see *R.* v. *Drage*, 1878, 14 Cox, C. C. 85.

[6] *R.* v. *Dunn*, 1826, 1 Moo. C. C. 146.

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.[7]

(*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.[8]

(*d*) A is charged with obtaining eggs from B by falsely pretending that he was carrying on a real business as a farmer or dairyman.

The fact that on subsequent occasions he had obtained eggs from C and D by means of the same pretence is deemed to be relevant, as showing that he was not carrying on a real business.[9]

(*e*) A is charged with obtaining money from B by falsely pretending that Z had authorised 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,[10] 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.

(*f*) 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.[11]

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

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[7] *R.* v. *Forster*, 1855, Dear. 456; and see *R.* v. *Weeks*, 1861, L. & C. 18.

[8] *R.* v. *Francis*, 1874, L. R. 2 C. C. R. 128. The case of *R.* v. *Cooper*, 1875, 1 Q. B. D. (C. C. R.) 19, is similar to *R.* v. *Francis*, and perhaps stronger.

[9] *R.* v. *Rhodes*, [1899], 1 Q. B. 77. See, too, *R.* v. *Neill*, *post*, p. 55, note 23.

[10] *R.* v. *Holt*, 1860, Bell, C. C. 280; and see *R.* v. *Francis*, *ub. sup.* p. 130.

[11] See cases collected in Roscoe's Nisi Prius, 748.

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.[12]

(*h*) 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.[13]

(*i*) 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 neighbours and by persons dealing with him, is deemed to be relevant, as showing that A made the representation in good faith.[14]

(*j*) 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.[15]

(*k*) 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.[16]

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

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[12] *Gibson* v. *Hunter*, 1794, 2 H. Bl. 288.

[13] *Barrett* v. *Long*, 1851, 3 H. L. C. 395, at p. 414.

[14] *Sheen* v. *Bumpstead*, 1863, 2 H. & C. 193.

[15] *Gerish* v. *Charlier*, 1845, 1 C. B. 13.

[16] This illustration is adapted from *Preston's Case*, 1851, 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.

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.[17]

(*m*) 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.[18]

(*n*) 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.[19]

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

The fact that the blockade was notified in the Gazette is deemed to be relevant.[20]

AMERICAN NOTE.

General.

(See also note to Article 12.)

Authorities.— Taylor on Evidence (Chamberlayne's 9th ed.), p. 2576; Greenleaf on Evidence (15th ed.), sec. 53, note; Abbott's Trial Evidence, p. 342; *Nichols* v. *Baker*, 75 Me. 334; *Conant* v. *Leslie*, 85 Me. 257; *Hovey* v. *Grant*, 52 N. H. 569; *Adams* v. *Kenney*, 59 N. H. 133; *State* v. *Palmer*, 65 N. H. 216, 20 Atl. 6; *State* v. *McDonald*, 14 R. I. 270; *State* v. *Fitzsimon*, 18 R. I. 236, 27 Atl. 446; *State* v. *Habib*, 18 R. I. 558, 30 Atl. 462; *State* v. *Kelley*, 65 Vt. 531; *Fratini* v. *Caslini*, 66 Vt. 273; *Limerick Nat. Bank* v. *Adams*, 70 Vt. 133, 40 Atl. 166; *State* v. *Hallock*, 70 Vt. 159, 40 Atl. 51; *Bottomly* v. *U. S.*, 1 Story (U. S.), 135, 143; *Kennan* v. *Gilmer*, 131 U. S. 22, 25; *Lincoln* v. *Claflin*, 7 Wall. (U. S.) 132, 138; *Butler* v. *Watkins*, 13 Wall. (U. S.) 457, 464; *Castle* v. *Bullard*, 23 How. Pr. 172, 186; *People* v. *Molineux*, 168 N. Y. 264.

The second, third, and fourth paragraphs of the text, as appears from the notes, are statutory and have no application to this country.

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[17] *Trelawny* v. *Coleman*, 1817, 1 B. & Ald. 90.

[18] *R.* v. *Palmer*, 1856. See my 'Gen. View of Crim. Law,' pp. 238, 256 (evidence of Dr. Savage and Mr. Stephens).

[19] *Aveson* v. *Lord Kinnaird*, 1805, 6 Ea. 188.

[20] *Harrat* v. *Wise*, 1829, 9 B. & C. 712.

Intent.— *Com.* v. *Stoehr*, 109 Mass. 365; *Com.* v. *Dearborn*, 109 Mass. 368; *Com.* v. *Kelley*, 116 Mass. 341.

A is charged with illegally keeping liquors for sale. The fact that nearly three months prior to the complaint and seizure in question A had been convicted, on a plea of *nolo contendere*, of illegally keeping liquors, is relevant to show intent. *State* v. *Plunkett*, 64 Me. 534.

Upon an issue of whether A, by the use of fraudulent representations, purchased property from B, the fact that about the same time of the transaction in question A had fraudulently dealt with B, is relevant. *Pierce* v. *Hoffman*, 24 Vt. 525.

Upon the question of whether A, a depositor and client of a bank, had been misused or wronged by B, its cashier, the fact that other depositors had been misused or wronged by B is irrelevant. *Whitney* v. *First Nat. Bank*, 55 Vt. 154, 45 Am. Dec. 598.

Where fraud is imputed, a considerable latitude must be allowed in the admission of evidence. *Hoxie* v. *Home Ins. Co.*, 32 Conn. 37. See *Goodwin* v. *U. S. Annuity Co.*, 24 Conn. 602.

If an insolvent debtor simultaneously conveys all his estate by several deeds to different relatives, all the deeds are admissible to raise a presumption of fraud, in an action to set aside any one of them. *Thomas* v. *Beck*, 39 Conn. 243.

In an action of trover the plaintiff claimed that the defendant had conspired with other persons to obtain the goods in question from him by fraudulent representations. Held, that evidence of similar fraudulent representations by the same parties to a stranger, made in order to procure goods from him, was admissible to show the character of the representations made to the plaintiff. *Luckey* v. *Roberts*, 25 Conn. 492.

In a prosecution for keeping liquors with intent to sell the same, the State offered evidence of sales made by the defendant, before the date of the alleged offense. Held, that it was admissible on the question of intent, although other prosecutions for such sales were pending against him. *State* v. *Raymond*, 24 Conn. 206.

In an action against A, B, and C, for a conspiracy to defraud such merchants as they could, by representing A, who was a bankrupt, to be a man of large property and safely to be trusted, evidence is admissible that the defendants made such representations to certain third parties, in consequence of which the latter, without the request

of the defendants, recommended A to the plaintiff, whereby he was induced to give him credit. *Gardner* v. *Preston*, 2 Day (Conn.), 210.

So evidence of other recent forgeries or utterings by the defendant can be introduced to show guilty knowledge, or intent on a trial for forgery, or uttering forged instruments. *People* v. *Baird*, 105 Cal. 126; *People* v. *Kemp*, 76 Mich. 410; *Anson* v. *People*, 148 Ill. 494.

In civil actions guilty knowledge, or fraudulent purpose can be similarly proved. *Lockwood* v. *Doane*, 107 Ill. 235; *Lincoln* v. *Claflin*, 7 Wall. 132.

To prove guilty knowledge on the part of receiver of stolen goods, it may be proved that he had before received stolen goods from the same person. *State* v. *Ward*, 49 Conn. 440; *Com.* v. *Johnson*, 133 Pa. 293; *Shriedley* v. *State*, 23 O. St. 130.

It is not necessary that the goods before received should have been stolen from the same person, nor be of the same character. *State* v. *Ward*, 49 Conn. 441, 442.

Proof of a combination or conspiracy for a criminal purpose is not often made by direct, open and positive evidence, but more generally and more naturally by proving a repetition of acts of a character conducing to show a mutual purpose. In such cases it is seldom true that any one act, taken by itself, can be detected as tending to prove a combination, but when it is seen in connection with other acts, its true nature may be discovered. *State* v. *Spalding*, 19 Conn. 237. See also *Stalker* v. *State*, 9 Conn. 341.

Inadmissible to show was likely to so act.— As authorities for this proposition of the text, see *State* v. *Bates*, 10 Conn. 373; *Edwards* v. *Warner*, 35 Conn. 517; *Shaser* v. *State*, 36 Misc. Rep. 429.

A is charged with larceny. The fact that A had told an officer of the law, in the course of conversations, much concerning other crimes committed by him is irrelevant to show that A, by reason of being a notorious thief, was likely to steal on the occasion in question. *Com.* v. *Campbell*, 155 Mass. 537.

Authorities for the first statement of text.— *Bruen* v. *Bruen*, 4 Edw. Ch. 640; *People* v. *Hopson*, 1 Denio, 574; *Allison* v. *Matthieu*, 3 Johnson, 235; *Cary* v. *Hotailing*, 1 Hill, 311, 37 Am. Dec. 323; *Olmsted* v. *Hotailing*, 1 Hill, 317; *Welsh* v. *Carter*, 1 Wend. 185, 19 Am. Dec. 473; *Benham* v. *Cary*, 11 Wend. 83; *Jackson* v. *Timmerman*, 12 Wend. 299; *Howard* v. *Sexton*, 4 N. Y. 157; *Waterman* v. *Whitney*, 11 N. Y. 157; *Zabriskie* v. *Smith*, 13 N. Y. 322, 64 Am. Dec. 551; *Hall* v. *Naylor*, 18 N. Y. 588, 75 Am.

Dec. 269; *Hennequin* v. *Naylor,* 24 N. Y. 139; *Hathorne* v. *Hodges,* 28 N. Y. 486; *Copperman* v. *People,* 56 N. Y. 591; *People* v. *Weed,* 56 N. Y. 628; *Coleman* v. *People,* 58 N. Y. 555; *Swift* v. *Life Ins. Co.,* 63 N. Y. 186; *Miller* v. *Barber,* 66 N. Y. 558; *Edington* v. *Life Ins. Co.,* 67 N. Y. 185; *Dilliber* v. *Life Ins. Co.,* 69 N. Y. 256.

Similar acts (*e. g.,* gambling transactions) are admissible to prove intent. *Gardner* v. *Meeker,* 169 Ill. 40, 48 N. E. 307, affirming *Gardner* v. *Girtin,* 69 Ill. App. 422.

Upon an issue of fraud, prior fraudulent transactions with other parties are irrelevant. *Simpkins* v. *Berggren,* 2 Brad. 101.

Proof in forgery of the passing of other forged papers is admissible to show *scienter.* *Steele* v. *People,* 45 Ill. 152.

Evidence of other recent forgeries or utterings by the defendant can be introduced to show guilty knowledge or intent, on a trial for forgery or uttering forged instruments. *Anson* v. *People,* 148 Ill. 494.

In civil actions guilty knowledge or fraudulent purpose can be similarly proved. *Lockwood* v. *Doane,* 107 Ill. 235.

The statements of a pauper are admissible as tending to show his residence. *Dorr* v. *Seneca,* 74 Ill. 101.

Former dealings may be shown upon an issue of intention. *Jamieson* v. *Wallace,* 166 Ill. 388.

The alteration of other notes by the defendant, such notes being held by other parties, is admissible. *Merritt* v. *Boyden,* 191 Ill. 136, 60 N. E. 907, affirming 93 Ill. App. 613.

New Jersey.

Authorities.— *Evening Jour. Assn.* v. *McDermott,* 44 N. J. L. 430; *Ellison* v. *Lindsley,* 33 N. J. Eq. 258.

Intent.— On trial for perjury it is permissible to show that the witness testified to immaterial matters falsely for the purpose of showing intention and to rebut any claim of mistake. *Dodge* v. *State,* 4 Zab. 456.

Illustration (b).— To prove *scienter* and intent in passing counterfeit money other crimes of the sort are admissible. *State* v. *Van Houten,* Pen. 672; *State* v. *Robinson,* 1 Harr. 507.

Mutual disposition.— On trial for adultery, prior acts of adultery between the same parties are admissible to prove their mutual disposition. *State* v. *Jackson,* 65 N. J. L. 62; *State* v. *Snover,* 65 N. J. L. 289.

State of bodily feeling.— An expression of present suffering or pain is a part of the *res gestæ* and is admissible; an expression as to past suffering is not. *State* v. *Gedicke*, 43 N. J. L. 86.

State of mind.— The existence of lawsuits between parties is admissible to show their state of feeling. *State* v. *Zellers*, 7 N. J. L. 220.

Facts admitted as negativing the existence of a certain state of mind or intention. *Schlemmer* v. *State*, 51 N. J. L. 23.

Forgery.— Alleging intent to defraud in case of forgery. G. S. 1895, "Criminal Procedure," 50.

Evidence of passing other counterfeit money admissible to prove guilty knowledge. *State* v. *Van Houten*, 2 Pen. 672; *State* v. *Robinson*, 16 N. J. L. 507.

Maryland.

Intent.— Evidence of a subsequent attempt to cause an abortion by different means is admissible to show intent on the first occasion. *Lamb* v. *State*, 66 Md. 285.

The State may show that the accused in a trial for homicide tried to get the deceased to accompany him to a lonely spot. *Garlitz* v. *State*, 71 Md. 293.

Proof of other similar fraudulent acts is admissible to show intent to cheat and defraud. *Bloomer* v. *State*, 48 Md. 521.

Proof of other crimes admitted to show intent. *Bell* v. *State*, 57 Md. 108 (forgery); *Lamb* v. *State*, 66 Md. 285 (abortion).

Malice.— A previous assault by the accused on the deceased is admissible to show malice. *Williams* v. *State*, 64 Md. 384.

Forgery.— To prove guilty knowledge, it is permissible to prove that the accused had in his possession about the same time other forged instruments. *Bloomer* v. *State*, 48 Md. 521; *Bell* v. *State*, 57 Md. 108; *Bishop* v. *State*, 55 Md. 138.

False pretenses.— In a prosecution for obtaining property by false pretenses, a letter of the defendant showing his guilty intent is admissible even though it was not used in obtaining the property. *Carnell* v. *State*, 85 Md. 1.

Fraud.— To show intention and motive in cases where fraud is involved similar acts and declarations with third parties are admissible. *Friend* v. *Hamill*, 34 Md. 298.

To prove a conspiracy to defraud, it may be shown that goods

bought by one were offered for sale by another below cost. *Blum* v *State,* 94 Md. 375.

Illustration (o).— *Griffith* v. *Diffenderffer,* 50 Md. 466.

Character of an act.— Evidence may be given as to other crimes when they form part of the same transaction and characterize the act in question. *Lamb* v. *State,* 66 Md. 285.

Authority of agent.— To show that an agent had apparent authority to make a certain contract, evidence showing that he had had authority to make such contracts with others is admissible. *Bonaparte* v. *Clagett,* 78 Md. 87.

Pennsylvania.

General authorities.— *Sherwood* v. *Titman,* 55 Pa. 77; *Kilrow* v. *Com.,* 89 Pa. 480; *Neel* v. *Potter,* 40 Pa. 483; *Green, etc., R. Co.* v. *Bresner,* 97 Pa. 103.

Intention.— To prove that a misstatement as to loss was intentional, other such misstatements may be proved. *McSparran* v. *Insurance Co.,* 193 Pa. 184.

One may testify as to his intent where the character of the transaction must be shown by it. *Bartley* v. *Phillips,* 179 Pa. 175.

Proof of other crimes admissible to show motive and intent. *Goersen* v. *Com.,* 99 Pa. 388, 106 Pa. 477 (arsenical poisoning); *McConkey* v. *Com.,* 101 Pa. 416; *Kramer* v. *Com.,* 87 Pa. 299; *Com.* v. *Shepherd,* 2 Pa. Dist. 345.

In trial for murder of a wife by setting fire to her dress, it may be shown that defendant at another time set fire to her dress. *Com.* v. *Birriolo,* 197 Pa. 371.

After the doing of an act has been proved, to prove that a certain person did it a prior declaration of his intention to do it may be proved. *Dodge* v. *Baehe,* 57 Pa. 421.

Evidence of one's penurious and miserly habits is admissible to show that a transfer was not a gift. *Hasel* v. *Beilstein,* 179 Pa. 560.

State of mind.— A letter written a month before the homicide admitted to show the state of defendant's mind toward the deceased. *Com.* v. *Krause,* 193 Pa. 306.

Bodily condition.— Statements of present bodily pain are admissible as part of the *res gestæ;* a statement as to past suffering is not. *Lichtenwallner* v. *Laubach,* 105 Pa. 366.

Guilty knowledge.— Other instances of receiving stolen goods are provable. *Com.* v. *Charles,* 21 Pittsb. Leg. J. 11, 14 Phila. 663;

Com. v. *Moorby*, 8 Phila. 615; *Com.* v. *Johnson*, 133 Pa. 293; *Kilrow* v. *Com.*, 89 Pa. 480.

Fraud.— To show fraud, evidence of similar transactions with other persons is admissible. *Kauffman* v. *Swar*, 5 Pa. 230; *Helfrich* v. *Stern*, 17 Pa. 143; *Evans* v. *Matson*, 56 Pa. 54.

To identify one who got a note by fraud, it is permissible to show that defendant got other notes from other persons by fraud. *Brown* v. *Schock*, 77 Pa. 471.

Similar fraudulent representations admissible to show false pretense. *Striker* v. *McMichael*, 1 Phila. 89.

Subsequent misrepresentations admitted to show fraud. *Cummings* v. *Cummings*, 5 W. & S. 553.

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.

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 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.[21]

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* See Note VI.

[21] *R.* v. *Gray*, 1866, 4 F. & F. 1102. I acted on this case in *R.* v. *Stanley*, Liverpool Summer Assizes, 1882, but I greatly doubt its authority. The objection to the admission of such evidence is that it may practically involve the trial of several distinct charges at once, as it would be hard to exclude evidence to show that the other fires were accidental.— See, too, *Makin* v. *The Attorney-General for New*

(*b*) A is employed to pay the wages of B's labourers, 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 favour of each case in A, is deemed to be relevant.[22]

(*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.[23]

(*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.[24]

South Wales, [1894], A. C. 57, decided after the author had written the foregoing note, where the judgment in *R.* v. *Gray* was mentioned without disapproval in the judgment of the Judicial Committee; the decision in this case was that on a charge of murder of a baby, evidence of children's remains being found on premises occupied by the accused was admissible.

22 *R.* v. *Richardson*, 1860, 2 F. & F. 343.

23 *R.* v. *Geering*, 1849, 18 L. J. M. C. 215; cf. *R.* v. *Garner*, 1863 3 F. & F. 681. See, too, *Makin* v. *The Attorney-General for New South Wales*, [1894], A. C. 57. The earlier cases were discussed in *R.* v. *Neill* (or *Cream*), tried at the Central Criminal Court in October, 1892, when Hawkins, J., admitted evidence of subsequent administrations of strychnine by the prisoner to persons other than and unconnected with the woman of whose murder the prisoner was then convicted. See. too, *R.* v. *Rhodes, ante,* p. 63, note 9.

24 *Blake* v. *Albion Life Assurance Society,* 1878, 4 C. P. D. 94.

AMERICAN NOTE.

General.

(See also notes under Article 11.)

Authorities.— 1 Taylor on Evidence (Chamberlayne's 9th ed.), p. 257[15]; 1 Greenleaf on Evidence (15th ed.), sec. 53, note; *Dearborn* v. *Union Nat. Bank*, 61 Me. 369; *Ossipee* v. *Grant*, 59 N. H. 70; *State* v. *McDonald*, 14 R. I. 270; *McCasker* v. *Enright*, 64 Vt. 488, 33 Am. St. Rep. 938; *State* v. *Kelley*, 65 Vt. 531; *Hoxie* v. *Home Ins. Co.*, 32 Conn. 21, 85 Am. Dec. 240; *Hawes* v. *State*, 88 Ala. 37, 67; *State* v. *Stice*, 88 Ia. 27; *Dawson* v. *State*, 32 Tex. App. 535; *Goersen* v. *Com.*, 99 Pa. 388, 106 Pa. 477; *Wood* v. *U. S.*, 16 Pet. 342, 360; *Bottomly* v. *U. S.*, 1 Story R. 135, 143; *Friend* v. *Hamill*, 34 Md. 298, 306; *Com.* v. *McCarthy*, 119 Mass. 354; *Com.* v. *Robinson*, 146 Mass. 571, 16 N. E. 152; *Com.* v. *Eastman*, 1 Cush. (Mass.) 189, 48 Am. Dec. 595; *Com.* v. *Bradford*, 126 Mass. 42.

A bought a vessel, on which he held a mortgage, and insured it with B. The vessel was lost on her next voyage, and A brought suit on the policy of insurance. B claimed that the vessel was fraudulently lost by the master's misconduct, to which A was privy, and that the insurance was fraudulently procured with intent that the vessel should be lost. The fact that a series of losses, under suspicious circumstances, of other vessels owned by one of the same owners, and mortgaged in the same manner to A, has occurred, is relevant to show that the loss of the vessel in question was not accidental. *Hoxie* v. *Home Ins. Co.*, 32 Conn. 21, 85 Am. Dec. 240.

So to show that ordinary care has been used in a particular instance the usual practice of others in the same business or employment under similar circumstances is relevant. *Holland* v. *Tenn. Coal Co.*, 91 Ala. 444; *Reese* v. *Hershey*, 163 Pa. 253; *Railway Co.* v. *Manchester Mills*, 88 Tenn. 653; *Doyle* v. *St. Paul, etc., R. Co.*, 42 Minn. 79; *Whitsett* v. *Chicago, etc.*, 67 Ia. 150.

A series of like acts, the expression of a system of conduct, may be shown to prove habit, etc. *Baulec* v. *N. Y., etc., R. Co.*, 59 N. Y. 356; *Lanpher* v. *Clark*, 149 N. Y. 472. But this rule must be limited in its scope. See *Wooster* v. *Broadway, etc., R. Co.*, 72 Hun, 197; *Ross* v. *Ackerman*, 46 N. Y. 210; cases under article 10.

Illustration (a).— See *People* v. *Dimick*, 107 N. Y. 13; *Faucet* v. *Nichols*, 64 N. Y. 383, 2 Wkly. Dig. 332.

Illustration (b).— See *Rankin* v. *Blaekwell,* 2 Johns. Cas. 198.

Illustration (c).— See *Weyman* v. *People,* 4 Hun, 511, 578, 62 N. Y. 623.

Maryland.

Authority.— *Friend* v. *Hamill,* 34 Md. 298, 306.

Evidence showing a scheme devised by the defendant for obtaining goods by false pretense is admissible. *Carnell* v. *State,* 85 Md. 1.

System of selling liquor by seeming to give it away admitted to prove intent. *Archer* v. *State,* 45 Md. 33. But former crimes barred by the Statute of Limitations cannot be proved. *World* v. *State,* 50 Md. 49.

Pennsylvania.

Authorities.— *Goersen* v. *Com.,* 99 Pa. 388; *Swan* v. *Com.,* 104 Pa. 218; *Funk* v. *Ely,* 45 Pa. 444.

A general fraudulent scheme to obtain goods by falsely representing one's credit is admissible. *White* v. *Rosenthal,* 173 Pa. 175.

To show collusion between a minor and defendant in securing property from plaintiff by the minor's falsely representing his age, other similar systematic frauds of the minor are admissible. *Neff* v. *Landis,* 110 Pa. 204.

So as to show that ordinary care has been used in a particular instance the usual practice of others in the same business or employment under similar circumstances is relevant. *Reese* v. *Hershey,* 163 Pa. 253.

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 according to which it naturally would have been done, is a relevant fact.

When there is a question whether a particular person

* See Note VII.

held a particular public office, the fact that he acted in that office is deemed to be relevant.[25]

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.

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.[26]

(*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.[27]

(*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.[28]

(*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.[29]

AMERICAN NOTE.

General.

Authority.— Abbott's Trial Evidence (2d ed.), pp. 52, 237.

Course of business.— *Union Bank* v. *Stone*, 50 Me. 595, 79 Am. Dec. 631; *Hall* v. *Brown*, 58 N. H. 93; *Bussard* v. *Levering*, 6 Wheat. 102; *Lindenbarger* v. *Bell*, 6 Wheat. 104; *U. S.* v. *Babcock*, 3 Dillon C. C. (U. S.) 571; *Knickerbocker Ins. Co.* v. *Pendleton*, 115 U. S. 539;

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[25] 1 Ph. Ev. 449; Roscoe's N. P. 43; Taylor, s. 171.

[26] *R.* v. *Canning*, 1754, 19 S. T. 370.

[27] *Hetherington* v. *Kemp*, 1815, 4 Camp. 193; and see *Skilbeck* v. *Garbett*, 1845, 7 Q. B. 846, and *Trotter* v. *Maclean*, 1879, 13 Ch. Div. 574.

[28] *Warren* v. *Warren*, 1834, 1 C. M. & R. 250; *Woodcock* v. *Houldsworth*, 1846, 16 M. & W. 124. Other cases on this subject are collected in Roscoe's Nisi Prius, p. 374.

[29] *Blake* v. *Albion Life Assurance Society*, 1878, 4 C. P. D. 94.

Dunlop v. *U. S.*, 165 U. S. 486; *First Nat. Bank* v. *McMonigle*, 69 Pa. St. 156; *State* v. *Taylor*, 126 Mo. 531, 8 Am. Rep. 236; *Dwight* v. *Brown*, 9 Conn. 83.

Holding office.— *State* v. *Carroll*, 38 Conn. 449, 9 Am. Rep. 409; *Bank U. S.* v. *Dandridge*, 12 Wheat. 64, 70; *State* v. *Row*, 81 Ia. 138; *Golder* v. *Bressler*, 105 Ill. 419, 428; *Fowler* v. *Beebe*, 9 Mass. 231.

Agency.— *Kent* v. *Tyson*, 20 N. H. 121; *Perry* v. *Dwelling-House Ins. Co.*, 67 N. H. 291, 33 Atl. 731, 26 Ins. L. J. 120; *Austrian & Co.* v. *Springer*, 94 Mich. 343, 34 Am. St. Rep. 350; *Thurber* v. *Anderson*, 88 Ill. 167; *Gallinger* v. *Lake Shore Co.*, 67 Wis. 529; *Putnam* v. *Home Ins. Co.*, 123 Mass. 324, 25 Am. Rep. 93; *Doyle* v. *Corey*, 170 Mass. 337, 49 N. E. 651; *Kelley* v. *Lindsey*, 7 Gray (Mass.), 287; *Roche* v. *Ladd*, 1 Allen (Mass.), 436.

Mailing letter, etc.— Illustration (*e*). *Huntley* v. *Whittier*, 105 Mass. 391, 7 Am. Rep. 536; *Munn* v. *Baldwin*, 6 Mass. 316; *Hedden* v. *Roberts*, 134 Mass. 38; *Marston* v. *Bigelow*, 150 Mass. 45, 22 N. E. 71, 5 L. R. A. 43; *Briggs* v. *Hervey*, 130 Mass. 186; *Inhabitants of Augusta* v. *Shepard*, 21 Me. (8 Shep.) 298; *Labre* v. *Smith*, 62 N. H. 663; *Woodman* v. *Jones*, 8 N. H. 344; *Russell* v. *Buckley*, 4 R. I. 525, 70 Am. Dec. 167; *Oakes* v. *Weller*, 16 Vt. 63; *Com.* v. *Kimball*, 108 Mass. 473; *Holly* v. *Boston Gaslight Co.*, 8 Gray (Mass.), 123, 69 Am. Dec. 233; *Briggs* v. *Hervey*, 130 Mass. 187; *Rosenthal* v. *Walker*, 111 U. S. 185; *Folsom* v. *Cook*, 115 Pa. St. 539; *McFarland* v. *Accident Assn.*, 124 Mo. 124.

But such evidence is not conclusive proof of the receipt of the letter. *Schutz* v. *Jordan*, 141 U. S. 213; *Harrington* v. *Hickman*, 148 Pa. 405. Nor is like evidence conclusive in the case of telegrams. *U. S.* v. *Babcock*, 3 Dill. 571; *Eppinger* v. *Scott*, 112 Cal. 369.

The question is, whether a particular letter reached A. The fact that it was the usage, at a hotel, to deposit all letters, left for the guests, in an urn, whence they were sent, at short intervals during the day, to the rooms of the different guests to whom they were directed, is deemed to be relevant. *Dana* v. *Kemble*, 19 Pick. (Mass.) 112.

The question is, whether a letter reached A. The facts that B, the alleged sender, took a copy thereof in the course of his business, and in accordance with his custom, by which he would naturally deposit the letter in the post-office, directed and post-paid, are deemed to be relevant. *McKay* v. *Myers*, 168 Mass. 312, 47 N. E. 98.

The question is, whether a particular telegram reached A.

The facts that it was properly addressed and deposited in the telegraph office, with the charges prepaid, are deemed to be relevant. *Com.* v. *Jeffries*, 7 Allen (Mass.), 548, 73 Am. Dec. 712.

The question is, whether a notice of protest was sent on a given day. The post-mark of the office where it was mailed is deemed to be relevant. *New Haven County Bank* v. *Mitchell*, 15 Conn. 206.

The question is, whether notice was given to an indorser of a note upon its dishonor. The testimony of a notary public, alleged to have given such notice, as to his usual course of proceeding and his customary habit of business, in regard to giving notice, is deemed to be relevant. *Union Bank* v. *Stone*, 50 Me. 595, 79 Am. Dec. 631.

In order to entitle a party to the benefit of the presumption, it must be shown that the letter was mailed properly addressed, and that it came from proper custody. *Ward* v. *Hasbrouck*, 60 N. Y. Supp. 391, 44 App. Div. 32.

New Jersey.

Agency.— The fact of agency may be proved by acts and conduct of the principal and agent. *Bruhn* v. *Forge Co.*, 38 N. J. L. 74.

Holding office.— *Den.* v. *Pond*, Coxe, 379; *Brewster* v. *Vail*, Spen. 56; *Conover* v. *Solomon*, Spen. 295; *Smith* v. *Perth Amboy*, 4 Harr. 52; *Reeves* v. *Ferguson*, 31 N. J. L. 107; *Gilbert* v. *Patterson*, 32 N. J. L. 177; *Gratz* v. *Wilson*, 1 Hal. 419.

One's acting as constable is sufficient evidence of his authority. *Stout* v. *Hopping*, 1 Hal. 125.

Maryland.

Holding office.— Proof that one has acted in a public capacity raises the presumption that he had authority. *Hanon* v. *State*, 63 Md. 123.

Course of business.— To prove the existence of an instrument, a public officer may testify that according to the custom of his office certain entries would not have been made if the instrument in question had not been produced. *State* v. *Mayor*, 52 Md. 398.

The usual custom of a justice of the peace in drawing deeds not admitted. *Pocock* v. *Hendricks*, 8 G. & J. 421.

Agency.— Agency may be proved by course of dealing. *Packing Co.* v. *Brown*, 87 Md. 1.

Mailing letter.— Evidence that a letter was mailed is evidence that it was received. *Phelps* v. *Georges Creek Co.*, 60 Md. 536; *Roberts* v. *Mattress Co.*, 46 Md. 374.

To prove receipt of a letter, it may be shown that it was written, copied, addressed, and prepared for mailing according to the usual course of business, and that another letter placed in the same bunch was duly received by its addressee. *Bank* v. *Raney & Co.*, 77 Md. 321; *Williams* v. *Brailsford*, 25 Md. 126.

Pennsylvania.

Mailing letter.—Illustration (*c*). *Folsom* v. *Cook*, 115 Pa. 539.

Proof of a letter properly addressed and mailed is *prima facie* evidence of its receipt. But it is rebuttable. *Mutual Ins. Co.* v. *Toy Co.*, 97 Pa. 424; *Whitmore* v. *Insurance Co.*, 148 Pa. 405; *Jensen* v. *McCorkell*, 154 Pa. 323; *McSparron* v. *Insurance Co.*, 193 Pa. 184.

"Letters properly directed and duly mailed are sufficient evidence of notice of the dishonor of bills, or nonpayment of negotiable notes." *Kenney* v. *Altvater*, 77 Pa. 34; *Bank* v. *McMonigle*, 69 Pa. 156.

Course of business.— *First Nat. Bank* v. *McMonigle*, 69 Pa. 156.

Proof of uniform course of business between two parties admitted to show that there was no liability for services performed. *McCaul's Estate*, 206 Pa. 506.

Course of business between testatrix and beneficiary admitted to show undue influence. *Robinson* v. *Robinson*, 203 Pa. 400.

Acting as officer.— That one acted as coroner is *prima facie* evidence that he was commissioned and his sureties approved. *Young* v. *Com.*, 6 Binn. 88.

Acting as bank cashier is admissible to prove his appointment. *Barrington* v. *Bank*, 14 S. & R. 405.

Acting as agent.— Agency proved by proof of acts as agent with knowledge of principal. *Culver* v. *Ice Co.*, 206 Pa. 481.

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.

[2] *Stobart* v. *Dryden*, 1836, 1 M. & W. 615.

(*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.[3]

AMERICAN NOTE.

General.

Authorities.— 1 Greenleaf on Evidence (15th ed.), sec. 99; McKelvey on Evidence, p. 203.

Hearsay inadmissible.— Authorities on the first clause of the text. *In re Hurlburt's Estate*, 68 Vt. 366, 35 Atl. 77; *Quinnam* v. *Quinnam*, 71 Me. 179; *Sidelinger* v. *Bucklin*, 64 Me. 371; *Chapman* v. *Twitchell*, 37 Me. 59, 58 Am. Dec. 773; *Sheldon* v. *Robinson*, 7 N. H. 157, 26 Am. Dec. 726; *Rose* v. *Mitchell*, 21 R. I. 270, 43 Atl. 67; *Amann* v. *Lowell*, 66 Cal. 306, 5 Pac. 363; *Aiken* v. *Hodge*, 61 Ill. 436; *Bank of Monroe* v. *Gifford*, 72 Ia. 750, 32 N. W. 669; *Hipps* v. *Wardle*, 1 Atl. (Pa.) 727; *Dobson* v. *Cochran*, 34 S. C. 518, 13 S. E. 679; *Edgell* v. *Francis*, 66 Mich. 303, 33 N. W. 501; *Sutherland* v. *Round*, 57 Fed. Rep. 467, 6 C. C. A. 428, 16 U. S. App. 30; *Cook* v. *Osborn*, 2 Root (Conn.), 31; *Baxter* v. *Camp*, 71 Conn. 245, 41 Atl. 803, 42 L. R. A. 514; *Brown* v. *Butler*, 71 Conn. 576, 42 Atl. 654; *Porter* v. *Ritch*, 70 Conn. 235; *Allen* v. *Rundle*, 50 Conn. 24; *Strong* v. *Smith*, 62 Conn. 43; *Benton* v. *Starr*, 58 Conn. 288, 290; *McKinnon* v. *Norcross*, 148 Mass. 533, 30 N. E. 183; *Ryan* v. *Merriam*, 4 Allen (86 Mass.), 77.

Instances.— The question is, whether A made a promise of marriage to B.

The declarations of A's mother, to the plaintiff, B, made in A's absence, and not communicated to him, are deemed irrelevant either as tending to prove the alleged promise on the part of A, the defendant, or that on the part of B. *Lawrence* v. *Cooke*, 56 Me. 187, 96 Am. Dec. 443.

The declarations of deceased persons, who had means of knowledge and were disinterested, are deemed irrelevant in relation to acts of ownership or possession on the part of A. *Wendell* v. *Abbott*, 45 N. H. 349.

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[3] *Sturla* v. *Freccia*, 1880, 5 App. Cas. 623.

The question is, what was the boundary line between the property of A and of B, and what was the location of a certain corner therein.

The fact that on a survey of the line by C, a witness, the plaintiff's brother, D, was present, and did not object to his taking the corner to be at the place where the defendant, B, claimed it to be, is deemed to be irrelevant as against A, the plaintiff. *Johnson* v. *Prescott*, 67 N. H. 597, 32 Atl. 775.

The question is, whether a warranty that a horse "would work well" had been broken.

The fact that a horse trainer, not called as a witness, had offered to subdue the horse for the plaintiff, A, for a certain sum, but that A declined to employ him, is irrelevant and hearsay. *Gates* v. *Moore*, 51 Vt. 222.

The question is, whether an injury was occasioned by A.

The reasons given by guests of an inn for leaving it when offered in testimony as declarations to B, a witness, are irrelevant as to the question in controversy. *Wesson* v. *Washburn Iron Co.*, 13 Allen (Mass.), 95, 90 Am. Dec. 181.

The question is, how a certain accident happened, whereby A, an employee, was injured.

Testimony of a conversation with B, a foreman, in which B told how the accident to A, the plaintiff, happened, is irrelevant. *McKinnon* v. *Norcross*, 148 Mass. 533, 20 N. E. 183.

The question is, whether A, a deceased person, was insane.

Evidence of what his widow, B, had said in relation to his insanity is deemed irrelevant. *Cook* v. *Osborn*, 2 Root (Conn.), 31.

The question is, whether a reconveyance of land from B to A was valid as against C, the plaintiff in an ejectment suit against A.

Declarations of B, made to C out of court, showing that the deed from A to B was *bona fide*, being intended as security for responsibilities incurred by B for A, and a writing of defeasance was simultaneously given back are deemed irrelevant. *Chapin* v. *Pease*, 10 Conn. 69, 25 Am. Dec. 56.

The question is, whether a certain dog was vicious in biting A, who brought an action against his master, B, for damages resulting from the bite.

The fact that A, upon dropping into a drowse, would jump up and call, "Take him off," that the dog was biting him, is deemed irrelevant. *Plummer* v. *Ricker*, 71 Vt. 114, 41 Atl. 1045.

Written hearsay inadmissible.— Authorities on the second clause of the text. *Kimball* v. *Hilton*, 92 Me. 214, 42 Atl. 394; *Ordway* v. *Haynes*, 50 N. H. 159; *State* v. *O'Brien*, 7 R. I. 336; *Hibbard* v. *Mills*, 46 Vt. 243; *Abel* v. *Fitch*, 20 Conn. 90, 96; *Buckman* v. *Barnum*, 15 Conn. 67; *Allen's Appeal*, 69 Conn. 702, 708, 38 Atl. 701; *Hammond* v. *Hammond Buckle Co.*, 72 Conn. 130, 139, 44 Atl. 25; *Roraback* v. *Pennsylvania Coal Co.*, 58 Conn. 292; *Union* v. *Plainfield*, 39 Conn. 563; *Caron* v. *B. & A. R. R. Co.*, 167 Mass. 72; *Prescott* v. *Ward*, 10 Allen (Mass.), 203; *Vicksburg, etc., R. Co.* v. *O'Brien*, 119 U. S. 99; *Munshower* v. *State*, 55 Md. 11; *Kelley* v. *State*, 82 Ga. 441; *State* v. *Gee*, 92 N. C. 756.

Instances.— The question is, what were the terms of a contract made upon a particular occasion by A, the agent of B, with C.

A letter to B, from A, relative to the contract which A proposes to make, is irrelevant to prove the contract, being a mere declaration out of court. *Sargent* v. *Wording*, 46 Me. 464.

In a suit by A, for the alienation of his wife's affections, the question is, why B, the wife, remained away from her husband, A.

A declaration and petition for divorce on the ground of adultery, offered in evidence by A, are irrelevant when B, the wife, testifies that she left him be ause of cruel treatment, but does not claim that she stayed away because of unjust charges. *Rose* v. *Mitchell*, 21 R. I. 270, 21 R. I. (part 2) 60, 43 Atl. 67.

The question is, whether A was employed by B, a corporation, as treasurer and general manager.

An extract from the annual report of C, president of this corporation, containing a statement that A is "now the manager," is irrelevant. *Hammond* v. *Hammond Buckle Co.*, 72 Conn. 130, 44 Atl. 25.

The question is, what was the fair cash value of certain shares of stock.

Quotations in newspapers, obtained from persons who might have been summoned as witnesses, are deemed irrelevant, being hearsay. *National Bank of Commerce* v. *New Bedford*, 175 Mass. 257, 56 N. E. 288. See *Laurent* v. *Vaughn*, 30 Vt. 90, 94, 95.

The question is, whether A or B owned a certain scientific catalogue manuscript. Letters written by C to A, the plaintiff, in an action of replevin, who recognized A's ownership, are irrelevant and hearsay. *Root* v. *Borst*, 142 N. Y. 62, 36 N. E. 814.

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Entries in a police blotter are not admissible to show how a motorman acted at the time of an accident. *Kerr* v. *Metropolitan St. Ry. Co.*, 55 N. Y. Supp. 1142, 57 N. Y. Supp. 794, 27 Misc. Rep. 190.

Letters of third persons are mere hearsay and inadmissible. *Frank* v. *Brewer*, 26 N. Y. St. R. 590, 7 N. Y. Supp. 182; *Rothchild* v. *Schwarz*, 59 N. Y. Supp. 527, 28 Misc. Rep. 521; *Welsbach Commercial Co.* v. *Popper*, 59 N. Y. Supp. 1016; *O'Brien* v. *Gallagher*, 57 N. Y. Supp. 250, 26 Misc. Rep. 838.

A time card made by a conductor is inadmissible to prove when an accident occurred. *Lucas* v. *Metropolitan St. Ry. Co.*, 67 N. Y. Supp. 833, 56 App. Div. 405.

Newspaper accounts are not evidence. *Child* v. *Sun Mutual Insurance Co.*, 3 Sand. 26; *Downs* v. *New York Central Railroad Co.*, 47 N. Y. 83.

Affidavit.— An affidavit in a suit is hearsay as to third parties. *Manning* v. *Bresnahan*, 63 Mich. 584; *Cook* v. *Hopper*, 23 Mich. 511.

New Jersey.

General rule excluding hearsay. *Demoney* v. *Walker*, Coxe, 33; *Curtis* v. *Aaronson*, 49 N. J. L. 68; *Arata* v. *Sullivan*, 63 N. J. L. 46; *Trenton Ins. Co.* v. *Johnson*, 4 Zab. 576; *Horner* v. *Leeds*, 25 N. J. L. 106; *McKernan* v. *McDonald*, 27 N. J. L. 541; *Stevens* v. *Post*, 12 N. J. Eq. 408.

Hearsay evidence received by the court when it would not have been admissible before a jury. *State* v. *McDonald*, Coxe, 333.

Statements of third persons admitted to fix the recollection of the witness. *State* v. *Fox*, 25 N. J. L. 566.

Reputation in issue.— Hearsay admissible when the fact to be shown is notoriety. *Browning* v. *Skillman*, 4 Zab. 351.

Deceased witness.— Declarations of a deceased attesting witness that a will was not duly executed, notwithstanding the contrary presumption arising from proof of his signature as such witness, held admissible. *Church* v. *Ten Eyck*, 1 Dutch. 40; affirmed in *Otterson* v. *Hofford*, 36 N. J. L. 129.

Objecting to hearsay.— Hearsay evidence, no objection to its admission having been made, held sufficient to prove that W was agent of defendant. *Smith* v. *Delaware & Atl. T. & T. Co.*, 63 N. J. Eq. 93.

Instances.— Declarations of a testator made after the will is executed are hearsay. *Meeker* v. *Boylan*, 28 N. J. L. 274.

Statements by one not a party to the suit claiming an interest in property and denying that defendant had any interest, not made in

the presence of the defendant, are not admissible. *Hoyt* v. *Hoyt*, 12 C. E. Gr. 399.

Statements by complainant made not in defendant's presence inadmissible as against defendant. *Smith* v. *McVeigh*, 11 N. J. Eq. 242.

The fact that defendant held herself out to be a partner cannot be proved by statements of other members of the firm that she had been made a partner. *Carey* v. *Marshall*, 67 N. J. L. 236.

Agency cannot be proved by the declarations of the agent. *Smith* v. *Delaware & Atl. T. & T. Co.*, 63 N. J. Eq. 93.

Statements in Dun's Commercial Agency report are mere hearsay and not admissible to prove statements made by parties to the reporter. *Cowen* v. *Bloomberg*, 66 N. J. L. 385.

A confession of a *particeps criminis* in adultery is not admissible. *Berckmans* v. *Berckmans*, 16 N. J. Eq. 122.

Written hearsay.— *Railroad Co.* v. *May*, 48 N. J. L. 401.

Maryland.

General rule excluding hearsay.— *Norwood* v. *State*, 45 Md. 68; *Herrick* v. *Swomley*, 56 Md. 439; *Smith* v. *Wood*, 31 Md. 293; *Lee* v. *Tinges*, 7 Md. 215.

Instances.— Declarations of a third party as to the ownership of property is hearsay. *Chelton* v. *State*, 45 Md. 564.

Statements of third persons not in the presence of a party are not admissible against him. *Swartz* v. *Chickering*, 58 Md. 290.

One cannot prove the truth of a fact by introducing previous statements of his own. *Williamson* v. *Dillon*, 1 H. & G. 444.

Declarations of a witness who has been suddenly taken sick are not admissible merely on the ground of necessity. *Gaither* v. *Martin*, 3 Md. 146.

Hearsay as to the position of a building; what a former owner said is not admissible. *Tome Institute* v. *Davis*, 87 Md. 591.

To show that one acted with reasonable prudence or in good faith, the information upon which he acted is admissible, even though it consists of statements of third parties. *Friend* v. *Hamill*, 34 Md. 308.

Written hearsay inadmissible.— Authorities on the second clause of the text. *Munshower* v. *State*, 55 Md. 11; *Lewis* v. *Kramer*, 3 Md. 265.

A written memorandum by one now deceased not made in the course of business is hearsay and not admissible. *Tome Institute* v. *Davis*, 87 Md. 591.

The fact that a letter contained a certain enclosure cannot be proved by statements in the letter, for they are hearsay. *Whiteford* v. *Burckmyer*, 1 Gill, 127.

Letters as hearsay.— *Rosenstock* v. *Tormey*, 32 Md. 169.

Voluntary affidavits are on the same basis as unsworn statements of third parties. *Patterson* v. *Maryland Ins. Co.*, 3 H. & J. 71. As to *ex parte* affidavits, see also *Insurance Co.* v. *Carlin*, 58 Md. 336; *Kemp* v. *Insurance Co.*, 2 G. & J. 108; *Newson* v. *Douglass*, 7 H. & J. 417.

Testimony based on hearsay.— If testimony is based wholly upon information derived from others, it is hearsay and is not admissible. *Herrick* v. *Swomley*, 56 Md. 439; *Lewis* v. *Kramer*, 3 Md. 265; *Lee* v. *Tinges*, 7 Md. 215 (the correctness of an account); *Green* v. *Caulk*, 16 Md. 556.

Ancient facts.— Very ancient facts, written evidence of which cannot be supposed to exist, may be proved by hearsay. *Casey* v. *Inloes*, 1 Gill, 430.

Pennsylvania.

Hearsay inadmissible.— Authority on the first clause of the text. *Hipps* v. *Wardle*, 1 Atl. 727.

That a witness had notice of a dissolution of a partnership at a certain time is not admissible to prove such dissolution at that time. *Shaffer* v. *Snyder*, 7 S. & R. 503.

As to declarations of a deceased attesting witness that notwithstanding his signature a will was not duly executed, see *Crouse* v. *Miller*, 10 S. & R. 155.

Conversations with third persons are not admissible, though such third person himself would be competent. *Corser* v. *Hale*, 149 Pa. 274; *Johnston* v. *Patterson*, 114 Pa. 398; *Evans* v. *McKee*, 152 Pa. 89.

Instances.— *Ex parte* conversations. *Gordon* v. *Bowers*, 16 Pa. 226.

Telegram from a third person. *Cummings* v. *Gann*, 52 Pa. 484.

Statements of a third person communicated to defendant. *Harper* v. *Kean*, 11 S. & R. 280.

The accused's declarations are not competent in his favor. *Com.* v. *Frew*, 3 Pa. Co. Ct. 492; *Rudy* v. *Com.*, 128 Pa. 500.

Illustration (a).— This doctrine denied. *Neely* v. *Neely*, 17 Pa. 227.

Written hearsay.— Written hearsay just as inadmissible as oral. *Miller* v. *Miller*, 187 Pa. 572.

A copy of a list of lands made out fifty years before the trial is not admissible. *Galloway* v. *Ogle*, 2 Binn. 468.

Other examples: *Urket* v. *Coryell*, 5 W. & S. 60.

SECTION I.

HEARSAY WHEN RELEVANT.

ARTICLE 15.*

ADMISSION 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 favour unless it is or is deemed to be relevant for some other reason.

AMERICAN NOTE.

General.

Authorities.— 1 Greenleaf on Evidence (15th ed.), secs. 169 *et seq.*, 192; McKelvey on Evidence, pp. 90 *et seq.*, 104.

Admissions competent evidence.— As supporting the text, see *Cole* v. *Cole*, 33 Me. 542; *Wilkinson* v. *Drew*, 75 Me. 360; *Hamblett* v. *Hamblett*, 6 N. H. 333; *Olney* v. *Chadsey*, 7 R. I. 224; *Whitney* v. *Bayley*, 4 Allen (Mass.), 173; *Lord* v. *Bigelow*, 124 Mass. 185; *Crowley* v. *Pendleton*, 46 Conn. 64; *Saunders' Appeal*, 54 Conn. 108; *Broschart* v. *Tuttle*, 59 Conn. 1, 21 Atl. 925, 11 L. R. A. 9, 33; *Electric Motor Co.* v. *D. Frisbie Co.*, 66 Conn. 67; *Carney* v. *Hennessey*, 74 Conn. 107, 49 Atl. 910; *Harrington* v. *Gable*, 81 Pa. 406; *Folger* v. *Boyington*, 67 Wis. 447 (pleadings); *Pope* v. *Ellis*, 115

*See Note IX.

U. S. 363 (pleadings); *Bogie* v. *Nolan*, 96 Mo. 85 (former proceedings); *Ex parte Hayes*, 92 Ala. 120 (former proceedings).

If any part of a statement is received as an admission, all other parts of the same statement which explain or qualify it must also be received. *Ins. Co.* v. *Newton*, 22 Wall. 32; *Vauneter* v. *Crossman*, 42 Mich. 465; *Simmons* v. *Haas*, 56 Md. 153.

Oral admissions are not generally conclusive and may be explained or shown to be contrary to facts, etc. *Allen* v. *Kirk*, 81 Ia. 658; *Miller* v. *Rowan*, 108 Ala. 98; *Knobloch* v. *Mueller*, 123 Ill. 554. And admissions may be by conduct. *Wesner* v. *Stein*, 97 Pa. St. 322; *Lefever* v. *Johnson*, 79 Ind. 554.

Instances.— The question is, whether the title in a particular piece of property was vested in A, by virtue of being derived from B, A's father, or not.

The fact that C, the grantor of the plaintiff, D, when he bought this property for a home for A's mother, E, said to her: "You have got a good home as long as you live by paying the taxes, insurance, and keeping the house in repair," to which statement it did not appear that E, the mother of A, the defendant, made any reply, is an admission, implied by her silence, that D's grantor, C, was the owner of the property, and in affirmance of C's title, and is relevant to the question in controversy. *Roberts* v. *Rice*, 69 N. H. 472, 45 Atl. 237.

The question is, whether A, a driver employed by B, was careless or incompetent in the overturning of a carriage driven by A, whereby C was injured.

The fact that immediately after the accident A was discharged by his master, B, is competent evidence as an admission that A was careless or incompetent. *Martin* v. *Towle*, 59 N. H. 31.

The declaration of B, that "he wished to God it had burned the whole of it," deemed to be relevant as an admission in an action brought by A against B for a loss sustained by a fire negligently set to A's grove. *Wilkinson* v. *Drew*, 75 Me. 360.

The question is, whether or not A was worth $600 at a given time.

The fact that at that time A rated his property to the assessors at $600 is deemed to be relevant as an admission. *Richardson* v. *Hitchcock*, 28 Vt. 757.

In an action brought by A against B, her husband, for a divorce, because of ill-treatment of her by B, the testimony of C, that B had stated to him that he had ill-treated his wife, A, is deemed to be

relevant as an admission. *Morehouse* v. *Morehouse*, 70 Conn. 420, 39 Atl. 516.

The mere absence of declarations of a party in favor of his own title cannot be shown by the adverse party against him. *Saugatuck Cong. Society* v. *East Saugatuck School Dist.*, 53 Conn. 481.

Answers in former actions may be introduced as admissions. *Miles* v. *Strong*, 68 Conn. 273.

The question is, whether a certain mortgage and note were given without consideration.

The statements of A, the mortgagee, after the execution of the mortgage, and in the presence of B, the mortgagor, tending to show that no consideration had passed between the parties, are deemed to be relevant to the question in controversy as admissions. *Saunders* v. *Dunn*, 175 Mass. 164, 55 N. E. 175.

An agreement to buy shares in a corporation is an admission of its existence. *Mann* v. *Williams*, 143 Mass. 394.

Agency may be disproved by admissions. *Hosmer* v. *Groat*, 143 Mass. 16.

A statement by a party that he has heard stories inconsistent with those of his witnesses is not admissible. *Stephens* v. *Vroman*, 16 N. Y. 381, reversing 18 Barb. 250.

A statement of A's share in an estate in the account of B, the administrator, on his settlement of the estate with the surrogate, and in proceedings for his appointment as a guardian of A, is deemed to be relevant as an acknowledgment by him of the amount due A from the estate in an action on the bond of B for failure to pay A's distributive share. *Potter* v. *Ogden*, 136 N. Y. 384, 33 N. E. 228.

Criminal cases.— Admissions are competent in a criminal case. *Hire* v. *State*, 144 Ind. 359; *State* v. *Hunt*, 137 Ind. 537; *Davidson* v. *State*, 135 Ind. 254; *Parker* v. *State*, 136 Ind. 284.

Admissions of persons accused of crime are competent if voluntary; it is otherwise if caused by fear or compulsion. *Snyder* v. *State*, 59 Ind. 105; *Smith* v. *State*, 10 Ind. 106; *Harding* v. *State*, 54 Ind. 359; *Brown* v. *State*, 71 Ind. 470; *State* v. *Freeman*, 12 Ind. 100.

One may be convicted on his own admissions. *Anderson* v. *State*, 26 Ind. 89.

In a bigamy trial marriage may be shown by admissions. *State* v. *Seals*, 16 Ind. 352.

The statements of the victim are not competent as admissions. *Shields* v. *State*, 149 Ind. 395.

The statements of the deceased made in the absence of the accused are inadmissible in a murder trial. *Jones* v. *State*, 71 Ind. 66; *Binns* v. *State*, 57 Ind. 46.

The accused may show acts and declarations implicating another. *Jones* v. *State*, 64 Ind. 473.

The statement of a stranger that he committed the crime is not competent. *Siple* v. *State*, 154 Ind. 647.

The accused cannot prove his declarations made immediately after the crime was committed. *Bland* v. *State*, 2 Ind. 608; *Doles* v. *State*, 97 Ind. 555; *Dukes* v. *State*, 11 Ind. 557.

Charging the jury concerning admissions.— *Garfield* v. *State*, 74 Ind. 60, 63; *Koerner* v. *State*, 98 Ind. 7, 19; *Finch* v. *Berguis*, 89 Ind. 360, 362; *Lewis* v. *Christie*, 99 Ind. 377, 381; *Shorb* v. *Kinzie*, 100 Ind. 429, 430; *Morris* v. *State ex rel.*, 101 Ind. 560, 562; *Unruh* v. *State ex rel.*, 105 Ind. 117, 120.

The court should not instruct the jury to regard oral admissions with caution. *Morris* v. *State*, 101 Ind. 560; *Davis* v. *Herdy*, 76 Ind. 272, 277; *Newman* v. *Hazelrigg*, 96 Ind. 73, 75; *Tenor* v. *Johnson*, 107 Ind. 69, 70.

It is not error to refuse to instruct as to what effect shall be given to admissions. *Tobin* v. *Young*, 124 Ind. 507, 514.

Admissions not conclusive.—*Chandler* v. *Schoonover*, 14 Ind. 324; *Richardson* v. *St. Joseph Iron Co.*, 5 Blackf. 146. *Compare McCarty* v. *Osborne*, 1 Blackf. 325.

Declarations by defendant in a slander suit on moving for a change of venue, that he wanted to make the plaintiff trouble, are incompetent upon the trial of the issue. *Peterson* v. *Hutchinson*, 30 Ind. 38.

As to the weight to be given to admissions, see *Pence* v. *Makepeace*, 65 Ind. 345; *Gimble* v. *Hufford*, 46 Ind. 125; *Finch* v. *Bergins*, 89 Ind. 360; *Hill* v. *Newman*, 47 Ind. 187; *Newman* v. *Hazelrigg*, 96 Ind. 73; *McMullen* v. *Clark*, 49 Ind. 77.

Implied admissions.— Admissions may be implied from acts and conduct. *Lefever* v. *Johnson*, 79 Ind. 554.

In order to constitute silence an admission, the statement to the party must be made under such circumstances that he may and naturally would reply. *Johnson* v. *Holliday*, 79 Ind. 151, 157; *Conway* v. *State*, 118 Ind. 482, 485; *Howard* v. *Howard*, 69 Ind.

592; *Surber* v. *State*, 99 Ind. 71; *Pierce* v. *Goldsberry*, 35 Ind. 317; *Broyles* v. *State*, 47 Ind. 251; *Puett* v. *Beard*, 86 Ind. 104.

He must have heard the statements. *Leach* v. *Dickerson*, 14 Ind. App. 375.

Failure to answer a letter is not generally deemed an admission of the truth of its contents. *Hays* v. *Morgan*, 87 Ind. 231.

Where one does not dissent from statements in a letter inclosing a check there is an admission by silence. *St. Joseph, etc.* v. *Globe, etc., Co.*, 156 Ind. 665.

The declarations of a wife are admissible against the husband if made in his presence. *Gebhart* v. *Burkett*, 57 Ind. 378.

Declarations of a husband are not admissible against the wife if she was not present. *Bremmerman* v. *Jennings*, 101 Ind. 253.

Self-serving declarations.— Independent declarations which are made by a party in his own favor are not admissible, unless they form part of the *res gestæ*. *Brown* v. *Kenyon*, 108 Ind. 283; *Scobey* v. *Armington*, 5 Ind. 514; *Church* v. *Drummond*, 7 Ind. 17; *Zimmerman* v. *Marchland*, 23 Ind. 474.

Conversation.— The declarations of one party and the replies of the other, in a conversation had between the two, are evidence when proved in a cause. The jury may believe those of the one side and reject those of the other, if they, from all the circumstances, believe one to be true and the other untrue. *Ball* v. *Clark*, 15 Ind. 370.

Self-serving declarations are admissible neither in favor of the one making them nor his assignee. *Hays* v. *Hynds*, 28 Ind. 531.

Bank-books are not admissible in favor of the bank. *First Nat. Bank* v. *Williams*, 4 Ind. App. 501.

Declarations in favor of the declarant cannot be offered in reply to his admissions. *Logansport Co.* v. *Heil*, 118 Ind. 135.

But partnership books are admissible in favor of a partner. *Reno* v. *Crane*, 2 Blackf. 217.

Of deceased person.— The fact that a person has died during the pendency of the suit does not render his admissions incompetent. *Matson* v. *Melchor*, 42 Mich. 477.

Admissions by silence.— Statements in the hearing of a party, under such circumstances that acquiescence can be inferred from his conduct, are admissible. *People* v. *O'Brien*, 68 Mich. 468.

When statements are made to him under such circumstances that he would naturally speak, this operates as a tacit admission.

Evans v. *Montgomery*, 95 Mich. 497; *Sanscrainte* v. *Torongo*, 87 Mich. 69.

Conversations between one of the parties and a stranger, in the presence of the other party, may be admissible; if admitted on the statement of counsel that the other party was present, and it subsequently appears that he was not, it may be stricken out on motion. *Bronson* v. *Leach*, 74 Mich. 713.

New Jersey.

Weight of admissions as evidence.— Oral admissions are to be received with caution. *Jones* v. *Knauss*, 31 N. J. Eq. 609.

Admissions by a party to the suit.— *De Hart* v. *Creveling*, 57 N. J. L. 642; *Turrell* v. *Elizabeth*, 33 N. J. L. 272; *Conover* v. *Brown*, 29 N. J. Eq. 510.

Admissions in pleading.— Admissions in the pleadings are binding on the parties. *Schenck* v. *Schenck*, 5 Hal. 276; *Thompson* v. *Harvey*, Pen. 894; *Marsh* v. *Mitchell*, 26 N. J. Eq. 497; *Van Hook* v. *Somerville Co.*, 5 N. J. Eq. 633; *Evans* v. *Huffman*, 5 N. J. Eq. 254; *Lippincott* v. *Ridgway*, 11 N. J. Eq. 526; *Truax* v. *Truax*, Pen. 166; *Carren* v. *Coogan*, 50 N. J. Eq. 268.

Admissions in an unsworn answer are competent evidence for complainant. *Craft* v. *Schlag*, 62 N. J. Eq. 567.

Admission of a marriage in an answer sufficient to prove it when corroborated. *Dare* v. *Dare*, 52 N. J. Eq. 195.

Bill of particulars treated as an admission. *Lee* v. *Heath*, 61 N. J. L. 250.

Admissions by silence.— Silence in the face of an accusation as an admission. *Donnelly* v. *State*, 26 N. J. L. 464, 601.

Failure to reply to a letter not an admission. *Hand* v. *Howell*, 61 N. J. L. 142.

In action for divorce, statements made in letters alleged to be from a paramour to the wife and undenied by her, regarded as admissions by her. *Stickle* v. *Stickle*, 48 N. J. Eq. 336.

By conduct.— Acts and conduct competent as admissions. *Voorhees* v. *Hendrickson*, 29 N. J. L. 101.

Admissions by implication.— *Dixon* v. *Dixon*, 8 C. E. Gr. 317.

By infants.— An infant is incapable of making a binding admission. *Shultz* v. *Sanders*, 38 N. J. Eq. 154, 293.

Self-serving declarations.— Declarations of a party as to the contents of an agreement he has made not admissible in his favor. *Wilson* v. *Hillyer*, Sax. 63.

Declarations of a party not admissible in his own favor. *Woolston* v. *King*, Pen. 1049; *Sayre* v. *Sayre*, 2 Gr. 487.

Declarations of a plaintiff in breach of promise made long before action was begun are admissible to show mutuality. *Peppinger* v. *Low*, 1 Hal. 384.

Miscellaneous.— An admission must be introduced as a whole. *Fox* v. *Lambson*, 3 Hal. 275.

Admissions of debtor as to amount due on account are competent without introducing the creditor's books. *Bonnell* v. *Mawha*, 37 N. J. L. 198.

An admission is not competent to show that *due* notice has not been given, for that is a question of law. *Passaic Freeholders* v. *Stevenson*, 46 N. J. L. 173.

Admissions made on one trial are admissible at a subsequent trial of the same case. *Reed* v. *Rocap*, 4 Hal. 346; *Ramsden* v. *Bryden*, 31 N. J. L. 27.

Maryland.

Admissions competent evidence.— Admissions of a party as to the character of his possession of a chattel on the question of title. *Garner* v. *Smith*, 7 Gill, 1.

Letters of a party containing admissions are competent evidence. *Canton* v. *McGraw*, 67 Md. 583.

The admissions of a party may be introduced against him without first questioning him concerning them. *Kirk* v. *Garrett*, 84 Md. 383.

Declarations against one's interest as to boundary are admissible. *Neal* v. *Hopkins*, 87 Md. 19.

Entries in books of account made by the party to be charged are admissible against him. *Ward* v. *Leitch*, 30 Md. 326.

Previous inconsistent declarations are admissible against a party. *Buschman* v. *Codd*, 52 Md. 202.

The written admissions of a party at one trial are admissible against him at a subsequent trial. *Elwood* v. *Lannon*, 27 Md. 200.

A creditor may prove his account by admissions of the bankrupt debtor made before the act of bankruptcy, but not by those made after. *Gaither* v. *Martin*, 3 Md. 146.

Admission of a defendant that he wrote a libelous article. *Maurice* v. *Worden*, 54 Md. 233.

Admissions of one deceased as against his estate.— In an action against an estate for services performed the plaintiff may prove declarations of the deceased that the plaintiff had never been paid anything. *Gill* v. *Donovan*, 96 Md. 518.

Silence as an admission.— Failure to answer a letter making a claim is no admission of the correctness of the claim. *Biggs* v. *Stueler,* 93 Md. 100.

Self-serving statements.— Declarations of a party favorable to himself are not admissible unless made in the presence of the other party or as part of the *res gestæ.* *Boyle* v. *McLaughlin,* 4 H. & J. 291; *Bowie* v. *Stonestreet,* 6 Md. 418; *Green* v. *Sprogle,* 16 Md. 579; *Knight* v. *House,* 29 Md. 194; *Nusbaum* v. *Thompson,* 11 Md. 557; *Whiteford* v. *Burckmyer,* 1 Gill, 127; *Hagan* v. *Hendry,* 18 Md. 177; *Wolf* v. *Frank,* 92 Md. 138; *Leffler* v. *Allard,* 18 Md. 552.

One cannot prove a fact by proving his own previous statements. *Williamson* v. *Dillon,* 1 H. & G. 444.

One's own letters are not admissible in his favor. *Simmons* v. *Haas,* 56 Md. 153.

One's own declarations are not admissible in favor of his own title. *Taggart* v. *Boldin,* 10 Md. 104.

Similar statements of a witness made before he had an interest to misrepresent are admissible to corroborate him when he is charged with misrepresenting by reason of some interest. *Stocksdale* v. *Cullison,* 35 Md. 322; *Washington F. I. Co.* v. *Davison,* 30 Md. 91; *Bloomer* v. *State,* 48 Md. 521; *Cooke* v. *Curtis,* 6 H. & J. 93.

One's own declarations near the time of the occurrence are admissible to corroborate his testimony when it has been contradicted by the other side. *Mallonee* v. *Duff,* 72 Md. 283; *Maitland* v. *Bank,* 40 Md. 540.

Where a party is alleged to have admitted that he had no title, he may prove in rebuttal that at about the same time he asserted his title. *Brooke* v. *Berry,* 1 Gill, 153.

Qualifying statement.— If any part of a statement is received as an admission, all other parts of the same statement which explain or qualify it must also be received. *Simmons* v. *Haas,* 56 Md. 153; *Smith* v. *Wood,* 31 Md. 293; *Turner* v. *Jenkins,* 1 H. & G. 161; *Bull* v. *Schuberth,* 2 Md. 38.

When a statement of a party is used against him, other statements that he made as part of the same conversation are admissible though in his own favor. *Bowie* v. *Stonestreet,* 6 Md. 418.

Pennsylvania.

Authorities.— *Wilson* v. *Wilson,* 137 Pa. 269; *Cope* v. *Kidney,* 115 Pa. 228; *Bramberry's Estate,* 156 Pa. 628; *Winters* v. *Mowrer,* 163

Pa. 239; *Schwartz* v. *Hersker,* 140 Pa. 550; *Harrington* v. *Gable,* 81 Pa. 406.

An admission of a party is admissible as against him to prove the fact admitted. *Eldred* v. *Hazlett,* 33 Pa. 307.

Admissions by a party are admissible against him, and if made in court in another action they can be proved conclusively. Usually admissions are uncertain proof. *Stevenson* v. *Coal Co.,* 201 Pa. 122.

Admissions made in a pleading in another case are competent. *Limbert* v. *Jones,* 136 Pa. 31.

Declarations by decedent that he intended to pay for his board are admissible to prove a contract. *Perkins* v. *Hasbrouck,* 155 Pa. 494; *Appeal of Miller,* 100 Pa. 568.

Admissions of one in possession to show that he is not holding adversely. *St. Clare* v. *Shale,* 9 Pa. 252; *S. C.,* 20 Pa. 105.

An offer to pay is an admission by inference that the sum is due. *Wallace* v. *Hussey,* 63 Pa. 24.

The whole of an admission must be taken together. *Newman* v. *Bradley,* 1 Dall. 240; *Farrell* v. *McClea,* 1 Dall. 392; *Gill* v. *Kuhn,* 6 S. & R. 333; *Postens* v. *Postens,* 3 W. & S. 127; *Hamsher* v. *Kline,* 57 Pa. 397.

Oral admissions are not generally conclusive and may be explained or shown to be contrary to facts, etc. And admissions may be by conduct. *Wesner* v. *Stein,* 97 Pa. 322.

Written admissions.— *Martin* v. *Kline,* 157 Pa. 473; *Ege* v. *Medlar,* 82 Pa. 86; *Mifflin* v. *Juniata Co.,* 144 Pa. 365.

Admission by silence.— *McKlenkan* v. *McMillan,* 6 Pa. 366; *Huston's Estate,* 167 Pa. 217.

Failure to file a judgment as an asset in bankruptcy is admissible as indicating that nothing was due. *Lyon* v. *Phillips,* 106 Pa. 57; *S. P., Fullam* v. *Rose,* 160 Pa. 47.

Silence in the face of an assertion of fact is an admission. *McClenkan* v. *McMillan,* 6 Pa. 366.

But not under circumstances making it improper to deny the assertion. *McDermott* v. *Hoffman,* 70 Pa. 31.

Statements made in the hearing of a party at the time of paying him money are evidence, if he remains silent. *Vincent* v. *Huff,* 8 S. & R. 381.

Declarations in one's own favor.— Declarations in one's own favor are inadmissible. *Gordon* v. *Bowers,* 16 Pa. 226; *Tisch* v. *Utz,* 142 Pa. 186.

When they are not part of the *res gestæ. Cain* v. *Cain,* 140 Pa. 144; *Duvall* v. *Darby,* 38 Pa. 56.

Self-serving statements not admissible, when not in the presence of the other party. *Levering* v. *Rittenhouse*, 4 Whart. 130; *Taylor* v. *Adams*, 2 S. & R. 534; *Wolf* v. *Carothers*, 3 S. & R. 240; *Com.* v. *Kreager*, 78 Pa. 477; *McGregor* v. *Sibley*, 69 Pa. 388; *Wallace* v. *Baker*, 1 Binn. 610; *Smith* v. *Eyre*, 161 Pa. 115.

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—

By any nominal party to that proceeding;

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

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

A statement made by a party to a proceeding may be an admission whenever it is made, 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.

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.

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.[4]

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* See Note X.

[4] *Hanson* v. *Parker*, 1749, 1 Wils. 257.

(*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.

(*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]

AMERICAN NOTE.

General.

Authorities.— 1 Am. & Eng. Encyclopædia of Law (2d ed.), p. 670 *et seq.;* 1 Greenleaf on Evidence (15th ed.), sec. 169 *et seq; Bulkley* v. *Landon,* 3 Conn. 84; *Coit* v. *Tracy,* 8 Conn. 277; *Scripture* v. *Newcomb,* 16 Conn. 591. Compare *Smith* v. *Vincent,* 15 Conn. 4, 11, as modifying the rule of the text. *Wing* v. *Bishop,* 3 Allen (Mass.), 456.

Nominal party.— *Tenney* v. *Evans,* 14 N. H. 343.

But the rule of the text is repudiated or modified in many States. 1 Am. & Eng. Encyclopædia of Law (2d ed.), p. 678. See *Butler* v. *Millet,* 47 Me. 492; *Gillighan* v. *Tebbets,* 33 Me. 360; *Sargeant* v. *Sargeant,* 18 Vt. 371; *Halloran* v. *Whitcomb,* 43 Vt. 306; *Day* v. *Baldwin,* 34 Ia. 380; *Owings* v. *Low,* 5 Gill & J. (Md.) 134; *Palmer* v. *Cassin,* 2 Cranch C. C. (U. S.) 66; *Thompson* v. *Drake,* 32 Ala. 99; *Dazey* v. *Mills,* 5 Gilman (Ill.), 67; *Welch* v. *Mandeville,* 1 Wheat. (U. S.) 233; *Cooper* v. *Mayhew,* 40 Mich. 528; *Bragg* v. *Geddes,* 93 Ill. 39.

Instance.— The declarations of the assignor of a chose in action, made after the assignment, are not admissible against the assignee. *Wing* v. *Bishop,* 3 Allen (Mass.), 456; *Butler* v. *Millet,* 47 Me. 492; *Sargeant* v. *Sargeant,* 18 Vt. 371.

Person with substantial interest.— *Bigelow* v. *Foss,* 59 Me. 162; *Fickett* v. *Smith,* 41 Me. 65, 66 Am. Dec. 214; *Earle* v. *Bearce,* 33 Me. 337; *Gooch* v. *Bryant,* 13 Me. (1 Shep.) 386; *Pike* v. *Wiggin,* 8 N. H. 356; *Hamblett* v. *Hamblett,* 6 N. H. 333; *Rich* v. *Eldredge,* 42 N. H. 153; *Carlton* v. *Patterson,* 29 N. H. (9 Fost.) 580; *Mathew-*

[5] *Fenwick* v. *Thornton,* 1827, M. & M. 51 (by Lord Tenterden). In *Smith* v. *Morgan,* 1839, 2 M. & R. 257, Tindal, C. J., decided exactly the reverse.

[6] *Pocock* v. *Billing,* 1824, 2 Bing. 269.

son v. *Eureka Powder Works*, 44 N. H. 289; *Taylor* v. *Grand Trunk R. R. Co.*, 48 N. H. 304; *Barber's Admr.* v. *Bennett*, 60 Vt. 662; *Bayley* v. *Bryant*, 41 Mass. (24 Pick.) 198; *Smith* v. *Aldrich*, 94 Mass. (12 Allen) 553; *Lawrence* v. *Boston*, 119 Mass. 126; *Ryan* v. *Merriam*, 4 Allen (Mass.), 77; *Butler* v. *Damon*, 15 Mass. 223; *Terral* v. *McRae*, 14 Miss. (6 Sm. & M.) 133; *State* v. *Allen*, 27 N. C. (5 Ired.) 36; *Wheeler* v. *Hambright*, 9 Serg. & R. (Pa.) 390. But see *Hamlin* v. *Fitch*, Kirby (Conn.), 174; *Stratford* v. *Sanford*, 9 Conn. 275, 284; *Bucknam* v. *Barnum*, 15 Conn. 74.

The interest must be a substantial one. The admission of the holder of a bare legal title is not competent. *Townsend Sav. Bank* v. *Todd*, 47 Conn. 217.

Privies in law.— *Holt* v. *Walker*, 26 Me. (13 Shep.) 107, 45 Am. Dec. 98; *Putnam* v. *Osgood*, 52 N. H. 148; *Alger* v. *Andrews*, 47 Vt. 238; *Daggett* v. *Simonds*, 173 Mass. 340, 53 N. E. 907, 46 L. R. A. 332; *Clouser* v. *Ruckman*, 104 Ind. 588; *McNight* v. *McNight*, 20 Wis. 446; *Eckert* v. *Triplett*, 48 Ind. 174, 17 Am. Rep. 735; *Hughes* v. *D. & H. Canal Co.*, 176 Pa. St. 254, 35 Atl. 190.

Instances.— Declarations of one in the possession of personal property that it is owned by another are deemed to be relevant in favor of the person declared to be the owner, as against an officer who has attached it as the property of the declarant. *Putnam* v. *Osgood*, 52 N. H. 148.

Privies in blood.— Supporting text: *Dale* v. *Gower*, 24 Me. (11 Shep.) 563; *Tilton* v. *Emery*, 17 N. H. 536; *Pike* v. *Hayes*, 14 N. H. 19, 40 Am. Dec. 171; *Little* v. *Gibson*, 39 N. H. 505; *Baker* v. *Haskell*, 47 N. H. 479, 93 Am. Dec. 455; *Hunt* v. *Haven*, 56 N. H. 87; *Hurlburt* v. *Wheeler*, 40 N. H. 73; *Wheeler* v. *Wheeler's Estate*, 47 Vt. 637; *Gilbert* v. *Vail*, 60 Vt. 261, 14 Atl. 542; *Davis* v. *Nelson*, 66 Ia. 171; *McSweeney* v. *McMillen*, 96 Ind. 298; *Crosman* v. *Fuller*, 17 Pick. (Mass.) 171; *Plimpton* v. *Chamberlain*, 4 Gray (Mass.), 320; *Wilson* v. *Terry*, 9 Allen (Mass.), 214; *Fellows* v. *Smith*, 130 Mass. 378; *White* v. *Loring*, 24 Pick. (Mass.) 319; *Hodges* v. *Hodges*, 2 Cush. (Mass.) 455; *Heywood* v. *Heywood*, 10 Allen (Mass.), 105.

Instance.— The declarations of an intestate that he had given his son something handsome, and, if he did well for him, should give him more, that he had held a writing against him, not a note, but had made him a present of it; and that he had had claims against him, but had none then,— being made by the ancestor against his right and interest, are deemed to be relevant against, and binding on,

those claiming under him and in his right. *Wheeler* v. *Wheeler's Estate,* 47 Vt. 637.

Privies in estate.— *Royal* v. *Chandler,* 79 Me. 265, 1 Am. St. Rep. 305, 9 Atl. 675; *Holt* v. *Walker,* 26 Me. (13 Shep.) 107; *Treat* v. *Strickland,* 23 Me. (10 Shep.) 234; *Littlefield* v. *Getchell,* 32 Me. 390; *Crane* v. *Marshall,* 16 Me. (4 Shep.) 27, 33 Am. Dec. 631; *Peabody* v. *Hewett,* 52 Me. 33; *Adams* v. *French,* 2 N. H. 387; *Morrill* v. *Foster,* 33 N. H. 379; *Inhabitants of South Hampton* v. *Fowler,* 54 N. H. 197; *Smith* v. *Powers,* 15 N. H. 546; *Pike* v. *Hayes,* 14 N. H. 19, 40 Am. Dec. 171; *Hobbs* v. *Crane,* 22 N. H. (2 Fost.) 130; *Dow* v. *Jewell,* 18 N. H. 340, 45 Am. Dec. 371; *Fellows* v. *Fellows,* 37 N. H. 75; *Rand* v. *Dodge,* 17 N. H. 343; *Smith* v. *Putnam,* 62 N. H. 369; *Wood* v. *Fiske,* 62 N. H. 173; *Bennett* v. *Camp,* 54 Vt. 36; *Beecher* v. *Parmelee,* 9 Vt. 352; *Downs* v. *Belden,* 46 Vt. 674; *Hale* v. *Rich,* 48 Vt. 217; *Coffin* v. *Cole,* 67 Vt. 226, 31 Atl. 313; *Simpson* v. *Dix,* 131 Mass. 179; *Pickering* v. *Reynolds,* 119 Mass. 111; *Hyde* v. *Middlesex County,* 2 Gray (Mass.), 267; *Osgood* v. *Coates,* 1 Allen (Mass.), 77; *Blake* v. *Everett,* 1 Allen (Mass.), 248; *Tyler* v. *Mather,* 9 Gray (Mass.), 177; *Foster* v. *Hall,* 12 Pick. (Mass.) 89, 22 Am. Dec. 400; *Inhabitants of West Cambridge* v. *Inhabitants of Lexington,* 2 Pick. (Mass.) 536; *Bosworth* v. *Sturtevant,* 2 Cush. (Mass.) 392; *Randegger* v. *Ehrhardt,* 51 Ill. 101; *Magee* v. *Raiguel,* 64 Pa. St. 110; *Gratz* v. *Beates,* 45 Pa. St. 495; *Guy* v. *Hall,* 3 Murph. (N. C.) 150; *Pool* v. *Morris,* 29 Ga. 374, 74 Am. Dec. 68; *Bowen* v. *Chase,* 98 U. S. 254; *Dooley* v. *Baynes,* 86 Va. 644; *Taylor* v. *Hess,* 57 Minn. 96.

Instances.— And statements by the owner of land or by one claiming title relative to the character of his possession and title are admissible against persons in privity with the declarant. *Creighton* v. *Hoppis,* 99 Ind. 369; *Mississippi Co.* v. *Vowels,* 101 Mo. 225; *Garber* v. *Doersom,* 117 Pa. St. 225; *Lacy* v. *Tenn., etc., R. Co.,* 92 Ala. 246; *Sharp* v. *Blackenship,* 79 Cal. 411.

In a contest of the will, to which B is a party, the admissions of B are relevant to the question in controversy. *Fay* v. *Feely,* 18 R. I. 715, 38 Atl. 342.

When made — Parties.— Supporting text: *McCobb* v. *Healy,* 17 Me. (5 Shep.) 158; *Taylor* v. *Grand Trunk R. R. Co.,* 48 N. H. 304; *Tufts* v. *Hayes,* 5 N. H. 452; *Straw* v. *Jones,* 9 N. H. 400; *Perkins* v. *Towle,* 59 N. H. 583; *Barber's Admr.* v. *Bennett,* 60 Vt. 662, 15 Atl. 348, 6 Am. St. Rep. 141, 1 L. R. A. 224 (citing this article);

Goldsborough v. *Baker*, 3 Cranch C. C. 48; *Dillon* v. *Chouteau*, 7 Mo. 386; *Duncan* v. *Lawrence*, 24 Pa. St. 154; *Klein* v. *Hoffheimer*, 132 U. S. 367, 10 Sup. Ct. 130; *Gordon* v. *Stubbs*, 36 La. Ann. 625; *Rœsler* v. *Oliver*, 97 Ala. 710, 12 So. 238; *White* v. *Merrill*, 82 Cal. 14, 22 Pac. 1129; *Holway* v. *Boston Land, etc., Co.*, 20 Colo. 7, 36 Pac. 767; *Batchelder* v. *Rand*, 117 Mass. 176; *Henshaw* v. *Mullens*, 121 Mass. 143; *Dole* v. *Young*, 24 Pick. (Mass.) 250; *Davis* v. *Spooner*, 3 Pick. (Mass.) 284.

A party's admissions are relevant whenever they were made. *Plant* v. *McEwen*, 4 Conn. 549.

When made — Representatives.— *Brooks* v. *Goss*, 61 Me. 307; *Barber* v. *Bennett*, 60 Vt. 662, 15 Atl. 348, 6 Am. St. Rep. 41, 1 L. R. A. 224 (citing this article); *Lamar* v. *Micou*, 112 U. S. 432; *Webster* v. *Le Compte*, 74 Md. 249; *Prudential Ins. Co.* v. *Fredericks*, 41 Ill. App. 419; *Godbee* v. *Sapp*, 53 Ga. 283; *Hill* v. *Buckminster*, 5 Pick. (Mass.) 391; *Faunce* v. *Gray*, 21 Pick. (Mass.) 243; *Phillips* v. *Middlesex*, 127 Mass. 262.

An admission of one suing or sued in a representative capacity to be admissible must have been made while he sustained that character. *Plant* v. *McEwen*, 4 Conn. 549.

Continuance of interest.— Supporting last paragraph of text: *Merrick* v. *Parkman*, 18 Me. 407; *Bryant* v. *Crosby*, 40 Me. 9; *Holt* v. *Walker*, 26 Me. (13 Shep.) 107; *Treat* v. *Strickland*, 23 Me. (10 Shep.) 234; *Tarr* v. *Smith*, 68 Me. 97; *Osgood* v. *Eaton*, 63 N. H. 355; *Morrill* v. *Foster*, 33 N. H. 379; *Mandeville* v. *Welch*, 5 Wheat. (U. S.) 277, 283; *Dudley* v. *Hurst*, 67 Md. 44, 1 Am. St. Rep. 368; *Kimball* v. *Leland*, 110 Mass. 323; *Chase* v. *Horton*, 143 Mass. 118, 19 N. E. 31; *Roberts* v. *Medbery*, 132 Mass. 100; *Bond* v. *Fitzpatrick*, 4 Gray (Mass.), 89; *Stockwell* v. *Blamey*, 129 Mass. 312; *Hyde* v. *Middlesex County*, 2 Gray (Mass.), 267; *Osgood* v. *Coates*, 1 Allen (Mass.), 77; *Blake* v. *Everett*, 1 Allen (Mass.), 248; *Simpson* v. *Dix*, 131 Mass. 179.

So declarations by a grantor or mortgagor of land made before acquiring or after parting with his interest are not competent admissions against his grantee or mortgagee. *Miller* v. *Cook*, 135 Ill. 190; *Ruckman* v. *Cory*, 129 U. S. 387; *McLaughlin* v. *McLaughlin*, 91 Pa. St. 462.

The declarations of an assignor made after the assignment are not receivable as admissions against his assignee. *Ohio Coal Co.* v. *Dav-*

enport, 37 O. St. 194; *Turner* v. *Hardin*, 80 Ia. 691; *Winchester, etc., Co.* v. *Creary*, 116 U. S. 161.

Acceptance of benefit.— *Spaulding* v. *Albin*, 63 Vt. 148, 21 Atl. 530; *Carpenter* v. *Hollister*, 13 Vt. 552, 37 Am. Dec. 612; *Alger* v. *Andrews*, 47 Vt. 238.

Against administrator.— The admissions of an intestate are receivable against his administrator. *Clouser* v. *Ruckman*, 104 Ind. 588; *Bevins* v. *Cline*, 21 Ind. 37; *Slade* v. *Leonard*, 75 Ind. 171.

Against trustee in bankruptcy.— *Compton* v. *Fleming*, 8 Blackf. 153. See, also, *Caldwell* v. *Williams*, 1 Ind. 405; *Wynne* v. *Glidewell*, 17 Ind. 446.

Husband and wife.— Where a husband is sued for his wife's tort, her declarations may be proved against him. *Ball* v. *Bennett*, 21 Ind. 427.

In a suit against husband and wife for a debt due by the wife before the marriage, the plaintiff cannot prove admissions by the wife during coverture. *Brown* v. *Lasselle*, 6 Blackf. 147.

On a bill against husband and wife, mere admissions in the answer, although filed in the name of both husband and wife, do not authorize a decree against her. (Citing Gr. Eq. Ev. 24; 9 Price, 556; 2 M. & K. 678; 1 Smith Ch. Pr. 253.) *Comley* v. *Hendricks*, 8 Blackf. 189; *Work* v. *Doyle*, 3 Ind. 436.

New Jersey.

Declarations of privies in estate.— *Kinna* v. *Smith*, 2 N. J. Eq. 14; *Sweet* v. *Parker*, 22 N. J. Eq. 453; *Beeckman* v. *Montgomery*, 14 N. J. Eq. 106; *Ten Eyck* v. *Runk*, 26 N. J. L. 513; *Edwards* v. *Derrickson*, 28 N. J. L. 39, 29 N. J. L. 468.

The statements and acts of a former possessor of land are competent evidence to prove boundary. *Townsend* v. *Johnson*, Pen. 706; *Cox* v. *Tomlin*, 4 Harr. 76; *Horner* v. *Stillwell*, 35 N. J. L. 310; *Van Blarcom* v. *Kip*, 26 N. J. L. 351.

A disavowal by a previous owner of the claim now made by plaintiff is admissible against him. *New Jersey Zinc Co.* v. *Lehigh Zinc Co.*, 59 N. J. L. 189.

Declarations of a former holder of a note, made while such, that it has been paid. *Reed* v. *Vanclcve*, 27 N. J. L. 352.

Privies in blood.— Whether a father intended a certain conveyance as an advancement to his son may be shown by the father's declarations at the time of the conveyance or afterward. *Speer* v. *Speer*, 14 N. J. Eq. 240.

Maryland.

Nominal party.— As to admissions by one who is merely a nominal party, see *Owings* v. *Low,* 5 G. & J. 134.

Admissions of a party to the suit are competent evidence, although he is acting in the capacity of trustee. *Beatty* v. *Davis,* 9 Gill, 211.

Joint defendants.— Admissions of a joint defendant are competent against the other. *Lowe* v. *Boteler,* 4 H. & McH. 346.

Privies in estate.— Admissions of one under whom a party claims title are admissible as against such party. *Dorsey* v. *Dorsey,* 3 H. & J. 410; *Keener* v. *Kauffman,* 16 Md. 296; *Richards* v. *Swan,* 7 Gill, 366.

Admissions by a previous owner in a bill in equity are competent against a subsequent owner in privity with the former. *Stump* v. *Henry,* 6 Md. 201.

Statements of a former owner are not admissible as against one not claiming under such former owner. *Smith* v. *Wood,* 31 Md. 293.

Statements of the holder of a bond are admissible against one who holds under him. *Clary* v. *Grimes,* 12 G. & J. 31.

Privies in blood.— Declarations of the father of a party, who had no interest in the suit and whose knowledge was derived from hearsay, are not admissible. *City Pass. Ry.* v. *McDonnell,* 43 Md. 534.

When made — Representatives.— *Webster* v. *Le Compte,* 74 Md. 249.

Statements of an executor or administrator are admissible against the estate only if made while he was acting in such capacity. *Dent* v. *Dent,* 3 Gill, 482.

Continuance of interest.— Supporting last paragraph of text: *Dudley* v. *Hurst,* 67 Md. 44, 1 Am. St. Rep. 368.

Acts and declarations of a grantor subsequent to the transfer are not admissible to impeach it. *Dudley* v. *Hurst,* 67 Md. 44; *Hall* v. *Hinks,* 21 Md. 406; *Cooke* v. *Cooke,* 29 Md. 538; *Dorsey* v. *Gassaway,* 2 H. & J. 402; *Stewart* v. *Redditt,* 3 Md. 67.

Statements of a grantor at the time of executing the deed, that its object is to defraud creditors, are admissible against the grantee. *McDowell* v. *Goldsmith,* 2 Md. Ch. 370; *Cooke* v. *Cooke,* 29 Md. 538; *Groff* v. *Rohrer,* 35 Md. 327.

Pennsylvania.

Privies in estate.— *Magee* v. *Raiguel,* 64 Pa. 110; *Gratz* v. *Beates,* 45 Pa. 495.

Admissions of a predecessor in estate are admissible. *Brown* v. *Bank,* 3 Pa. 187; *Weidman* v. *Kohr,* 4 S. & R. 174; *Patton* v. *Goldsborough,* 9 S. & R. 47; *Strickler* v. *Todd,* 10 S. & R. 63; *McKellip* v. *McIlhenny,* 4 Watts, 317.

In ejectment admissions of one under whom defendant holds are admissible. *Andrew* v. *Fleming,* 2 Dall. 93; *Reed* v. *Dickey,* 1 Watts, 152; *Alden* v. *Grove,* 18 Pa. 377; *McIldowny* v. *Williams,* 28 Pa. 492.

Admissions and acts of former owners admitted to show boundary. *Benner* v. *Hauser,* 11 S. & R. 352; *Hunt* v. *Deving,* 8 Watts, 403; *Sheaffer* v. *Eakman,* 56 Pa. 144.

Entries by a decedent in his account-books against his interest are admissible against his representatives. *Appeal of Roberts,* 126 Pa. 102; *Johnson* v. *McCain,* 145 Pa. 531.

By predecessor in title as to a right of way. *Bennett* v. *Biddle,* 150 Pa. 420.

Acts and statements of a former owner of personal property are admissible against those claiming under him. *Caldwell* v. *Gamble,* 4 Watts, 292. But not acts and statements after the sale. *Pier* v. *Duff,* 63 Pa. 59; *Mitchell* v. *Welch,* 17 Pa. 339.

Admissions of the assignor of a bond before the assignment are admissible against the assignee. *Kellogg* v. *Krauser,* 14 S. & R. 137. But not when made after the assignment. *Eby* v. *Eby,* 5 Pa. 435; *Work's Appeal,* 59 Pa. 444.

And statements by the owner of land or by one claiming title relative to the character of his possession and title are admissible against persons in privity with the declarant. *Garber* v. *Doersom,* 117 Pa. 225.

Privies in law.— *Hughes* v. *D. & H. Canal Co.,* 176 Pa. 254, 35 Atl. 190.

Person with substantial interest.— *Wheeler* v. *Hambright,* 9 S. & R. 390.

In suit against administrators, declarations of an heir are admissible, because he has a substantial interest in the event. *Reagan* v. *Grim,* 13 Pa. 508.

When made — Parties.— Supporting text: *Duncan* v. *Lawrence,* 24 Pa. 154.

Admissions of a party are competent as against him whether made before or after the suit was brought. *Morris* v. *Vanderen,* 1 Dall. 64; *Kunkle* v. *Wolfersberger,* 6 Watts, 126; *Gallaher* v. *Collins,* 7 Watts, 552; *McGill* v. *Ash,* 7 Pa. 397; *Duncan* v. *Lawrence,* 24 Pa.

154; *Shirley* v. *Shirley*, 59 Pa. 267; *Simons* v. *Oil Co.*, 61 Pa. 202; *Munger* v. *Silsbee*, 64 Pa. 454.

Continuance of interest.— Statements of a person who no longer has an interest are not admissible to impeach title derived from him. *Packer* v. *Gonsalus*, 1 S. & R. 526; *Hoffman* v. *Lee*, 3 Watts, 352; *Romig* v. *Romig*, 2 Rawle, 241; *Postens* v. *Postens*, 3 W. & S. 127; *Payne* v. *Craft*, 7 W. & S. 458; *Gregory* v. *Griffin*, 1 Pa. 208; *McIldowny* v. *Williams*, 28 Pa. 492.

Admissions of privies in estate are admissible only if made while interest continues. *McLaughlin* v. *McLaughlin*, 91 Pa. 462.

Declarations of a grantor after parting with title are not admissible against grantee. *Baldwin* v. *Stier*, 191 Pa. 432.

Statements of a grantor of land after the transfer, made in pursuance of a conspiracy to defraud creditors, are admissible. *Souder* v. *Schechterly*, 91 Pa. 83.

Declarations of a transferrer while still in possession may be admissible. *Pier* v. *Duff*, 63 Pa. 59.

ARTICLE 17.*

ADMISSIONS BY AGENTS AND PERSONS JOINTLY INTERESTED WITH PARTIES.

Admissions may be made by agents authorised 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.

A report made by an agent to a principal is not an admission which can be proved by a third person.[7]

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.

* See Note XI.

[7] *Re Devala Company*, 1883, 22 Ch. Div. 593.

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

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.

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 authorised 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].[8]

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.

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

[8] 9 Geo. IV, c. 14, s. 1. The words in the first set of brackets were added by 19 & 20 Vict. c. 97, s. 13. The words in the second set by s. 14 of the same Act. The language is slightly altered.

the parcel had been stolen by a porter, are deemed to be relevant, as against the railway, as admissions by an agent.[9]

(*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.[10]

(*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[11] [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.[12]

(*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.[13]

(*f*) A, B, C, and D make a joint and several promissory note. Either can make admissions about it as against the rest.[14]

(*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.[15]

(*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.[16]

(*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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[9] *Kirkstall Brewery* v. *Furness Ry.*, 1874, L. R. 9 Q. B. 468.

[10] *Clifford* v. *Burton*, 1823, 1 Bing. 199.

[11] *Helyear* v. *Hawke*, 1803, 5 Esp. 72.

[12] *Langhorn* v. *Allnutt*, 1812, 4 Tau. 511.

[13] *Lucas* v. *De La Cour*, 1813, 1 M. & S. 249.

[14] *Whitcomb* v. *Whitting*, 1781, 1 S. L. C. 644.

[15] *Holt* v. *Squere*, 1825, Ry. & Mo. 282.

[16] *Petch* v. *Lyon*, 1846, 9 Q. B. 147.

interest, even if he is co-partner with that other as to other parts of the ship.[17]

(*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.[18]

AMERICAN NOTE.

General.

Authorities.— 1 Am. & Eng. Encyclopædia of Law (2d ed.), p. 690 *et seq.;* McKelvey on Evidence, p. 100 *et seq.*

Agents.— The admission must concern some act of agency which is part of the *res gestæ*. *Cliquot's Champagne,* 3 Wall. 114, 140; *U. S.* v. *Brig Burdett,* 9 Pet. 682, 689; *Vicksburg, etc., R. Co.* v. *O'Brien,* 119 U. S. 99, 104; *Giberson* v. *Patterson Mills Co.,* 174 Pa. St. 369; *Ohio, etc., R. Co.* v. *Stein,* 133 Ind. 243; *Paterson* v. *Wabash, etc., R. Co.,* 54 Mich. 91; *Xenia Bank* v. *Stewart,* 114 U. S. 224; *Carney* v. *Hennessey,* 74 Conn. 107.

The declarations of an agent, in the course of his agency, are evidence against the principal. *Perkins* v. *Burnet,* 2 Root (Conn.), 30; *Mather* v. *Phelps,* 2 Root (Conn.), 150; *N. & W. R. R. Co.* v. *Cahill,* 18 Conn. 492. See, also, *Southington Eccl. Society* v. *Gridley,* 20 Conn. 204; *Plumb* v. *Curtis,* 66 Conn. 154.

But not his declarations as to acts previously done by him, as agent. *Fairfield County Turnpike Co.* v. *Thorp,* 13 Conn. 128.

Before the declarations of one claimed to be an agent of the party can be received, his agency must be proved *aliunde*. *Fitch* v. *Chapman,* 10 Conn. 12; *Builders' Supply Co.* v. *Cox,* 68 Conn. 381.

The admissions of a public official are competent evidence to bind the public corporation, when made in connection with some act within the scope of his duties. *Smythe* v. *Bangor,* 72 Me. 252; *Gray* v. *Rollinsford,* 58 N. H. 253.

The admission of a mere inhabitant is incompetent. *Petition of Landoff,* 34 N. H. 163.

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[17] *Jaggers* v. *Binnings,* 1815, 1 Star. 64.

[18] *Smith* v. *Whippingham,* 1833, 6 C. & P. 78. See also *Evans* v. *Beattie,* 1803, 5 Esp. 26; *Bacon* v. *Chesney,* 1816, 1 Star. 192; *Caermarthen R. C.* v. *Manchester R. C.,* 1873, L. R. 8 C. P. 685.

Either a wife or husband may be an agent of the other party to the relation, but the agency must be shown; it is not presumed. *Goodrich* v. *Tracy*, 43 Vt. 314; *Phelps* v. *James*, 86 Ia. 399; *Wright* v. *Towle*, 67 Mich. 255.

Partners.— *Fickett* v. *Swift*, 41 Me. 65, 66 Am. Dec. 214.

In an action against former copartners, upon a plea of the statute of limitations, evidence of an acknowledgment by one, after the dissolution, and when himself insolvent, is admissible against both. *Austin* v. *Bostwick*, 9 Conn. 501. See also *Bissell* v. *Adams*, 35 Conn. 299.

Sustaining the text so far as admissions made during the existence of the partnership are concerned. *Griffin* v. *Stearns*, 44 N. H. 498; *Western Assurance Co.* v. *Towle*, 65 Wis. 247; *Slipp* v. *Hartley*, 50 Minn. 118.

While there is a conflict on the point, some authorities have held that the admissions of a partner as to acts during the existence of the partnership are admissible to charge the partnership, if made after dissolution. *Parker* v. *Merrill*, 6 Greenl. (Me.) 41; *Hinkley* v. *Gilligan*, 34 Me. 101; *Loomis* v. *Loomis*, 26 Vt. 198, 203; *Rich* v. *Flanders*, 39 N. H. 304, 339.

The fact of partnership must first be shown. *Bundy* v. *Bruce*, 61 Vt. 619; *McNeilan's Estate*, 167 Pa. St. 472; *Armstrong* v. *Potter*, 103 Mich. 409; *Vaunoy* v. *Klein*, 122 Ind. 416; *Pleasants* v. *Faut*, 22 Wall. 116; *McClurg* v. *Howard*, 45 Mo. 365. *Compare Davis* v. *Poland*, 92 Va. 225; *Feigley* v. *Whittaker*.

A retiring partner is not bound by the admissions of the remaining partners made after his retirement. *Bell* v. *Morrison*, 1 Pet. 357; *Wilson* v. *Waugh*, 101 Pa. St. 233; *Gates* v. *Fisk*, 45 Mich. 522; *Nat. Bank of Commerce* v. *Meader*, 40 Minn. 325; *Maxcy* v. *Strong*, 53 Miss. 280.

Joint contractors.— *Bound* v. *Lathrop*, 4 Conn. 339; *Pierce* v. *Roberts*, 57 Conn. 40; *Dennis* v. *Williams*, 135 Mass. 28; *Martin* v. *Root*, 17 Mass. 222; *Hunt* v. *Bridgham*, 2 Pick. (Mass.) 581; *Amherst Bank* v. *Root*, 2 Metc. (Mass.) 522.

The acknowledgment of one of several joint makers of a promissory note takes it out of the statute as against the others. *Bound* v. *Lathrop*, 4 Conn. 338, 339.

And this, although the others were only sureties for the first, if the promise was not collusively made. *Clark* v. *Sigourney*, 17 Conn. 516; *Caldwell* v. *Sigourney*, 19 Conn. 44; *Block* v. *Dorman*, 51 Mo.

31; *Schindel* v. *Gates*, 46 Md. 604. *Contra, Campbell* v. *Brown*, 86 N. C. 376; *Kallenbach* v. *Dickinson*, 100 Ill. 427.

Modifying rule of text.— *Clark* v. *Burn*, 86 Pa. St. 502; *Willoughby* v. *Irish*, 35 Minn. 63; *Steele* v. *Souder*, 20 Kan. 39; *McDermott* v. *Hoffman*, 70 Pa. St. 52, explaining 12 Pa. St. 101; *Railroad* v. *Shute*, 28 Kan. 394, 42 Am. Rep. 163.

Attorneys.— *Holley* v. *Young*, 68 Me. 215; *Saunders* v. *McCarthy*, 8 Allen (Mass.), 42.

The admissions of an attorney may be either oral or written. *Loomis* v. *N. Y., etc., R. R. Co.*, 159 Mass. 39.

Statute of limitations.— The paragraph next to the last of the text (with reference to the statute of limitations) is based, as seen in the notes, upon English statutes. At common law an oral acknowledgment has the same effect as a written one. In the absence of statute the admissions of one joint contractor start the running of the statute of limitations against the others anew. *Shepley* v. *Waterhouse*, 22 Me. 497; *Woonsocket Inst.* v. *Ballou*, 16 R. I. 351.

Sureties.— Supporting text. *Chelmsford Co.* v. *Demarest*, 7 Gray (Mass.), 1. *Compare Bank of Brighton* v. *Smith*, 12 Allen (Mass.), 243.

Illustration (a).— *Green* v. *B. & L. R. R. Co.*, 128 Mass. 221; *B. & M. R. R. Co.* v. *Ordway*, 140 Mass. 510; *Rockwell* v. *Taylor*, 41 Conn. 59.

Illustration (e).— See *Harding* v. *Butler*, 156 Mass. 34.

Illustration (h).— *Saunders* v. *McCarthy*, 8 Allen (Mass.), 553.

Illustration (i).— *Smith* v. *Aldrich*, 12 Allen (Mass.), 553; *McLellan* v. *Cox*, 36 Me. 95.

During continuance of agency.— The declarations must be made during the continuance of the agency. *Brown* v. *Dutchess County Mut. Ins. Co.*, 71 N. Y. Supp. 670, 64 App. Div. 9.

A written statement of the terms of a lease made by an agent leasing property for his principal after his agency has terminated is not admissible. *Moore* v. *Rankin*, 67 N. Y. Supp. 179, 33 Misc. Rep. 749.

Executors and administrators.— The admissions of executors or administrators in order to be relevant must be made while engaged in their representative capacity. *More* v. *Finch*, 65 Hun, 404, 48 N. Y. St. R. 23.

Agents — Preliminary proof of agency.— The court, in its discretion, may receive evidence of the admissions first, and proof of the agency later. *Lanahan* v. *Zeltner Brewing Co.*, 20 Misc. Rep. 551, 46

N. Y. Supp. 431, affirming 20 Misc. Rep. 712; *Smith* v. *Dodge,* 19 N. Y. St. R. 292, 3 N. Y. Supp. 866.

The authority of an agent cannot be shown by his admissions. *Kaiser* v. *Hamburg-Bremen Fire Ins. Co. of Hamburg and Bremen,* 69 N. Y. Supp 344, 59 App. Div. 525.

Husband and wife.— A husband or a wife is not, as such, the agent of the other party to the relation. *Lay Grae* v. *Peterson,* 2 Sandf. 338.

Report to principal — Modifying text.— An agent's letter to his principal, detailing the final settlement of an account he was authorized to effect, after the agreement was concluded, is admissible to prove such settlement as a part of the *res gestæ.* *Ballard* v. *Beveridge,* 61 N. Y. Supp. 648, 45 App. Div. 477.

Corporation officers and agents.— The rule of the text as to agents applies to the agents of corporations. *Meislahn* v. *Irving Nat. Bank,* 70 N. Y. Supp. 988, 62 App. Div. 231; *Vaughn Mach. Co.* v. *Quintard,* 59 N. E. 1132, affirming 55 N. Y. Supp. 1114, 37 App. Div. 368.

Public agents.—As to declarations of supervisors, see *Boynton* v. *Phelps,* 52 Ill. 210, 212.

The admissions of supervisors are not competent. *Mann* v. *Sodokat,* 66 Ill. App. 393.

The declarations of school directors not then in office are not competent as against the school district. *School Directors* v. *Wallace,* 9 Brad. 312.

The declarations of county commissioners are not evidence to bind the county. *County of La Salle* v. *Simmons,* 5 Gilm. 513.

The letter of a deputy revenue collector is not admissible as against his principal. *Grimshaw* v. *Paul,* 76 Ill. 164.

To show agency.—The declarations of an agent are not admissible to show agency. *Mellor* v. *Carithers,* 52 Ill. App. 86; *Whiteside* v *Margarel,* 51 Ill. 207.

Agency may be established by parol evidence. *K. B. Co.* v. *Shannon,* 1 Gilm. 15; *Cadwell* v. *Meek,* 17 Ill. 220; *O. & M. R. R. Co.* v. *Middleton,* 20 Ill. 629; *Mathews* v. *Hamilton,* 23 Ill. 470; *Durham* v. *Gill,* 48 Ill. 151; *L. M. Ins. Co.* v. *Bell,* 166 Ill. 400.

One who asserts that an agency exists has the burden of proving it. *Skakel* v. *Hennessey* 57 Ill. App. 332.

Persons jointly interested.— The admissions of one jointly interested are competent against the others. *McMillan* v. *McDill,* 110 Ill. 47.

If several persons are jointly interested, having a community of interest, the declarations of one may be evidence against the rest. *Snyder* v. *Laframboise*, Breese, 343. *Compare Rector* v. *Rector*, 3 Gilm. 105; *Hitt* v. *Ormsbee*, 12 Ill. 166.

The admissions of one joint obligor are competent against the rest. *Rhode* v. *McLean*, 9 Brad. 404.

The declarations of a deceased co-owner are competent against the surviving owner. *Abend* v. *Mueller*, 11 Brad. 257.

The declaration of one tenant in common is not competent against the other. *Keegan* v. *Kinnaire*, 12 Brad. 484.

In a suit by a consignor against a common carrier for nondelivery, the consignee's declarations made after delivery are not admissible. *Ten Eyke* v. *Harris*, 47 Ill. 268.

Principal and surety.— The admission of a principal as against a surety is evidence against himself and co-obligors. *Rhode* v. *McLean*, 101 Ill. 467.

Relatives.— The admissions of a son are not competent to bind the father, unless the agency be shown. *Reynolds* v. *Ferree*, 86 Ill. 570.

The admissions of a father are incompetent against a child. *Cochran* v. *McDowell*, 15 Ill. 11.

The declarations of a wife in the absence of the husband are not competent as against him. *Keegan* v. *Kinnaire*, 12 Brad. 484.

The declarations of a wife, while acting as the agent of her husband, are admissible. *Burl. Ins. Co.* v. *Wzieck*, 16 Ill. App. 296.

In a suit by a wife against a third party, the admissions of the husband are not competent, when not made in the presence of the wife. *Pierce* v. *Hasbrouck*, 49 Ill. 23.

The question of whether or not the husband is the agent of the wife is for the jury. *Bongard* v. *Core*, 82 Ill. 19; *Waggonseller* v. *Rexford*, 2 Brad. 455.

Trustees.— A trustee cannot make an admission prejudicial to the trust. *Thomas* v. *Bowman*, 29 Ill. 426, 30 Ill. 85.

The admissions of a trustee are not competent as against the *cestui que trust*. *Bragg* v. *Geddes*, 93 Ill. 39.

Executors and administrators.— Statements made by an administrator before his appointment are not admissions provable against the estate. *Prudential Ins. Co.* v. *Fredericks*, 41 Ill. App. 419, 423.

Coexecutors.— The admissions of deceased coexecutors are not admissible against the other executor. *Berdan* v. *Allen*, 10 Brad. 91.

Guardian.— The statements of a guardian may be admissions to bind the ward. *Brush* v. *Blanchard*, 19 Ill. 31.

Joint maker of notes.— The admissions of one joint maker of a note are not admissible against another. *Rogers* v. *Anderson*, 40 Mich. 290. *Compare Dawson* v. *Hall*, 2 Mich. 390.

New Jersey.

Agents.— The books of a bank which has been acting as the common agent of two parties are admissible against either. *Oliver* v. *Phelps*, 20 N. J. L. 180.

Admissions of an agent are admissible against the principal only when they are a part of a transaction within the scope of the agent's authority. *Runk* v. *Ten Eyck*, 4 Zab. 756; *Sussex Ins. Co.* v. *Woodruff*, 26 N. J. L. 541; *Ashmore* v. *Pennsylvania Towing Co.*, 38 N. J. L. 13; *Blackman* v. *Railroad Co.*, 68 N. J. L. 1.

When one puts another in possession of goods he makes the latter his agent so as to be bound by the latter's statements to persons contracting on the faith of the goods. *Betts* v. *Francis*, 30 N. J. L. 152.

Agents of corporations.— Admissions of a general agent of a corporation. *Insurance Co.* v. *Potts*, 55 N. J. L. 158.

Declarations of members of a township committee not admissions by the corporate body. *Traction Co.* v. *Horse R. Co.*, 53 N. J. Eq. 163.

Preliminary proof of agency.— Declarations of an agent not admissible to show the extent of his authority. *Dowden* v. *Cryder*, 55 N. J. L. 329.

When the fact of agency has been established, the admissions of the agent are competent against the principal. *Gifford* v. *Landrine*, 37 N. J. Eq. 127, 628.

Order of proof.— A verdict will not be set aside because proof of the agency was not made until after the acts of the agent had been given in evidence. *Allen* v. *Bunting*, 3 Harr. 299.

Partners.— Admission by one partner the admission of the other partner also. *Hoboken Bank* v. *Beckman*, 37 N. J. Eq. 331, reversing *S. C.*, 36 N. J. Eq. 84; *Ruckman* v. *Decker*, 23 N. J. Eq. 283.

Entries in the books made by one partner admissible against the others. *Dunnell* v. *Henderson*, 23 N. J. Eq. 174; *Gulick* v. *Gulick*, 2 Gr. 578.

The admissions of a partner after the dissolution of the firm are admissible against the partners, if made in regard to past transactions of the firm as such; such an admission may remove the bar of the Statute of Limitations on a firm debt. *Merritt* v. *Day*, 38 N. J. L. 32. Such admissions said not to be conclusive. *McElroy* v. *Ludlam*, 32 N. J. Eq. 828.

Preliminary proof of partnership.— The fact of partnership cannot be proved by the admission of one partner; but after the partnership is proved, the admissions of one are admissible against the others. *Flannigin* v. *Champion*, 2 N. J. Eq. 51; *Ruckman* v. *Decker*, 23 N. J. Eq. 283.

Attorneys.— Solemn admissions made by way of stipulations of the attorneys in court are admissible in a subsequent trial of the same case. *Gallagher* v. *McBride*, 66 N. J. L. 360.

Husband and wife.— Declarations of one while acting as the agent of the other are admissible against the other. *Boyles* v. *M'Eowen*, Pen. 677.

Joint contractors.— The admission of a joint covenantor is admissible against the others. *Walling* v. *Rosevelt*, 1 Harr. 42; *Ruckman* v. *Decker*, 23 N. J. Eq. 283.

The admission of a joint debtor is admissible as against all the debtors and will revive the remedy barred by Statute of Limitations. *Parker* v. *Butterworth*, 46 N. J. L. 244; *Black* v. *Lamb*, 12 N. J. Eq. 108.

Time of making admission.— Statements of counsel made after ceasing to represent the client are not admissible against the latter. *Janeway* v. *Skeritt*, 30 N. J. L. 97.

Maryland.

Agents.— Admissions of an agent are admissible against the principal if made in the course of execution of the principal's affairs. *Whiteford* v. *Burckmyer*, 1 Gill, 127; *Hutzler* v. *Lord*, 64 Md. 534.

The agency must be clearly established before declarations of the agent become admissible against the principal. *Rosenstock* v. *Tormey*, 32 Md. 169; *Marshall* v. *Haney*, 4 Md. 498; *Rowland* v. *Long*, 45 Md. 439; *Mechanics' Bank* v. *Bank of Balto.*, 36 Md. 5.

Before the admissions of an alleged agent are admissible against a party, the fact of agency must be proved by other evidence. *Atwell* v. *Miller*, 11 Md. 348; *Newbold* v. *Bradstreet*, 57 Md. 38.

Declarations of an agent within the scope of his authority are admissible against the principal as part of the *res gestæ* when they are made in connection with the transaction of the principal's business. *Franklin Bank* v. *Navigation Co.*, 11 G. & J. 28; *Phelps* v. *Georges Creek R. Co.*, 60 Md. 536; *Bradford* v. *Williams*, 2 Md. Ch. 1; *Thomas* v. *Sternheimer*, 29 Md. 268; *Union Banking Co.* v. *Gittings*, 45 Md. 181.

Declarations of an agent after the termination of his agency, or as isolated statements and acts not in connection with the principal's business, are not admissible. *Dietrich* v. *Halls Springs Ry. Co.*, 58 Md. 347.

Declarations of an agent after the agency is terminated are not admissible. *Owings* v. *Low*, 5 G. & J. 135; *Franklin Bank* v. *Navigation Co.*, 11 G. & J. 28; *Phelps* v. *Georges Creek Co.*, 60 Md. 536.

Partners.— The admissions of one partner are admissible against the others on partnership matters. *Harryman* v. *Roberts*, 52 Md. 64.

Admissions of a partner after dissolution of the firm. *Newman* v. *McComas*, 43 Md. 70.

Officer of a bank.— Declarations of a bank president that certain money brought to the bank belonged to the plaintiff are not admissible because not within the scope of his authority. *City Bank* v. *Bateman*, 7 H. & J. 104.

Attorneys.— Declarations of an attorney made in argument of a case at a former trial are not admissible. *B. & O. R. R. Co.* v. *Boyd*, 67 Md. 32.

An attorney employed to collect a claim has no authority to make admissions for his client as to the distribution of the amount collected. *Lyon* v. *Hires*, 91 Md. 411.

Husband and wife.— Declarations by a wife in the presence of her husband as to why a deposit was made in their joint names is admissible. *Taylor* v. *Brown*, 65 Md. 366.

Joint contractors.— The acknowledgment of one of several joint makers of a promissory note takes it out of the statute as against the others. And this, although the others were only sureties for the first, if the promise was not collusively made. *Schindel* v. *Gates*, 46 Md. 604.

The admission of an administrator or executor of a joint contractor is not admissible against the survivor. *Wilmer* v. *Harris*, 5 H. & J. 1.

Executors and administrators.— The declarations of an executor are not admissible against the estate if made before his qualification. *Berry* v. *Safe Deposit Co.*, 96 Md. 45.

The admission of one of several executors is admissible to remove the bar of the Statute of Limitations. *Stoner* v. *Devilbiss,* 70 Md. 144.

The admissions of an executor made before he is completely clothed with the trust are not competent against him afterward. *Webster* v. *Le Compte,* 74 Md. 249.

Pennsylvania.

Agents.— *Dicken* v. *Winters,* 169 Pa. 126; *Detwiller* v. *Graham,* 41 Leg. Int. 253; *Baker* v. *Gas Co.,* 157 Pa. 593; *Shafer* v. *Lacock,* 168 Pa. 497;*Pennsylvania R. Co.* v. *Books,* 57 Pa. 339 (officer of a corporation).

Acts and admissions of an agent in the execution of his agency are admissible against the principal. *The Portland,* 2 S. & R. 197; *Shelhamer* v. *Thomas,* 7 S. & R. 106; *Hannay* v. *Stewart,* 6 Watts, 487; *Dick* v. *Cooper,* 24 Pa. 217; *Woodwell* v. *Brown,* 44 Pa. 121; *Coal Co.* v. *Decker,* 82 Pa. 119.

Declarations by an agent after the event held not admissible to show negligence. *Giberson* v. *Mills Co.,* 174 Pa. 369; *American S. S. Co.* v. *Landreth,* 102 Pa. 131. See also *Chapin* v. *Cambria Iron Co.,* 145 Pa. 478.

Admissions of an agent within a reasonable time after the transaction are admissible. *Transportation Co.* v. *Riegel,* 73 Pa. 72.

Admissions by trustees and agents of a congregation. *Magill* v. *Kauffman,* 4 S. & R. 317.

Scope of agent's authority.— Admissions of one's agent as to matters not within the scope of his authority are not admissible. *Monocacy B. Co.* v. *American Mfg. Co.,* 83 Pa. 517; *Thread Co.* v. *Shoe Mfg. Co.,* 115 Pa. 314; *Muller's Estate,* 13 Pa. Co. Ct. 183; *Relief Assn.* v. *Post,* 122 Pa. 579.

Admissions of an agent not competent against the principal unless made in the execution of the agency or with authority. *Irvine* v. *Buckaloe,* 12 S. & R. 35; *Wilt* v. *Vickers,* 8 Watts, 227; *Patton* v. *Minesinger,* 25 Pa. 393; *Railroad Co.* v. *Books,* 57 Pa. 339; *Fawcett* v. *Bigley,* 59 Pa. 411; *Railroad Co.* v. *Plankroad Co.,* 71 Pa. 350; *Bigley* v. *Williams,* 80 Pa. 107.

Statements of an agent as to his principal's motives are not admissible. *Karns* v. *Tanner,* 66 Pa. 297.

Former agents.— Admissions made by one formerly an agent, but no longer one, are not admissible. *Life Ins. Co.* v. *Roth,* 87 Pa. 409.

Admissions of a former president of a bank not admissible. *Sterling* v. *Trading Co.*, 11 S. & R. 179; *Bank* v. *Davis*, 6 W. & S. 285; *Railroad Co.* v. *Books*, 57 Pa. 339.

Fact of agency.— Agency cannot be proved by admissions of the agent, but he is himself a competent witness on the subject. *Lawall* v. *Groman*, 180 Pa. 532; *Whiting* v. *Lake*, 91 Pa. 349.

The fact of agency must be shown before admissions of the supposed agent are competent. *Relief Assn.* v. *Post*, 122 Pa. 579; *Long* v. *Insurance Co.*, 137 Pa. 335.

Statements of an agent denying the agency are not admissible against the principal. *Harrington* v. *Bronson*, 161 Pa. 296.

It is not error to admit declarations of the agent as against his principal if they are followed by independent evidence of the agency itself. *Stewart* v. *Climax Road Mach. Co.*, 200 Pa. 611.

Officers of a corporation.— *O'Toole* v. *Publishing* Co., 179 Pa. 271.

To ascertain the value of a turnpike taken in eminent domain, the returns by the officers of the road company to the State as to the value of the capital stock are admissible. *Plankroad Co.* v. *Chester Co.*, 182 Pa. 40.

Admissions of a cashier binding on the bank. *Bank* v. *Tyler*, 3 W. & S. 373.

Attorneys and counselors.— *Sohns* v. *McCulloh*, 5 Pa. 473.

Admission of an attorney that a letter is genuine binds his client. *Overholzer* v. *McMichael*, 10 Pa. 139.

Partners.— Admissions of one partner admissible against the others. *McCoy* v. *Lightner*, 2 Watts, 347. But not to prove the partnership except as against himself. *Edwards* v. *Tracy*, 62 Pa. 374; *McNeilan's Estate*, 167 Pa. 472.

Admissions of one partner after dissolution are not admissible against the others. *Tassey* v. *Church*, 4 W. & S. 141; *Hogg* v. *Orgill*, 34 Pa. 344.

A retiring partner is not bound by the admissions of the remaining partners made after his retirement. *Wilson* v. *Waugh*, 101 Pa. 233.

Joint owners — Authority.— *Campbell* v. *Galbraith*, 1 Watts, 70.

Statements of a coclaimant are admissible against another as to boundary. *Moore* v. *Pearson*, 6 W. & S. 51.

Declarations of one are admissible against another jointly interested with him to show fraud. *Schall* v. *Miller*, 5 Whart. 156.

Admissions of one tenant in common are not admissible against another. *Pier* v. *Duff*, 63 Pa. 59.

The admission of one devisee or legatee is not admissible against another. *Clark* v. *Morrison*, 25 Pa. 453.

Joint debtors.— Acknowledgment or part payment by one joint debtor will not take away the bar of the Statute of Limitations as against the others. *Coleman* v. *Fobes*, 22 Pa. 308; *Bush* v. *Stowell*, 71 Pa. 208.

Debtor and surety.— Admissions of the principal debtor are admissible against a guarantor or a surety. *Meade* v. *McDowell*, 5 Binn. 195; *Com.* v. *Kendig*, 2 Pa. 448; *Respublica* v. *Davis*, 3 Yeates, 128.

Husband and wife.— A husband is not his wife's agent in making declarations as to her interest in property. *Leedom* v. *Leedom*, 160 Pa. 273; *Martin* v. *Rutt*, 127 Pa. 380; *Evans* v. *Evans*, 155 Pa. 572. Either may be the other's agent under special circumstances. See *Sharpless* v. *Dobbins*, 1 Del. Co. R. 25; *Murphy* v. *Hubert*, 16 Pa. 50.

Statements of a wife as agent of her husband. *Steel* v. *Thompson*, 3 P. & W. 34; *Peck* v. *Ward*, 18 Pa. 506.

Admissions of a wife in her husband's absence not competent against him. *Jones* v. *McKee*, 3 Pa. 496.

ARTICLE 18.*

ADMISSION BY STRANGERS.

Statements by strangers to a proceeding are not relevant as against the parties except in the cases hereinafter mentioned.[19]

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.[20]

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* See Note XII.

19 *Coole* v. *Braham*, 1848, 3 Ex. 183. For a third exception, which could hardly occur now, see *Clay* v. *Langslow*, 1827, M. & M. 45.

20 *Kempland* v. *Macauley*, 1791, Peake, 95; *Williams* v. *Bridges*, 1817, 2 Star. 42.

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 plaintiff.[21]

AMERICAN NOTE.

General.

Authorities.—1 Am. & Eng. Encyclopædia of Law (2d ed.), p. 675 *et seq.;* 2 Taylor on Evidence (Chamberlayne's 9th ed.), sec. 759.

Statements by strangers.—Sustaining the text as to their inadmissibility generally. *Taylor* v. *Grand Trunk R. R. Co.*, 48 N. H. 304, 2 Am. Rep. 229; *Nelson* v. *Flint*, 166 U. S. 276; *Montgomery* v. *Brush*, 121 Ill. 513: *Lyon* v. *Manning*, 133 Mass. 439; *Wilson* v. *Bowden*, 113 Mass. 422; *Kafer* v. *Harlow*, 5 Allen (Mass.), 348; *Kline* v. *Baker*, 106 Mass. 61; *Davis* v. *Kingsley*, 13 Conn. 285.

Private boundaries.—See cases under Article 30.

Actions against officers.—(Second paragraph of text.) *Hart* v. *Stevenson*, 25 Conn. 499, 506; *Strong* v. *Wheeler*, 5 Pick. (Mass.) 410; *Pugh* v. *McRae*, 2 Ala. 393.

Bankruptcy.—*Carnes* v. *White*, 15 Gray (Mass.), 378; *Wellington* v. *Jackson*, 121 Mass. 157; *Ramsbottom* v. *Phelps*, 18 Conn. 278.

Other parties.—*White Co.* v. *Gordon*, 124 Ind. 495; *Olney* v. *Jackson*, 106 Ind. 286; *Brown* v. *Kenyon*, 108 Ind. 283.

The admissions of third parties are inadmissible. *Carter* v. *Hill*, 81 Mich. 275; *Rosenbury* v. *Angell*, 6 Mich. 508; *Beebe* v. *Knapp*, 28 Mich. 53; *Merritt* v. *Stebbins*, 86 Mich. 342.

New Jersey.

Strangers.—Parol evidence of a confession of a paramour not admissible against the party charged with adultery. *Berckmans* v. *Berckmans*, 16 N. J. Eq. 122; *Kloman* v. *Kloman*, 62 N. J. Eq. 153.

Action against a constable.—Second paragraph of text. *Stout* v. *Hopping*, 1 Hal. 125.

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21 *Jarrett* v. *Leonard*, 1814, 2 M. & S. 265 (adapted to the new law of bankruptcy).

Maryland.

Authorities.— Declarations of third parties are generally inadmissible. *City Bank* v. *Bateman*, 7 H. & J. 104; *Forrester* v. *State*, 46 Md. 154: *Treusch* v. *Clark*, 51 Md. 162.

Admissions of a stranger to the cause at issue are not admissible. *Herrick* v. *Swomley*, 56 Md. 439.

Statements of third parties may be admissible because they were a part of the transaction in question. *Kolb* v. *Whitely*, 3 G. & J. 188.

Statements by one representative of a deceased person are not binding on another representative of such deceased. *Walkup* v. *Pratt*, 5 H. & J. 51.

In an action against a bank to recover money paid out by it on alleged forged checks, the confession of the forger is not admissible. *Hardy* v. *Bank*, 51 Md. 562.

In a suit on a promise given in consideration for the forbearance on plaintiff's part to sue on a claim against a third party, to prove the existence of such claim the admissions of the third party may be introduced. *Bowen* v. *Tipton*, 64 Md. 275.

Pennsylvania.

Statements by strangers.— Sustaining text. *Bovard* v. *Wallace*, 4 S. & R. 499; *Nussear* v. *Arnold*, 13 S. & R. 323; *Boyd* v. *Ely*, 8 Watts, 66; *Dietrich* v. *Dietrich*, 4 Watts, 167; *Hauberger* v. *Root*, 6 W. & S. 431; *Shaw* v. *Boom Co.*, 125 Pa. 324: *Lawall* v. *Groman*, 180 Pa. 532.

Statements of the insured made after issuance of the policy affecting the good faith of his statements in the application are not admissible as against the beneficiaries. *Hermany* v. *Mut. Life Assn.*, 151 Pa. 17.

Admissions of a principal not competent against his surety. *Nickols* v. *Jones*, 166 Pa. 599.

Statements by a stranger not in the presence of a party are not admissible. *Chambers* v. *Davis*, 3 Whart. 40.

Declarations of one legatee not admissible against the others, for their interests are not joint. *Clark* v. *Morrison*, 25 Pa. 453; *Dotts* v. *Fetzer*, 9 Pa. 88.

In ejectment, statements by a father are not evidence against the son, in the absence of privity of estate. *Emery* v. *Harrison*, 13 Pa. 317.

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.

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.[22]

AMERICAN NOTE.

General.

Authorities.— 10 Am. & Eng. Encyclopædia of Law (2d ed.), p. 701; 1 Greenleaf on Evidence (15th ed.), sec. 182.

Supporting text.— *Chapman* v. *Twitchell*, 37 Me. 59, 58 Am. Dec. 773; *Folsom* v. *Batchelder*, 22 N. H. 47; *Chadsey* v. *Greene*, 24 Conn. 562; *Gott* v. *Dinsmore*, 111 Mass. 45; *Proctor* v. *Old Colony R. R. Co.*, 154 Mass. 251; *Com.* v. *Vose*, 157 Mass. 393; *Beebe* v. *Knapp*, 28 Mich. 53; *Allen* v. *Killinger*, 8 Wall. 480; *Rosenbury* v. *Angell*, 6 Mich. 508. *Compare Adler-Goldman Co.* v. *Adams Express Co.*, 53 Mo. App. 284.

The reference must be for the purpose of giving information, and the statements must be confined to the matter as to which reference was made. *Allen* v. *Killinger*, 8 Wall. 480; *Rosenbury* v. *Angell*, 6 Mich. 508.

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* See Note XIII.

[22] *Daniel* v. *Pitt*, 1808, 1 Camp. 366, n. See, too, *R.* v. *Mallory*, 1884, 13 Q. B. D. 33. This is a weaker illustration than *Daniel* v. *Pitt*.

A conversation through an interpreter may be proved as an admission. *Com.* v. *Vose,* 157 Mass. 393; *Miller* v. *Lathrop,* 50 Minn. 91.

The statements can be shown only so far as they refer to the subject of the injury. *Lambert* v. *People,* 76 N. Y. 220; *Duval* v. *Covenhover,* 4 Wend. 561.

Communications through an interpreter may be proved as admissions. *Wright* v. *Maseras,* 56 Barb. 521.

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,[23] or under circumstances from which the judge infers that the parties agreed together that evidence of it should not be given,[24] or if it was made under duress.[25]

AMERICAN NOTE.

General.

Authorities.— 1 Am. & Eng. Encyclopædia of Law (2d ed.), pp. 715–717; 2 Taylor on Evidence (Chamberlayne's 9th ed.), p. 5548.

Compromises.— Offers of compromise are not admissible. *Greenfield* v. *Kennett,* 69 N. H. 419, 45 Atl. 233; *Daniels* v. *Woonsocket,* 11 R. I. 4, 39 N. E. 644; *Webber* v. *Dunn,* 71 Me. 331; *Home Ins. Co.* v. *Baltimore Warehouse Co.,* 93 U. S. 527, 23 L. Ed. 868; *Harrison* v. *Trickett,* 57 Ill App. 515; *Reynolds* v. *Manning,* 15 Md. 510, 526; *Kassing* v. *Walter,* 65 N. W. (Ia.) 832; *Fink* v. *Lancashire Ins. Co.,* 60 Mo. App. 673; *Greve* v. *Wood-Harmon Co.,* 173 Mass. 45; *Feibel-*

* See Note XIV.

23 *Cory* v. *Bretton,* 1830, 4 C. & P. 462.

24 *Paddock* v. *Forester,* 1842, 3 M. & G. 903.

25 *Stockfleth* v. *De Tastet,* 1814, *per* Ellenborough, C. J., 4 Camp. 10.

man v. *Manchester Fire Ins. Co.*, 108 Ala. 180, 19 So. 540; *Fowles* v. *Allen*, 64 Conn. 351; *Perkins* v. *Concord R. R. Co.*, 44 N. H. 223; *Montgomery* v. *Allen*, 84 Mich. 656; *Louisville, etc., R. Co.* v. *Wright*, 115 Ind. 378; *Reynolds* v. *Manning*, 15 Md. 510.

But admissions of facts in the course of conversations with reference to compromise are competent. *Beaudette* v. *Gagne*, 87 Me. 534, 33 Atl. 23; *Eastman* v. *Amoskeag Mfg. Co.*, 44 N. H. 143, 82 Am. Dec. 201; *Jenness* v. *Jones*, 44 Atl. (N. H.) 607; *Stanford* v. *Bates*, 22 Vt. 546; *Doon* v. *Rovey*, 49 Vt. 293; *Chickering* v. *Brooks*, 61 Vt. 554, 18 Atl. 144; *Hartford Bridge Co.* v. *Granger*, 4 Conn. 148; *Fuller* v. *Hampton*, 5 Conn. 426; *Howard Ins. Co.* v. *Hope Mut. Ins. Co.*, 22 Conn. 403; *Broschart* v. *Tuttle*, 59 Conn. 24; *Bassett* v. *Shares*, 63 Conn. 44; *Arthur* v. *James*, 28 Pa. St. 236; *McNiel* v. *Holbrook*, 37 U. S. (12 Pet.) 84, 9 L. Ed. 1009; *Durgin* v. *Somers*, 117 Mass. 55; *Akers* v. *Demond*, 103 Mass. 318; *Evans* v. *Smith*, 21 Ky. (5 T. B. Mon.) 363, 17 Am. Dec. 74; *Akers* v. *Kirk*, 91 Ga. 590, 18 S. E. 366; *Thom* v. *Hess*, 51 Ill. App. 274; *Binford* v. *Young*, 115 Ind. 174, 16 N. E. 142; *Bank* v. *Seymour*, 64 Mich. 59, 31 N. W. 140.

As to the admissibility of facts discovered in consequence of an inadmissible confession, see note to *Whitely* v. *Miss.* (Miss.), 53 L. R. A. 402.

Duress.— Sustaining text. *Tilley* v. *Damon*, 11 Cush. 247.

The admission need not be voluntary in the sense in which a confession must be voluntary. *Newhall* v. *Jenkins*, 2 Gray (Mass.), 562.

The fact that one was compelled to testify in an earlier suit does not render his admissions thus made incompetent because of duress. *Tooker* v. *Gonner*, 2 Hilt. 71.

Facts.— But admissions of facts, even though in the course of conversations about a compromise, are admissible. *Thom* v. *Hess*, 51 Ill. App. 274.

New Jersey.

Compromises.— Offers of compromise not admissible against the party. *Miller* v. *Halsey*, 14 N. J. L. 48; *Wrege* v. *Westcott*, 30 N. J. L. 212; *Railway Co.* v. *Currie*, 54 N. J. Eq. 84; *Gardner* v. *Short*, 19 N. J. Eq. 341; *Crowther* v. *Lloyd*, 31 N. J. L. 395.

An offer made by one party to another is competent evidence against the former, when it was not stated that it was made with-

out prejudice and was not in compromise of a claim. *Richardson* v. *Pottery Co.*, 63 N. J. L. 248.

Maryland.

Compromises.—Offers of compromise are not admissible. *Reynolds* v. *Manning*, 15 Md. 510, 526; *Groff* v. *Hansel*, 33 Md. 161.

Unaccepted offer of a compromise not admissible. *Furnace Co.* v. *Hooper*, 90 Md. 390.

An offer of settlement of a suit pending is not admissible, even though nothing was said as to its being without prejudice. *Reynolds* v. *Manning*, 15 Md. 510.

Statements made to induce the other to make an offer of compromise are admissible. *Seldner* v. *Smith*, 40 Md. 602.

Admissions made during an attempt to compromise are competent evidence unless made without prejudice or made as mere concessions to induce the compromise. *Calvert* v. *Friebus*, 48 Md. 44.

A claim made, but not accepted, is not admissible against the one making it. *Pentz* v. *Fire Ins. Co.*, 92 Md. 444. But an offer to settle a loss, not made by way of compromise, is admissible to show that the company did not refuse to pay because of failure to furnish proof of loss. *Id.*

Pennsylvania.

Compromises.— Offers of compromise are not admissible. *Slocum* v. *Perkins*, 3 S. & R. 295; *Spence* v. *Spence*, 4 Watts, 165; *Arthur* v. *James*, 28 Pa. 236; *Tryon* v. *Miller*, 1 Whart. 11.

Letters written in a negotiation for a settlement are not admissible. *Fisher* v. *Life Assn.*, 188 Pa. 1.

Admissions made in negotiations for a compromise not effected are not admissible. *Spence* v. *Spence*, 4 Watts, 165.

The admission of an independent fact, though made during negotiations for a compromise, is admissible. *Sailor* v. *Hertzog*, 2 Pa. 182; *Arthur* v. *James*, 28 Pa. 236.

Admissions at the time of an offer of compromise, but not a part of it, are admissible. *Sailor* v. *Hertzog*, 2 Pa. 182.

When a part of a conversation has been offered, the remainder becomes admissible even though it may contain an offer of a compromise. *Bascom* v. *Stove & Mfg. Co.*, 182 Pa. 427.

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. Confessions, if voluntary, are deemed to be relevant facts as against the persons who make them only.

AMERICAN NOTE.

General.

Authorities.— 6 Am. & Eng. Encyclopædia of Law (2d ed.), p. 520 *et seq.;* Underhill on Evidence, sec. 88 *et seq.; U. S.* v. *Douglas,* 2 Blatchf. 207; *U. S.* v. *White,* 5 Cranch C. C. 38; *Gaines* v. *Rolf,* 12 How. 472, 539; *Hopt* v. *Utah,* 110 U. S. 574, 583, 4 S. C. Rep. 202.

Confession defined in *State* v. *Carr,* 53 Vt. 37.

Confession to be admitted must be voluntary. *State* v. *Walker,* 34 Vt. 296; *State* v. *York,* 37 N. H. 175; *Com.* v. *Nott,* 135 Mass. 269; *Com.* v. *Myers,* 160 Mass. 530; *Com.* v. *Morey,* 1 Gray (Mass.), 461; *Com.* v. *Flood,* 152 Mass. 529, 25 N. E. 971. *Contra, State* v. *Jenkins,* 2 Tyler (Vt.), 377.

Remote and obscure allusions by the accused to the act in contemplation are admissible on a criminal prosecution, as tending to show an existing disposition or design. *State* v. *Hoyt,* 47 Conn. 538, 539.

Statements of the accused in the nature of a confession are admissible in evidence, upon the ground that a party's conduct in respect to the matter in dispute, whether exhibited by acts, speech, or writing, which is clearly inconsistent with his contention, is a fact relevant to the issue. Such statements, however, are not in themselves testimony, but are matters to be proved as independent facts, the probative force of which must depend upon the circumstances of each particular case. *State* v. *Willis,* 71 Conn. 204.

Distinguished from admissions.— *People* v. *Hickman*, 113 Cal. 80, 86; *State* v. *Heidenreich*, 29 Ore. 381; *Fletcher* v. *State*, 90 Ga. 468; *Taylor* v. *State*, 37 Neb. 788.

By silence.— Keeping silence under certain circumstances may be an implied confession. *Sparf* v. *U. S.*, 156 U. S. 57; *Com.* v. *McCabe*, 163 Mass. 98; *Richards* v. *State*, 82 Wis. 172. Even when under arrest. *Murphy* v. *State*, 36 O. St. 628; *Ackerson* v. *People*, 124 Ill. 563. *Contra, State* v. *Howard*, 102 Mo. 142; *Com.* v. *McDermott*, 123 Mass. 440.

Proof of corpus delicti.— In order to convict on the extra-judicial confession of the accused, the *corpus delicti* must be proved by other evidence. Robinson's Elementary Law, sec. 511; *Bergen* v. *People*, 17 Ill. 426, 65 Am. Dec. 672; *Campbell* v. *People*, 159 Ill. 9; *Gray* v. *Com.*, 101 Pa. St. 380, 47 Am. Rep. 733; *Stringfellow* v. *State*, 26 Miss. 157, 163, 59 Am. Dec. 247; *People* v. *Lane*, 49 Mich. 340; *Guild's Case*, 5 Halst. (N. J.) 163, 185, 18 Am. Dec. 404; *State* v. *Knowles*, 48 Ia. 598; *Blackburn* v. *State*, 23 O. St. 146; *People* v. *Simonsen*, 107 Cal. 345; *Ryan* v. *State*, 100 Ala. 94; Clark on Criminal Law, p. 130; 6 Am. & Eng. Ency. of Law, p. 569. But see Bishop's New Crim. Pro., par. 1056.

The rule is otherwise as to judicial confessions. *Dantz* v. *State*, 87 Ind. 398; *State* v. *Lamb*, 28 Mo. 218; *Hallinger* v. *Davis*, 146 U. S. 314; *Can* v. *Holstine*, 132 Pa. St. 337.

Last paragraph of text.— A confession is admissible only against the person who made it. *Com.* v. *Ingraham*, 7 Gray (Mass.), 46; *State* v. *Albert*, 73 Mo. 347; *People* v. *Stevens*, 47 Mich. 411; *Ackerson* v. *People*, 124 Ill. 563; *Fife* v. *Com.*, 29 Pa. St. 429; *Sparf* v. *U. S.*, 156 U. S. 51, 15 S. C. Rep. 273.

Definition.— *People* v. *Mondon*, 38 Hun, 197.

Must be voluntary.— *People* v. *Wentz*, 37 N. Y. 303; *People* v. *Phillips*, 42 N. Y. 200; *O'Brien* v. *People*, 48 Barb. 274; *Cox* v. *People*, 80 N. Y. 500; *People* v. *McGloin*, 91 N. Y. 242; *People* v. *Burns*, 2 Park. Cr. 34; *People* v. *Thoms*, 3 Park. Cr. 256; *Hartung* v. *People*, 4 Park. Cr. 319; *Ward* v. *People*, 3 Hill, 395; *People* v. *McMahon*, 15 N. Y. 384; *Fowler* v. *People*, 18 How. Pr. 493; *People* v. *Mardon*, 103 N. Y. 211, 57 Am. Rep. 709; *People* v. *McCallam*, 103 N. Y. 587; *People* v. *Druse*, 103 N. Y. 655.

As to the reason of the rule that only voluntary confessions are admissible. *People* v. *Wentz*, 37 N. Y. 303; *People* v. *McMahon*, 15 N. Y. 384.

By silence.— A confession may be implied from silence. *Kelley* v. *People,* 55 N. Y. 572, 14 Am. Rep. 342: *People* v. *Lewis,* 16 N. Y. Supp. 881. Even though the accused is under arrest. *Kelley* v. *People,* 55 N. Y. 565.

There must however be an opportunity to speak. Hence, no implication is to be drawn from silence at a coroner's inquest. *People* v. *Willett,* 92 N. Y. 29.

By conduct.— Confessions may be implied from conduct. *Conkey* v. *People,* 1 Abb. App. Dec. 418; *People* v. *O'Neil,* 49 Hun, 422, 17 N. Y. St. R. 956, 112 N. Y. 355; *Greenleaf* v. *People,* 85 N. Y. 75, 39 Am. Rep. 636. Or from the act of a third person done in the presence of the accused. *Hochreiter* v. *People,* 2 Abb. App. Dec. 363.

Explanatory facts.— Facts explaining or qualifying a confession or which indicate its falsity are admissible. *People* v. *Fox,* 121 N. Y. 449.

Form of confession.— A confession contained in a letter may be admissible. *People* v. *Cassidy,* 133 N. Y. 612.

Independent proof of corpus delicti.— A confession will justify a conviction only if there is independent proof that the crime has been committed. *May* v. *People,* 92 Ill. 343; *South* v. *People,* 98 Ill. 261; *Bergen* v. *People,* 17 Ill. 426, 65 Am. Dec. 672; *Campbell* v. *People,* 159 Ill. 9.

Last paragraph of text.— A confession is admissible only against the person who made it. *Ackerson* v. *People,* 124 Ill. 563.

New Jersey.

Confessions must be voluntary.— See cases in succeeding note.

In divorce.— Confessions in divorce cases to be received with caution. *Clutch* v. *Clutch,* 1 N. J. Eq. 474; *Miller* v. *Miller,* 2 N. J. Eq. 139; *Jones* v. *Jones,* 17 N. J. Eq. 351; *Derby* v. *Derby,* 21 N. J. Eq. 36.

Confessions of the *particeps criminis* are not admissible to prove adultery. *Berckmans* v. *Berckmans,* 16 N. J. Eq. 122.

Maryland.

Authorities.— Voluntary declarations of the accused as to the crime in question are admissible. *Lamb* v. *State,* 66 Md. 285; *Ross* v. *State,* 67 Md. 286.

A confession is admissible if there is no reason to doubt its truth. If there was such inducement of hope or fear as to cast doubt upon

the truth of the confession, it is not admissible. *State* v. *Freeman*, 12 Md. 100.

The confession of a forger is not admissible in a civil action against a bank to recover funds paid out by it on the alleged forged checks. *Hardy* v. *Bank*, 51 Md. 562.

Conduct from which complicity in a crime may be inferred is admissible. *Bloomer* v. *State*, 48 Md. 521.

Pennsylvania.

Authorities.— A confession not admitting guilt but merely showing guilty knowledge of the crime is not admissible. *Com.* v. *Clark*, 130 Pa. 641.

A confession through the soil pipes of a prison admitted. *Brown* v. *Com.*, 76 Pa. 319.

Confession is evidence of the first marriage in trial for bigamy. *Com.* v. *Murtaugh*, 1 Ash. 272; *Com.* v. *Wyman*, 3 Brewst. 338.

A confession of one of several jointly tried is admissible, though it may tend to prejudice the others. *Fife* v. *Com.*, 29 Pa. 429.

Silence.— A confession may be implied from silence when one is charged with a crime under circumstances justifying the expectation of a reply. *Ettinger* v. *Com.*, 98 Pa. 338.

Proof of corpus delicti.— In order to convict on the extrajudicial confession of the accused, the *corpus delicti* must be proved by other evidence. *Gray* v. *Com.*, 101 Pa. 380, 47 Am. Rep. 733; *Com.* v. *Hanlon*, 8 Phila. 401.

The rule is otherwise as to judicial confessions. *Com.* v. *Holstine*, 132 Pa. 337.

Last paragraph of text.— A confession is admissible only against the person who made it. *Fife* v. *Com.*, 29 Pa. 429.

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

* See Note XV.

having reference to the charge against the accused person, whether addressed to him directly or brought to his knowledge indirectly;

and if (in the opinion of the judge)[26] 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.

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, or by an inducement collateral to the proceeding, or by inducements held out by a person not in authority.

The prosecutor, officers of justice having the prisoner in custody, magistrates, and other persons in similar positions,

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[26] It is not easy to reconcile the cases on this subject. In *R.* v. *Baldry*, 1852, 2 Den. 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*, 1867, 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." On the other hand, in *R.* v. *Reeve*, 1872, 1 C. C. R. 364, the words, "You had better, as good boys, tell the truth:" in *R.* v. *Fennell*, 1881, 7 Q. B. D. 147, "The inspector tells me you are making housebreaking implements; if that is so, you had better tell the truth, it may be better for you," were held to exclude the confession which followed. There are later cases (unreported) which follow these

are persons in authority. 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.

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.

Before a confession can be treated as relevant in a criminal trial it must be proved affirmatively that it was free and voluntary.[27]

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

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.[28]

(*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 grounds to confess his sins. A, in consequence, makes a confession. This confession is voluntary.[29]

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27 *R.* v. *Thompson*, [1893], 2 Q. B. 12. The early authorities on the admission of confessions are summed up in this case by Cave, J., who describes a "free and voluntary statement," as one which was not "preceded by any inducement to make a statement held out by a person in authority."

28 *R.* v. *Boswell*, 1842, Car. & Marsh. 584.

29 *R.* v. *Gilham*, 1828, 1 Moo. C. C. 186. In this case the exhortation was that the accused man should confess "to God," but it seems

(*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.[30]

(*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.[31]

(*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.[32]

(*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.[33]

AMERICAN NOTE.

General.

Authorities.— 6 Am. & Eng. Encyclopædia of Law (2d ed.), p. 525 *et seq.*; Underhill on Evidence, sec. 88 *et seq.*

Burden of proof.— In some States the burden of showing that a confession is not voluntary is on the defendant. It is *prima facie* admissible. *Com.* v. *Sego*, 125 Mass. 213; *Rufer* v. *State*, 25 O.

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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.

[30] *R.* v. *Lloyd*, 1834, 6 C. & P. 393.

[31] *R.* v. *Moore*, 1852, 2 Den. C. C. 522.

[32] *R.* v. *Cleves*, 1830, 4 C. & P. 221.

[33] *R.* v. *Gould*, 1840, 9 C. & P. 364. This is not consistent, so far as the proof of the words goes, with *R.* v. *Warwickshall*, 1783, 1 Leach, 263.

St. 464; *State* v. *Meyers*, 99 Mo. 107; *State* v. *Davis*, 34 La. Ann. 351. In others the public prosecutor must show it to be voluntary. *Bradford* v. *State*, 104 Ala. 68; *Wyre* v. *State*, 95 Ga. 467; *People* v. *Sato*, 49 Cal. 67; *Nicholson* v. *State*, 38 Md. 140.

If the evidence is conflicting he may admit it with instructions to disregard it if they find it was not voluntary. *Com.* v. *Preece*, 140 Mass. 276; *Com.* v. *Burrough*, 162 Mass. 512; *Com.* v. *Howe*, 9 Gray (Mass.), 110; *Com.* v. *Smith*, 119 Mass. 305; *Com.* v. *Piper*, 120 Mass. 185; *Com.* v. *Cuffee*, 108 Mass. 285; *Com.* v. *Nott*, 135 Mass. 269; *Wilson* v. *U. S.*, 162 U. S. 613; *Burdge* v. *State*, 53 O St. 512: *Ellis* v. *State*, 65 Miss. 44.

The inducement.— A confession is admissible if it appears that the inducement had no effect. *Com.* v. *Crocker*, 108 Mass. 464. See, also, *Com.* v. *Knapp*, 9 Pick. (Mass.) 503.

A plea of guilty before a committing magistrate is admissible as a confession. *Com.* v. *Brown*, 150 Mass. 330.

A statement by an officer that " the more lies one tells in such cases, the deeper one gets into the mud " does not render a confession inadmissible. *Com.* v. *Mitchell*, 117 Mass. 431.

The mere threat of conviction does not render a confession inadmissible. *Com.* v. *Whittemore*, 11 Gray (Mass.), 201.

The fact of custody does not prevent a confession being voluntary *Com.* v. *Cuffee*, 108 Mass. 285.

The fact that the prisoner is in irons does not prevent a confession being voluntary. *State* v. *Gorham*, 67 Vt. 365.

The mere fact that a confession is made through hope of favor does not affect its admissibility so long as the hope was not induced. *Com.* v. *Sego*, 125 Mass. 210, 213.

Where one agrees to turn State's evidence, under a promise of immunity from prosecution, but refuses subsequently to testify, his confession is admissible. *Com.* v. *Knapp*, 10 Pick. (Mass.) 477; *U. S.* v. *Hinz*, 35 Fed. Rep. 272; *State* v. *Moran*, 15 Ore. 262.

The inducement must be calculated to induce hope or fear. *Com.* v. *Sego*, 125 Mass. 210; *Com.* v. *Morey*, 1 Gray (Mass.), 461.

When voluntary.— Sustaining the first paragraph of the text: *Com.* v. *Chabbock*, 1 Mass. 144; *Com.* v. *Knapp*, 9 Pick. (Mass.) 496, 20 Am. Dec. 491; *State* v. *Potter*, 18 Conn. 178; *State* v. *Thompson*, Kirby (Conn.), 345.

Confessions not voluntary are excluded, " not because any wrong

is done to the prisoner in using them, but because he may be induced by the pressure of hope or fear to admit facts unfavorable to him without regard to their truth in order to obtain the promised relief or avoid the threatened danger." *Com.* v. *Morey*, 1 Gray (Mass.), 462.

If there were any indication that the prisoner was not perfectly cool and self-possessed, so as to render his statements unreliable, that would seem to be a matter affecting the weight rather than the admissibility of the evidence. *State* v. *Coffee*, 56 Conn. 415.

Confessions extorted by mob violence, or by like means, are involuntary and inadmissible. *Miller* v. *People*, 39 Ill. 457; *Young* v. *State*, 68 Ala. 569; *Williams* v. *State*, 72 Miss. 117; *State* v. *Resells*, 34 La. Ann. 381, 44 Am. Rep. 436.

Religious exhortation.— *Com.* v. *Tuckerman*, 10 Gray (Mass.), 173; *Com.* v. *Drake*, 15 Mass. 161.

Mere advice.— Mere advice of a public official that it is better to confess, coupled with a statement that no promise is made, do not render the confession inadmissible. *Com.* v. *Nott*, 135 Mass. 269.

The character of the person holding out the inducement.— *Com.* v. *Howe*, 2 Allen (Mass.), 153.

The master is a person in authority if he is the prosecutor. *Com.* v. *Sego*, 125 Mass. 210.

A confession to a public official, if voluntary, is admissible. *Com.* v. *Sheehan*, 163 Mass. 170; *Com.* v. *Holt*, 121 Mass. 61; *Com.* v. *Crocker*, 108 Mass. 464.

Person not in authority.— *Com.* v. *Tuckerman*, 10 Gray (Mass.), 173, 190.

A confession to fellow-members of the church is voluntary. *Com.* v. *Drake*, 15 Mass. 161.

Question for the judge.— The admissibility of a confession presents a question for the judge. *Com.* v. *Culver*, 126 Mass. 464; *Palmer* v. *State*, 136 Ind. 393; *State* v. *Kinder*, 96 Mo. 548; *State* v. *Holden*, 42 Minn. 350; *Biscoe* v. *State*, 67 Md. 6; *Lefevre* v. *State*, 50 O. St. 584.

The inquiry as to admissibility is addressed to the discretion of the court, and is whether, considering the age, situation, and character of the prisoner, and the circumstances, it was voluntary or not. *State* v. *Potter*, 18 Conn. 178.

The discretion of the trial judge in receiving a confession involves a question of duty, and is, therefore, reviewable; and a clear

case of abuse may furnish ground for a new trial. *State* v. *Willis*. 71 Conn. 294.

Collateral inducement.— *State* v. *Wentworth*, 37 N. H. 218: *Stone* v. *State*, 105 Ala. 60, 69; *State* v. *Hopkirk*, 84 Mo. 278.

After removal of impression.— *State* v. *Carr*, 37 Vt. 191; *State* v. *Potter*, 18 Conn. 166. Supporting the text. *Com.* v. *Howe*, 132 Mass. 250; *Com.* v. *Cullen*, 111 Mass. 435; *State* v. *Brown*, 73 Mo. 631; *Rizzolo* v. *Com.*, 126 Pa. St. 54; *U. S.* v. *Kurtz*, 4 Cranch C. C. 106.

The circumstances under which statements are made are a matter for the judge. The fact that prior to the confession to a sheriff, promises and inducements had been held out by another officer, does not, as matter of law, render the confession inadmissible. It may appear that the confession was uninfluenced, and voluntarily made. *State* v. *Willis*, 71 Conn. 294.

Facts discovered through confession.— *Com.* v. *Knapp*, 9 Pick. (Mass.) 497, 20 Am. Dec. 491; *People* v. *Hoy Yen*. 34 Cal. 176; *Pressley* v. *State*, 111 Ala. 34; *State* v. *Winston*, 116 N. C. 990; *State* v. *Mortimer*, 20 Kan. 93; *U. S.* v. *Hunter*, 1 Cranch C. C. 317; *Gates* v. *People*, 14 Ill. 433; *Laros* v. *Com.*, 84 Pa. St. 200; *State* v. *Garvey*, 28 La. Ann. 925.

A statement by one accused of murder, as to what disposition he had made of the watch of the decedent, in connection with evidence identifying the watch, and that it was found at the place indicated, is admissible, no matter what promises had been previously made. *State* v. *Willis*, 71 Conn. 294.

In custody.— A confession is not to be rejected simply on the ground that it was made while in custody. *People* v. *Wentz*, 37 N. Y. 303; *Murphy* v. *People*, 63 N. Y. 590; *Cox* v. *People*, 80 N. Y. 500; *People* v. *McCallam*, 103 N. Y. 587; *People* v. *Chapleau*, 121 N. Y. 266; *People* v. *Cassidy*, 133 N. Y. 612; *People* v. *Druse*, 103 N. Y. 655; *People* v. *Rogers*, 18 N. Y. 9, 72 Am. Dec. 484; *People* v. *Thaus*, 3 Park. Cr. 256; *Hartung* v. *People*, 4 Park. Cr. 319; *People* v. *Montgomery*, 13 Abb. Pr. (N. S.) 207; *Ward* v. *People*, 3 Hill, 395.

Even though the custody is illegal. *Balbo* v. *People*, 80 N. Y. 499, affirming 19 Hun, 424.

Inducement withdrawn.— A confession made after the promise which would make it incompetent has been withdrawn is admissible. *Ward* v. *People*, 3 Hill, 395, 6 Hill, 144.

Confession through hope.— Under section 395 of the Code of Criminal Procedure, a confession is not inadmissible simply because it was induced by hope. *People* v. *Mondan*, 103 N. Y. 219, 57 Am. Rep. 709.

After removal of impression.— *People* v. *MacKinder*, 80 Hun, 40, 29 N. Y. Supp. 842.

Credit for jury.— The credit to be given to a confession is for the jury. *Barnes* v. *Allen*, 30 Barb. 663; *Murphy* v. *People*, 63 N. Y. 590.

They may give different weight to different parts of it. *People* v. *Ruloff*, 3 Park. Cr. 401.

New Jersey.

What is a voluntary confession.— *Roesel* v. *State*, 62 N. J. L. 216; *State* v. *Young*, 67 N. J. L. 223.

Confession must be voluntary.— Before admitting a confession, the court should require the fullest explanation of the circumstances under which it was made, and the defendant has the right to introduce testimony on the point prior to its admission. *State* v. *Hill*, 65 N. J. L. 627.

A confession improperly induced not admissible, nor is an examination of the accused made a few hours after the confession. *State* v. *Guild*, 5 Hal. 163.

A confession admissible only when voluntary; the question being as to the state of mind of the prisoner at the time he confessed. This question is for the trial court. *Bullock* v. *State*, 65 N. J. L. 557; *State* v. *Roesel*, 62 N. J. L. 216; *State* v. *Abbatto*, 64 N. J. L. 658.

Confession of an infant.— Confession of an infant under twelve to be excluded — circumstances of inducement of hope or fear. *State* v. *Aaron*, 1 South. 231, 240.

Burden of proof.— The burden of proving that a confession is voluntary is on the State. *State* v. *Young*, 67 N. J. L. 223; *Roesel* v. *State*, 62 N. J. L. 216.

After removal of influence.— A confession is admissible though improper inducements have been previously used if it can be shown that they had no influence on this confession. *State* v. *Guild*, 5 Hal. 163.

Question for the judge.— Whether a confession was or was not voluntary is a question of mixed law and fact for the trial judge. *State* v. *Young*, 67 N. J. L. 223.

Maryland.

Authorities.— *Rogers* v. *State*, 89 Md. 424; *State* v. *Freeman*, 12 Md. 100; *Green* v. *State*, 96 Md. 384; *Biscoe* v. *State*, 67 Md. 6; *Ross* v. *State*, 67 Md. 286.

Burden of proof.— Burden of proving a confession to be voluntary is on the prosecutor. *Nicholson* v. *State*, 38 Md. 140.

Before admitting a confession, the court should ascertain whether any improper inducements were used and whether they did induce the confession. *Biscoe* v. *State*, 67 Md. 6; *Nicholson* v. *State*, 38 Md. 140.

Confessions to officers.— A confession is not involuntary merely because made to a peace officer having custody of the one confessing. *Young* v. *State*, 90 Md. 579.

A confession made to a marshal of police may be admissible. *Ross* v. *State*, 67 Md. 286.

Question for the judge.— The admissibility of a confession presents a question for the judge. *Biscoe* v. *State*, 67 Md. 6.

Pennsylvania.

Voluntary confessions.— *Com.* v. *Harman*, 4 Pa. 269; *Fife* v. *Com.*, 29 Pa. 429.

The inducement.— Confession induced by threats is not admissible. *Com.* v. *Hanlon*, 8 Phila. 423.

A confession held admissible obtained after an officer said the following: "If you have anything to tell me, tell the truth; if not, tell me nothing. You have a right to keep your mouth shut, but I tell you now, anything you say to me I shall use against you." *Rizzolo* v. *Com.*, 126 Pa. 54.

The accused may show as a part of his defense that a confession. made prior to one introduced by the State, was procured by improper means. *Com.* v. *Van Horn*, 188 Pa. 143.

Confessions to officers.— A confession is not inadmissible merely because it was made to the officer in charge of the prisoner. *Com.* v. *Mosler*, 4 Pa. 264; *Com.* v. *McGowan*, 2 Pars. 341.

A confession is not inadmissible merely because it was made after arrest. *Com.* v. *Mosler*, 4 Pa. 264; *Com.* v. *Hanlon*, 8 Phila. 423.

After removal of impression.— Supporting the text. *Rizzolo* v. *Com.*, 126 Pa. 54.

A confession is admissible though obtained by means of improper inducements, if adhered to after the influence of such inducements is gone. *Com.* v. *Dillon*, 4 Dall. 116; *Fife* v. *Com.*, 29 Pa. 437.

Facts discovered through confession.— *Laros* v. *Com.*, 84 Pa. 200.

Province of the court and of the jury.— Whether a confession was voluntary is at first a question for the court. The witness who is offered to prove the confession may first be cross-examined as to the circumstances under which it was given. Later the accused may give testimony to show that the confession was involuntary, and it then becomes a question for the jury. *Com.* v. *Epps*, 193 Pa. 512; *Rizzolo* v. *Com.*, 126 Pa. 54; *Com.* v. *Van Horn*, 188 Pa. 143; *Com.* v. *Shew*, 190 Pa. 23.

The court is the judge of whether such inducement was held out as to make a confession inadmissible. *Fife* v. *Com.*, 29 Pa. 429.

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 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; but if, after refusing to answer any such question, the witness is improperly compelled to answer it, his answer is not a voluntary confession.[34]

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.[35]

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* See Note XVI.

[34] *R.* v. *Garbett*, 1847, 1 Den. 236. See also *R.* v. *Owen*, 1888, 20 Q. B. D. 829, as explained in *R.* v. *Paul*, 1890, 25 Q. B. D. 202.

[35] *R.* v. *Scott*, 1856, 1 D. & B. 47; 25 L. J. M. C. 128; *R.* v. *Robinson*, 1867, 1 C. C. R. 80; *R.* v. *Widdop*, 1872, L. R. 2 C. C. 5; *R.* v. *Erdheim*, [1896], 2 Q. B. 260.

(*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.[36]

AMERICAN NOTE.

General.

Authorities.— 6 Am. & Eng. Encyclopædia of Law (2d ed.), p. 562; 1 Greenleaf on Evidence (15th ed.), sec. 224–227; *State* v. *Witham*, 72 Me. 531; *State* v. *Gilman*, 51 Me. 209; *State* v. *Coffee*, 56 Conn. 399; *Com.* v. *King*, 8 Gray (Mass.), 501; *Com.* v. *Bradford*, 126 Mass. 42; *Com.* v. *Wesley*, 166 Mass. 248, 44 N. E. 228; *Com.* v. *Myers*, 160 Mass. 530; *Com.* v. *Brown*, 103 Mass. 422; *Com.* v. *Denehy*, 103 Mass. 424, note; *State* v. *Glahn*, 97 Mo. 679; *People* v. *Mitchell*, 94 Cal. 550; *Dickerson* v. *State*, 48 Wis. 288; *Alston* v. *State*, 41 Tex. 39; *Behler* v. *State*, 112 Ind. 140; *Wilson* v. *State*, 110 Ala. 1; *Newton* v. *State*, 21 Fla. 53. Compare *State* v. *Young*, 119 Mo. 495; *Wood* v. *State*, 22 Tex. 431; *Williams* v. *Com.*, 29 Pa. St. 102; *State* v. *Clifford*, 86 Ia. 553, 41 Am. St. Rep. 518.

Where a person afterwards indicted for murder was summoned as a witness before a coroner and there told that he could not be compelled to make any statement, held, that his declarations then made are admissible against him on his trial upon the indictment. *State* v. *Coffee*, 56 Conn. 413–416.

Improperly compelled to answer.— Last clause of the text. *Farkes* v. *State*, 60 Miss. 847; *Lyons* v. *People*, 137 Ill. 602; *State* v. *Clifford*, 86 Ia. 550.

Testimony at inquest.— Testimony at a coroner's inquest may be admitted as a confession. *Hendrickson* v. *People*, 10 N. Y. 13, 61 Am. Dec. 721; *Teachout* v. *People*, 41 N. Y. 7.

Last clause of the text.— Compulsory testimony given after the accused has claimed his privilege cannot be used against him. *Hendricksen* v. *People*, 10 N. Y. 13, 61 Am. Dec. 721; *People* v. *McMahon*, 15 N. Y. 384.

It is otherwise where the testimony is voluntarily given. *People* v. *Mondan*, 103 N. Y. 211, 57 Am. Rep. 709.

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[36] *R.* v. *Chidley & Cummins*, 1860. 8 Cox. C. C. 365.

Pennsylvania.

Authorities.— *Williams* v. *Com.*, 29 Pa. 102.

Confession not inadmissible merely because made on oath. *Com.* v. *Clark*, 130 Pa. 641.

Testimony of the accused given on oath at the coroner's inquest before he himself was suspected is admissible against him. *Williams* v. *Com.*, 29 Pa. 102.

Where the committing magistrate obtains a confession on oath by a threat of commitment, it is not admissible. *Com.* v. *Harman*, 4 Pa. 269.

Where a statute provides that a prisoner shall not be put on oath at a preliminary hearing, a confession made under oath at such hearing is not admissible. *Com.* v. *Harman*, 4 Pa. 269.

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, or when he was drunk, or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, 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.[37]

AMERICAN NOTE.

General.

Authorities.— 6 Am. & Eng. Encyclopædia of Law (2d ed.), pp. 534, 535, 570; 2 Taylor on Evidence (Chamberlayne's 9th ed.), p. 58812.

Promise of secrecy.—*State* v. *Squires*, 48 N. H. 367; *State* v. *Thomson*, Kirby (Conn.), 345; *Com.* v. *Knapp*, 9 Pick. (Mass.) 496;

[37] Cases collected and referred to in 1 Ph. Ev. 420, and Taylor, 881. See, too, Joy, sections iii., iv., v.

State v. *Darnell,* 1 Houst. (Del.) 321; *State* v. *Mitchell,* 1 Phill. L. (N. C.) 447.

Confessions are not excluded because confidentially made to private individuals, while endeavoring to persuade them to use their influence to secure the admission of the party confessing as a witness for the State. *State* v. *Thompson,* Kirby (Conn.), 345.

Obtained by deception.— 6 Am. & Eng. Encyclopædia of Law (2d ed.), p. 535; *Com.* v. *Dana,* 2 Metc. (Mass.) 329; *State* v. *Graham,* 74 N. C. 646; *State* v. *Brooks,* 92 Mo. 542; *Burton* v. *State,* 107 Ala. 108; *Heldt* v. *State,* 20 Neb. 492; *Wigginton* v. *Com.,* 92 Ky. 282; *State* v. *Staley,* 14 Minn. 105; *Price* v. *State,* 18 O. St. 418; *Hardy* v. *U. S.,* 3 App. D. C. 35; *People* v. *Barker,* 60 Mich. 277; *Com.* v. *Hanlon,* 3 Brewst. (Pa.) 461, 498.

While drunk.— A confession made while under the influence of liquor is admissible, but not if so drunk as not to understand the nature of the confession. 6 Am. & Eng. Encyclopædia of Law (2d ed.), p. 570; *Com.* v. *Howe,* 9 Gray (Mass.), 110; *State* v. *Grear,* 28 Minn. 426; *People* v. *Ramirez,* 56 Cal. 533; *State* v. *Feltes,* 51 Ia. 495; *White* v. *State,* 32 Tex. App. 625; *Eskridge* v. *State,* 25 Ala. 30; *Woolfolk* v. *State,* 85 Ga. 69, 101; *People* v. *Robinson,* 19 Cal. 40.

No warning.— *People* v. *Cuffee,* 108 Mass. 285; *Com.* v. *Robinson,* 165 Mass. 429, 43 N. E. 121; *Wilson* v. *U. S.,* 162 U. S. 613.

A warning to the accused that he need not confess is not necessary, but if given is relevant to show that the confession was voluntary. *State* v. *Gilman,* 51 Me. 206.

The warning, when given, tends to show that the confession was voluntary. *People* v. *Simpson,* 48 Mich. 474. It is sometimes required by statute. *State* v. *Rogers,* 112 N. C. 874; *Coffee* v. *State,* 25 Fla. 501.

In answer to improper question.— *People* v. *Wentz,* 37 N. Y. 303, 306.

Pennsylvania.

Confessions obtained by deception.— Confession obtained by artifice is admissible. *Com.* v. *Hanlon,* 3 Brewst. 461; *Com.* v. *Cressinger,* 193 Pa. 326.

A confession procured by the artifice of granting an interview between a man and a woman accused of a crime and then stationing eavesdroppers is admissible. *Com.* v. *Goodwin,* 186 Pa. 218.

A confession obtained by detectives, who represented themselves to be a criminal gang and offered to let the defendant join them if he could show that his criminal record was sufficient, is admissible, but open to suspicion. *Com.* v. *Wilson*, 186 Pa. 1.

A confession to a fellow convict obtained by deception is admissible in the absence of improper inducement. *Com.* v. *Hanlon*, 3 Brewst. 461; *S. C.*, 8 Phila. 401, 423.

ARTICLE 25.

STATEMENTS BY DECEASED PERSONS WHEN DEEMED TO BE RELEVANT.

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

AMERICAN NOTE.

General.

Authorities.— 9 Am. & Eng. Encyclopædia of Law (2d ed.), p. 6 *et seq.;* 1 Greenleaf on Evidence (15th ed.), sec. 123; *Putnam* v. *Fisher*, 52 Vt. 191.

It is no ground for admitting a declaration of a living person that he cannot be produced as a witness. *Churchill* v. *Smith*, 16 Vt. 560.

Insanity.— Insanity in some States has the same effect as death so far as the question of admissibility of declarations is concerned. *Union Bank* v. *Knapp*, 3 Pick. (Mass.) 96, 109, 15 Am. Dec. 181; *Holbrook* v. *Gay*, 6 Cush. (Mass.) 215; *Reynolds* v. *Manning*, 15 Md. 510, 523.

Absence.— And so in some States has permanent absence from the State. *Alter* v. *Berghaus*, 8 Watts (Pa.), 77; *Elms* v. *Chevis*, 2 McCord (S. C.), 329; *Reynolds* v. *Manning*, 15 Md. 510, 523. *Contra*, *Moore* v. *Andrews & Bros.*, 5 Porter (Ala.) 107.

Maryland.

Declarations of one now insane are admissible; also of one permanently absent from the State. *Reynolds* v. *Manning*, 15 Md. 510, 523.

Pennsylvania.

Permanent absence from the State has the same effect as death. *Alter* v. *Berghaus*, 8 Watts, 77.

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, is deemed to be relevant

only in trials for the murder or manslaughter of the declarant;

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

Such a declaration is not irrelevant merely because it was intended to be made as a deposition before a magistrate, but is irregular.

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,

* See Note XVII.

though his doctor had such hopes, and B lives ten days after making the statement. The statement is deemed to be relevant.[38]

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.[39]

(*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.[40]

(*c*) The question is, whether A murdered B. A dying declaration by C that he (C) murdered B is deemed to be irrelevant.[41]

(*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.[42]

AMERICAN NOTE.

General.

Authorities.— 10 Am. & Eng. Encyclopædia of Law (2d ed.), p. 360 *et seq.;* Underhill on Evidence, sec. 100 *et seq.; State* v. *Wagner*, 61 Me. 178, 195; *Com.* v. *Casey*, 11 Cush. (Mass.) 417, 421, 59 Am. Dec. 150; *Com.* v. *Richards,* 18 Pick. (Mass.) 437; *Maxwell* v. *Hardy,* 8 Pick. (Mass.) 561; *Com.* v. *Cooper,* 5 Allen (Mass.), 495; *Hamlin* v. *State,* 48 Conn. 96.

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[38] *R.* v. *Mosley,* 1825, 1 Moo. 97.

[39] *R.* v. *Jenkins,* 1869, 1 C. C. R. 187.

[40] *R.* v. *Hind,* 1860, Bell. 253, following *R.* v. *Hutchinson,* 1824, 2 B. & C. 608 n., quoted in a note to *R.* v. *Mead.*

[41] *Gray's Case,* 1841, Ir. Cir. Rep. 76.

[42] *R.* v. *Woodcock,* 1789, 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. It is now settled that the question is for the judge.

Even though written memoranda of the contents of the declaration were made, if they are lost, parol evidence may be admitted. *State* v. *Patterson*, 45 Vt. 308.

Dying declarations are admissible in a trial for murder resulting from an attempt to commit an abortion. *State* v. *Dickinson*, 41 Wis. 299; *State* v. *Leeper*, 70 Ia. 748.

Scope of proof.— Declarations as to facts attending a murder, made by the victim in expectation of death, are admissible upon the trial for the murder. *State* v. *Smith*, 49 Conn. 379; *State* v. *McGowan*, 65 Conn. 381.

It is not essential to their admissibility that they should directly accuse the prisoner of being the assailant. *State* v. *Cronin*, 64 Conn. 304–306.

Antecedent threats cannot be proven by such declarations. *State* v. *Wood*, 53 Vt. 560; *Jones* v. *State*, 71 Ind. 66; *People* v. *Ah Fong Sing*, 64 Cal. 253.

How made.— Declarations of this nature are admissible if made in response to questions. *Com.* v. *Casey*, 11 Cush. (Mass.) 417.

Such a declaration may be made by signs. *Com.* v. *Casey*, 11 Cush. (Mass.) 417; *State* v. *Foot You*, 24 Ore. 61; *Jones* v. *State*, 71 Ind. 66.

A dying declaration may be admitted, even though written and sworn to. *Com.* v. *Haney*, 127 Mass. 455.

An intended deposition may be used as a memorandum to refresh the recollection of the witness. *Com.* v. *Haney*, 127 Mass. 455.

In contemplation of death.— The declaration must be made in contemplation of death. *Com.* v. *Densmore*, 12 Allen (Mass.), 535; *State* v. *Baldwin*, 79 Ia. 714; *Westbrook* v. *People*, 126 Ill. 81; *State* v. *Nelson*, 101 Mo. 464; *Kehoe* v. *Com.*, 85 Pa. St. 127; *People* v. *Simpson*, 48 Mich. 474; *Carver* v. *U. S.*, 164 U. S. 694. (Receipt of extreme unction admissible evidence.) See also as similar to the last preceding case, *State* v. *Swift*, 57 Conn. 505, 506.

All hope of recovery must have been abandoned. *Com.* v. *Roberts*, 108 Mass. 296; *Com.* v. *Brewer*, 164 Mass. 577; *Allison* v. *Com.*, 99 Pa. 17; *State* v. *Johnson*, 118 Mo. 491; *Simons* v. *People*, 150 Ill. 66; *Hake* v. *Com.*, 89 Va. 171; *People* v. *Gray*, 61 Cal. 164.

All the attendant circumstances are admissible to show the actual danger of death and that hope has been abandoned. *State* v. *Swift*, 57 Conn. 496.

Such declarations may tend to show that the deceased was in actual danger of death, and had given up all hope; and if so, are

admissible to lay a foundation for the admission of other declarations which do identify the prisoner as the assailant. *State* v. *Cronin*, 64 Conn. 304.

In criminal prosecutions only.— Dying declarations are not admissible in civil suits. *Thayer* v. *Lombard*, 165 Mass. 174, 42 N. E. 563; *Daily* v. *N. Y., etc., R. R. Co.*, 32 Conn. 356, 87 Am. Dec. 176; *Hood* v. *Pioneer Co.*, 95 Ala. 461; *Marshall* v. *Chicago, etc., R. Co.*, 48 Ill. 475.

Nearness of death.— It is not necessary that the declarant die at once. They were admitted, although he lived seventeen days after making them. *Com.* v. *Cooper*, 5 Allen (Mass.), 495; *Jones* v. *State*, 71 Ind. 66 (14 days); *Lowry* v. *State*, 12 Lea (Tenn.), 142 (17 days); *State* v. *Craine*, 120 N. C. 601 (4 months).

Constitutionality of rule.— The constitutional provision that one accused has a right to be confronted with his witnesses does not exclude evidence of this nature. *Com.* v. *Casey*, 12 Cush. (Mass.) 246; *People* v. *Glen*, 10 Cal. 32; *Brown* v. *Com.*, 73 Pa. St. 321; *State* v. *Nash*, 7 Ia. 347; *Walston* v. *Com.*, 16 B. Mon. (Ky.) 15; *Burrill* v. *State*, 18 Tex. 713; *State* v. *Dickinson*, 41 Wis. 299; *Robbins* v. *State*, 8 O. St. 131.

Only in homicide cases.— They are not admissible in prosecutions for abortion where death is not a necessary element of the crime. *People* v. *Davis*, 56 N. Y. 95.

They are confined to cases involving the death of the declarant. *People* v. *Davis*, 56 N. Y. 103; *Hackett* v. *People*, 54 Barb. 372; *People* v. *Wood*, 2 Edm. Sel. Cas. 74.

Husband and wife.— The declaration of husband or wife is admissible on the trial of the other. *People* v. *Green*, 1 Den. 614.

Sense of impending death, how shown.—*Doles* v. *State*, 97 Ind. 555.

The proof that a statement was in expectation of death may be circumstantial. *Green* v. *State*, 154 Ind. 655.

In order to render dying declarations admissible the declarant must be at the point of death, and conscious that he is at the point of death. *Jones* v. *State*, 71 Ind. 66; *Morgan* v. *State*, 31 Ind. 193; *Archibald* v. *State*, 122 Ind. 122; *Watson* v. *State*, 63 Ind. 548.

Oral evidence.— Unless it appears that a dying declaration has been reduced to writing, oral evidence is admissible. *Shenkenberger* v. *State*, 154 Ind. 630; *Lane* v. *State*, 151 Ind. 511.

The best evidence of a written and signed dying declaration is the declaration itself. *Binns* v. *State*, 46 Ind. 311.

New Jersey.

General rule.— A patient was told she had one chance for life and stated she did not expect to recover but would like to. Her declarations held not admissible. *Peak* v. *State,* 50 N. J. L. 179.

Whether a dying declaration is admissible or not is for the court; its credibility is for the jury. *Donnelly* v. *State,* 26 N. J. L. 463, 601.

Declarant must have had a sense of impending death and no hope of recovery. *State* v. *Peake,* 10 N. J. L. J. 177.

The conduct of the declarant while making a dying declaration is admissible. His expectation of approaching death may be shown by his statements, by the fact that he made his will, and by other attendant circumstances. *Donnelly* v. *State,* 26 N. J. L. 463, 601.

Only to prove homicide.— Dying declarations inadmissible for other purposes (*Mackay* v. *Mackay,* Pen. 419e) as to show that the accused was insane (*State* v. *Spencer,* 1 Zab. 196).

Illustration (b).— In prosecution for causing an abortion, where the death of the woman is an element of the crime, her dying declarations are admissible. *State* v. *Meyer,* 65 N. J. L. 237, reversing 64 N. J. L. 382.

In civil cases.— Dying declarations not admissible as such in civil actions. *Jenks* v. *Breen* (Ch.), 5 Atl. 647.

Atheists.— Dying declaration by one not believing in God or in future reward and punishment is not admissible. *Donnelly* v. *State,* 26 N. J. L. 465, 602.

Maryland.

A declaration of one who believed she was about to die is admissible even though her physician held out hopes of her recovery. *Worthington* v. *State,* 92 Md. 222.

Pennsylvania.

General authorities.— *Pennsylvania* v. *Stoops,* Add. 381; *Com.* v. *Williams,* 2 Ash. 69; *Kilpatrick* v. *Com.,* 31 Pa. 198; *Com.* v. *Reed,* 2 Pitts. 470, 5 Phila. 528; *Com.* v. *Mika,* 171 Pa. 273; *Com.* v. *Silcox,* 161 Pa. 484.

Declaration admissible though made seven days before death. *Com.* v. *Britton,* 2 Leg. Gaz. 26.

Persons accused of the crime may be presented before the dying man, masked as were the parties when the deed was done, and his

identification becomes a part of his dying declaration. *Com.* v. *Roddy,* 184 Pa. 274.

A dying declaration as to the nature of an injury and the person causing it is admissible, no matter how much or how convincing the other evidence on the subject may be. *Com.* v. *Roddy,* 184 Pa. 274.

Oral and written dying declarations received. *Com.* v. *Birriolo,* 197 Pa. 371.

Parol evidence of a dying declaration is admissible, even though it was reduced to writing but not read over or signed by the declarant. *Alison* v. *Com.,* 99 Pa. 17.

Preliminary proof.— The preliminary evidence showing that a declaration was made under a sense that death was impending may be given in the presence of the jury. *Sullivan* v. *Com.,* 93 Pa. 284.

Only in trials for homicide of declarant.— Admissible only in trials for the homicide of the declarant. *Brown* v. *Com.,* 73 Pa. 321 (murder of declarant's husband); *Com.* v. *Reed,* 5 Phila. 528 (bastardy); *Kilpatrick* v. *Com.,* 31 Pa. 198.

Declaration of the woman was admitted on trial of an indictment for producing a miscarriage causing death. *Com.* v. *Bruce,* 16 Phila. 510.

Dying declaration not admissible in a civil suit. *Friedman* v. *Railroad Co.,* 7 Phila. 203.

Dying declarations of a codefendant not admissible. *Respublica* v. *Langcake,* 1 Yeates, 415.

Declaration of the wife not admissible in trial for murder of the husband, though she was murdered at the same time by the defendant. *Brown* v. *Com.,* 73 Pa. 321.

Consciousness of impending death.— *Small* v. *Com.,* 91 Pa. 304; *Kilpatrick* v. *Com.,* 31 Pa. 198.

The consciousness of impending death may be inferred from the circumstances. *Com.* v. *Murray,* 2 Ashm. 41; *Sullivan* v. *Com.,* 93 Pa. 284.

Or it may be shown by the words of the deceased. *Kehoe* v. *Com.,* 85 Pa. 127; *Com.* v. *Mika,* 171 Pa. 273.

All hope of recovery must have been given up by the declarant at the time the declaration is made. *Alison* v. *Com.,* 99 Pa. 17; *Small* v. *Com.,* 91 Pa. 304.

Death must have been impending and must have actually ensued. *Kilpatrick* v. *Com.,* 31 Pa. 198.

Court and jury.— Admissibility of a dying declaration is for the court; credibility is for the jury. *Kehoe* v. *Com.,* 85 Pa. 127; *Com.* v. *Sullivan,* 93 Pa. 284.

Constitutionality of rule.— The constitutional provision that one accused has a right to be confronted with his witnesses does not exclude evidence of this nature. *Brown* v. *Com.*, 73 Pa. 321.

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, at or near the time when the matter stated occurred,[43] and of his own knowledge.

Such declarations are deemed to be irrelevant except so far as they relate to the matter which the declarant stated in the ordinary course of his business or duty, or if they do not appear to be made by a person duly authorised to make them.

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.[44]

(*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.[45]

(*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

* See Note XVIII.

[43] *Doe* v. *Turford*, 1832, 3 B. & Ad. 890.

[44] *Price* v. *Torrington*, 1703, 2 Smith's L. C. 311.

[45] *Pritt* v. *Fairclough*, 1812, 3 Camp. 305.

relates to the fact of the arrest; but irrelevant so far as it relates to the place where the arrest took place.[46]

(*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.[47]

(*e*) The question is, what is A's age. A statement by the incumbent in a register of baptisms that he was baptised 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.[48]

(*f*) The question is, whether A was married. Proceedings in a college book, which ought to have been but was not signed by the registrar of the college, were held to be irrelevant.[49]

AMERICAN NOTE.

General.

Authorities.— 2 Taylor on Evidence (Chamberlayne's 9th ed.), sec. 697 *et seq.;* McKelvey on Evidence, p. 239 *et seq.; Wheeler* v. *Walker*, 45 N. H. 355; *Lassone* v. *Boston, etc., R. R. Co.*, 66 N. H. 345; *Barber* v. *Bennett*, 58 Vt. 476, 56 Am. Rep. 565; *Welsh* v. *Barrett*, 15 Mass. 380, 383; *Riley* v. *Boehm*, 167 Mass. 183; *Jones* v. *Howard*, 3 Allen (Mass.), 223.

When relevant.—First paragraph of the text. *Abel* v. *Fitch*, 20 Conn. 96.

Instances.— Memoranda of a surveyor are admissible under this article. *Walker* v. *Curtis*, 116 Mass. 98.

And those of a parish priest likewise. *Kennedy* v. *Doyle*, 10 Allen (Mass.), 161; *Whitcher* v. *McLaughlin*, 115 Mass. 167.

So those of a hospital physician. *Townsend* v. *Pepperell*, 99 Mass. 40.

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[46] *Chambers* v. *Bernasconi*, 1834, 1 C. M. & R. 347; see, too, *Smith* v. *Blakey*, 1867, L. R. 2 Q. B. 326.

[47] *Brain* v. *Preece*, 1843, 11 M. & W. 773.

[48] *R.* v. *Clapham*, 1829, 4 C. & P. 29.

[49] *Fox* v. *Bearblock*, 1881, 17 Ch. Div. 429.

The register of a notary is admissible to prove official acts with reference to dishonored paper. *Porter* v. *Judson,* 1 Gray (Mass.), 175; *Nicholls* v. *Webb,* 8 Wheat. (U. S.) 326.

Time when made.— *Matthews* v. *Westboro,* 134 Mass. 562.

The fact that the entries are made two or three days after the occurrences does not, of itself, render them inadmissible. *Barker* v. *Haskell,* 9 Cush. (Mass.) 218.

Under certain circumstances, entries made from two to four weeks after the occurrences are admissible. *Hall* v. *Glidden,* 39 Me. 445; *Chaffee* v. *U. S.,* 18 Wall. 516; *Reynolds* v. *Sumner,* 126 Ill. 58; *Culver* v. *Marks,* 122 Ind. 554; *Sands* v. *Hammell,* 108 Ala. 624; *Laird* v. *Campbell,* 100 Pa. 159.

Absent party.— In some States such declarations are admissible when the declarant has gone to parts unknown. *New Haven, etc., Co.* v. *Goodwin,* 42 Conn. 230. Or is out of the State. *Heiskell* v. *Rollins,* 82 Md. 14; *McDonald* v. *Carnes,* 90 Ala. 147; *Rigby* v. *Logan,* 45 S. C. 651.

Insane party.— Or insane. *Bridgewater* v. *Roxbury,* 54 Conn. 213; *Union Bank* v. *Knapp,* 3 Pick. (Mass.) 96.

But not if he is competent and within the State. *Bartholomew* v. *Farwell,* 41 Conn. 107; *House* v. *Bleak,* 141 Ill. 290.

Books of account.— By the early common law, books of account, as such, were inadmissible. In this country they are admissible, both authenticated. 9 Am. & Eng. Encyclopaedia of Law (2d ed.), p. 903: against and in favor of the person keeping them, when properly 2 Taylor on Evidence (American edition of 1897), p. 4631 *et seq.;* *Augusta* v. *Windsor,* 19 Me. 317; *Lassone* v. *B., etc., R. R. Co.,* 66 N. H. 345; *Bridgewater* v. *Roxbury,* 54 Conn. 216; *Terrill* v. *Beecher,* 9 Conn. 344; *House* v. *Bleak,* 141 Ill. 290; *Donovan* v. *B., etc., R. R. Co.,* 158 Mass. 450; *Pratt* v. *White,* 132 Mass. 477; *Miller* v. *Shay,* 145 Mass. 162. But see *Kaiser* v. *Alexander,* 144 Mass. 71.

A shop-book, to be admissible, must have been kept in the regular course of business, under such circumstances as to import trustworthiness. Its character in this regard is to be passed upon by the judge. *Riley* v. *Boehm,* 167 Mass. 183.

A shop-book, kept by one who cannot write, consisting of mere marks, is admissible. *Miller* v. *Shay,* 145 Mass. 162.

Entries duly authenticated are admissible even though they record

facts communicated by others. *Smith* v. *Law*, 47 Conn. 431; *Harwood* v. *Mulry*, 8 Gray (Mass.), 250.

When entries are customarily made on information received from others, if these are authenticated as correct by the informants, such entries are admissible. *Chisholm* v. *Beaman Co.*, 160 Ill. 101; *Chateaugay Iron Co.* v. *Blake*, 144 U. S. 476.

Time when made.— The entries must have been practically contemporaneous. *Davis* v. *Sanford*, 9 Allen (Mass.), 216; *Bentley* v. *Ward*, 116 Mass. 333; *Morris* v. *Briggs*, 3 Cush. (Mass.) 342; *Barker* v. *Haskell*, 9 Cush. (Mass.) 218; *Chisholm* v. *Beaman Co.*, 160 Ill. 101; *Hoover* v. *Gehr*, 62 Pa. St. 136.

Or must be connected with contemporaneous entries by the testimony of the one who transferred them. *Kent* v. *Garvin*, 1 Gray (Mass.), 148; *Whitney* v. *Sawyer*, 11 Gray (Mass.), 242.

Books of original entry.— The book of original entries should be produced. *Stetson* v. *Wolcott*, 15 Gray (Mass.), 545; *Woolsey* v. *Bohn*, 41 Minn. 235; *Bonnell* v. *Mawha*, 37 N. J. L. 198 (day-book and ledger).

If the ledger is the book of original entry, it is admissible as such. *Swain* v. *Cheney*, 41 N. H. 232; *Hoover* v. *Gehr*, 62 Pa. St. 136; *Faxon* v. *Hollis*, 13 Mass. 427; *Bonnell* v. *Mawha*, 37 N. J. L. 198.

Authentication of book entries.— As to the authentication of entries in books, see *Anderson* v. *Edwards*, 123 Mass. 273; *Pratt* v. *White*, 132 Mass. 477; *Holbrook* v. *Gay*, 6 Cush. (Mass.) 215; *Moots* v. *State*, 21 O. St. 653.

Where the person who made entries which are admissible in evidence is beyond the reach of process or is incompetent to testify, it is the same as if he were dead, and his handwriting may be proved. *Bridgewater* v. *Roxbury*, 54 Conn. 216.

Books of account must be proved by the one making the entries, or if he is dead, by his personal representative. *Pratt* v. *White*, 132 Mass. 477; *Coggswell* v. *Dolliver*, 2 Mass. 217; *Prince* v. *Smith*, 4 Mass. 455; *Frye* v. *Barker*, 2 Pick. (Mass.) 65; *Mathes* v. *Robinson*, 8 Metc. (Mass.) 269; *Ball* v. *Gates*, 12 Metc. (Mass.) 491; *Gibson* v. *Bailey*, 13 Metc. (Mass.) 537; *Arnold* v. *Sabin*, 1 Cush. (Mass.) 531.

If the party is insane his guardian may prove them. *Holbrook* v. *Gay*, 6 Cush. (Mass.) 215.

Illustration (d).— *Kent* v. *Garvin*, 1 Gray (Mass.), 148; *Harwood* v. *Mulry*, 8 Gray (Mass.), 250; *Chaffee* v. *U. S.*, 18 Wall. 516, 543; *Thomas* v. *Price*, 30 Md. 483.

Illustration (e).— *Whitcher* v. *McLaughlin*, 115 Mass. 167; *Townsend* v. *Pepperell*, 99 Mass. 40; *Kennedy* v. *Doyle*, 10 Allen (Mass.), 161; *Durfee* v. *Abbott*, 61 Mich. 471; *Blackburn* v. *Crawfords*, 3 Wall. 175; *Weaver* v. *Leiman*, 52 Md. 708; *Litter* v. *Gehr*, 105 Pa. St. 577.

Partnership books.— Partnership books are admissible in the same way as those of an individual. *Adams* v. *Bowerman*, 109 N. Y. 23; *Buffalo, etc., Bank* v. *Guenther*, 1 N. Y. Supp. 753.

They are competent in a suit between partners. *Fairchild* v. *Fairchild*, 64 N. Y. 471, affirming 5 Hun, 407; *Caldwell* v. *Leiber*, 7 Paige, 483; *Van Bokkeleim* v. *Berdell*, 3 N. Y. Supp. 333; *Cheever* v. *Lamar*, 19 Hun, 130.

In such a suit there is a *prima facie* presumption that they are correct. *Heartt* v. *Corning*, 3 Paige, 566; *Cheever* v. *Lamar*, 19 Hun, 130.

Preliminary proof.— Books of account are admissible in evidence when proper foundation has been laid. *Ruggles* v. *Gatten*, 50 Ill. 412; *Talliaferro* v. *Ives*, 51 Ill. 247; *First Nat. Bank of Woodstock* v. *Mansfield*, 48 Ill. 494; *Waggeman* v. *Peters*, 22 Ill. 42; *Adams* v. *Funk*, 53 Ill. 219; *Kirby* v. *Watt*, 19 Ill. 393; *Dishon* v. *Schorr*, 19 Ill. 59; *Humphreys* v. *Spear*, 15 Ill. 275; *Friend* v. *Cole*, 5 Gilm. 339; *Dodson* v. *Sears*, 25 Ill. 513; *Boyer* v. *Sweet*, 3 Scam. 120.

As to authenticating books of account, see *Brooks* v. *Funk*, 85 Ill. App. 631.

In order that books of account be admissible the preliminary proof under the staute must be made. *Richardson* v. *Allman*, 40 Ill. App. 90, 93; *Sexton* v. *Brown*, 36 Ill. App. 281, 283.

As to preliminary proof in case of books of account, see *Rigdon* v. *Conley*, 141 Ill. 565; *House* v. *Beak*, 141 Ill. 290.

As to foundation for the admission of books of account, see *F. H. Hill Co.* v. *Sommer*, 55 Ill. App. 344.

It is error to admit the plaintiff's books without laying sufficient ground for their admission. *Baird* v. *Hooker*, 8 Brad. 306.

Account-books are not authenticated by the mere admission of a partner that they are correct. *Gormley* v. *Hartray*, 92 Ill. App. 115.

Evidence that account-books are the only ones kept authenticates them as books of original entry. *Patrick* v. *Jack*, 82 Ill. 81.

A witness must be called to authenticate a party's books of ac-

count. *Stellaner* v. *White*, 98 Ill. 72; *Redlich* v. *Bauerlee*, 98 Ill. 134; *Clapp* v. *Emery*, 98 Ill. 523.

The one offering books of account should testify that they were made by himself and are true and just. *Pres. Church* v. *Emerson*, 66 Ill. 269. Compare *Walcott* v. *Heath*, 78 Ill. 433.

When entries are customarily made on information received from others, if these are authenticated as correct by the informants, such entries are admissible. *Chisholm* v. *Beaman Co.*, 160 Ill. 101.

Weather records.— *Hart* v. *Walker*, 100 Mich. 406.

Record of receipts.— *People* v. *Flash*, 100 Mich. 512.

Illustration (e).— *Durfee* v. *Abbott*, 61 Mich. 471.

New Jersey.

Church records.— A church record of baptisms is admissible. *Supreme Assembly* v. *McDonald*, 59 N. J. L. 248.

Physician's record.— Daily entries by a physician in the ward-books of an asylum are admissible. *State* v. *Hinkley*, 9 N. J. L. J. 118.

Books of a corporation.— The books of a corporation are competent evidence of the proceedings of the corporation. *N. River Meadow Co.* v. *Shrewsbury Church*, 2 Zab. 425; *Van Hook* v. *Somerville Co.*, 5 N. J. Eq. 137, 633; *Black* v. *Lamb*, 12 N. J. Eq. 109.

Books of account.— Books of account are admissible to prove amount of service rendered. *Oliver* v. *Phelps*, Spen. 180, 1 Zab. 597; *Lyons* v. *Davis*, 30 N. J. L. 301.

Books of account not admissible to prove damages from breach of covenant or from wrongful taking of personal property. *Wait* v. *Krewson*, 59 N. J. L. 71.

Day-book admissible. *Oram* v. *Bishop*, 7 Hal. 153.

Books of original entry.— The book of original entries should be produced. *Bonnell* v. *Mawha*, 37 N. J. L. 198 (day-book and ledger).

Slips written by a bookkeeper in course of business, but not the original memoranda of the transactions in question, are not admissible. *New Jersey Zinc Co.* v. *Lehigh Zinc Co.*, 59 N. J. L. 189.

An account-book not a book of original entry is not admissible. *Rumsey* v. *Telephone Co.*, 49 N. J. L. 322.

Day-book and ledger should be offered together, when it appears affirmatively that some items have been carried over into the latter. *Bonnell* v. *Mawha*, 37 N. J. L. 198.

Cash items.— Plaintiff's book is evidence of money lent. *Craven* v. *Shaird*, 2 Hal. 345; *Brannin* v. *Voorhees*, 2 Green, 590.

But not where the book contains but the single item of cash loaned. *Carman* v. *Dunham*, 6 Hal. 189; *Wilson* v. *Wilson*, 1 Hal. 95.

And see, as holding that books of account are not admissible to prove payment of money or a loan of money, *Inslee* v. *Prall*, 3 Zab. 457; *S. C.*, 25 N. J. L. 665.

Books of account not admissible in favor of the merchant to prove payments credited therein. *Oberg* v. *Breen*, 50 N. J. L. 145.

Time entries must be made.— Entries may be admissible even though not made on the same day as the transaction, if they are made in the usual course of business. *Bay* v. *Cook*, 2 Zab. 343.

Entries made in a day-book twenty days after the business was closed, from slips on which memoranda had been put down, held admissible. The slips themselves also admissible in connection with the day-book. *Diament* v. *Colloty*. 66 N. J. L. 295.

Miscellaneous.— Stubs in a check-book are not admissible. *Bunting ads. Allen*, 3 Harr. 299.

An account rendered is admissible, though not kept by book. *Norris* v. *Douglass*, 2 South. 817.

Erasures in an account affect only its credibility, not its admissibility. *James* v. *Harvey*, Coxe, 228; *Cook* v. *Brister*, 4 Harr. 73.

Maryland.

Authority.— Such declarations must have been made as a part of the ordinary routine of the particular transaction. *Railroad Co.* v. *Manro*, 32 Md. 280.

Absent party.— Such declarations are admissible when the declarant is out of the State. *Heiskell* v. *Rollins*, 82 Md. 14.

Books of account.— Original entries made by a clerk in the regular course of his duty, when he had no interest to misstate the fact, are admissible on proof of his handwriting if the clerk himself be dead, insane, or beyond the jurisdiction. *Reynolds* v. *Manning*, 15 Md. 510.

Entries in the regular course of business by a clerk having no interest to make them incorrectly are admissible on proof of his handwriting if he himself is beyond the jurisdiction. *Heiskell* v. *Rollins*, 82 Md. 14.

The entries need not be in the handwriting of the witness himself, if made at his dictation and in his presence. *Bullock* v. *Hunter*, 44 Md. 416.

A pass-book in a bank is competent evidence to show that a note had been discounted. *Black* v. *Bank,* 96 Md. 399.

If a party relies upon certain entries in his favor, the other entries in the book become admissible also. *Allender* v. *Vestry of Trinity,* 3 Gill, 166; *Lee* v. *Tinges,* 7 Md. 216.

Entries by interested party.— The rule admitting books of original entry applies only when such entries were made by a disinterested party. *Romer* v. *Jaecksch,* 39 Md. 585.

Entries by one partner now dead are not admissible against a firm debtor. *Romer* v. *Jaecksch,* 39 Md. 585.

Entries in a book of original entry made by the defendant in his own handwriting are not admissible against the plaintiff, but may be used to refresh recollection. *Stallings* v. *Gottschalk,* 77 Md. 429.

In corroboration.— Where a witness saw money paid by one now deceased and further saw the deceased make entries in relation thereto in his books, such entries are admissible in corroboration of the witness, though they would not be independently admissible. *Gill* v. *Staylor,* 93 Md. 453.

Entries not original.— Entries made from memoranda kept by another are not admissible. *Thomas* v. *Price,* 30 Md. 483.

A copy of certain entries is not admissible, even though the original entries were made by the one copying them. *Green* v. *Caulk,* 16 Md. 556.

Illustration (e).— *Weaver* v. *Leiman,* 52 Md. 708.

Illustration (d).— *Thomas* v. *Price,* 30 Md. 483.

Proof of accounts.— P. G. L. 1888, art. 35, secs. 43–46.

Comptroller's accounts made *prima facie* evidence. P. G. L. 1888, art. 19, sec. 22.

Pennsylvania.

Books of account.— Entries in account-books are admissible even in favor of the party making them to prove work done or goods sold and delivered. *Corr* v. *Sellers,* 100 Pa. 169.

One cannot prove the existence of a contract by proving an entry in his books charging himself with receipt of the consideration. *Building Society* v. *Holt,* 184 Pa. 572.

Where there is a written contract to deliver goods at specified periods, their delivery cannot be proved by books of original entry. *Hall* v. *Woolen Co.,* 187 Pa. 18.

Self-serving entries not admissible. *Hottle* v. *Weaver,* 206 Pa. 87.

The payment or loan of money cannot be proved by entries in books of account. *Ducoign* v. *Schreppel,* I Yeates, 347.

Entries containing "lumping charges" are not admissible. *Corr* v. *Sellers*, 100 Pa. 169.

As to the effect of making parties competent witnesses, see *Nichols* v. *Haynes*, 78 Pa. 174.

Entry in a receipt-book of a company is admissible against it. *Building Assn.* v. *Sutton*, 35 Pa. 463.

The books of a mutual insurance company are admissible against one insured in the company. *Diehl* v. *Insurance Co.*, 58 Pa. 443.

Account-books are not admitted as against the representative of one now deceased. *Appeal of McNulty*, 135 Pa. 210; *Bishop* v. *Goodhart*, 135 Pa. 374.

Books of original entry.— A ledger is admissible if it is the book of original entry, and not otherwise. *Hoover* v. *Gehr*, 62 Pa. 136; *Huston's Estate*, 167 Pa. 217.

Transferred entries held not admissible. *Breinig* v. *Meitzler*, 23 Pa. 156; *Forsythe* v. *Norcross*, 5 Watts, 432; *Kessler* v. *McConachy*, 1 Rawle, 435.

A day-book into which entries are copied from a blotter is not a book of original entry. *Breinig* v. *Meitzler*, 23 Pa. 156.

But a book into which entries are made on the same or following day from memoranda of servants is admissible. *Ingraham* v. *Bockins*, 9 S. & R. 285; *Patton* v. *Ryan*, 4 Rawle. 408; *Hartley* v. *Brookes*, 6 Whart. 189; *Jones* v. *Long*, 3 Watts, 325; *Hoover* v. *Gehr*, 62 Pa. 136.

Book of original entry written in lead pencil is admissible. *Hill* v. *Scott*, 12 Pa. 168.

Course of business.— An entry not in the usual course of business is not admissible. *Shoemaker* v. *Kellog*, 11 Pa. 310.

A book containing no entries except those against the defendant is not admissible as one kept in the regular course of business. *Fulton's Estate*, 178 Pa. 78.

An entry of a special transaction not in the usual course of business is not admissible. *Stuckslager* v. *Neel*, 123 Pa. 53.

Time of entry.— *Kaughley* v. *Brewer*, 16 S. & R. 133; *Wollenweber* v. *Ketterlinus*, 17 Pa. 389; *Keim* v. *Rush*, 5 W. & S. 377; *Parker* v. *Donaldson*, 2 W. & S. 9; *Rhoads* v. *Gaul*, 4 Rawle, 404.

To be admitted, the entries must have been made at the time of the transaction. *Fairchild* v. *Dennison*, 4 Watts, 258; *Walter* v. *Bollman*, 8 Watts, 544; *Hoover* v. *Gehr*, 62 Pa. 136.

Under certain circumstances, entries made from two to four weeks after the occurrences are admissible. *Laird* v. *Campbell,* 100 Pa. 159.

Entries made regularly at the end of each week held admissible. *Yearsley's Appeal,* 48 Pa. 531.

Charges made in the book before the goods were sold are not admissible. *Laird* v. *Campbell,* 100 Pa. 159.

Illustration (e).—*Sitler* v. *Gehr,* 105 Pa. 577.

In suits between third parties.— Books of a bank not admissible to prove a deposit in a suit between third parties unless the clerk making the entries be dead or beyond the jurisdiction. *Bank* v. *Officer,* 12 S. & R. 49; *Ridgway* v. *Bank,* 12 S. & R. 256; *Gochenauer* v. *Good,* 2 P. & W. 174.

Book of original entry is not admissible in a suit between third parties to prove a collateral fact. *Bank* v. *Brown,* 5 S. & R. 226; *Winter* v. *Newell,* 49 Pa. 507.

Authentication of entries.— The maker of the entry should be called to prove it. *Sterrett* v. *Bull,* 1 Binn. 234; *Imhoff* v. *Smith,* 3 Phila. 381. But if he is dead or absent from the State, his handwriting may be proved. *Hay* v. *Kramer,* 2 W. & S. 137; *Alter* v. *Berghaus,* 8 Watts, 77; *Odell* v. *Culbert,* 9 W. & S. 66; *Hoover* v. *Gehr,* 62 Pa. 136.

Erasures and alterations must be explained before a book is admissible. *Churchman* v. *Smith,* 6 Whart. 146; *Kline* v. *Gundrum,* 11 Pa. 242.

Verified copies of bank books.— Pepper & Lewis' Digest of Laws. "Evidence," secs. 39–41.

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.[50] The whole of any such

* See Note XIX.

[50] These are almost the exact words of Bayley, J., in *Gleadow* v. *Atkin,* 1833, 1 Cromp. & M. at p. 423. The interest must not be too remote: *Smith* v. *Blakey,* 1867, L. R. 2 Q. B. 326.

declaration, 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; 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.[51]

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 part.[52]

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.[53]

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

[51] Illustrations (*a*) (*b*) and (*c*).

[52] Illustrations (*d*) and (*e*).

[53] Illustration (*g*); see Lord Campbell's judgment in case there quoted, at p. 177.

[54] 9 Geo. IV. c. 14, s. 3.

Limitation;[54] but any such declaration made in any other form by or by the direction of the person to whom the payment was made is, when such person is dead, sufficient proof for the purpose aforesaid.[55]

Any indorsement 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;[56] but it is uncertain whether the date of such indorsement or memorandum may be presumed to be correct without independent evidence.[57]

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.[58]

Illustrations.

(*a*) The question is, whether a person was born on a particular day.

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[55] *Bradley* v. *James*, 1853, 13 C. B. 822. *Newbould* v. *Smith*, 1885, 29 Ch. Div. 882, seems scarcely consistent with this. It was a decision of North, J. On appeal, 1886, 33 Ch. Div. 127, the Court expressed no opinion on the admissibility of the entry rejected by North, J.; and see, too, the appeal to the House of Lords, 1889, 14 App. Ca. 423, where the same was the case.

[56] 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.

[57] See the question discussed in 2 Ph. Ev. 302–305, and Taylor, ss. 692–696; and see Article 85.

[58] Illustration (*h*).

An entry in the book of a deceased man-midwife in these words is deemed to be relevant:[59]

"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."[60]

(*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.[61]

(*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 favour of the steward.[62]

(*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

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[59] *Higham* v. *Ridgway*, 2 Smith's L. C. 318.

[60] *Stead* v. *Heaton*, 1792, 4 T. R. 669.

[61] *Doe* v. *Beviss*, 1849, 7 C. B. 456.

[62] *Williams* v. *Graves*, 1838, 8 C. & P. 592.

to be { relevant[63] / irrelevant[64] } there being no other evidence either that the repairs were done or that the money was paid.

(*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.[65]

(*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.[66]

(*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.[67]

AMERICAN NOTE.

General.

Authorities.— 9 Am. & Eng. Encyclopædia of Law (2d ed.), p. 7; 1 Greenleaf on Evidence (15th ed.), sec. 147 *et seq.;* 2 Taylor on Evidence (Chamberlayne's 9th ed.), sec. 668 *et seq.; Rand* v. *Dodge,* 17 N. H. 343, 360.

A declaration in disparagement of title is admissible under this article. *Potter* v. *Waite,* 55 Conn. 236, 10 Atl. 563.

The interest must be pecuniary. *Com.* v. *Chabbock,* 1 Mass. 143.

Declarations of a deceased landowner are admissible to prove a right of way over it. *Rowell* v. *Doggett,* 143 Mass. 483.

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[63] *R.* v. *Lower Heyford,* 1840, note to *Higham* v. *Ridgway,* 1808, 2 Smith's L. C. 329.

[64] *Doe* v. *Vowles,* 1833, 1 Mo. & Ro. 261. In *Taylor* v. *Witham,* 1876, 3 Ch. Div. 605, Jessel, M.R., followed *R.* v. *Lower Heyford,* and dissented from *Doe* v. *Vowles.*

[65] *R.* v. *Exeter,* 1869, L. R. 4 Q. B. 341.

[66] *Papendick* v. *Bridgewater,* 1855, 5 E. & B. 166.

[67] *Sussex Peerage Case,* 1844, 11 C. & F. at p. 108.

A declaration of a former owner in disparagement of title is admissible under this article. *Inhabitants of West Cambridge* v. *Inhabitants of Lexington*, 2 Pick. (Mass.) 536.

The declaration may be oral or written. *County of Mahaska* v. *Ingalls*, 16 Ia. 81; *Baker* v. *Taylor*, 54 Minn. 71; *Marcy* v. *Stone*, 8 Cush. (Mass.) 4.

Death of declarant.— The declaration is admitted only on proof of death. *Davis* v. *Fuller*, 12 Vt. 178, 36 Am. Dec. 334; *Trammel* v. *Hadman*, 78 Ala. 222; *Fitch* v. *Chapman*, 10 Conn. 8; *Currier* v. *Gale*, 14 Gray (Mass.), 504.

Must be against interest.— *Hinkley* v. *Davis*, 6 N. H. 210, 25 Am. Dec. 457; *Chase* v. *Smith*, 5 Vt. 556; *Dwight* v. *Brown*, 9 Conn. 83, 92; *Taylor* v. *Gould*, 57 Pa. 152; *Hart* v. *Kendall*, 82 Ala. 144; *Lamar* v. *Pearre*, 90 Ga. 377; *Dean* v. *Wilkinson*, 126 Ind. 338; *Zimmerman* v. *Bloom*, 43 Minn. 163; *Com.* v. *Densmore*, 12 Allen (Mass.), 537.

Statute of limitations.— Massachusetts Public Statutes, c. 197, sec. 16, and Maine Rev. Stat., c. 81, sec. 100, are similar to 9 Geo. IV., c. 14, sec. 3, cited in the note. See also *Libby* v. *Brown*, 78 Me. 492; *Rogers* v. *Anderson*, 40 Mich. 290; Indiana Rev. Stat., sec. 303; Wisconsin Rev. Stat., sec. 4247.

An indorsement, after the statute has run, is not a declaration against interest. *Coon's Appeal*, 52 Conn. 186.

Indorsements.— Modifying the rule of the text: *Clap* v. *Ingersol*, 2 Fairf. (Me.) 83; *Coffin* v. *Bucknam*, 3 Fairf. (Me.) 471. See *Clough* v. *McDaniel*, 58 N. H. 201; *Runner's Appeal*, 121 Pa. St. 649; *Haver* v. *Schwyhart*, 39 Mo. App. 303; *White* v. *Beaman*, 85 N. C. 3.

It must appear affirmatively that the indorsement was made at a time when it was against the interest of the creditor. *Read* v. *Hurd*, 7 Wend. 410; *Mills* v. *Davis*, 113 N. Y. 243; *Matter of Kellogg*, 104 N. Y. 648, 5 N. Y. St. R. 668, citing *Risley* v. *Wightman*, 13 Hun, 163; *Hulbert* v. *Nichol*, 20 Hun, 454; *Roseboom* v. *Billington*, 17 Johns. 182.

New Jersey.

Indorsements.— An indorsement of a payment on a note made by one now dead is admissible as being against interest, but only when made before the period of the Statute of Limitations has run. Standing alone it is not then sufficient evidence to remove the bar of the statute. *Christopher* v. *Wilkins*, 64 N. J. Eq. 354.

Declarations adverse to one's title.— *Meeker* v. *Boyland*, 28 N. J. L. 274.

Maryland.

Authorities.—*Coale* v. *Harrington*, 7 H. & J. 147; *Railroad Co.* v. *Manro*, 32 Md. 280.

The declarations of a party paying out the money of a third person on his request are not admissible because not sufficiently against the declarant's interest. *Railroad Co.* v. *Manro*, 32 Md. 280.

Pennsylvania.

Declarations of deceased persons against interest.— *Taylor* v. *Gould*, 57 Pa. 152; *Hohensack* v. *Hallman*, 17 Pa. 154.

Declarations against interest made by the husband prior to his marriage are admissible in favor of creditors as against the wife. *Barnes* v. *Black*, 193 Pa. 447.

The acts of one now dead performed by him against his own interest are admissible in favor of those who claim through him. *Allegheny* v. *Nelson*, 25 Pa. 332.

Entries in one's books against interest are admissible. *Canal Co.* v. *Loyd*, 4 W. & S. 393.

Declarations against proprietary interest. *Hiester* v. *Laird*, 1 W. & S. 245; *Sergeant* v. *Ingersoll*, 15 Pa. 343.

Instances.— Declarations of a trustee that a certain investment was made out of the trust fund are admissible. *Bank* v. *Tyler*, 3 W. & S. 373.

Declarations of an executor that certain funds belonged to the estate are admissible. *Stair* v. *Bank*, 55 Pa. 364.

A declaration of trust by one holding title to land is admissible. *King* v. *Weible*, 10 Pa. Co. Ct. 521.

An admission of marriage is an admission against interest. *Seibert's Estate*, 17 Wkly. Notes Cas. 271.

Indorsements.— Modifying the rule of the text. *Runner's Appeal*, 121 Pa. 649.

Indorsements not admissible unless proved to have been made at a time when they were against interest. *Adams* v. *Seitzenger*, 1 Serg. & R. 243.

Indorsements by the holder of a bill or note may be admissible even though such holder be alive. But it must be shown by extrinsic evidence that the indorsement was made at a time when the action on the note was not barred by the Statute of Limitations, for otherwise the indorsement would not be regarded as against interest. *Shaffer* v. *Shaffer*, 41 Pa. 51; *Clark* v. *Burn*, 86 Pa. 502.

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; and

when the question is whether an existing will is genuine or was improperly obtained; and

when the question is whether any and which of more existing documents than one constitute his will.

In all these cases it is immaterial whether the declarations were made before or after the making or loss of the will.[68]

AMERICAN NOTE.

General.

Authorities.— 2 Taylor on Evidence (Chamberlayne's 9th ed.), sec. 1203 A; McKelvey on Evidence, p. 213; *Collagan* v. *Burns*, 57 Me. 449; *Pickens* v. *Davis*, 134 Mass. 252, 45 Am. Rep. 322; *Leonard* v. *Quinlan*, 121 Mass. 579.

On the issue of undue influence, declarations are admissible. *Denison's Appeal*, 29 Conn. 402; *Canada's Appeal*, 47 Conn. 463.

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[68] *Sugden* v. *St. Leonards*, 1876, L. R. 1 P. D. (C. A.) 154: and see *Gould* v. *Lakes*, 1880, L. R. 6 P. D. 1. 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*, 1880, L. R. 6 P. D. 1; *Doe* v. *Palmer*, 1851, 16 Q. B. 747. The decision in this case at p. 757, followed by *Quick* v. *Quick*, 1864, 3 Sw. & Tr. 442, is overruled by *Sugden* v. *St. Leonards*.

In ejectment, evidence of directions to the scrivener to make a different disposition by will than that made is inadmissible. *Chappel* v. *Avery*, 6 Conn. 34.

Lost will.—*In re Johnson's Will*, 40 Conn. 587; *McDonald* v. *McDonald*, 142 Ind. 55; *In re Page*, 118 Ill. 576; *Valentine's Will*, 93 Wis. 45; *Apperson* v. *Dowdy*, 82 Va. 776; *Behrens* v. *Behrens*, 47 O. St. 323; *Byers* v. *Hoppe*, 66 Md. 206; *In re Lambie*, 97 Mich. 49.

Different wills.— On the question of admitting a will to probate, declarations of the testator that he meant a prior will to take effect and supposed it would are admissible. *Canada's Appeal*, 47 Conn. 463. See, also, *Valentine's Will*, 93 Wis. 45; *Estate of Johnson*, 57 Cal. 529.

A testator's declarations are admissible to prove the publication of the will. *Lane* v. *Lane*, 95 N. Y. 494; *Gilbert* v. *Knox*, 52 N. Y. 125.

New Jersey.

Want of capacity.— Conduct and declarations of the testator at time of making the will are admissible to show want of capacity or fraud. *Meeker* v. *Boylan*, 28 N. J. L. 274; *Den.* v. *Van Cleve*, 2 South. 589, 654; *Pancoast* v. *Graham*, 15 N. J. Eq. 295; *Boylan* v. *Meeker*, 15 N. J. Eq. 310; *Matter of Vanderveer*, 20 N. J. Eq. 463; *S. C.*, modified, 21 N. J. Eq. 561; *Day* v. *Day*, 3 N. J. Eq. 549.

Declarations of testator are admissible to show the condition of his mind, not to prove undue influence. *Middleditch* v. *Williams*, 47 N. J. Eq. 585, reversing *S. C.*, 45 N. J. Eq. 726.

Declarations of a testator admitted to show the real consideration of a deed expressed on its face as love and affection, to prove the transaction not an advancement. *Hattersley* v. *Bissett*, 50 N. J. Eq. 577, 51 N. J. Eq. 597.

Contents of a will shown by testator's declarations as to his intentions. *Den.* v. *Van Cleve*, 2 South. 677.

Latent ambiguity.— Declarations of a testator are admissible to explain a latent ambiguity in his will. *Griscom* v. *Evens*, 40 N. J. L. 402; *Burnet* v. *Burnet*, 30 N. J. Eq. 595; *Den.* v. *Cubberly*, 7 Hal. 308; *Hand* v. *Huffman*, 3 Hal. 71; *Eaton* v. *Cook*, 25 N. J. Eq. 55; *Evans* v. *Hooper*, 3 N. J. Eq. 204.

Forgery of will.— Where issue is whether a will is a forgery, declarations of alleged testator not admissible. *Gordon's Case*, 50 N. J. Eq. 397, 52 N. J. Eq. 317.

Declarations not admissible.—Declarations of a testator at the time of making his will as to his meaning or intention or the instructions to the scrivener are not admissible. *Yard* v. *Carman*, Pen. 936; *Vernon* v. *Marsh*, 3 N. J. Eq. 502; *Leigh* v. *Savidge*, 14 N. J. Eq. 124; *Lynch* v. *Clements*, 24 N. J. Eq. 431; *Jones* v. *Jones*, 13 N. J. Eq. 236; *Evans* v. *Hooper*, 3 N. J. Eq. 204; *Massaker* v. *Massaker*, 13 N. J. Eq. 264.

Maryland.

Lost will.—*Byers* v *Hoppe*, 66 Md. 206.

Declarations of a testator are admissible as corroborative evidence of the execution of a certain will, but not until other direct evidence of the fact is given. *Hoppe* v. *Byers*, 60 Md. 381.

Capacity to make a will.—Declarations of a testator made while sane to the effect that he was crazy when he made a will are admissible as to his capacity to make such will. *Colvin* v. *Warford*, 20 Md. 357.

Declarations of a testator are admissible on the question of undue influence and fraud to show his mental condition. *Griffith* v. *Dieffenderffer*, 50 Md. 466.

Intention of testator.—The instructions given to the draftsman by the testator are not admissible to show his intention. *Frick* v. *Frick*, 82 Md. 218.

Declarations of the testator are not admissible to render a will inoperative. *Sewell* v. *Slingluff*, 57 Md. 537; *Moore* v. *McDonald*, 68 Md. 321.

Such declarations are not admissible to aid in the interpretation of a will. *Zimmerman* v. *Hafer*, 81 Md. 347.

Pennsylvania.

Contents of a lost will may be proved by declarations of the testator. *Foster's Appeal*, 87 Pa. 67.

Declarations of testatrix admitted to show weakness of mind on question of undue influence. *Robinson* v. *Robinson*, 203 Pa. 400; *Rambler* v. *Tryon*, 7 S. & R. 90.

Declarations of a testator are not admissible as direct proof to establish a paper as his will, but may be given in corroboration. Such testimony is dangerous. *Swope* v. *Donnelly*, 190 Pa. 417.

Extrinsic evidence allowed to prove the intention of the testator. *Sharp* v. *Wightman*, 205 Pa. 285.

ARTICLE 30.[69]

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. But declarations as to particular 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.

A right is public if it is common to all Her Majesty's subjects, 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.

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[69] See Note XX. Also see *Weeks* v. *Sparke*, 1813, 1 M. & S. 679; *Crease* v. *Barrett*, 1835, 1 C. M. & R. 919. Article 5 has much in common with this article. Lord Blackburn's judgment in *Neill* v. *Duke of Devonshire*, 1882, L. R. 8 App. Ca., pp. 186, 187, especially explains the law.

Illustrations.

(*a*) The question is, whether a road is public.

A statement by A (deceased) that it is public is deemed to be relevant.[70]

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.[71]

(*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;[72]

Copies of Court rolls;[73]

Deeds and leases between private persons;[74]

Verdicts, judgments, decrees, and orders of Courts, and similar bodies[75] if final.[76]

AMERICAN NOTE.

General.

Authorities.— 9 Am. & Eng. Encyclopædia of Law (2d ed.), p. 9; 2 Taylor on Evidence (Chamberlayne's 9th ed.), sec. 607 *et seq.*; *Lawrence* v. *Tennant*, 64 N. H. 543; *Hampson* v. *Taylor*, 15 R. I. 83; *Wooster* v. *Butler*, 13 Conn. 309; *S. W. Sch. Dist.* v. *Williams*, 48 Conn. 504; *Drury* v. *Midland R. R. Co.*, 127 Mass. 571; *Dillingham* v. *Snow*, 5 Mass. 552; *People* v. *Velarde*, 59 Cal. 457; *Shuttle* v. *Thompson*, 15 Wall. 151; *Mullaney* v. *Duffy*, 145 Ill. 559; *Young* v. *Kansas City, etc., R. Co.*, 39 Mo. App. 52; *Thoen* v. *Roche*, 57 Minn. 135; *Birmingham* v. *Anderson*, 40 Pa. 506.

Ancient deeds and wills are sometimes admissible to prove private matters. *Oldtown* v. *Shapleigh*, 33 Me. 278; *Greenfield* v. *Camden*,

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70 *Crease* v. *Barrett*, per Parke, B., 1835, 1 C. M. & R. at p. 929.

71 *R.* v. *Bliss*, 1837, 7 A. & E. 550.

72 Implied in *Hammond* v. *Bradstreet*, 1854, 10 Ex. 390, and *Pipe* v. *Fulcher*, 1858, 1 E. & E. 111. In each of these cases the map was rejected as not properly qualified.

73 *Crease* v. *Barrett*, 1835, 1 C. M. & R. at p. 928.

74 *Plaxton* v. *Dare*, 1829, 10 B. & C. 17.

75 *Duke of Newcastle* v. *Broxtowe*, 1832, 4 B. & Ad. 273.

76 *Pim* v. *Currell*, 1840, 6 M. & W. 234, 266.

74 Me. 56; *Ward* v. *Oxford*, 8 Pick. (Mass.) 476; *Wright* v. *Boston*, 126 Mass. 161.

The position of a line separating two towns is a matter of public interest, and declarations are admissible, even though they concern the position of a single house, as related to that line. *Abington* v. *North Bridgewater*, 23 Pick. (Mass.) 170, 174.

The incorporation of a town may be proved by declarations. *Dillingham* v. *Snow*, 5 Mass. 547.

Declarations as to private rights are generally inadmissible. *Boston, etc., Co.* v. *Hanlon*, 132 Mass. 483.

The declarant must be dead. *Flagg* v. *Mason*, 8 Gray (Mass.), 556; *Whitney* v. *Bacon*, 9 Gray (Mass.), 206.

Under this rule the declarations of owners and tenants in possession only are admissible. *Bartlett* v. *Emerson*, 7 Gray (Mass.), 174.

The declarations of one holding under a bond for a deed may be admissible. *Niles* v. *Patch*, 13 Gray (Mass.), 254.

Boundary cannot be shown by tradition. *Hall* v. *Mayo*, 97 Mass. 416.

Deeds and leases.— *Drury* v. *Midland R. R. Co.*, 127 Mass. 571.

Ancient records.— See *Willey* v. *Portsmouth*, 35 N. H. 303.

Ancient records of a town, showing the location of a highway, are admissible. *State* v. *Vale Mills*, 63 N. H. 4.

Maps.— As to the admissibility of maps, see *Smith* v. *Forrest*, 49 N. H. 230; *McCausland* v. *Fleming*, 63 Pa. St. 36.

Private boundaries.— The declarations of a landowner as to the location of his boundaries, made while pointing them out, are admissible. *Royal* v. *Chandler*, 33 Me. 150; *Child* v. *Kingsbury*, 46 Vt. 47; *Powers* v. *Silby*, 41 Vt. 288. *Contra*, *Chapman* v. *Twitchell*, 37 Me. 59.

They have been held admissible in some States, if not made while pointing out boundaries. *Smith* v. *Forrest*, 49 N. H. 230; *Lawrence* v. *Tennant*, 64 N. H. 532; *Great Falls* v. *Worster*, 15 N. H. 437.

It has been held that if it was for the interest of the declarant to misstate at the time he made the declaration, it is inadmissible. *Child* v. *Kingsbury*, 46 Vt. 47, 53.

The rule as to declarations, with reference to private boundary, is confined to monuments and lines and boundaries, but does not extend to acts of ownership, or possession, or to any other facts. *Wendall* v. *Abbott*, 45 N. H. 349.

Private boundary may not be proved by declarations of deceased persons not accompanying any act performed upon the land. *Hayden* v. *Stone*, 121 Mass. 413.

Declarations of a deceased owner of land, as to his boundary, made while in possession, and in the act of pointing out his boundaries, are admissible if no interest to misrepresent them at the time existed. *Currier* v. *Gale*, 14 Gray (Mass.), 504; *Wood* v. *Foster*, 8 Allen (Mass.), 24; *Daggett* v. *Shaw*, 5 Metc. 223; *Bartlett* v. *Emerson*, 7 Gray (Mass.), 171; *Davis* v. *Sherman*, 7 Gray (Mass.), 291; *Holmes* v. *Turner's Falls Co.*, 150 Mass. 535; *Robinson* v. *Dewhurst*, 68 Fed. Rep. 336. So when made by surveyors or others with knowledge. *Kramer* v. *Goodlander*, 98 Pa. St. 366; *Clement* v. *Packer*, 125 U. S. 309; *Fry* v. *Stowers*, 92 Va. 13; *Bethea* v. *Byrd*, 95 N. C. 309; *Lemmon* v. *Hartsook*, 80 Mo. 13.

The declarations of ancient persons as to private boundaries are admissible. Swift's System, p. 244; 1 Swift's Digest, side p. 766; Swift's Evidence, p. 123; *Wooster* v. *Butler*, 13 Conn. 316; *Kinney* v. *Farnsworth*, 17 Conn. 363; *Higley* v. *Bidwell*, 9 Conn. 451; *Merwin* v. *Morris*, 71 Conn. 572. *Contra*, in case of interested persons, *Porter* v. *Warner*, 2 Root (Conn.), 22.

Particular facts inadmissible.— Sustaining text: *S. W. Sch. Dist.* v. *Williams*, 48 Conn. 504; *Noyes* v. *Ward*, 19 Conn. 250, 269; *Wooster* v. *Butler*, 13 Conn. 316; *Hall* v. *Mayo*, 97 Mass. 416.

New Jersey.

Private boundaries.— Declarations as to boundary made by an owner of land while on the ground and pointing out such boundary are admissible, if he had no interest to misrepresent at the time. *Curtis* v. *Aaronson*, 49 N. J. L. 68.

A map indorsed by a former owner is competent evidence of boundary. *Opdyke* v. *Stephens*, 28 N. J. L. 84.

Pennsylvania.

Boundaries.— Declarations of a deceased surveyor are receivable to prove public boundaries. *Birmingham* v. *Anderson*, 40 Pa. 506.

Reputation and hearsay received as to boundary. *Nieman* v. *Ward*, 1 W. & S. 68; *Birmingham* v. *Anderson*, 40 Pa. 506; *Buchanan* v. *Moore*, 10 S. & R. 275; *Bender* v. *Pitzer*, 27 Pa. 333.

An ancient draft from proper custody admissible to prove boundary. *McCausland* v. *Fleming*, 63 Pa. 36.

Declarations of a former owner as to boundary. *Dawson* v. *Mills*, 32 Pa. 302; *Gratz* v. *Beates*, 45 Pa. 495.

Declarations of a deceased owner of land, as to his boundary, made while in possession, and in the act of pointing out his boundaries, are admissible if no interest to misrepresent them at the time existed. So when made by surveyors or others with knowledge. *Kramer* v. *Goodlander*, 98 Pa. 366.

Maps.— As to the admissibility of maps, see *McCausland* v. *Fleming*, 63 Pa. 36.

Ancient facts.— Reputation in ancient things and ancient documentary evidence are admissible. *Old Eagle School*, 36 Wkly. Notes Cas. 348.

An unofficial survey and the field notes thereof are not admissible however ancient. *Rogers* v. *Coal & Iron Co.*, 31 Leg. Int. 325.

Such evidence was admitted to establish the identity of land sold for taxes. *Russell* v. *Werntz*, 24 Pa. 337.

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.[77]

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 de-

77 Illustration (*a*).

* See Note XXI.

clarants.[78] They may be made in any form and in any document or upon anything in which statements as to relationship are commonly made.[79]

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;[80]

(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.[81]

(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.[82]

This condition applies also to statements as to public and general rights or customs and matters of public and general interest.

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78 *Davies* v. *Lowndes*, 1843, 6 M. & G. at p. 527.

79 Illustration (*d*).

80 Illustration (*b*).

81 *Shrewsbury Peerage Case*, 1857, 7 H. L. C. 26. For Scotch law, see *Lauderdale Peerage Case*, 1885, L. R. 10 App. Ca. 692; also *Lovat Peerage Case*, 1885, *ib.* 763. In *In re Turner, Glenister* v. *Harding*, 1885, 29 Ch. Div. 985, a declaration by a deceased reputed father of his daughter's illegitimacy was admitted on grounds not very clear to me: and on the authority of two Nisi Prius cases, *Morris* v. *Davies*, 1825, 3 C. & P. 215, and *Cope* v. *Cope*, 1833, 1 Mo. & Ro. 269. See note to Article 34.

82 *Berkeley Peerage Case*. 1811, 4 Cam. 401–417; and see *Lovat Peerage*, 1885, 10 App. Ca. 797.

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.[83]

(*b*) The question is, whether A, sued for the price of horses and pleading infancy, was on a given day an infant or not.

The fact that his father stated in an affidavit in a Chancery suit to which the plaintiff was not a party, that A was born on a certain day, is irrelevant.[84]

(*c*) The question is, whether one of the *cestuis que vie* in a lease for lives is living.

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.[85]

(*d*) 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.[86]

AMERICAN NOTE.

General.

Authorities.—18 Am. & Eng. Encyclopædia of Law (1st ed.), p. 258 *et seq.;* Abbott's Trial Evidence (2d ed.), p. 115 *et seq.*

Hearsay evidence on questions of pedigree is not admissible, unless the party who made the declarations or entries can be named, and is deceased, and appears to have been a relative or a connection, or an inmate of the family, and to have made the declarations or entries

[83] Vin. Abr., 1731, *tit.* Evidence, T. b. 91. The report calls the son Achicus.

[84] *Guthrie* v. *Haines*, 1884, 13 Q. B. D. 818. In this case all the authorities on this point are fully considered.

[85] *Whittuck* v. *Walters*, 1830, 4 C. & P. 375.

[86] In 1 Ph. Ev. 203–215; Taylor, ss. 648–652; and Roscoe's N. P. 44–46, these and many other forms of statement of the same sort are mentioned; and see *Davies* v. *Lowndes*, 1843, 6 M. & G. at pp. 526, 527.

under such circumstances as preclude any presumption of interest or bias. *Chapman* v. *Chapman*, 2 Conn. 349.

It is not enough to show a general declaration that such an one inherited a particular estate and was a relative of its former owner, but the particular relationship must be pointed out, and it must be such as to make the person indicated heir to such estate. *Chapman* v. *Chapman*, 2 Conn. 350.

An authenticated copy of a record of a birth, made from a statement of the mother, is admissible. *Derby* v. *Salem*, 30 Vt. 722.

Slight proof of relationship is sufficient. *Northrop* v. *Hale*, 76 Me. 306, 309, 49 Am. Rep. 615; *Faulkerson* v. *Holmes*, 117 U. S. 38.

One may testify as to his own age. *Com.* v. *Stevenson*, 142 Mass. 466; *State* v. *Marshall*, 137 Mo. 463; *People* v. *Ratz*, 115 Cal. 132; *Morrison* v. *Emsley*, 53 Mich. 564; *Conn. Life Ins. Co.* v. *Schwenk*, 94 U. S. 593, 598 (age is a question of pedigree).

And the jury may consider his personal appearance. *Com.* v. *Phillips*, 162 Mass. 504; *Hermann* v. *State*, 73 Wis. 248.

What may be shown.—First paragraph of text. *Morrill* v. *Foster*, 33 N. H. 379; *Fulkerson* v. *Holmes*, 117 U. S. 389; *Pickens's Estate*, 163 Pa. 14; *Jackson* v. *Jackson*, 80 Md. 176; *Cuddy* v. *Brown*, 78 Ill. 415; *Shorten* v. *Judd*, 56 Kan. 43; *Robb's Estate*, 37 S. C. 19; *Haddock* v. *B. & M. R. R. Co.*, 3 Allen (Mass.), 298.

Death is a question of pedigree. *Webb* v. *Richardson*, 42 Vt. 465.

Pedigree in issue.— Modifying rule of the text. *North Brookfield* v. *Warren*, 16 Gray (Mass.), 174.

Place.— The place of birth cannot be thus shown. *Greenfield* v. *Camden*, 74 Me. 56; *Tyler* v. *Flanders*, 57 N. H. 618; *Union* v. *Plainfield*, 39 Conn. 564, 565.

Nor can the former place of residence. *Londonderry* v. *Andover*, 28 Vt. 416. See *Jackson* v. *Jackson*, 80 Md. 176; *Byers* v. *Wallace*, 87 Tex. 503, 511; *Wise* v. *Wynn*, 59 Miss. 588; *Adams* v. *Swansea*, 116 Mass. 591, 596; *Wilmington* v. *Burlington*, 4 Pick. (Mass.) 174.

Death of declarant.— The declarant must be dead. *Northrop* v. *Hale*, 76 Me. 306; *Mooers* v. *Bunker*, 29 N. H. 420; *Chapman* v. *Chapman*, 2 Conn. 347, 7 Am. Dec. 277.

Whose declarations admissible.— *Northrop* v. *Hale*, 76 Me. 306; *Waldron* v. *Tuttle*, 4 N. H. 371; *Haddock* v. *B. & M. R. R. Co.*, 3 Allen (Mass.), 298, 81 Am. Dec. 656.

Common repute cannot be shown. *Blaisdell* v. *Bickum*, 139 Mass. 250.

There can be no evidence of pedigree, except such as consists of the declarations of relatives of the family. *Inhabitants of South Hampton* v. *Fowler*, 54 N. H. 197; *Sitler* v. *Gehr*, 105 Pa. St. 577.

As to what is embraced under "general reputation in the family," see *In re Hurlburt's Estate*, 68 Vt. 366, 35 Atl. 77, 35 L. R. A. 794.

Family reputation, based upon declarations of deceased members, may be shown. *Hurlburt's Estate*, 68 Vt. 366, 35 Atl. 77, 35 L. R. A. 794; *Eastman* v. *Martin*, 19 N. H. 152; *Carland* v. *Eastman*, 107 Ill. 535; *Eaton* v. *Talmadge*, 24 Wis. 217; *Pickens's Estate*, 163 Pa. 14.

Ante litem motam.— *Northrop* v. *Hale*, 76 Me. 306, 49 Am. Rep. 615. Sustaining text: *Chapman* v. *Chapman*, 2 Conn. 347; *Com.* v. *Felch*, 132 Mass. 23; *Stein* v. *Bowman*, 13 Pet. 209; *Metheny* v. *Bohn*, 160 Ill. 263; *Barnum* v. *Barnum*, 42 Md. 251, 304.

Form.— Parchment pedigree and inscription on tombstone are admissible. *North Brookfield* v. *Warren*, 16 Gray (Mass.), 171; *McClaskey* v. *Barr*, 54 Fed. Rep. 781 (parchment pedigree and tombstone); *Greenleaf* v. *Dubuque, etc., R. Co.*, 30 Ia. 301 (family Bible); *Pearson* v. *Pearson*, 46 Cal. 610 (will); *Fulkerson* v. *Holmes*, 117 U. S. 389 (deeds); *Scharff* v. *Keener*, 64 Pa. St. 376 (deeds).

Source of information.— Second paragraph of text. *Eisenlord* v. *Clum*, 126 N. Y. 552, 565.

Death.— Death may be a question of pedigree. *Clark* v. *Owens*, 18 N. Y. 434; *People* v. *Miller*, 30 Misc. Rep. 355, 14 N. Y. Cr. 407, 63 N. Y. Supp. 949.

How made.— Second paragraph of text (last sentence). *Eisenlord* v. *Clum*, 126 N. Y. 552, 566.

Family conduct.— The declaration may be by acts as family conduct. *Clark* v. *Owens*, 18 N. Y. 434.

Written declarations.— The declarations may be made in writing. *Jackson* v. *Cooley*, 8 Johns. 128, 131; *Jackson* v. *Russell*, 4 Wend. 543.

Family Bible.— A family Bible is admissible to prove the date of a birth. *McDeed* v. *McDeed*, 67 Ill. 546.

New Jersey.

General rule admitting hearsay evidence of pedigree.— *Westfield* v. *Warren*, 3 Hal. 249.

As to manner of making statements as to pedigree, see *Bussom* v. *Forsyth*, 32 N. J. Eq. 277.

Recognition by kinsmen.— Where legitimacy is in question, evidence that the kinsmen of the parents recognized the child as a relation is admissible to prove the marriage. *Gaines* v. *Mining Co.*, 32 N. J. Eq. 86, 33 N. J. Eq. 603.

Family record.— A family record of births held inadmissible. *Houston* v. *Cooper*, Pen. 866.

Marriage.— Declarations are not admissible to prove the existence of marriage as an independent fact. *Westfield* v. *Warren*, 3 Hal. 249.

Such declarations admissible to prove the fact of marriage, when the question in issue is pedigree. *Westfield* v. *Warren*, 3 Hal. 249; *E. Windsor* v. *Montgomery*, 4 Hal. 39.

A marriage certificate is competent evidence of the marriage on a question of legitimacy when properly authenticated. *Gaines* v. *Mining Co.*, 33 N. J. Eq. 603, 32 N. J. Eq. 86.

Place of birth.— Declaration of a father not admissible to prove the place of a child's birth. *Independence* v. *Pompton*, 4 Hal. 209.

Maryland.

General authorities.— *Barnum* v. *Barnum*, 42 Md. 251; *Jones* v. *Jones*, 36 Md. 447; *Pancoast* v. *Addison*, 1 H. & J. 350; *Raborg* v. *Hammond*, 2 H. & G. 42; *State* v. *Greenwell*, 4 G. & J. 407.

Hearsay is admitted as to matters of pedigree on the ground of necessity. *Copes* v. *Pearce*, 7 Gill, 247.

Suspicion and doubt may reasonably attach to such declarations by reason of antiquity and chances for error. *Sprigg* v. *Moale*, 26 Md. 497.

The former place of residence cannot be thus shown. See *Jackson* v. *Jackson*, 80 Md. 176.

Family reputation admitted to show which of two brothers died first. *Raborg* v. *Hammond*, 2 H. & J. 42.

Tradition in a family that a member thereof died seized of certain real estate was admitted. *Pancoast* v. *Addison*, 1 H. & J. 350.

Family Bible.—Entries in a family Bible are admissible without proof that they were made by a member of the family. *Weaver* v. *Leiman*, 52 Md. 708. If the book is produced from proper custody. *Jones* v. *Jones*, 45 Md. 144.

Entries in a Bible made years after the event are entitled to little weight. *Amey* v. *Cockey*, 73 Md. 297.

Relationship.— Common reputation admitted to prove that two persons were brothers of the whole blood. *Johnson* v. *Howard*, 1 H. & McH. 281.

Declarations of members of the family are admissible to determine who are next of kin. *Jones* v. *Jones*, 36 Md. 447.

The term "pedigree" includes descent and relationship, and the facts of birth, marriage, and death. *Craufurd* v. *Blackburn*, 17 Md. 49; *Copes* v. *Pearce*, 7 Gill, 247.

Relationship of declarant.— The declarant must be proved by extrinsic evidence to be connected with at least one branch of the family. *Craufurd* v. *Blackburn*, 17 Md. 49; *Jackson* v. *Jackson*, 80 Md. 176.

Ante litem motam.— Sustaining text: *Barnum* v. *Barnum*, 42 Md. 251, 304.

Marriage and legitimacy.— Declarations of deceased persons are admissible on the question of legitimacy, and to prove a marriage at a particular time. *Jackson* v. *Jackson*, 80 Md. 176.

Marriage may be proved by declarations of the parties made *ante litem motam*. *Craufurd* v. *Blackburn*, 17 Md. 49; *Barnum* v. *Barnum*, 42 Md. 251.

Personal resemblance.— Relationship cannot be proved by evidence of personal resemblance. *Jones* v. *Jones*, 45 Md. 144.

General reputation.— Whether general reputation is admissible see *Boone* v. *Purnell*, 28 Md. 607.

Illustration (a).— *Weaver* v. *Leiman*, 52 Md. 708.

Pennsylvania.

What may be proved.— Family reputation admissible to prove one's age. *Watson* v. *Brewster*, 1 Pa. 381; *Carskadden* v. *Poorman*, 10 Watts, 82; *Albertson* v. *Robeson*, 1 Dall. 9.

Descent and relationship, birth, marriage, and death. *Trust Co.* v. *Rosenagle*, 77 Pa. 507; *Pickens's Estate*, 163 Pa. 14.

Legitimacy of children may be proved by the declarations of their parents. *Kenyon* v. *Ashbridge*, 35 Pa. 157.

Family reputation, based upon declarations of deceased members, may be shown. *Pickens's Estate*, 163 Pa. 14.

Family conduct or reputation is admissible. *Watson* v. *Brewster*, 1 Pa. 381.

Ancient hearsay *ante litem motam*. *Strickland* v. *Poole*, 1 Dall. 14.

Relationship of declarant.— Such declarations are admissible if

shown to have been made by a member of the same family, though not of the same branch. *Sitler* v. *Gehr*, 105 Pa. 577.

The fact of relationship must be proved by evidence outside of the declaration itself. *Sitler* v. *Gehr*, 105 Pa. 577.

Form of statement.— The statement may be in a will. *Kenyon* v. *Ashbridge*, 35 Pa. 157; *Richard* v. *Brehm*, 73 Pa. 140.

The statement may be in the form of a deposition. *Life Ins. Co.* v. *Rosenagle*, 77 Pa. 507.

Letters addressed to the wife. *Vincent's Appeal*, 60 Pa. 228.

An inscription on a tombstone relating to pedigree was rejected because of lack of proof as to the identity of the person buried beneath the stone. *Gehr* v. *Fisher*, 143 Pa. 311.

Bible entries.— Family Bible entries not admissible when mere copies of another record. *Curtis* v. *Patton*, 6 S. & R. 135.

Entry in the family Bible admitted to prove age. *Carskadden* v. *Poorman*, 10 Watts, 82.

Leaf from a family Bible received. *Douglass* v. *Sanderson*, 2 Dall. 116; *S. C.*, 1 Yeates, 15.

Deeds.— Recitals in a deed are admissible as to pedigree. *Paxton* v. *Price*, 1 Yeates, 500; *Appeal of Bicking*, 2 Brewst. 202; *Bowser* v. *Cravener*, 56 Pa. 132; *Scharff* v. *Keener*, 64 Pa. 376; *Morris* v. *Vanderen*, 1 Dall. 64.

A recital in a deed as to pedigree is not admissible in favor of the grantor. *Murphy* v. *Loyd*, 3 Whart. 538.

ARTICLE 32.*

EVIDENCE GIVEN IN FORMER PROCEEDINGS 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,[87] or is mad,[88] or so ill that he will probably never be able to travel,[89] or is kept out of

* See Note XXII.

87 *Mayor of Doncaster* v. *Day*, 1810, 3 Tau. 262.

88 *R.* v. *Eriswell*, 1790, 3 T. R. 720.

89 *R.* v. *Hogg*, 1833, 6 C. & P. 176.

the way by the adverse party,[90] or in civil, but not, it seems, in criminal, cases, is out of the jurisdiction of the Court,[91] or, perhaps, in civil, but not in criminal, cases, when he cannot be found.[92]

Provided in all cases —

(1) That the person against whom the evidence is to be given had the right and opportunity to cross-examine the declarant when he was examined as a witness;[93]

(2) That the questions in issue were substantially the same in the first as in the second proceeding;[93]

Provided also —

(3) That the proceeding, if civil, was between the same parties or their representatives in interest;[93]

(4) That, in criminal cases, the same person is accused upon the same facts.[94]

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.

The conditions under which depositions may be used as evidence are stated in Articles 140–142.

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90 *R.* v. *Scaife*, 1851, 17 Q. B. 238, 243.

91 *Fry* v. *Wood*, 1737, 1 Atk. 444; *R.* v. *Scaife*, 1851, 17 Q. B. at p. 243.

92 Godbolt, 1623, p. 326, case 418; *R.* v. *Scaife*, 1851, 17 Q. B. at p. 243.

93 *Doe* v. *Tatham*, 1834, 1 A. & E. 3, 19; *Doe* v. *Derby*, 1834, 1 A. & E. 783, 785, 789. See, as a late illustration, as to privies in estate, *Llanover* v. *Homfray*, 1880, 19 Ch. Div. 224. In this case the first set of proceedings was between lords of the same manor and tenants of the same manor as the parties to the second suit.

94 *Beeston's Case*, 1854, Dears. 405.

AMERICAN NOTE.

General.

Authorities.— 11 Am. & Eng. Encyclopædia of Law (2d ed.), p. 523 *et seq.;* 1 Greenleaf on Evidence (15th ed.), sec. 163 *et seq.*

Former testimony before arbitrators may be proved. *Bailey* v. *Woods*, 17 N. H. 365.

As to the testimony of parties, see *Blair* v. *Ellsworth*, 55 Vt. 415.

Evidence at preliminary hearing.— The rule allows the admission of evidence at a preliminary examination if the party against whom it is offered was present. *Rex* v. *Barber*, 1 Root (Conn.), 76; *State* v. *Hooker*, 17 Vt. 658; *Com.* v. *Richards*, 18 Pick. (Mass.) 434, 29 Am. Dec. 608.

Deceased witness.— Sustaining text: *Watson* v. *Lisbon Bridge*, 14 Me. 201; *Orr* v. *Hadley*, 36 N. H. 575; *Glass* v. *Beach*, 5 Vt. 172; *Mathewson* v. *Sargeant*, 36 Vt. 142; *Johnson* v. *Powers*, 40 Vt. 611; *Earl* v. *Tupper*, 45 Vt. 275; *Chase* v. *Spring Vale Mills Co.*, 75 Me. 156; *Mattox* v. *U. S.*, 156 U. S. 237; *Barnett* v. *People*, 54 Ill. 325; *State* v. *Elliott*, 90 Mo. 350; *State* v. *George*, 60 Minn. 503; *Lane* v. *Brainerd*, 30 Conn. 565; *Woods* v. *Keyes*, 14 Allen (Mass.), 238, 92 Am. Dec. 766; *Corey* v. *Jones*, 15 Gray (Mass.). 543; *Com.* v. *Richards*, 18 Pick. (Mass.) 434, 29 Am. Dec. 608; *Warren* v. *Nichols*, 6 Metc. (Mass.) 261; *Yale* v. *Comstock*, 112 Mass. 267; *Costigan* v. *Lunt*, 127 Mass. 355; *Radclyffe* v. *Barton*, 161 Mass. 327; *Thornton* v. *Britton*, 144 Pa. 126; *Stout* v. *Cook*, 47 Ill. 530; *Cassaday* v. *Trustees*, 105 Ill. 560; *Benson* v. *Shotwell*, 103 Cal. 163; *Hudson* v. *Roos*, 76 Mich. 173; *Minn. Mill. Co.* v. *Minn., etc., R. Co.*, 51 Minn. 504.

Insane witness.— Sustaining text. *Whitaker* v. *Marsh*, 62 N. H. 477; *Stein* v. *Swenson*, 46 Minn. 360; *Howard* v. *Patrick*, 38 Mich. 795.

Illness of witness.— Illness is sometimes held sufficient to allow testimony to come in under the rule of this article. *Chase* v. *Spring Vale Mills Co.*, 75 Me. 156; *Scoville* v. *Hannibal, etc., R. Co.*, 94 Mo. 84.

In criminal cases the illness of a witness does not render his former testimony admissible. *State* v. *Staples*, 47 N. H. 113; *Com.* v. *McKenna*, 158 Mass. 207.

Forgetful witness.— The mere fact that the witness cannot recall the facts does not render the evidence competent. *Robinson* v. *Gilman*, 43 N. H. 295.

Absent witness.— The former testimony of an absent witness cannot be shown in a criminal case. *U. S.* v. *Angell*, 11 Fed. Rep. 34; *People* v. *Gordon*, 99 Cal. 227; *Pitman* v. *State*, 92 Ga. 480; *Gastrell* v. *Phillips*, 64 Miss. 473; *Bemey* v. *Mitchell*, 34 N. J. L. 337. *Contra*, *Thompson* v. *State*, 106 Ala. (when indefinite); *McNamara* v. *State*. 60 Ark. 400.

Witness spirited away.— One under indictment induced a witness who had testified against him before the grand jury to go away, so that he could not be had before the petit jury. Held, that the State might prove what the witness stated before the grand jury. *Rex* v. *Barber*, 1 Root (Conn.), 76.

The right to cross-examine in previous trial.—*Johnson* v. *Powers*, 40 Vt. 611; *Wheeler* v. *Walker*, 12 Vt. 427; *Reynolds* v. *U. S.*, 98 U. S. 145, 159; *Wright* v. *Cunesty*, 41 Pa. St. 102, 111; *Black* v. *Woodrow*, 39 Md. 194.

Same parties.— *Lane* v. *Brainerd*, 30 Conn. 565; *Orr* v. *Hadley*, 36 N. H. 575; *Johnson* v. *Powers*, 40 Vt. 611; *Earl* v. *Tupper*, 45 Vt. 275; *Chase* v. *Spring Vale Mills Co.*, 75 Me. 156; *Walbridge* v. *Knipper*, 96 Pa. 48, 51; *Marshall* v. *Hancock*, 80 Cal. 82; *Allen* v. *Choteau*, 102 Mo. 309; *Phil., W. & B. R. R. Co.* v. *Howard*, 13 How. (U. S.) 307.

Similarity of issues.— Sustaining text. *Melvin* v. *Whiting*, 7 Pick. (Mass.) 79; *Radclyffe* v. *Barton*, 161 Mass. 327; *Lane* v. *Brainerd*, 30 Conn. 565; *Orr* v. *Hadley*, 36 N. H. 575.

Who may testify.— Any one who heard the former testimony may give evidence as to what was said. *Emery* v. *Fowler*, 39 Me. 326; *Sage* v. *State*, 127 Ind. 15; *Hutchings* v. *Corgan*, 59 Ill. 70 (juror); *Hepler* v. *Bank*, 97 Pa. 420; *Harrison* v. *Charlton*, 42 Ia. 573; *Bank* v. *Leonard*, 40 Neb. 677; *Woods* v. *Keyes*, 14 Allen (Mass.), 236.

As for instance an attorney. *Earl* v. *Tupper*, 45 Vt. 275; *Costigan* v. *Lunt*, 127 Mass. 354.

It has been held however that he must give substantially the language used. *Costigan* v. *Lunt*, 127 Mass. 354; *Woods* v. *Keyes*, 14 Allen (Mass.), 238, 92 Am. Dec. 766; *Warren* v. *Nichols*, 6 Metc. (Mass.) 267; *Corey* v. *Jones*, 15 Gray (Mass.), 545; *Com.* v. *Richards*, 18 Pick. (Mass.) 434, 29 Am. Dec. 608; *Yale* v. *Comstock*, 112 Mass. 267.

The witness need state only the substance of the testimony. *Lime Rock Bank* v. *Hewett*, 52 Me. 531; *Emery* v. *Fowler*, 39 Me. 326, 63 Am. Dec. 627; *Wung* v. *Dearborn*, 22 N. H. 377; *Marsh* v. *Jones*, 21 Vt. 378, 52 Am. Dec. 67; *Williams* v. *Willard*, 23 Vt. 369; *Johnson* v. *Powers*, 40 Vt. 611; *Ruch* v. *Rock Island*, 97 U. S. 693; *State* v. *Able*, 65 Mo. 357; *State* v. *O'Brien*, 81 Ia. 88.

How proven.— The former testimony may be proved by witnesses or from the stenographer's minutes duly authenticated. *Yale* v. *Comstock*, 112 Mass. 267; *Quinn* v. *Halbert*, 57 Vt. 178. Or by the judge's minutes properly authenticated. *Johnson* v. *Powers*, 40 Vt. 611; *Whitcher* v. *Morey*, 39 Vt. 459. See also *Luetgert* v. *Volker*, 153 Ill. 385; *Labor* v. *Crane*, 56 Mich. 585; *Jackson* v. *State*, 81 Wis. 127; *Davis* v. *Kline*, 96 Mo. 401 (bill of exceptions).

Judge's notes not admissible.—*Schafer* v. *Schafer*, 93 Ind. 586, 588.

Stenographer's report.— Where a stenographer has testified that his record is correct and that he has no recollection, his report is admissible. *Keith* v. *State*, 157 Ind. 376; *Higgins* v. *State*, 157 Ind. 57.

Bill of exceptions.— In order to prove prior testimony of a deceased witness by a bill of exceptions, it must be proved that the bill of exceptions contains a correct statement. *Fisher* v. *Fisher*, 131 Ind. 462, 463.

New Jersey.

Absent witness.— The former testimony of an absent witness cannot be shown in a criminal case. *Berney* v. *Mitchell*, 34 N. J. L. 337.

Mere absence from the jurisdiction and refusal to attend does not authorize the admission of testimony taken at a prior cause. *Railroad Co.* v. *Haring*, 47 N. J. L. 139.

How former testimony is proved.— It is sufficient to prove the substance of what the deceased witness testified. *Sloan* v. *Somers*, Spen. 66; *Ramsay* v. *Dumars*, 4 Harr. 66.

A witness is not competent to prove the testimony given in another trial, unless he has a distinct recollection that the witness in the prior trial was sworn; but he need not remember the exact words of the testimony if he knows its substance. *Sloan* v. *Somers*, Spen. 66.

Evidence reduced to writing cannot be proved by parol. *State* v. *Zellers*, 2 Hal. 220; *Sayre* v. *Sayre*, 2 Green, 487.

The fact of the former trial must be proved by the record before evidence can be admitted as to what a witness, since deceased, then testified. *Chambers* v. *Hunt*, 2 Zab. 552.

Books of account must be proved, even though they were proved at a former trial. *Linberger* v. *Latourette*, 2 South. 809.

Before arbitrators.— Testimony taken before arbitrators in the same cause is not admissible even though the witness be dead. *Jessup* v. *Cook*, 1 Hal. 434.

Different issues.— Evidence taken in another cause between the same parties not admissible. *Trimmer* v. *Larrison*, 3 Hal. 56.

By order of court.— Order entered that two suits should be heard together and that evidence taken in one should be used in the other. *Evans* v. *Evans*, 23 N. J. Eq. 180.

Statute.— Testimony of a deceased party at a former trial. G. S. 1895, "Evidence," 12.

Maryland.

General authorities.— *Marshall* v. *Haney*, 9 Gill, 251; *Jones* v. *Jones*, 45 Md. 144; *Calvert* v. *Coxe*, 1 Gill, 95; *Bowie* v. *O'Neale*, 5 H. & J. 226.

Witness dead.— *Calvert* v. *Coxe*, 1 Gill, 95; *Bowie* v. *O'Neale*, 5 H. & J. 226.

Manner of proving.— The former testimony cannot be proved by a printed copy of the record, but it may be by one who heard it. *Gisriel* v. *Burrows*, 72 Md. 366; *Price* v. *Lawson*, 74 Md. 499.

It cannot be proved by the introduction of the bill of exceptions. *Ecker* v. *McAllister*, 54 Md. 362.

The one testifying as to what a witness said at the former trial must be able to give the substance of the whole testimony, not merely what the witness said on one point. *Black* v. *Woodrow*, 39 Md. 194.

The exact words are not required, but it is not permissible to state merely the effect of such former testimony. *Black* v. *Woodrow*, 39 Md. 194; *Bowie* v. *O'Neale*, 5 H. & J. 226.

A copy of the stenographer's notes is not admissible to prove the testimony given. *Herrick* v. *Swomley*, 56 Md. 439.

Attorney's notes.— An attorney is a competent witness to prove such testimony and his notes taken at the time may be used to refresh his memory. *Waters* v. *Waters*, 35 Md. 531.

Identity of parties and issues.—*Jones* v. *Jones*, 45 Md. 144.

Testimony of one deceased given in a former trial is not admissible against one not a party to that action or in privity with a party. *Tome Institute* v. *Davis,* 87 Md. 591.

Opportunity to cross-examine.— *Jones* v. *Jones,* 45 Md. 144.

Pennsylvania.

General authorities.— *Arwin* v. *Bisbing,* 1 Yeates, 400; *Insurance Co.* v. *Johnson,* 23 Pa. 72; *Moore* v. *Pearson,* 6 W. & S. 51; *Jones* v. *Wood,* 16 Pa. 25; *Wright* v. *Cumpsty,* 41 Pa. 102; *Pratt* v. *Patterson,* 81 Pa. 114.

Deceased witness.— *Hauk* v. *Greensweig,* 7 Pa. Law J. 374; *Beers* v. *Cornelius,* 1 Pittsb. R. 274; *Walbridge* v. *Knippen,* 96 Pa. 48; *Brown* v. *Com.,* 73 Pa. 321; *Thornton* v. *Britton,* 144 Pa. 126.

Such evidence not admissible if witness is living and within the jurisdiction. *Richardson* v. *Stewart,* 2 S. & R. 84; *Chess* v. *Chess,* 17 S. & R. 409; *Huidekoper* v. *Cotton,* 3 Watts, 56; *Lafferty's Estate,* 184 Pa. 502.

Witness sick or infirm.— *Perrin* v. *Wells,* 155 Pa. 299; *Emig* v. *Diehl,* 76 Pa. 359; *Rothrock* v. *Gallagher,* 91 Pa. 108; *Thornton* v. *Britton,* 144 Pa. 126; *Walbridge* v. *Knippen,* 96 Pa. 48; *McClain* v. *Com.,* 99 Pa. 86.

Deposition admissible when witness is too sick to attend or has lost his memory. *Emig* v. *Diehl,* 76 Pa. 359.

Absence from jurisdiction.— *Ballman* v. *Heron,* 169 Pa. 510; *Lohr* v. *Philipsburgh,* 165 Pa. 109.

The notes of the testimony of a witness in a former trial of the same cause may be read in evidence if the witness be out of the State. *Giberson* v. *Mills Co.,* 187 Pa. 513.

If the witness is beyond the jurisdiction, his former testimony is admissible. *Magill* v. *Kauffman,* 4 S. & R. 317; *Flanagin* v. *Leibert,* Bright. 61.

Identity of parties and issues.— The parties to the former suit must be identical with the parties of the present one. *McCully* v. *Barr,* 17 S. & R. 445; *Norris* v. *Monen,* 3 Watts, 465.

The issue must be identical. *Harger* v. *Thomas,* 44 Pa. 128; *Sample* v. *Coulson,* 9 W. & S. 62.

Testimony of a party to the present action given in a former action between other parties is admissible as an admission. *Stevenson* v. *Coal Co.,* 201 Pa. 122.

The right to cross-examine in previous trial.— *Wright* v. *Cumpsty,* 41 Pa. 102, 111.

Evidence taken in a former proceeding not admissible when the defendant was not represented by counsel and was not told of his right to cross-examine. *Com.* v. *Lenousky*, 206 Pa. 277.

Preliminary hearings.—Testimony given at the preliminary hearing is admissible, the witness having since died. *Brown* v. *Com.*, 73 Pa. 740. Even though the defendant waived a hearing. *Com.* v. *Keck*, 148 Pa. 639.

Testimony taken before a coroner is admissible when duly authenticated. *Edwards* v. *Gimbel*, 202 Pa. 30.

How proved.— The former testimony may be proved by the judge's notes, if sworn to. *Miles* v. *O'Hara*, 4 Binn. 108; *Foster* v. *Shaw*, 7 S. & R. 156; *Livingston* v. *Cox*, 8 W. & S. 61. Or by notes of counsel. *Gould* v. *Crawford*, 2 Pa. 89; *Chess* v. *Chess*, 17 S. & R. 409; *Rhine* v. *Robinson*, 27 Pa. 30; *Railroad Co.* v. *Spearen*, 47 Pa. 300. Or by any witness who heard the testimony and can give its substance. *Cornell* v. *Green*, 10 S. & R. 14; *Chess* v. *Chess*, 17 S. & R. 409; *Wolf* v. *Wyeth*, 11 S. & R. 149; *Hepler* v. *Mt. Carmel Bank*, 97 Pa. 420.

The entire substance of such former witness' testimony must be given, but not the exact words. *Hepler* v. *Mt. Carmel Bank*, 97 Pa. 420.

Stenographer's notes are not admissible; the stenographer must be sworn. *Smith* v. *Hine*, 179 Pa. 203.

Statutory rule.— Pepper & Lewis' Digest of Laws, " Criminal Procedure," sec. 84; " Witnesses," secs. 6, 20.

When depositions may be read in subsequent causes. Pepper & Lewis' Digest of Laws, " Evidence," sec. 1.

SECTION II.

STATEMENTS IN BOOKS, DOCUMENTS, AND RECORDS, WHEN RELEVANT.

ARTICLE 33.

RECITALS OF PUBLIC FACTS IN STATUTES AND PROCLAMATIONS.

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 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.[95]

AMERICAN NOTE.

General.

Authorities.— 9 Am. & Eng. Encyclopædia of Law, p. 880 *et seq.;* 3 Taylor on Evidence (Chamberlayne's 9th ed.), p. 1179 *et seq.;* *Whiton* v. *Albany, etc., Ins. Co.*, 109 Mass. 24; *Worcester* v. *Northborough,* 140 Mass. 397.

Recitals in Federal state papers published by congressional authority and in diplomatic correspondence communicated by the President to Congress are within the article. *Armstrong* v. *U. S.*, 13 Wall. 154; *Bryan* v. *Forsyth*, 19 How. 334, 338; *Gregg* v. *Forsyth*, 24 How. (U. S.) 179; *Watkins* v. *Holman*, 16 Pet. 25, 55, 56.

Recitals in the official precept of the governor are within this article. *Com.* v. *Hall*, 9 Gray (Mass.), 262.

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[95] *R.* v. *Francklin*, 1731, 17 S. T. at p. 636, *et seq; R.* v. *Sutton,* 1816, 4 M. & S. 532.

The compendium of the tenth census, printed by authority of Congress, is admissible to show the population of a town. *Fulham* v. *Howe*, 60 Vt. 351, 14 Atl. 652.

As are also those in official papers prepared in the adjutant-general's office, which are admissible to prove that a certain person was or was not assigned to a particular town as belonging to its quota of soldiers. *Worcester* v. *Northborough*, 140 Mass. 397, 5 N. E. 270.

Legislative journals are thus admissible. *Root* v. *King*, 7 Cow. 613; *People* v. *Devlin*, 33 N. Y. 279, 88 Am. Dec. 377. And so are the return of election inspectors. *People* v. *Merick*, 21 N. Y. 539. And municipal records. *Denning* v. *Roome*, 6 Wend. 651.

Mere official reports are not. *Erickson* v. *Smith*, 38 How. Pr. 454; *Swift* v. *State*, 89 N. Y. 52. Nor are official certificates not provided for by statute. *Porter* v. *Waring*, 69 N. Y. 250.

New Jersey.

A statute may make recitals in a deed issued by a public officer admissible to prove the proceedings under which the deed was issued. *Woodbridge* v. *Allen*, 43 N. J. L. 262.

Pennsylvania.

If an act of the Legislature rendering a bastard legitimate recites the child's parentage, such recital is *prima facie* evidence of the fact. *McGunnigle* v. *McKee*, 77 Pa. 81.

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 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 relevant fact.[96]

AMERICAN NOTE.

General.

Authorities.—3 Taylor on Evidence (American edition of 1897), p. 1179[40] *et seq.;* McKelvey on Evidence, p. 276; 9 Am. & Eng. Encyclopædia of Law (2d ed.), p. 882 *et seq.; Gurney* v. *Howe,* 9 Gray (Mass.), 404, 69 Am. Dec. 229; *Pells* v. *Webquish,* 129 Mass. 469; *Hunt* v. *Chosen Order of Friends,* 64 Mich. 671, 8 Am. St. Rep. 855 (church records); *Sandy White* v. *U. S.,* 164 U. S. 100; *Succession of Justus,* 48 La. Ann. 1096; *Bell* v. *Kendrick,* 25 Fla. 778; *Chicago R. R. Co.* v. *Trayes,* 17 Ill. App. 136 (weather records); *St. Clair* v. *U. S.,* 154 U. S. 134 (ship register); *Evanston* v. *Gunn,* 99 U. S. 660, 666.

Only such statements as are contained in such documents as may be made in the regular course of duty are included. *Erwin* v. *English,* 61 Conn. 502; *Rindge* v. *Walker,* 61 N. H. 58; *U. S.* v. *Corwin,* 129 U. S. 381.

Instances.— The record of baptism is admissible when made by a deceased minister. *Huntley* v. *Compstock,* 2 Root (Conn.), 100. So is a certified copy of the inventory of an insolvent estate. *Fielding* v. *Silverstein,* 70 Conn. 605.

The record of registered letters, at a post-office, is evidence, and need not be authenticated by the clerk. *Gurney* v. *Howe,* 9 Gray (Mass.), 404.

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[96] *Sturla* v. *Freccia,* 1880, 5 App. Ca. 623; see especially, pp. 633–4, and 643–5; *Lyell* v. *Kennedy,* 1889, 14 App. Ca. 437; Taylor, ss. 1591–1595. See also *Queen's Proctor* v. *Fry,* 1879, 4 P. D. 230. In *Robinson* v. *The Duke of Buccleuch and Queensbury,* 1887, 3 Times L. R. 472, the Court of Appeal held in a pedigree case that neither a baptism nor a burial certificate was evidence of the age of the person to whom they related. This had been previously doubted: see *In re Turner; Glenister* v. *Harding,* 1885, 29 Ch. Div. at pp. 990, 991: *Morris* v. *Davies,* 1825, 3 C. & P. 215; and *Cope* v. *Cope,* 1833, 1 Moo. & Rob. 269. See note to Article 31, *ante,* p. 185, note 81.

Tax assessors' books are admissible in suits involving the issue of adverse possession. *Elwell* v. *Hinckley*, 138 Mass. 225. And to show in whose name the property was assessed when the question arose on other issues. *Edson* v. *Munsell*, 10 Allen (Mass.), 557.

A town clerk's record, kept in accordance with statute, is competent but not exclusive evidence as to the soldiers who comprised the town's quota. *Wayland* v. *Ware*, 104 Mass. 46; *Hanson* v. *South Scituate*, 115 Mass. 336.

The date of the trial of a case in the lower court may be shown on appeal by the record of the lower court. The record being in the same case need not be formally put in evidence. *Com.* v. *Lane*, 151 Mass. 356.

The fact that testimony within this article is admitted does not exclude contradictory parol evidence. *Com.* v. *Waterman*, 122 Mass. 43.

A certificate of marriage is often treated as an original document and not as a copy. *Northrop* v. *Knowles*, 52 Conn. 525, 526; *Erwin* v. *English*, 61 Conn. 507; *State* v. *Schweitzer*, 57 Conn. 537.

As to entries in corporation books, see *Howard* v. *Hayward*, 10 Metc. (Mass.) 408; *Ten Eyck* v. *R. R. Co.*, 74 Mich. 226; *R. R. Co.* v. *Cunnington*, 34 O. St. 327; *Chase* v. *Sycamore, etc., R. Co.*, 38 Ill. 315.

The stock-books are evidence, though not conclusive, as to who are the stockholders. *Turnbull* v. *Payson*, 95 U. S. 418; *Vanderwerken* v. *Glenn*, 85 Va. 9; *Lehman* v. *Glenn*, 87 Ala. 618.

Registers of births, marriages, and burials are evidence to prove pedigree. *Bogert* v. *King*, 5 Cow. 237; *Miner* v. *Boneham*, 15 Johns. 226; *Maxwell* v. *Chapman*, 8 Barb. 579; *Porter* v. *Ruckman*, 6 Tr. App. 65 (engrossed minutes of a clerk); *Svhile* v. *Brokhahus*, 80 N. Y. 614 (signal service records); *Matter of Silvernail*, 45 Hun, 575 (county treasurer's books); *Supervisors of Monroe* v. *Clarke*, 25 Hun, 282 (county treasurer's books).

The report or certificate of an officer is evidence only of facts which, by law, he is required or authorized to certify. *Water Commissioners* v. *Lansing*, 45 N. Y. 19; *Anderson* v. *James*, 4 Rob. 35; affirmed by the Court of Appeals. See 6 Alb. L. J. 166.

It may be evidence in favor of the officer himself. *McKnight* v. *Lewis*, 5 Barb. 681; *Bissell* v. *Hamblin*, 6 Duer, 512; *Glover* v. *Whit-*

tenhall, 2 Den. 633 (sheriff's return); *Cornell* v. *Cook*, 7 Cow. 310 (a constable's indorsement of a levy on his execution).

The charter of the city of New York may be read from a volume printed by authority of the common council. *Howell* v. *Ruggles*, 5 N. Y. 444.

A report of a railway company to the board of railway commissioners is inadmissible by itself. *Bella* v. *N. Y., L. & W. Ry. Co.*, 6 N. Y. Supp. 552.

Governor's proclamation.— The State register is admissible in evidence to prove the Governor's proclamation. *Lurton* v. *Gilliam*, 1 Scam. 577.

Legislative journal.— Journal entries of the house of legislature are admissible. *Miller* v. *Goodwin*, 70 Ill. 659; *People* v. *Barnes*, 35 Ill. 121.

Legislative journals of Illinois prove themselves. *Grob* v. *Cushman*, 45 Ill. 119.

The presentation of a bill may be shown by the journal of the legislature. *People* v. *Hatch*, 33 Ill. 9.

Ordinances.— Ordinances may be read in evidence from the original record. *Grob* v. *Cushman*, 45 Ill. 119.

In order to render city ordinances admissible the authority to pass them must be shown. *Bethalto* v. *Conley*, 9 Brad. 339; *Alton* v. *Hartford Fire Ins. Co.*, 72 Ill. 328; *Byars* v. *Mt. Vernon*, 77 Ill. 467; *Schott* v. *People*, 89 Ill. 195; *L., N. A. & C. R. R. Co.* v. *Shires*, 108 Ill. 617.

Published laws.— Published laws, certified by the Secretary of State, are admissible. *Illinois Cent. R. R. Co.* v. *Wren*, 43 Ill. 77; *Bedard* v. *Hall*, 44 Ill. 91.

The printed statute books of other States, issued under authority of the State, are admissible. Hurd's Rev. Stat., chap. 51, sec. 10, p. 860; *Heuthorn* v. *Doe*, 1 Blackf. 157.

Law reports.— Law reports may be read in evidence. Hurd's Rev. Stat., chap. 51, sec. 12, p. 860.

Official reports and accounts.— The reports and accounts of officers are often admissible. *Ohning* v. *City*, 66 Ind. 59; *State* v. *Grammer*, 29 Ind. 530; *State* v. *Prather*, 44 Ind. 287; *Osborne* v. *State ex rel.*, 128 Ind. 129; *Goodwine* v. *State*, 81 Ind. 109; *Hunt* v. *State*, 93 Ind. 311; *City* v. *Dykeman*, 116 Ind. 15.

Assessment lists.— A copy of a tax duplicate is admissible. *Standard Co.* v. *Bretz*, 98 Ind. 231.

Assessment lists are not competent to prove value. *McAfee* v. *Montgomery,* 21 Ind. App. 196; *Railroad Co.* v. *McDougal,* 108 Ind. 179.

Adjutant-general's records.— Certified copies of the adjutant-general's records are admissible. *Board* v. *May,* 67 Ind: 562.

Statutes of other States.— The printed statutes of other States, published by authority, are admissible. *Crake* v. *Crake,* 18 Ind. 156; *Comparet* v. *Jernegan,* 5 Blackf. 375; *Paine* v. *Railroad Co.,* 31 Ind. 283; *Rothrock* v. *Perkinson,* 61 Ind. 39; *Vaughn* v. *Griffith,* 16 Ind. 353. But not unless printed under authority. *Magee* v. *Saunderson,* 10 Ind. 261.

Ordinance.— The fire limits of a city may be proved by an ordinance. *Miller* v. *Valparaiso,* 10 Ind. App. 22.

Land records.— Land records may be admitted without the original instruments being accounted for. *Bowers* v. *Van Winkle,* 41 Ind. 432; *Burns* v. *Harris,* 66 Ind. 536; *Winship* v. *Clendenning,* 24 Ind. 439.

In order to render a record admissible the paper must be one properly recorded. *Westerman* v. *Foster,* 57 Ind. 408.

As to verification under 3040, Burns, 1901, see *Naanes* v. *State,* 143 Ind. 299.

A *lis pendens* record is admissible. *Ellison* v. *Braustrator,* 153 Ind. 416.

An indorsement by a county recorder on an instrument filed for record is admissible. *Moore* v. *Glover,* 115 Ind. 367.

The tract-book of a county recorder's office is admissible. *Keesling* v. *Truitt,* 30 Ind. 306.

Official returns.— The acts of an officer may be shown by his return. *Thurston* v. *Barnes,* 10 Ind. 289.

The return of an officer is conclusive as against his surety. *Bagot* v. *State,* 33 Ind. 262.

The conclusiveness of an officer's return applies only to acts which he is required to perform. *Lindley* v. *Kelley,* 42 Ind. 294.

The return of an officer is admissible in his own favor. *Splahn* v. *Gillespie,* 48 Ind. 397.

In a suit for false return, the return may be contradicted. *Stockton* v. *Stockton,* 59 Ind. 574.

Survey.— Federal surveys of public lands are admissible. *Doe* v. *Hildreth,* 2 Ind. 274.

Docket.— A justice docket is admissible. *Redelsheimer* v. *Miller,* 107 Ind. 485; *Miller* v. *State,* 61 Ind. 503.

Record of city council.— *City of Huntington* v. *Mendenhall,* 73 Ind. 460, 464; *City of Lafayette* v. *Weaver,* 92 Ind. 477, 479.

Transcript.— Justice transcripts are admissible. *Fisher* v. *Hamilton,* 49 Ind. 341.

A justice transcript of another State is admissible. *Ault* v. *Zeliering,* 38 Ind. 429; *Dragoo* v. *Graham,* 9 Ind. 212, 17 Ind. 427.

Authentication of records.— Original records must be properly authenticated. *Bridges* v. *Branan,* 133 Ind. 488.

United States weather reports, see *People* v. *Dow,* 64 Mich. 717.

Marriage certificate.— *People* v. *Innes,* 110 Mich. 250; *People* v. *Loomis,* 106 Mich. 250; *People* v. *Isham,* 109 Mich. 72.

New Jersey.

Books of a corporation.— The books of the corporation are the only evidence of who are the stockholders and entitled to vote. *In re St. Lawrence Steamboat Co.*, 44 N. J. L. 529.

The books of a corporation are not admissible to establish a right in its favor against third persons. *N. Riv. Meadow Co.* v. *Church,* 22 N. J. L. 424; *Wetherbee* v. *Baker,* 35 N. J. Eq. 501.

The books of a corporation are admissible to prove the proceedings of the corporation, but are not conclusive. *N. Riv. Meadow Co.* v. *Church,* 2 Zab. 425; *Van Hook* v. *Somerville Co.*, 5 N. J. Eq. 633, reversing Id. 137; *Black* v. *Lamb*, 12 N. J. Eq. 109, *S. C.*, 13 N. J. Eq. 456.

A certified copy of a report as to the financial condition of a corporation not admissible. *Whitaker* v. *Miller,* 63 N. J. L. 587.

Stock-books as evidence.—G. S. 1895, "Corporations," 36.

Minutes of public meetings.—Minutes kept by school trustees are admissible even though no law requires them to be kept. *Gilbert* v. *Van Winkle,* 25 N. J. L. 73.

Book of minutes of a township meeting is admissible. *Reeves* v. *Ferguson,* 31 N. J. L. 107.

Parish register.— The register of a parish of the Catholic Church kept according to church rules is admissible. *Hancock* v. *Catholic Benev. Legion,* 67 N. J. L. 614.

Records of boards of health as to deaths, marriages, and births.— G. S. 1895, "Evidence," 60–62; "Marriages, Births, and Deaths," 23.

Family records.—A Bible is not admissible to prove a person's age until it is shown to contain an authentic family record. *Golden Star Fraternity* v. *Conklin*, 60 N. J. L. 565.

Instances.— Recitals in a deed issued by virtue of a sale under statute made *prima facie* evidence of the proceedings under which it was issued. *Woodbridge* v. *Allen*, 43 N. J. L. 262.

A sheriff's inventory made at the time of a levy on property is admissible. *Brewster* v. *Vail*, 20 N. J. L. 56.

If the statute of another State provides that a transcript of the record of a mortgage shall be admissible there, it will also be admissible in New Jersey. *Chase* v. *Caryl*, 57 N. J. L. 545.

A book of registry is not competent to prove the existence or contents of a mortgage. *Harker* v. *Gustin*, 12 N. J. L. 42.

A government gazette is not admissible to prove a fact of a private nature. *Brundred* v. *Del Hoyo*, 20 N. J. L. 328.

Book of assessments of drainage commissioners is admissible. *N. Riv. Meadow Co.* v. *Shrewsbury Church*, 2 Zab. 424.

A clergyman's certificate of baptism is not admissible to prove date of birth. *State* v. *Snover*, 63 N. J. L. 383.

Foreign records.—Public records of foreign States, and copies thereof. G. S. 1895, "Evidence," 58.

Notary's certificate.— Certificate of notary made conclusive evidence. G. S. 1895, "Evidence," 20, 69.

Maryland.

Death register.— The death records of the registrar of vital statistics are not admissible to prove that a person died of a certain disease. *Life Ins. Co.* v. *Anderson*, 79 Md. 375.

Register of baptisms.—A baptismal register is admissible to prove the date of a baptism if regularly kept by a clergyman as a part of his ecclesiastical duty and produced from the proper custody. *Weaver* v. *Leiman*, 52 Md. 708.

Entries in books of a corporation.— *Hammond* v. *Strauss*, 53 Md. 1; *Weber* v. *Fickey*, 47 Md. 196; *Morrison* v. *Dorsey*, 48 Md. 461.

Admissible as between the members; not as against others. *Hager* v. *Cleveland*, 36 Md. 476.

Admissible as against a subscriber for stock. *Frank* v. *Morrison*, 58 Md. 423.

Books of a corporation are not admissible against a creditor thereof. *Hager* v. *Cleveland*, 36 Md. 476.

The books of a corporation are not admissible in its favor as against third persons. *Brown* v. *State,* 64 Md. 199.

Minutes of a board.— The minutes of a board of county commissioners are admissible but may be contradicted. *Milburn* v. *State,* 55 Md. 11.

Notarial register.— Contemporaneous entries of a notary in the usual course of his business, verified by the notary, are admissible. *Sasscer* v. *Bank,* 4 Md. 409.

Marks on the ground by surveyors.— The fact that officers of the U. S. Geological Survey have placed certain marks indicating distances above sea level is not admissible to prove such distances. *New York, etc., R. Co.* v. *Jones,* 94 Md. 24.

Pennsylvania.

Instances.— The minutes of a public board of commissioners are admissible to prove what they transacted. *Dougherty* v. *Piper,* 3 Yeates, 290; *Galbraith* v. *McGaw,* Add. 305; *Deal* v. *McCormick,* 3 S. & R. 343; *White* v. *Kyle,* 6 S. & R. 107; *Hoover* v. *Gonzalus,* 11 S. & R. 314; *Rose* v. *Klinger,* 8 W. & S. 178.

Tax-books in a commissioner's office are official documents and are admissible to prove facts stated therein. *Fager* v. *Campbell,* 5 Watts, 287; *Overseers* v. *Overseers,* 2 W. & S. 65; *Vankirk* v. *Clark,* 16 S. & R. 286; *Cuttle* v. *Brockway,* 24 Pa. 145; *Scranton Dist.* v. *Directors,* 106 Pa. 446.

The original books of the county commissioners' office are admissible. *Miller* v. *Hale,* 26 Pa. 432. The clerk who made the entries need not be called. *Cuttle* v. *Brockway,* 24 Pa. 145.

Minutes of the board of surveys of Philadelphia. *Waln* v. *Philadelphia,* 99 Pa. 330.

Records of the land office to prove a survey. *Norris* v. *Hamilton,* 7 Watts, 91.

Papers in the office of a deputy surveyor made in performance of his official duty. *Lindsay* v. *Scroggs,* 2 Rawle, 141.

Records of the land office are admissible to show the custom of the office and that a warrant was not issued in accordance therewith. *Blackburn* v. *Holliday,* 12 S. & R. 140; *Goddard* v. *Gloninger,* 5 Watts, 209.

The entry of an appointment in the register of the Secretary of State is admissible. *Moore* v. *Houston,* 3 S. & R. 169.

Legislative journals are admissible to identify a bill which has been repealed. *Bank* v. *Com.*, 26 Pa. 446.

A book of original entries may be admissible even though the one making the entries did not have personal knowledge regarding them. *Imhoff* v. *Flewrer*, 2 Phila. 35.

Notarial records and certificates evidence of the facts.— Pepper & Lewis' Digest of Laws, "Evidence," secs. 44, 48, 50.

The registry of a deed in the office of a prothonotary is admissible. *Stonebreaker* v. *Short*, 8 Pa. 155.

Certificate of a prothonotary indorsed on a deed is evidence of acknowledgment. *Dikeman* v. *Parrish*, 6 Pa. 210.

Official and authorized records.— The document must be shown to be official or it will not be admitted. *Bank* v. *Donaldson*, 6 Pa. 179.

Records not authorized by law are not admissible. *Fitler* v. *Shotwell*, 7 W. & S. 14.

Registers of deaths, baptisms, etc.— Registry of births and deaths kept by a religious society are admissible when authenticated. *Stoever* v. *Whitman*, 6 Binn. 416; *Hyam* v. *Edwards*, 1 Dall. 2.

Register of marriages, baptisms, and burials of a parish is admissible to prove pedigree. *Kingston* v. *Lesley*, 10 S. & R. 383.

Register of baptisms not admissible to prove age. *Clark* v. *Trinity Church*, 5 W. & S. 266.

Health officers' records of marriages, births, and deaths.— Pepper & Lewis' Digest of Laws, "Evidence," sec. 49; "Registration of Marriages, Births, and Deaths," secs. 6, 17, 28.

Registers of burials out of the United States.— Pepper & Lewis' Digest of Laws, "Evidence," secs. 45, 46.

Corporation books.— Books of a corporation are admissible against the members of the corporation. *Graff* v. *Pitts. & S. R. Co.*, 31 Pa. 489; *Bavington* v. *Pitts. & S. R. Co.*, 34 Pa. 358; *Bedford R. Co.* v. *Bowser*, 48 Pa. 29; *Diehl* v. *Mut. Ins. Co.*, 58 Pa. 443.

A corporation's books are not admissible in its favor and against third persons. *Fleming* v. *Wallace*, 2 Yeates, 120.

Registers kept by religious societies made evidence.— Pepper & Lewis' Digest of Laws, "Evidence," secs. 43, 47.

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.[97]

[*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 facts;[98] but such statements are irrelevant if they relate to matters of private concern, or matters not likely to be accurately stated in such documents.[99]

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97 See cases in 2 Ph. Ev. 155–6, and *Read* v. *Bishop of Lincoln*, [1892], A. C. 644, at pp. 652–654.

98 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. In *R.* v. *Jameson*, Trial at Bar, 21 July, 1896, standard maps of South Africa were admitted to show the general positions of the places referred to: Phipson, p. 354.

99 *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: *Bradstreet*, v. *Hearfield*, 1877, 5 Ch. Div. 709, and see *Hammond* v. *Wilberforce* 1854, 10 Ex. 390: and *R.* v. *Berger*, [1894], 1 Q. B. 823. See, too, Phipson, pp. 333, 334.

AMERICAN NOTE.

General.

Authorities.— 1 Greenleaf on Evidence (15th ed.), secs. 139 and 497; 9 Am. & Eng. Encyclopædia of Law (2d ed.), p. 885 *et seq.;* Abbott's Trial Evidence (2d ed.), p. 883.

As to first paragraph of text, see *Woods* v. *Banks,* 14 N. H. 101.

Sustaining text so far as works by authors, long deceased, are concerned; *State* v. *Wagner,* 6 Me. 178; *Morris* v. *Harmer,* 7 Pet. 554; *Spalding* v. *Hedges,* 2 Pa. St. 240, 243; *Charlotte* v. *Chouteau,* 30 Mo. 194.

An almanac is admissible. *State* v. *Morris,* 47 Conn. 179; *Munshower* v. *State,* 55 Md. 11.

An encyclopædia is not admissible to prove recent occurrences. *Whiton* v. *Albany, etc., Ins. Co.,* 109 Mass. 24.

A list of prices current may be admitted if proved to be reliable. *Whitney* v. *Thacher,* 117 Mass. 523; *Cliquot's Champagne,* 3 Wall. 114; *Seligman* v. *Rogers,* 113 Mo. 642.

Maps, plans, photographs, etc.— *Com.* v. *King,* 150 Mass. 221.

Ancient maps, shown to be genuine, are competent evidence to prove matters relating to general or public rights. *Lawrence* v. *Tennant,* 64 N. H. 532; *Causland* v. *Fleming,* 63 Pa. 36.

Of private boundary. *Gibson* v. *Poor,* 21 N. H. 440.

Private surveys are not admissible without proof of their correctness. *Whitehouse* v. *Beckford,* 29 N. H. 471; *Com.* v. *Switzer,* 134 Pa. 383; *Wilkinson* v. *State,* 106 Ala. 23; *Rowland* v. *McCown,* 29 Ore. 538; *Burwell* v. *Sneed,* 104 N. C. 118.

An ancient layout of a highway by a proprietors' committee, with evidence that it was recorded in the proprietors' book, and that the land thus laid out has ever since been used as a highway, is admissible to prove the existence, by dedication, of the highway, and its width. *State* v. *Merrit,* 35 Conn. 315.

A survey found among the papers of a deceased surveyor, but where there was no evidence that it was made from actual survey, or at whose procurement, was held not admissible in evidence. *Free* v. *James,* 27 Conn. 79.

Ancient maps, shown to be genuine, are competent evidence to establish private boundary. *Whitman* v. *Shaw,* 166 Mass. 451.

A plan or picture is admissible if verified by proof. *Blair* v. *Pelham*, 118 Mass. 420; *Marcy* v. *Barnes*, 16 Gray (Mass.), 161; *Hollenbeck* v. *Rowley*, 8 Allen (Mass.), 473. *Contra, Bearce* v. *Jackson*, 4 Mass. 408.

A map published by authority of the Legislature is admissible to prove town boundaries. *Com.* v. *King*, 150 Mass. 221.

The judge is to pass upon the sufficiency of the verification. *Blair* v. *Pelham*, 118 Mass. 420; *Walker* v. *Curtis*, 116 Mass. 98. See also *Com.* v. *Coe*, 115 Mass. 481.

The admissibility of a photograph does not depend upon its verification by the photographer, provided it is shown to be accurate by any one competent to speak from personal observation. The sufficiency of the verification is a preliminary question of fact for the judge. *McGar* v. *Borough of Bristol*, 71 Conn. 652.

It is error to admit a photograph without verification. *Cunningham* v. *F. H. & W. R. R. Co.*, 72 Conn. 244.

Photographic views of the scene of an accident are admissible as a representation of the place. Any difference that arises from the views being taken at a different season of the year can be explained. *Dyson* v. *N. Y. & N. E. R. R. Co.*, 57 Conn. 24.

Scientific books.— Scientific books are not admissible, nor may they be read in argument. *Com.* v. *Wilson*, 1 Gray (Mass.), 337; *Washburn* v. *Cuddihy*, 8 Gray (Mass.), 430; *Ashworth* v. *Kittridge*, 12 Cush. (Mass.) 193, 59 Am. Dec. 178; *Com.* v. *Sturtivant*, 117 Mass. 122, 19 Am. Rep. 401; *Com.* v. *Brown*, 121 Mass. 69.

The reading to the court or jury of books recognized by experts as authority may be allowed or refused in the exercise of judicial discretion. *Richmond's Appeal*, 59 Conn. 244.

Medical books.— Medical books are not competent evidence. *Ashworth* v. *Kittridge*, 12 Cush. (Mass.) 193, 59 Am. Dec. 178; *Com.* v. *Sturtivant*, 117 Mass. 122; *Com.* v. *Wilson*, 1 Gray (Mass.), 337; *Fox* v. *Peninsular, etc., Works*, 84 Mich. 676; *Epps* v. *State*, 102 Ind. 539; *Gallagher* v. *Market St. R. Co.*, 67 Cal. 13; *Boyle* v. *State*, 57 Wis. 472, 46 Am. Rep. 41; *Bales* v. *State*, 63 Ala. 30; *Burg* v. *Chicago, etc., R. Co.*, 90 Ia. 106.

In some States standard medical works on insanity may be read to the jury by the counsel for the accused, upon the question of his insanity. *State* v. *Hoyt*, 46 Conn. 337.

This rule must be regarded as confined exclusively to cases where the plea of insanity is interposed. *Richmond's Appeal*, 59 Conn. 244.

In examining a medical expert, counsel may read questions from a medical book for the purpose of making himself understood. *Tompkins* v. *West*, 56 Conn. 485. Nor may they be read to the jury. *Washburn* v. *Cuddihy*, 8 Gray (Mass.), 430; *Boyle* v. *State*, 57 Wis. 472, 46 Am. Rep. 41; *People* v. *Wheeler*, 60 Cal. 581, 44 Am. Rep. 70.

An illustration in a medical book is not admissible. *Ordway* v. *Haynes*, 50 N. H. 159.

Law books.— The court, in its discretion, may allow books of statutes to be read to the jury. *Com.* v. *Hill*, 145 Mass. 305. See also *Com.* v. *Porter*, 10 Metc. (Mass.) 263; *State* v. *Fitzgerald*, 130 Mo. 407; *People* v. *Anderson*, 44 Cal. 65; *Curtis* v. *State*, 36 Ark. 284; *Gregory* v. *Ohio River R. Co.*, 37 W. Va. 606; *Blum* v. *Jones*, 86 Tex. 492; *Norfolk & Western R. Co.* v. *Harman's Admr.*, 83 Va. 553 (matter of right). But the reading of law books is prohibited in some States. *Lendbury* v. *Iron Mining Co.*, 75 Mich. 84; *Steffenson* v. *Chicago, etc., R. Co.*, 48 Minn. 285; *Yarborough* v. *State*, 105 Ala. 45.

It has been held that a reported case may be read to the jury in a criminal case. *State* v. *Hoyt*, 46 Conn. 330; *Wohlford* v. *People*, 148 Ill. 296; *Johnson* v. *Culver*, 116 Ind. 278; *Hudson* v. *Hudson*, 90 Ga. 582; *State* v. *Whitmore*, 53 Kan. 343.

An unofficial compilation of the laws of another State is not generally admissible. *Bride* v. *Clark*, 161 Mass. 130.

A printed book, purporting to be a copy of the statutes of another State, is not evidence of such statutes. *Bostwick* v. *Bogardus*, 2 Root (Conn.), 250.

Histories.— *Onondaga Nation* v. *Thatcher*, 61 N. Y. Supp. 1027, 29 Misc. Rep. 428; judgment affirmed in *Onondaga Nation* v. *Thatcher*, (Sup. 1900), 65 N. Y. Supp. 1014 (concerning Indian relics); *Bogardus* v. *Trinity Church*, 4 Sandf. Ch. 633; *McKinnon* v. *Bliss*, 21 N. Y. 206, 216; *Crill* v. *Rome*, 47 How. Pr. 400.

A local history is not admissible. *McKinnon* v. *Bliss*, 21 N. Y. 206, 31 Barb. 180; *Roe* v. *Strang*, 107 N. Y. 350.

Tide tables.— Tide tables, calculated by scientific authors, are competent evidence. *Green* v. *Cornwell*, 1 C. H. Rec. 11.

Life tables.— The Northampton tables are competent evidence, upon the question as to the probable duration of a life. *Schell* v. *Plumb*, 55 N. Y. 592, 46 How. Pr. 11; *Sauter* v. *New York Central Railroad Co.*, 6 Hun, 446, 66 N. Y. 50.

Prices-current.— Prices-current, published for public circulation, in a newspaper, are admissible. *Terry* v. *McNeil*, 58 Barb. 241. Compare *Whelan* v. *Lynch*, 60 N. Y. 469, affirming 65 Barb. 326.

Architect's schedule of charges.— The schedule of charges of the American Institute of Architects is admissible to show the customary and proper compensation. *Gilman* v. *Stevens*, 54 How. Pr. 197.

Photographs.— A photograph must be proved in order to be admissible. *C., C., C. & St. L. Ry. Co.* v. *Monaghan*, 140 Ill. 474.

Photographs of an injured person, duly authenticated, are admissible. *People's Gaslight & Coke Co.* v. *Amphlett*, 93 Ill. App. 194.

A photographic copy of a forged note is admissible in evidence. *Duffin* v. *People*, 107 Ill. 113.

A photograph a year after the accident is not admissible, it not being shown that no changes had occurred. *Iroquois Furnace Co.* v. *McCrea*, 191 Ill. 340, 61 N. E. 79, affirming 91 Ill. App. 337.

Photographs of the place of an injury, duly authenticated, are admissible. *Wabash Ry. Co.* v. *Jenkins*, 84 Ill. App. 511.

Photographs of the scene of an accident are admissible where no changes have taken place. *C. & E. I. R. R. Co.* v. *Lawrence*, 96 Ill. App. 635; *Williams* v. *Carterville*, 97 Ill. App. 160.

Stereoscopic views may be admissible in evidence. *Rockford* v. *Russell*, 9 Brad. 229.

Abstract of title admissible.—*Seaman* v. *Bisbee*, 163 Ill. 91. Compare *Walton* v. *Follansbee*, 165 Ill. 480.

Field notes.— Field notes are not admissible without authentication. *Owens* v. *Crossett*, 105 Ill. 354.

Plat admissible.— *Prouty* v. *Tilden*, 164 Ill. 163.

A plat of land duly authenticated is admissible. *Wahl* v. *Laubersheimer*, 174 Ill. 338, 51 N. E. 860.

A town plat is admissible in evidence. *Gould* v. *Howe*, 131 Ill. 490, 496.

In questions of dower, life tables are admissible. *McHenry* v. *Yokum*, 27 Ill. 160.

Annuity tables.— In accident cases, annuity tables are not admissible to show expectancy of life. *C., B. & Q. R. R. Co.* v. *Johnson*, 36 Ill. App. 564.

Meteorological observations.— Meteorological observations may be admissible. *C. & N. W. Ry. Co.* v. *Trayes*, 17 Ill. App. 136, 139.

Price lists.— Price lists are not admissible upon questions of value. *Cook County* v. *Harmes*, 10 Brad. 24.

Law books.— It has been held that a reported case may be read to the jury in a criminal case. *Wohlford* v. *People*, 148 Ill. 296.

Stenographer's notes.— A stenographer having testified as to the correctness of his notes may then read them. *Higgins* v. *State*, 157 Ind. 57; *Keith* v. *State*, 157 Ind. 376.

The stenographer's report may be made a part of the record by a bill of exceptions. *Brehm* v. *State*, 90 Ind. 140; *Butler* v. *Roberts*, 118 Ind. 481; *Galvin* v. *State*, 56 Ind. 51; *Lee* v. *State*, 88 Ind. 256; *Marshall* v. *State*, 107 Ind. 173; *Merrick* v. *State*, 63 Ind. 327; *Railway Co.* v. *Voight*, 122 Ind. 288; *Wagoner* v. *Wilson*, 108 Ind. 210; *Woolen* v. *Wishmier*, 70 Ind. 108.

Medical and scientific books not admissible.— *Epps* v. *State*, 102 Ind. 539.

Reading from books and newspapers.— Counsel should not in general be allowed to read extracts from other books or from newspapers. *Baldwin* v. *Bricker*, 86 Ind. 221.

Statutes.— The Detroit city ordinances stand upon the same footing with reference to proof as the statutes. *Napman* v. *People*, 19 Mich. 352.

Statutes of other States.—*Wilt* v. *Cutler*, 38 Mich. 189; *People* v. *Calder*, 30 Mich. 85; *Kopke* v. *People*, 43 Mich. 41. See *Ellis* v. *Maxson*, 19 Mich. 186; *People* v. *Lambert*, 5 Mich. 349; *Kermot* v. *Ayer*, 11 Mich. 181.

New Jersey.

Official maps.— Sharp's Book of Surveys is admissible in matters concerning titles under the West Jersey proprietors. *Den.* v. *Pond*, Coxe, 379.

Mortuary tables.— To show probable duration of human life, a standard mortuary table is admissible. *Camden & Atl. R. Co.* v. *Williams*, 61 N. J. L. 646.

Books of science.— Books of science not admissible, but when a witness quotes them as the basis of his opinion they may be admitted to contradict him. *New Jersey Zinc Co.* v. *Lehigh Zinc Co.*, 59 N. J. L. 189.

Printed copies of by-laws.— A printed copy of a by-law of a board of freeholders is not admissible. *Downie* v. *Freeholders*, 54 N. J. L. 223.

Printed laws of this State.— G. S. 1895, "Statutes," 38.

Printed statutes and decisions of other States.— G. S. 1895, "Evidence," 22, 23, 65.

Maryland.

Maps.— A map is not admissible to prove boundary when it was not made by public authority or proved to be correct. *Tome Institute* v. *Davis*, 87 Md. 591.

Medical books.— Treatise on medical jurisprudence not admissible to support or contradict an expert. *Davis* v. *State*, 38 Md. 15.

Law books.— Printed statutes of other States may be read in evidence to prove such statutes. *Harryman* v. *Roberts*, 52 Md. 64.

Printed laws.— Printed books to prove statutes and resolutions. P. G. L. 1888, art. 35, secs. 47–49.

Almanac.— An almanac is admissible. *Munshower* v. *State*, 55 Md. 11.

System of measurement.— A brick mason may testify as to the number of brick in a building from calculations based upon a system of measurement adopted in Baltimore by the trade and found to be correct. *Donohue* v. *Shedrick*, 46 Md. 226.

Pennsylvania.

Maps.—Ancient maps are evidence of boundary. *Com.* v. *Philadelphia*, 16 Pa. 79; *Huffman* v. *McCrea*, 56 Pa. 95.

Ancient maps, shown to be genuine, are competent evidence to prove matters relating to general or public rights. *Causland* v. *Fleming*, 63 Pa. 36.

Certified copies of Holmes's Map of Philadelphia, published in 1683 and on file in the office of the Surveyor-General, are admissible. *Com.* v. *Alburger*, 1 Whart. 469; *Baird* v. *Rice*, 63 Pa. 489. See *Farr* v. *Swan*, 2 Pa. 245; *Philadelphia* v. *Crump*, 1 Brewst. 320.

A copy of an official map is not admissible without accounting for the absence of the original. *Com.* v. *Switzer*, 134 Pa. 383.

Surveys.— Official surveys admitted in evidence. *Fothergill* v. *Stover*, 1 Dall. 6; *Leazure* v. *Hillegas*, 7 S. & R. 313; *Shields* v. *Buchanan*, 2 Yeates, 219; *Harris* v. *Monks*, 2 S. & R. 557; *Reynolds* v. *Dougherty*, 3 S. & R. 325; *Philips* v. *Shaffer*, 5 S. & R. 215; *Creek*

v. *Moon,* 7 S. & R. 330; *Funston* v. *McMahon,* 2 Yeates, 245; *Clemmins* v. *Gottshall,* 4 Yeates, 330.

An official survey is admissible to prove boundary without producing the warrant in pursuance of which it was made. *Miller* v. *Keene,* 5 Watts, 348. But there must be some proof that it is official. *Vickroy* v. *Skelley,* 14 S. & R. 372; *Blackburn* v. *Holliday,* 12 S. & R. 140; *Wilson* v. *Stoner,* 9 S. & R. 39.

An official survey is admissible to prove the location of land. *Canal Co.* v. *Dunkel,* 101 Pa. 103.

Memorandum in the warrant-book of a deceased deputy surveyor as to a warrant is admissible. *Ross* v. *Rhoads,* 15 Pa. 163.

A draft of adjoining lands, certified by the Surveyor-General is admissible to prove location and boundary. *Payne* v. *Craft,* 7 W. & S. 458; *Sweigart* v. *Richards,* 8 Pa. 436; *Gratz* v. *Beates,* 45 Pa. 495.

Field notes and plats of a deputy surveyor are admissible. Boyles v. *Johnston,* 6 Binn. 125; *Hoover* v. *Gonzalus,* 11 S. & R. 314; *McCormick* v. *McMurtrie,* 4 Watts, 192.

Unofficial surveys are not admissible. *Hubley* v. *White,* 2 Yeates, 133; *Hubley* v. *Vanhorne,* 7 S. & R. 185; *McKenzie* v. *Crow,* 4 Yeates, 428; *Farley* v. *Lenox,* 8 S. & R. 392.

A survey is unofficial, though made by a deputy surveyor, if it was outside his official duty. *Salmon* v. *Rance,* 3 S. & R. 311.

Private surveys are not admissible without proof of their correctness. *Com.* v. *Switzer,* 134 Pa. 383.

Life tables.— Carlisle tables are admissible to prove probable duration of life but are not conclusive. *Shippen's Appeal,* 80 Pa. 391.

Carlisle tables admissible on question of probable duration of life, but the jury's attention should be directed to all the special circumstances. *Seifred* v. *Railroad Co.,* 206 Pa. 399.

Mortality tables are not admissible to show expectancy of life in the absence of proof of the basis of the table and from what material it was made. *McKenna* v. *Gas Co.,* 198 Pa. 31; *Kerrigan* v. *Railroad Co.,* 194 Pa. 98.

Law books.— The authenticated reports of the highest court of Virginia received to rebut the presumption that Virginia law is the same as that of Pennsylvania. *Musser* v. *Stauffer,* 192 Pa. 398.

Printed copies.— Printed copies of Philadelphia ordinances as evidence. Pepper & Lewis' Digest of Laws, "Evidence," sec. 37.

History.— Works of history admissible to prove remote transactions. *Com.* v. *Alburger,* 1 Whart. 469.

Sustaining text so far as works by authors, long deceased, are concerned. *Spalding* v. *Hedges,* 2 Pa. 240, 243.

The articles of agreement between Penn and Baltimore as to State boundary are admissible. *Ross* v. *Cutshall,* 1 Binn. 399.

The "list of first purchasers" is admissible in Pennsylvania. *Hurst* v. *Dippo,* 1 Dall. 20; *Morris* v. *Vanderen,* 1 Dall. 64. So also is a certified copy. *Kingston* v. *Lesley,* 10 S. & R. 383.

The journal of the U. S. House of Representatives with a letter of the Secretary of War and a report of an engineer received in evidence to prove a fact. *Miles* v. *Stevens,* 3 Pa. 21.

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 favour of a party to a cause producing a copy of an entry in the book of his own bank].[1]

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.[2]

The word "Bank" is restricted to banks which have duly made a return to the Commissioners of Inland Revenue,

[1] *Harding* v. *Williams,* 1880, 14 Ch. Div. 197.

[2] And applies apparently to the books of bankers in all parts of the United Kingdom: *Kissam* v. *Link, post.*

Savings banks certified under the Act relating to savings banks,

Post-office savings banks, and

any company carrying on the business of bankers to which the Companies Acts, 1862 to 1880, are applicable, which has furnished to the registrar of joint-stock companies a list and summary, as required by the second part of the Companies Act, 1862, with the addition of a statement of the names of the several places where it carries on business.[3]

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.

The fact that a company carrying on the business of bankers has duly furnished a list and summary [*semble* with the addition specified] may be proved by the certificate of the registrar or any assistant registrar.[4]

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.[5]

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[3] 45 & 46 Vict. c. 72, s. 11.

[4] 45 & 46 Vict. c. 72, s. 11.

[5] 42 & 43 Vict. c. 11.

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].[6]

ARTICLE 38.

JUDGE'S POWERS AS TO BANKER'S BOOKS.

On the application of any party to a legal proceeding a Court or Judge [including a County Court Judge acting in respect to an action in his own court] 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.[7]

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[6] 42 & 43 Vict. c. 11, ss. 7, 10.

[7] 42 & 43 Vict. c. 11, s. 7. See *Davies* v. *White*, 1884, 53 L. J., Q. B. 275; *In re Marshfield, Marshfield* v. *Hutchings*, 1886, 32 Ch. D. 499; *Arnott* v. *Hayes*, 1887, 36 Ch. D. 731. The order may be made in respect of books in any part of the United Kingdom; *Kissam* v. *Link*, [1896], 1 Q. B. 574. See *post*, Article 71 (*b*).

ARTICLE 39.*

"JUDGMENT."

The word "judgment" in Articles 40–47 means any final judgment, order or decree of any Court.

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. 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.[8]

(*b*) The question is, whether A, a shipowner, is entitled to recover as for a loss by capture against B, an underwriter.

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* See Note XXIII.

[8] *Green* v. *New River Company*, 1792, 4 T. R. 589. (See Article 44, Illustration (*a*).)

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.[9]

(*c*) The question is, whether A can recover damages from B for a malicious prosecution.

The judgment of a Court by which A was acquitted is conclusive proof that A was acquitted by that Court.[10]

(*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.[11]

(*e*) A is deprived of his living by the sentence of an ecclesiastical court.

The sentence is conclusive proof of the act of deprivation in all cases.[12]

(*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.[13]

AMERICAN NOTE.

General.

Authorities.— 1 Greenleaf on Evidence (15th ed.), secs. 527, 538, 539; Underhill on Evidence, sec. 157; *Spencer* v. *Dearth*, 43 Vt. 98, 105; *Harrington* v. *Wadsworth*, 63 N. H. 400; *King* v. *Chase*, 15 N. H. 9, 41 Am. Dec. 675; *Chamberlain* v. *Carlisle*, 26 N. H. 540; *Burlen* v. *Shannon*, 3 Gray (Mass.), 387, 389; *Day* v. *Floyd*, 130 Mass. 488; *Emery* v. *Hildreth*, 2 Gray (Mass.), 228; *Aron* v. *Chaffe*, 72 Miss. 159; *Dorrell* v. *State*, 83 Ind. 357; *Key* v. *Dent*, 14 Md. 86, 98; *Emus* v. *Smith*, 14 How. (U. S.) 400, 430; *Faulcon* v. *Johnson*, 102 N. C. 264, 11 Am. St. Rep. 737.

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[9] Involved in *Geyer* v. *Aguilar*, 1798, 7 T. R. 681.

[10] *Leggatt* v. *Tollervey*, 1811, 14 East, 302; and see *Caddy* v. *Barlow*, 1827, 1 Man. & Ry. 277.

[11] *Allen* v. *Dundas*, 1789, 37 R. 125. In this case the will to which probate had been obtained was forged.

[12] Judgment of Lord Holt in *Philips* v. *Bury*, 1788, 2 T. R. 346, 351.

[13] Assumed in *Needham* v. *Bremner*, 1866, L. R. 1 C. P. 583.

The record of judgment is not admissible for any purpose against a person not a party or privy to it, except to prove the fact that such a judgment was rendered. *Smith* v. *Chapin*, 31 Conn. 532; *Trubee* v. *Wheeler*, 53 Conn. 461. See, also, *Cowles* v. *Harts*, 3 Conn. 552; *Union Mfg. Co.* v. *Pitkin*, 14 Conn. 183.

The grant of probate is conclusive proof of executorship as to all persons. *Steen* v. *Bennett*, 24 Vt. 303; *Mutual Ins. Co.* v. *Tisdale*, 91 U. S. 238, 243; *Quidort* v. *Pergeaux*, 18 N. J. Eq. 472.

A decree granting administration upon the estate of a living person is void for want of jurisdiction. *Jochumsen* v. *Suffolk Sav. Bank*, 3 Allen (Mass.), 89; *Lavin* v. *Emigrant Sav. Bank*, 18 Blatchf. 1, 36; *Stevenson* v. *Super Ct.*, 62 Cal. 60; *Thomas* v. *People*, 107 Ill. 517; *Devlin* v. *Com.*, 101 Pa. 273; *Springer* v. *Shavender*, 118 N. C. 33.

A decree appointing a trustee is conclusive proof of the existence of the trust relation. *Bassett* v. *Crafts*, 129 Mass. 513.

A decree appointing a guardian is conclusive proof of the existence of the guardianship. *Farrar* v. *Olmstead*, 24 Vt. 123.

A decree of admission to citizenship is conclusive proof of citizenship. *State* v. *MacDonald*, 24 Minn. 48; *Mut. Ins. Co.* v. *Tisdale*, 91 U. S. 238, 245; *People* v. *McGowan*, 77 Ill. 644.

A valid decree of divorce is conclusive upon the world. *Adams* v. *Adams*, 154 Mass. 290; *In re Eickhoff*, 101 Cal. 600.

The grant of probate is conclusive proof of executorship to all persons. *Kelly* v. *West*, 80 N. Y. 139; N. Y. Code Civ. Pro., sec. 2591.

So the appointment as a receiver, of the receivership. *Whittlesey* v. *Frantz*, 74 N. Y. 456.

A valid decree of divorce is conclusive upon the world. *Hunt* v. *Hunt*, 72 N. Y. 217.

As to impeaching a decree of divorce for want of jurisdiction, see *People* v. *Baker*, 76 N. Y. 78.

By statute, a decree by a surrogate, determining the fact of death of a person supposed to be dead is deemed conclusive, for the purpose of rendering the acts of the administrator valid until his authority is revoked. *Roderigas* v. *East River Sav. Inst.*, 63 N. Y. 460. But the clerk of the surrogate does not have this power. *Roderigas* v. *East River Sav. Inst.*, 76 N. Y. 316. See *Bolton* v. *Schriever*, 135 N. Y. 65.

A decree of divorce is conclusive evidence that the cause for which it was granted existed. *Clarke* v. *Lott*, 11 Ill. 105.

A decree of admission to citizenship is conclusive proof of citizenship. *People* v. *McGowan*, 77 Ill. 644.

A decree granting administration upon the estate of a living person is void for want of jurisdiction. *Thomas* v. *People*, 107 Ill. 517.

Judgment conclusive proof of legal effect.— *Grant Township* v. *Reno Township*, 107 Mich. 409, 114 Mich. 41; *Rouse, etc., Co.* v. *Detroit Cycle Co.*, 111 Mich. 251.

The basis of a judgment cannot be proved by the briefs. *Greenlee* v. *Lowing*, 35 Mich. 63.

A criminal record is not admissible in a subsequent civil case *English* v. *Caldwell*, 30 Mich. 362.

Judgments are admissible when they concern the same subject-matter and are rendered in proceedings between the same parties. *Phillips* v. *Jamieson*, 51 Mich. 153.

New Jersey.

Status as executor or administrator.— The granting of letters of administration by the Probate Court is conclusive as to one's status as administrator. *Plume* v. *Savings Inst.*, 46 N. J. L. 211.

The grant of probate is conclusive proof of executorship as to all persons. *Quidort* v. *Pergeaux*, 18 N. J. Eq. 472.

Personal status.— A judgment as to personal status is conclusive. *McClurg* v. *Terry*, 21 N. J. Eq. 225.

Guardianship.— Letter of guardianship is conclusive. *Vandervere* v. *Gaston*, 25 N. J. L. 623.

Probate of a will.— Decree of the Orphans' Court on question of probate is no evidence as to the validity of the will in an action of ejectment. *Den.* v. *Ayres*, 13 N. J. L. 153.

Maryland.

Authorities.— *Dorrell* v. *State*, 83 Md. 357.

A decree in chancery equally with a judgment at law is admissible even as against strangers to show *rem ipsam*. *Key* v. *Dent*, 14 Md. 86.

A decree appointing plaintiff as receiver is admissible to show his authority to sue as such. *Frank* v. *Morrison*, 58 Md. 423.

A decree in equity is admissible to prove the fact of its entry and its legal consequences, even as against strangers to it. *Parr* v. *State*,

71 Md. 220; *Key* v. *Dent*, 14 Md. 86; *Dorsey* v. *Gassaway*, 2 H. & J. 402.

A decree of a court of equity that property shall be deemed the separate estate of a wife is admissible in an attachment of such property for the debt of the husband. *Smith* v. *McAtee*, 27 Md. 420.

The refusal of probate to a will bars the devisee from thereafter proceeding in ejectment on the will. *Johns* v. *Hodges*, 62 Md. 525.

Pennsylvania.

Authorities.— *Masser* v. *Strickland*, 17 S. & R. 354.

The record of the conviction of the criminal is admissible in an action for the reward offered for him. *York* v. *Forscht*, 23 Pa. 391.

A decree establishing the status of an ousted stockholder of a corporation to be that of a creditor is conclusive. *Reading Iron Works Estate*, 149 Pa. 182.

A report of the county auditor passing the sheriff's bill for fees against the county is in effect a judgment and concludes the sheriff from thereafter asking a larger amount. *Northampton Co.* v. *Herman*, 119 Pa. 373.

Probate of a will conclusive if not contested within five years. *Cochran* v. *Young*, 104 Pa. 333.

A decree granting administration upon the estate of a living person is void for want of jurisdiction. *Devlin* v. *Com.*, 101 Pa. 273.

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, and appearing from the judgment itself to be the ground on which it was based; unless evidence was admitted in the action in which the judgment was delivered which is excluded in the action in which that judgment is intended to be proved.[14]

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[14] *R.* v. *Hutchins*, 1880, 5 Q. B. D. 353, supplies a good illustration of this principle.

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.[15]

(*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.[16]

(*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.[17]

(*d*) A obtains a decree of judicial separation from her husband B, on the ground of cruelty and desertion, proved by her own evidence.

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.[18]

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[15] *R.* v. *Hartington Middle Quarter*, 1855, 4 E. & B. 780; and see *Flitters* v. *Allfrey*, 1874, L. R. 10 C. P. 29; and contrast *Dover* v. *Child*, 1876; 1 Ex. Div. 172.

[16] *Barrs* v. *Jackson*, 1845, 1 Phill. 582, 587, 588.

[17] *Bank of Hindustan, &c., Alison's Case*, 1873, L. R. 9 Ch. App. 24.

[18] *Stoate* v. *Stoate*, 1861, 2 Swa. & Tri. 223. Both would now be competent witnesses in each suit.

AMERICAN NOTE.

General.

Authorities.— 1 Greenleaf on Evidence (15th ed.), sec. 524 *et seq.;* Thayer's Preliminary Treatise on Evidence, p. 398 *et seq.; Sanderson* v. *Peabody,* 58 N. H. 116; *Quinn* v. *Quinn,* 16 Vt. 426; *Woodruff* v. *Woodruff,* 11 Me. 475; *Bradley* v. *Bradley,* 11 Me. 367; *Kendall* v. *School District,* 75 Me. 358; *Beloit* v. *Morgan,* 7 Wall. 619, 622; *Marsteller* v. *Marsteller,* 137 Pa. St. 517; *Orthwein* v. *Thomas,* 127 Ill. 554; *Fenwick Hall Co.* v. *Old Saybrook,* 69 Conn. 40; *Bethlehem* v. *Watertown,* 47 Conn. 237; *Burritt* v. *Belfy,* 47 Conn. 323; *Burlen* v. *Shannon,* 3 Gray (Mass.), 387; *McCaffrey* v. *Carter,* 125 Mass. 330; *White* v. *Weatherbee,* 126 Mass. 450; *Bliss* v. *N. Y. Cent. R. R. Co.,* 160 Mass. 447, 455; *Fuller* v. *Shattuck,* 13 Gray (Mass.), 70; *Miller* v. *Miller,* 150 Mass. 111; *Bradley* v. *Brigham,* 149 Mass. 141; *Bigelow* v. *Winsor,* 1 Gray (Mass.), 299.

A judgment is conclusive as to facts within the issues and actually litigated. Parol evidence is admissible to prove what was litigated. *Embden* v. *Lisherness,* 89 Me. 578; *Campbell* v. *Rankins,* 99 U. S. 261; *Title Co.* v. *Shalleross,* 147 Pa. St. 385; *Palmer* v. *Sanger,* 143 Ill. 34; *Harding* v. *Bader,* 75 Mich. 323; *Stone* v. *St. Louis Stamping Co.,* 155 Mass. 267.

In a subsequent suit on the same cause of action, a judgment is conclusive as to all matters within the issues, which might have been litigated, whether they actually were or not. *Bassett* v. *Conn. Riv. R. R. Co.,* 150 Mass. 179; *Foye* v. *Patch,* 132 Mass. 110; *Bennett* v. *Hood,* 1 Allen (Mass.), 47; *Horner* v. *Fish,* 1 Pick. (Mass.) 435; *Wright* v. *Anderson,* 117 Ind. 315; *Diamond State Iron Co.* v. *Rarig,* 93 Va. 595; *Petersine* v. *Thomas,* 28 O. St. 596; *Funk* v. *Funk,* 35 Mo. App. 246.

If the second suit is upon a different cause of action, the judgment is conclusive only as to matters actually litigated, not as to those which might have been litigated. *Foye* v. *Patch,* 132 Mass. 106; *Gilbert* v. *Thompson,* 9 Cush. (Mass.) 348; *Morse* v. *Elms,* 131 Mass. 151; *Evans* v. *Clapp,* 123 Mass. 165; *Newell* v. *Carpenter,* 118 Mass. 411; *Sibley* v. *Hulbert,* 15 Gray (Mass.), 509; *Norton* v. *Huxley,* 13 Gray (Mass.), 285; *Gage* v. *Holmes,* 12 Gray (Mass.), 428; *Burnett* v. *Smith,* 4 Gray (Mass.), 50; *Norton* v. *Doherty,* 3 Gray (Mass.), 372; *Metcalf* v. *Gilmore,* 63 N. H. 174, 181; *Nesbitt* v. *Riverside*

Dist., 144 U. S. 610; *Hixson* v. *Ogg*, 53 O. St. 361; *Wright* v. *Griffey*, 147 Ill. 496; *Bond* v. *Markstrum*, 102 Mich. 11.

A judgment at law or decree in equity of a court having jurisdiction is conclusive between the parties to it and their privies, upon every material fact in issue, and cannot be collaterally impeached. *Peck* v. *Woodbridge*, 3 Day (Conn.), 36; *Canaan* v. *Greenwoods Turnpike Co.*, 1 Conn. 6; *Willey* v. *Paulk*, 6 Conn. 75; *Griswold* v. *Bigelow*, 6 Conn. 264; *Sears* v. *Terry*, 26 Conn. 280, 282; *McLoud* v. *Selby*, 10 Conn. 396; *Holcomb* v. *Phelps*, 16 Conn. 131; *Ormsbee* v. *Davis*, 16 Conn. 576. But where jurisdiction can be obtained only through the actual existence of some fact, a decree by a court which decides that such fact exists can be attacked collaterally and shown to be invalid. *Scott* v. *McNeal*, 154 U. S. 34. See *People's Sav. Bank* v. *Wilcox*, 15 R. I. 258; *Noble* v. *Union River Co.*, 147 U. S. 165, 173.

A judgment is conclusive as to facts within the issues and actually litigated. Parol evidence is admissible to prove what was litigated. *Bowe* v. *Wilkins*, 105 N. Y. 322. See *Lewis* v. *Ocean Nav. Co.*, 125 N. Y. 341.

In a subsequent suit on the same cause of action a judgment is conclusive as to all matters within the issues, which might have been litigated, whether they actually were or not. *Secor* v. *Sturgis*, 16 N. Y. 548; *Pray* v. *Hegeman*, 98 N. Y. 351; *Farrington* v. *Payne*, 15 Johns. 432; *Stevens* v. *Lockwood*, 13 Wend. 644; *Schopen* v. *Baldwin*, 83 Hun. 234; *Binck* v. *Wood*, 43 Barb. 315. This includes grounds of recovery or defense, permissible under the issues, but not presented by a defendant in the former suit. *White* v. *Merritt*, 7 N. Y. 352; *Malloney* v. *Horan*, 49 N. Y. 111; *Reich* v. *Cochran*, 151 N. Y. 122. But set-off and recoupment, not previously pleaded, may be the subject of an independent suit, if their recovery is not inconsistent with the findings of the former judgment. *Brown* v. *Gallaudet*, 80 N. Y. 413; *Malloney* v. *Horan*, 49 N. Y. 111; *Yates* v. *Fassett*, 5 Den. 21, 29, 30. If pleaded and determined, a subsequent action cannot be had thereon. *Patrick* v. *Shaffer*, 94 N. Y. 423.

If the second suit is upon a different cause of action, the judgment is conclusive only as to matters actually litigated, not as to those which might have been litigated. See cases above.

Conclusive judgment.— But a conclusive judgment, barring another action, must be a final decision on the merits. *Webb* v. *Buckelew*, 82 N. Y. 555. A nonsuit is not such a decree. *Wheeler* v. *Ruckman*, 51 N. Y. 391. Nor a discontinuance. *Loeb* v. *Willis*, 100 N. Y. 231.

Nor the sustaining of a plea in abatement. *Springer* v. *Bien*, 128 N. Y. 99. Nor a decree where an action was prematurely brought. *Rose* v. *Hawley*, 141 N. Y. 366. Nor where there is a verdict, but no judgment entered. *Springer* v. *Bien*, 128 N. Y. 99.

A judgment is conclusive as to facts within the issues and actually litigated. Parol evidence is admissible to prove what was litigated. *Palmer* v. *Sanger*, 143 Ill. 34.

If the second suit is upon a different cause of action, the judgment is conclusive only as to matters actually litigated, not as to those which might have been litigated. *Wright* v. *Griffey*, 147 Ill. 496.

The identity of parties in different suits may be shown by parol evidence. *Heacock* v. *Lubukee*, 108 Ill. 641.

Former recovery may be shown under the general issue. *Warren* v. *McNulty*, 2 Gilm. 355.

Where a judgment does not indicate clearly the point involved, outside evidence is competent. *Ryan* v. *Potwin*, 62 Ill. App. 134.

Judicial proceedings cannot be questioned collaterally. *Gage* v. *Parker*, 103 Ill. 528; *Keith* v. *Keith*, 104 Ill. 398.

Judgments conclusive between the parties.—*Bates* v. *Spooner*, 45 Ind. 489; *Campbell* v. *Cross*, 39 Ind. 155; *Gavin* v. *Graydon*, 41 Ind. 559; *Hackleman* v. *Harrison*, 50 Ind. 156; *Kress* v. *State*, 65 Ind. 106; *Larr* v. *State*, 45 Ind. 364; *Pressler* v. *Turner*, 57 Ind. 56.

In a subsequent suit on the same cause of action, a judgment is conclusive as to all matters within the issues, which might have been litigated, whether they actually were or not. *Wright* v. *Anderson*, 117 Ind. 315; *Lieb* v. *Lichtenstein*, 121 Ind. 483; *Goble* v. *Dillon*, 86 Ind. 327.

A judgment is a bar only as to matters in issue. *Winship* v. *Winship*, 43 Ind. 291.

So as to parties brought into a suit on motion. *City* v. *Wickwire*, 87 Ind. 77; *White* v. *Webster*, 58 Ind. 233; *Brown* v. *Eaton*, 98 Ind. 591.

Persons are bound by judgments only in the character in which they appear as parties litigant. *Lord* v. *Wilcox*, 99 Ind. 491; *Elliott* v. *Frakes*, 71 Ind. 412.

A judgment may be admissible, even though it is not conclusive. *Cleveland* v. *Obenchain*, 107 Ind. 591.

Where the issues of a case involve the record of a former proceeding, such record, or parts thereof relevant to the issues, may

be introduced in evidence. *Kramer* v. *Williamson*, 135 Ind. 655, 660.

In order to render a record admissible, it should show that the court had jurisdiction. *Cline* v. *Gibson*, 23 Ind. 11; *Phelps* v. *Tilton*, 17 Ind. 423.

A bill of exceptions is admissible to show the identity of the subject-matter of two suits. *Miles* v. *Wingate*, 6 Ind. 458.

In an action by an attorney-at-law for professional services rendered in a certain case, the record of the cause of action is admissible in evidence as part of the history of the case, showing the amount of recovery, and the services rendered. *McFadden* v. *Ferris*, 6 Ind. App. 454, 455.

In such an action the judgment is admissible in evidence as a part of the record, not being subject to the objection of want of mutuality, as such rule only applies when it is sought to bind a party by the recitals of the judgment. *McFadden* v. *Ferris*, 6 Ind. App. 454, 457.

The record of a justice of the peace is competent evidence of the proceedings had in a suit before him. *Redelsheimer* v. *Miller*, 107 Ind. 485, 489.

Judge's notes of evidence.— The judge's notes of evidence are not ordinarily admissible as evidence in the trial of another issue. *Citizen's State Bank* v. *Adams*, 91 Ind. 280, 287.

New Jersey.

Facts in issue.— A former decree or judgment is not conclusive as to any matter unless that matter was in issue. *Richmond* v. *Hays*, 3 N. J. L. 492.

A judgment is conclusive as to facts upon which it must have been based. *Trustees* v. *Stocker*, 42 N. J. L. 115.

Judgment of court of competent jurisdiction, on question of fact or law, while unreversed is binding upon parties and their privies. *Paterson* v. *Baker*, 51 N. J. Eq. 49.

In a second action for the same claim, the former judgment is final as to anything which *might have been* litigated in the first action; but where the second action is for a different claim, the judgment is final only as to such matters as actually were litigated. *Id.*

Judgment by default.— A judgment by confession or default is as conclusive as other judgments. *Cook* v. *McCahill*, 41 N. J. Eq. 69; *Gifford* v. *Thorn*, 9 N. J. Eq. 702.

Instances.— A corporation is concluded by a judgment in a suit brought against it by one stockholder, in other suits of a similar character brought by other stockholders. *Willoughby* v. *Chicago Junc., etc., Co.*, 50 N. J. Eq. 656.

A settlement by one joint tort-feasor bars a suit against another; and a decree that such a settlement was not obtained by fraud is conclusive in favor of the others. *Spurr* v. *Railroad Co.*, 56 N. J. L. 346.

A judgment is binding on a wife, though not made a formal party, if she causes her husband to defend the case in her behalf and as her agent. *Lyon* v. *Standford*, 42 N. J. Eq. 411.

The determination of the Orphans' Court as to the amount charged against executors is presumed to be correct. *Vanpelt* v. *Veghte*, 2 Green, 210.

A judgment in attachment does not conclude the defendant as to the debt for which it was entered. *Schenck* v. *Griffin*, 38 N. J. L. 462.

In interpleader by an owner to determine how much a contractor owes a subcontractor, a subsequent default judgment by the latter against the former is not conclusive. *Norcross* v. *Dilion*, 32 Atl. 701.

Interlocutory order not conclusive.— *Selz* v. *Presburger*, 49 N. J. L. 396.

A dismissal in equity, when not on the merits, is no bar. *Henninger* v. *Heald*, 51 N. J. Eq. 74.

As to the effect of a judgment in an action where evidence inadmissible in this action was received, see *Putnam* v. *Clark*, 34 N. J. Eq. 532.

Statute.— Failure to plead *plene administravit* is not conclusive evidence of a *devastavit*. G. S. 1895, "Evidence," 18.

Maryland.

Authorities.— *Clagett* v. *Easterday*, 42 Md. 617; *Butler* v. *State*, 5 G. & J. 511; *Hitch* v. *Davis*, 8 Md. 524.

The fact that the form of the second action is different from that of the first makes no difference. *Walsh* v. *Chesapeake R. Co.*, 59 Md. 423.

When in an injunction proceeding it is decided that the barn being built by defendant is not on plaintiff's land, such decision is

conclusive in a later action brought on the injunction bond for damages. *Lange* v. *Wagner*, 52 Md. 310.

An order approving an auditor's account is a decretal order and the matters become *res adjudicata*. *Lindsay* v. *Kirk*, 95 Md. 50; *Bank* v. *Heller*, 94 Md. 213.

Matters in issue.— *Whitehurst* v. *Rogers*, 38 Md. 503; *Robertson* v. *Parks*, 76 Md. 118.

Judgment conclusive as to matters that were in issue. *Clagett* v. *Easterday*, 42 Md. 617.

The construction given a deed in a judgment is conclusive as between the parties. *Oursler* v. *B. & O. R. Co.*, 60 Md. 358.

A judgment on the merits in the same cause of action is conclusive as between the parties in a subsequent action. *Beall* v. *Pearre*, 12 Md. 550.

A judgment is conclusive upon parties and privies as to all questions adjudicated. *Barrick* v. *Horner*, 78 Md. 253.

Matters that might have been determined.— As between the parties, a judgment is conclusive of all matters which might have been litigated in the suit, where every claim made in the second suit might have been made in the first. *Brown* v. *State*, 64 Md. 199; *Archer* v. *State*, 74 Md. 410; *Wagoner* v. *Wagoner*, 76 Md. 311.

A decree is conclusive upon the parties as to all matters that could and should have been presented. *Royston* v. *Horner*, 86 Md. 249.

Collateral matters.— A judgment is not conclusive as to matters only incidentally or collaterally involved, even though passed upon. *Singery* v. *Atty.-Gen.*, 2 Har. & J. 487.

A judgment is not conclusive as to any matter not in issue. *Garrott* v. *Johnson*, 11 G. & J. 173; *Cecil* v. *Cecil*, 19 Md. 72.

Who are concluded by the judgment.— Joint parties in interest having knowledge of the suit are bound by the judgment. *Albert* v. *Hamilton*, 76 Md. 304.

Parties to a proceeding are those having a right to control them, to defend, to examine witnesses, and to appeal. *Cecil* v. *Cecil*, 19 Md. 72.

Privies are concluded by a judgment equally with parties. *Cecil* v. *Cecil*, 19 Md. 72; *Keene* v. *Van Reuth*, 48 Md. 184.

One who seeks payment out of funds obtained through a decree in an action between others will not be allowed afterward to impeach the decree. *Bank* v. *Thomas*, 37 Md. 246.

Sureties on a guardian's bond are bound by the judgment in an action against the guardian, if they appear and take part by counsel. *Parr* v. *State,* 71 Md. 220.

One participating in an action as an attorney held to be concluded by the decree. *Kerr* v. *Bank,* 18 Md. 396.

Instance of a judgment binding on one not a party thereto but directly interested. *Savin* v. *Bond,* 57 Md. 228.

A judgment against a debtor is conclusive of the fact of the debt as against a garnishee. *Summers* v. *Oberndorf,* 73 Md. 312.

Judgment by default.— Judgment by default is conclusive on the parties. *Walsh* v. *McIntire,* 68 Md. 402.

Pennsylvania.

Authorities.— *Bickford* v. *Cooper,* 41 Pa. 142; *Marsteller* v. *Marsteller,* 132 Pa. 517.

In malicious prosecution, the record is admissible to show acquittal and that the defendant was prosecutor. *Katterman* v. *Stitzer,* 7 Watts, 189.

Conviction in a criminal proceeding for reckless driving is not admissible in an action against the driver by a person injured. *Summers* v. *Brewing Co.,* 143 Pa. 114.

A judgment by confession or default is held to be conclusive on the parties. *Orr* v. *Fire Ins. Co.,* 114 Pa. 387; *Weaver* v. *Adams,* 132 Pa. 392; *Stayton* v. *Graham,* 139 Pa. 1; *Spring Run Co.* v. *Tosier,* 102 Pa. 342.

Judgment on demurrer for defendant on the merits is not a bar to a new action on the same allegations so amended as to present a good cause of action. *Detrick* v. *Sharrar,* 95 Pa. 521.

Interlocutory judgment as a bar. *Frauenthal's Appeal,* 100 Pa. 290.

One who submits his claim to a competent court and has it adjudicated cannot later be heard as to the same matter in another court or another form of action. *Otterson* v. *Gallagher,* 88 Pa. 355; *Ahl* v. *Goodhart,* 161 Pa. 455; *Com.* v. *Comrey,* 174 Pa. 355; *Westcott* v. *Edmunds,* 68 Pa. 34.

Circumstances under which a dismissal of a petition to open a judgment is not conclusive of the facts upon which the petition was based. *Himes* v. *Kiehl,* 154 Pa. 190.

A judgment is conclusive as to all matters actually raised in the suit and all which might have been raised by the exercise of due

diligence in preparing and trying the case. *Fidelity Co.* v. *Gazzam*, 2 Pa. Dist. 569; *Pennock* v. *Kennedy*, 153 Pa. 579.

A recital in a judgment that it was given to secure payment of purchase money of real estate is conclusive upon the parties. *Hawbicker's Estate*, 6 Pa. Co. Ct. 570.

Matters in issue.— Judgment conclusive as to all facts actually decided. *White* v. *Reynolds*, 3 P. & W. 96.

If they do not appear upon the record they may be shown by parol; but such evidence is not allowed to contradict the record. *Roberts* v. *Orr*, 56 Pa. 176; *Title Co.* v. *Shallcross*, 147 Pa. 485; *Follansbee* v. *Walker*, 74 Pa. 306.

A judgment is conclusive as to all matters directly involved in the proceeding. *Wetherald* v. *Van Stavoren*, 125 Pa. 535; *Donaghy* v. *Gill*, 152 Pa. 92; *Kilheffer* v. *Herr*, 17 S. & R. 319. But not as to matters only indirectly or collaterally involved even though they were passed on. *Blackmore* v. *Gregg*, 10 Watts, 222; *Lentz* v. *Wallace*, 17 Pa. 412; *Tams* v. *Lewis*, 42 Pa. 402; *Appeal of Lewis*, 67 Pa. 153; *Carmack* v. *Com.*, 5 Binn. 184; *Howe* v. *Bank*, 1 Atl. 787.

A judgment is conclusive of every fact upon which it must have been founded. *Hamner* v. *Griffith*, 1 Grant, 193; *Cyphert* v. *McClune*, 22 Pa. 195; *Overseers* v. *Overseers*, 95 Pa. 269.

Ejectment.— Recovery in ejectment is conclusive of title as between parties and privies. *Levers* v. *Van Buskirk*, 4 Pa. 309. But see *Eichert* v. *Schaeffer*, 161 Pa. 519, and *Stevens* v. *Hughes*, 31 Pa. 381.

The former action must have involved the same parties, the same land, and the same title. *Chase* v. *Irwin*, 87 Pa. 286.

In ejectment against a landlord in possession by the purchaser at sheriff's sale of the leasehold estate, a judgment in ejectment, prior to such sheriff's sale, against the tenant and in favor of the landlord, is conclusive in the latter's favor. *Seltzer* v. *Robbins*, 181 Pa. 451.

Persons concluded.— A judgment is conclusive against the heirs of a party and all claiming under him. *Merklein* v. *Trapnell*, 34 Pa. 42; *Strayer* v. *Johnson*, 110 Pa. 21; *Reagan* v. *Grim*, 13 Pa. 508; *Follansbee* v. *Walker*, 74 Pa. 306.

The real party in interest who conducts the action is concluded by the judgment though he be not a nominal party. *Peterson* v. *Lothrop*, 34 Pa. 223; *Appeal of Dutch Church*, 88 Pa. 503.

A judgment against a beneficiary is admissible as against the trustee in another suit, the parties being substantially the same. *Calhoun* v. *Dunning*, 4 Dall. 120.

Judgment against one in a representative capacity held binding on him individually. *Miller* v. *Springer*, 88 Pa. 203; *Com.* v. *Cochran*, 146 Pa. 223.

One who appears merely as a witness is not concluded by the judgment. *In re Miller's Estate,* 159 Pa. 562.

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, except[19] in the case of judgments of Courts of Admiralty condemning ship as a prize. In such cases the judgment 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.[20]

(*b*) The question is, whether A committed bigamy by marrying B during the lifetime of her former husband C.

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[19] This exception is treated by Lord Eldon as an objectionable anomaly in *Lothian* v. *Henderson*, 1803, 3 Bos. & Pul. at p. 545. See, too, *Castrique* v. *Imrie*, 1870, L. R. 4 E. & I. App. 434–5.

[20] *Doe* v. *Brydges*, 1843, 6 M. & G. 282.

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.[21]

(*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 favour of B that the cargo was enemy's property (though on the facts the Court thought it was not).[22]

AMERICAN NOTE.

General.

Authorities.— 1 Greenleaf on Evidence (15th ed.), secs. 523, 525, 526, 535, 543, 544, 545, 556; Underhill on Evidence, sec. 150*b*; *Lord* v. *Chadbourne*, 42 Me. 429, 66 Am. Dec. 290; *Woodruff* v. *Taylor*, 20 Vt. 65.

privisies admits of this exception, that one may agree to stand in the place of another and to be so fully answerable for his debt or unlawful ast as that a judgment against the latter shall conclude the former as to the amount of such debt or damages. *Levick* v. *Norton*, 51 Conn. 470.

Criminal sentences are not evidence in civil issues, the parties being different, and the objects and results of the two proceedings equally diverse. *Betts* v. *New Hartford*, 25 Conn. 180; *State* v. *Bradnack*, 69 Conn. 215.

The converse of this rule, namely, that a judgment in a civil action is not admissible in a subsequent criminal prosecution, is equally true. *State* v. *Bradnack*, 69 Conn. 215.

Strangers.— *Brigham* v. *Fayerweather*. 140 Mass. 414 (quoting this article); *Wing* v. *Bishop*, 3 Allen (Mass.). 456; *Wood* v. *Mann*, 125 Mass. 319; *Eastman* v. *Symonds*, 108 Mass. 567; *Nettleton* v. *Beach*, 107 Mass. 499; *Finn* v. *Western Railroad*, 102 Mass. 283; *Leonard* v. *Bryant*, 11 Metc. (Mass.) 370; *Shrewsbury* v. *Boylston*, 1 Pick. (Mass.) 105; *Tyler* v. *Utmer*, 12 Mass. 163; *Perkins* v. *Pitts*, 11 Mass. 125; *Ashmead* v. *Colby*, 26 Conn. 315; *Beers* v. *Broome*, 4

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[21] *Duchess of Kingston's Case*, 1776. 2 S. L. C. 713.

[22] *Geyer* v. *Aguilar*, 1798, 7 T. R. 681.

Conn. 256, 257; *Betts* v. *New Hartford*, 25 Conn. 185; *Stevens* v. *Curtiss*, 3 Conn. 265; *Fowler* v. *Savage*, 3 Conn. 96; *Hough* v. *Ives*, 1 Root (Conn.), 492; *Edey* v. *Williams*, 1 Root (Conn.), 186; *Southington Eccl. Soc.* v. *Gridley*, 20 Conn. 202; *Fowler* v. *Collins*, 2 Root (Conn.), 231; *McLoud* v. *Selby*, 10 Conn. 396; *Railroad Co.* v. *Nat. Bank*, 102 U. S. 14; *Jones* v. *Vert*, 121 Ind. 140.

Admiralty.— Sustaining text. *Baxter* v. *New Eng. Ins. Co.*, 6 Mass. 277. See *Cushing* v. *Laird*, 107 U. S. 69, 80.

Whenever a Court of Admiralty in one country acting as a prize court decides on the question of prize, and condemns captured property, such sentence or decree is conclusive evidence of the character of the property, when brought in question in any other country recognizing the law of nations. *Brown* v. *Union Ins. Co.*, 4 Day (Conn.), 187.

The decree of a foreign Court of Admiralty, condemning a ship as prize, cannot be called in question here and impeached collaterally for fraud in procuring it. *Stewart* v. *Warner*, 1 Day (Conn.), 148.

Judgments in rem.— Judgments *in rem* are conclusive as to everybody. *Shores* v. *Hooper*, 153 Mass. 228; *Brigham* v. *Fayerweather*, 140 Mass. 411, 413; *Gelston* v. *Hoyt*, 3 Wheat. (U. S.) 246.

A judgment *in rem* is deemed irrelevant to establish any fact not appearing from the proceedings to have been directly in issue before and decided by the court even though the fact must have been assumed in arriving at the judgment. *Lea* v. *Lea*, 99 Mass. 493, 96 Am. Dec. 772, and note.

An attachment suit against a nonresident possesses the character of an *in rem* proceeding, the *res* comprising the property attached. *McKinney* v. *Collins*, 88 N. Y. 216. But decisions relative to personal status, in some cases, are conclusive only within the State wherein the decision is rendered. *People* v. *Baker*, 76 N. Y. 78.

New Jersey.

Strangers.— A judgment is not binding upon one a stranger to it. *Cox* v. *Flanagan*, 2 Atl. 33; *Lehigh Zinc Co.* v. *New Jersey Zinc Co.*, 55 N. J. L. 350; *S. C.*, on appeal, 28 Atl. 79; *Prall* v. *Patton*, 3 N. J. L. 570; *Steward* v. *Middleton*, 17 Atl. 294; *Insurance Co.* v. *Jackson*, 31 N. J. Eq. 50.

A judgment against the survivors of a partnership does not bind the representatives of a deceased partner. *Buckingham* v. *Ludlum*, 37 N. J. Eq. 137.

A judgment binds only parties and privies, and is not even evidential against others. *Lehigh Z. & I. Co.* v. *New Jersey Zinc & I. Co.*, 55 N. J. L. 350.

To prove title.— The existence of a judgment as a part of a chain of title may be shown by the record even in controversies with third persons. *Den.* v. *Hamilton,* 7 Hal. 109.

Evidence of a judgment was admitted as against a stranger to show title to personal property. *Vandoren* v. *Bellis,* 7 N. J. L. 137.

Personal status.— A judgment as to personal status, *e. g.*, divorce, is similar to a judgment in admiralty. *McClurg* v. *Terry,* 21 N. J. Eq. 225.

Statute.— Conviction for embezzlement, etc., not to be proved in a civil action to recover the money. G. S. 1895, "Crimes," 159.

Maryland.

A judgment is not binding on one not a party or privy to it. *Dorsey* v. *Gassaway,* 2 Har. & J. 402; *McKim* v. *Mason*, 3 Md. Ch. 186; *McClellan* v. *Kennedy,* 8 Md. 230; *Cockey* v. *Milne's Lessee,* 16 Md. 200; *Cecil* v. *Cecil,* 19 Md. 72; *Miller* v. *Johnson*, 27 Md. 6; *Bank* v. *Inloes,* 7 Md. 380; *Syester* v. *Brewer*, 27 Md. 288.

A decree is not admissible as against a stranger to prove the facts upon which it was founded. *Parr* v. *State*, 71 Md. 220.

One in possession of land cannot be dispossessed under a decree in an action to which he was not a party. *Tongue* v. *Morton,* 6 Har. & J. 21; *Frazer* v. *Palmer,* 2 Har. & G. 469; *Oliver* v. *Caton,* 2 Md. Ch. 297.

A judgment does not conclude a party to it as against a stranger. *Heaver* v. *Lanahan,* 74 Md. 493.

A judgment is not an estoppel against a party if it is not such an estoppel against the one seeking to take advantage of it. *Groshon* v. *Thomas,* 20 Md. 234.

Pennsylvania.

Authorities.— A judgment is not binding on strangers to it. *Rose* v. *Klinger,* 8 W. & S. 178; *Building Assn.* v. *O'Connor,* 3 Phila. 453; *Kauffelt* v. *Leber*, 9 W. & S. 93; *Davidson* v. *Barclay*, 63 Pa. 406. Even though the same title be in dispute. *Timbers* v. *Katz,* 6 W. & S. 290.

A decree declaring a mortgage a first lien is not binding on a prior lienor who was not a party or privy to the decree. *Railway Co.* v. *Marshall,* 85 Pa. 187.

Where one recovers judgment against a railroad company for a fire caused by its negligence, such judgment is not conclusive as between the party getting it and an insurance company. *Ætna Ins. Co.* v. *Confer,* 158 Pa. 598.

Foreign attachment is not such a proceeding *in rem* that the judgment will conclude strangers in the matter of the title to the property attached. *Megee* v. *Beirne,* 39 Pa. 50.

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 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, if the party who gives evidence of it had no opportunity of pleading it as an estoppel.

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 favour.[23]

(*b*) A sues B for breaking and entering A's land, and building

[23] *Vooght* v. *Winch,* 1819, 2 B. & Ald. 662; and see *Feversham* v. *Emerson,* 1855, 11 Ex. 391.

thereon a wall and a cornice. B pleads that the land was his, and obtains a verdict in his favour on that plea.

Afterwards 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 favour that the land was his.[24]

AMERICAN NOTE.

General.

Authorities.— 9 Encyclopædia of Pleading and Practice, pp. 613, 618; 1 Greenleaf on Evidence (15th ed.), sec. 531, and notes; *Perkins* v. *Walker,* 19 Vt. 144; *Gray* v. *Pingry,* 17 Vt. 424.

It is generally held in this country that the judgment is conclusive, whether pleaded or not, and whether or not there was an opportunity to plead it. 1 Greenleaf on Evidence (15th ed.), sec. 531, and notes; *Gray* v. *Pingry,* 17 Vt. 419; *Whitney* v. *Clarendon,* 18 Vt. 252; *Mussey* v. *White,* 58 Vt. 45; *Perkins* v. *Walker,* 19 Vt. 114; *Chamberlain* v. *Carball,* 26 N. H. 540; *Gove* v. *Lyford,* 44 N. H. 528; *Blain* v. *Blain,* 45 Vt. 538; *Whitney* v. *Berger,* 78 Me. 287; *Walker* v. *Chase,* 53 Me. 258; *Westcott* v. *Edmunds,* 68 Pa. St. 34; *Trayhem* v. *Colburn,* 66 Md. 277; *So. Pac. R. Co.* v. *U. S.,* 168 U. S. 1. Even if a foreign judgment. *Whiting* v. *Berger,* 78 Me. 287.

No opportunity to plead.— *King* v. *Chase,* 15 N. H. 9, 41 Am. Dec. 675; *Chase* v. *Walker,* 26 Me. 555; *Isaacs* v. *Clark,* 12 Vt. 692; *Perkins* v. *Walker,* 19 Vt. 144; *Dame* v. *Wingate,* 12 N. H. 291; *Morgan* v. *Burr,* 58 N. H. 470; *Shelton* v. *Alcox,* 11 Conn. 240; *Bell* v. *Raymond,* 18 Conn. 97; *Howard* v. *Mitchell,* 14 Mass. 242; *Adams* v. *Barnes,* 17 Mass. 365; *Sprague* v. *Waite,* 19 Pick. (Mass.) 455; *Meiss* v. *Gill,* 44 O. St. 253; *Wixson* v. *Devine,* 67 Cal. 341; *Porter* v. *Leache,* 56 Mich. 40; *Howe* v. *Minn. Mills Co.,* 44 Minn. 460; *Porter* v. *Leache,* 56 Mich. 40.

A judgment may be placed in evidence without being specially pleaded if it is desired to be used as evidence of a material fact in issue; not, however, as an estoppel or bar to the action. *Krikeler* v. *Ritter,* 62 N. Y. 372.

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[24] *Whitaker* v. *Jackson,* 1864, 2 H. & C. at p. 926. This had previously been doubted. See 2 Ph. Ev. 24, n. 4.

New Jersey.

Pleading.— Pleading a judgment as a bar. *Reeves* v. *Townsend,* 22 N. J. L. 396.

Evidence.— A judgment is admissible in evidence. *Dean* v. *Thatcher,* 32 N. J. L. 470.

A judgment may be given in evidence if there was no chance to plead it. *Ward* v. *Ward,* 22 N. J. L. 699.

Maryland.

Authorities.— A judgment need not be pleaded by way of estoppel. *Beall* v. *Pearre,* 12 Md. 550.

It is generally held in this country that the judgment is conclusive, whether pleaded or not, and whether or not there was an opportunity to plead it. *Trayhem* v. *Colburn,* 66 Md. 277.

Insufficient pleading of a former judgment. *Brooke* v. *Gregg,* 89 Md. 234.

A judgment is not matter for plea in abatement but in bar. *Bank of U. S.* v. *Merchants' Bank,* 7 Gill, 415.

Pennsylvania.

A judgment of a competent court on a point in issue is a bar when pleaded or conclusive when given in evidence. *Hibshman* v. *Dulleban,* 4 Watts, 183; *Westcott* v. *Edmunds,* 68 Pa. 34; *Railroad Co.* v. *Malone,* 85 Pa. 25.

Verdict of a jury is not admissible in evidence to create an estoppel until judgment is entered thereon. *Dougherty* v. *Lehigh C. & N. Co.,* 202 Pa. 635.

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;

as between parties and privies in suits where the issue is different even though they relate to the same occurrence or subject-matter;

or in favour of strangers against parties or privies.

But a judgment is deemed to be relevant as between strangers:

(1) if it is an admission, or

(2) if it relates to a matter of public or general interest, so as to be a statement under Article 30.

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.[25]

(*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.[26]

(*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.[27] [*Semble*, it is deemed to be irrelevant.][28]

(*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.[29]

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25 *Green* v. *New River Company*, 1792, 4 T. R. 589. (See Article 40, Illustration (*a*).)

26 Per Blackburn, J., in *Castrique* v. *Imrie*, 1870, L. R. 4 E. & I. App. at p. 434.

27 *The Calypso*, 1856, 1 Swab. Ad. 28.

28 On the general principle in *Duchess of Kingston's Case*, 1776, 2 Smith's L. C. 713.

29 *Semble* from *R.* v. *Turner*, 1832, 1 Moo. C. C. 347.

(*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.[30]

(*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].[31]

AMERICAN NOTE.

General.

Authorities.— 1 Greenleaf on Evidence (15th ed.), sec. 522 *et seq.;* Underhill on Evidence, sec. 150*b*.

Sustaining text. *King* v. *Chase*, 15 N. H. 9, 41 Am. Dec. 675.

Bartlett v. *Boston Gas Co.*, 122 Mass. 209; *Burlen* v. *Shannon*, 99 Mass. 200, 96 Am. Dec. 733; *Burlen* v. *Shannon*, 14 Gray (Mass.), 433.

A judgment against one of several joint-feasors is a defense in a suit against the others only if satisfied. *Cleveland* v. *Bangor*, 87 Me. 259; *The Beaconsfield*, 158 U. S. 303; *Leither* v. *Phil. Traction Co.*, 125 Pa. St. 397; *Roodhouse* v. *Christian*, 158 Ill. 137; *Savage* v. *Stevens*, 128 Mass. 254.

It has been sometimes held that sureties on official bonds are concluded by judgments against their principals. *Tracy* v. *Goodwin*, 5 Allen (Mass.), 409; *McMicken* v. *Com.*, 58 Pa. St. 213; *Stoval* v. *Banks*, 10 Wall. 583; *Nevitt* v. *Woodburn*, 160 Ill. 203; *Norris* v. *Mersereau*, 74 Mich. 687 (*prima facie* evidence only); *Tute* v. *James*, 50 Vt. 124.

A judgment against certain joint contractors constitutes a bar to a suit against the other if they were within the jurisdiction. *Kingsley* v. *Davis*, 104 Mass. 178.

A judgment against one of several persons, jointly and severally liable in contract, is a defense in a suit against the others only if satisfied. *Sawyer* v. *White*, 19 Vt. 40.

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[30] *Tilly* v. *Cowling*, 1701, Buller, N. P. 242, b.; 1 Ld. Raymd. 744.

[31] *Petrie* v. *Nuttall*, 1856, 11 Ex. 569.

A judgment against a party in his personal capacity is not binding on him in a suit wherein he appears in a representative capacity. *Landers* v. *Arno*, 65 Me. 26; *New Haven* v. *Chidsey*, 68 Conn. 397.

Strangers.— *Grand Trunk R. R. Co.* v. *Latham*, 63 Me. 177; *Burdick* v. *Norwich*, 49 Conn. 225.

A judgment against an indorser, unsatisfied, does not bar an action against the acceptor or maker. *Gilmore* v. *Carr*, 2 Mass. 171; *Railroad Co.* v. *Nat. Bank*, 102 U. S. 14.

A criminal judgment is not admissible in a civil suit unless it comes within the exception of the text. *State* v. *Bradnack*, 69 Conn. 212; *People* v. *Kenyon*, 93 Mich. 19; *Corbley* v. *Wilson*, 71 Ill. 209.

Issues different.— *Norton* v. *Huxley*, 13 Gray (Mass.). 285; *Burlen* v. *Shannon*, 99 Mass. 200; *Coleman's Appeal*, 62 Pa. St. 252; *Russell* v. *Place*, 94 U. S. 606.

One cannot avail himself of a judgment in his own favor in a suit which he brings as an assignee of a cause of action assigned to him after the rendition of the judgment. *Fuller* v. *Metropolitan Life Ins. Co.*, 68 Conn. 55.

Admissions.— *Parsons* v. *Copeland*, 33 Me. 370, 54 Am. Dec. 628; *Craig* v. *Carleton*, 8 Shepl. (Me.) 492; *Kellenberger* v. *Sturtevant*, 7 Cush. (Mass.) 465; *Rudolph* v. *Landwerlen*, 92 Ind. 34; *St. Louis Ins. Co.* v. *Cravens*, 69 Mo. 72.

Matter of public interest.— *People* v. *Buckland*, 13 Wend. 594.

New Jersey.

Authorities.— *Kutzmeyer* v. *Ennis*, 27 N. J. L. 371; *Newman* v. *Fowler*, 37 N. J. L. 89.

A judgment as to a thing immaterial to the issue is no bar in a subsequent action. *Munday* v. *Vail*, 34 N. J. L. 418.

Where A is primarily liable and B has agreed to indemnify him, a judgment against A in a suit of which B had notice is competent evidence in a suit by A against B on the contract of indemnity. *Hoppaugh* v. *McGrath*, 53 N. J. L. 81.

Judgment against a principal not conclusive against a surety as general rule. *Ball* v. *Chancellor*, 47 N. J. L. 125.

Maryland.

A contract of employment for one year at $50 per week is an entire contract. Upon a wrongful discharge the employee has only one action for damages. A judgment for one week's wages for the week succeeding the discharge bars any action for further damages. *Olmstead* v. *Bach*, 78 Md. 132.

Pennsylvania.

Strangers.— *Timbers* v. *Katz*, 6 W. & S. 290; *Sample* v. *Coulson*, 9 W. & S. 62; *Brookville* v. *Arthurs*, 130 Pa. 501.

A judgment against one of several joint-feasors is a defense in a suit against the others only if satisfied. *Leither* v. *Philadelphia Traction Co.*, 125 Pa. 397.

A judgment against a principal is not generally conclusive against a surety. *Giltinan* v. *Strong*, 64 Pa. 242.

It has been sometimes held that sureties on official bonds are concluded by judgments against their principals. *McMicken* v. *Com.*, 58 Pa. 213.

In an action on a bill of exchange, the fact that a person was convicted of forging the bill is not admissible. *Harger* v. *Thomas*, 44 Pa. 128.

Issues different.— *Coleman's Appeal*, 62 Pa. 252.

A judgment is not conclusive as to matters only to be argumentatively inferred. *Lentz* v. *Wallace*, 17 Pa. 412; *Schwan* v. *Kelley*, 173 Pa. 65.

ARTICLE 45.

JUDGMENTS CONCLUSIVE IN FAVOUR 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.[32]

AMERICAN NOTE.

General.

Authorities.— 1 Wharton on Evidence, sec. 813.

Piper v. *Pearson*, 2 Gray (Mass.), 120. See *Ex parte Sternes*, 77 Cal. 156; *Otis* v. *The Rio Grande*, 1 Woods (U. S.), 279. See *Harman* v. *Brotherson*, 1 Den. 537; *People* v. *Collins*, 19 Wend. 56, 62.

Generally the decision of a court as to a fact which is required to be ascertained and settled before jurisdiction of a case can be taken is final and protects parties acting thereunder, until directly reversed or vacated. *Colton* v. *Beardsley*, 38 Barb. 29, 51; *Dyckman* v. *Mayor of New York*, 5 N. Y. 434, 440. See *Austin* v. *Vrooman*, 128 N. Y. 229; *Bolton* v. *Shriever*, 135 N. Y. 65.

If, however, a court tries to acquire jurisdiction by assuming by a decision that a fact, which must actually exist to give jurisdiction, does exist, its proceeding is null and subject to collateral attack. *Roderigas* v. *East River Sav. Inst.*, 63 N. Y. 460, 464; *People* v. *Bd. of Health*, 140 N. Y. 1; *Miller* v. *Amsterdam*, 149 N. Y. 288. See *McLean* v. *Jephson*, 123 N. Y. 142.

Maryland.

Authorities.— An inferior judge, acting within his jurisdiction, cannot be made a trespasser for enforcing his judgment even though it is erroneous. *Deal* v. *Harris*, 8 Md. 40. See also *Hiss* v. *State*, 24 Md. 556.

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[32] *Brittain* v. *Kinnaird*, 1819, 1 Brod. & Bing. 432.

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 it is so offered may prove that the Court which gave it had no jurisdiction, or that it has been reversed, or, if he is a stranger to it, that it was obtained by any fraud or collusion, to which neither he nor any person to whom he is privy was a party.[33]

If an action is brought in an English Court to enforce the judgment of a foreign Court, and probably if an action is brought in an English Court to enforce the judgment of another English Court, any such matter as aforesaid may be proved by the defendant, even if the matter alleged as fraud was alleged by way of defence in the foreign Court and was not believed by them to exist.[34]

AMERICAN NOTE.

General.

Authorities.— 1 Wharton on Evidence, sec. 797; 17 Am. & Eng. Encyclopædia of Law (2d ed.), pp. 848, 1047 *et seq.*

A judgment at law or decree in equity of a court having jurisdiction is conclusive between the parties to it and their privies, upon every material fact in issue, and cannot be collaterally impeached. *Wight* v. *Mott*, Kirby (Conn.), 154; *Peck* v. *Woodbridge*, 3 Day (Conn.), 36; *Canaan* v. *Greenwoods Turnpike Co.*, 1 Conn. 6;

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[33] Cases collected in 2 Taylor, ss. 1715, 1716, 1721. See, too, 2 Ph. Ev. 25, 70, and *Ochsenbein* v. *Papelier*, 1873, 8 Ch. App. 695.

[34] *Abouloff* v. *Oppenheimer*, 1882, 10 Q. B. D. 295.

Willey v. *Paulk*, 6 Conn. 75; *Griswold* v. *Bigelow*, 6 Conn. 264; *Sears* v. *Terry*, 26 Conn. 280, 282; *McLoud* v. *Selby*, 10 Conn. 396; *Holcomb* v. *Phelps*, 16 Conn. 131; *Ormsbee* v. *Davis*, 6 Conn. 576; *Huntington* v. *Birch*, 12 Conn. 152.

Want of jurisdiction.— Any one may attack a judgment for want of jurisdiction. *Lovejoy* v. *Albee*, 33 Me. 414, 54 Am. Dec. 630; *Penobscot R. R. Co.* v. *Watson*, 52 Me. 456; *Buffum* v. *Ramsdell*, 55 Me. 252, 92 Am. Dec. 589; *Smith* v. *Knowlton*, 11 N. H. 19; *Kittredge* v. *Emerson*, 15 N. H. 227; *Wilbur* v. *Abbot*, 60 N. H. 40; *Eastman* v. *Dearborn*, 63 N. H. 364; *State* v. *Wakefield*, 60 Vt. 610; *Barrett* v. *Crane*, 16 Vt. 246; *Vaughn* v. *Congdon*, 56 Vt. 111, 48 Am. Rep. 758; *Adams* v. *Cowles*, 95 Mo. 501; *Sandwich Co.* v. *Earl*, 56 Minn. 390; *Hill* v. *City Cab Co.*, 79 Cal. 188; *People* v. *Seelye*, 146 Ill. 189; *Wall* v. *Wall*, 123 Pa. 545. See *McClanahan* v. *West*, 100 Mo. 309.

A stranger can attack a judgment collaterally for want of jurisdiction. *Buffum* v. *Ramsdell*, 55 Me. 252.

Unless one has been served or made appearance he is a stranger. *Safford* v. *Weare*, 142 Mass. 231; *Needham* v. *Thayer*, 147 Mass. 536; *Eliot* v. *McCormick*, 144 Mass. 10; *Martin* v. *Kittredge*, 144 Mass. 13; *Fall River* v. *Riley*, 140 Mass. 488. See also *Sumner* v. *Parker*, 7 Mass. 78.

A domestic judgment may be attacked collaterally for lack of jurisdiction. *Fall River* v. *Riley*, 140 Mass. 488.

In some States a justice court is a court of record. *Hendrick* v. *Whittemore*, 105 Mass. 23, 28.

In others it is an inferior court. *Fahey* v. *Mottee*, 67 Md. 250; *Clayborn* v. *Tompkins*, 141 Ind. 19.

Full jurisdiction must embrace the parties, the subject-matter, and the process. *Sears* v. *Terry*, 26 Conn. 280.

The recitals of the judgment of a Superior Court are conclusive upon the parties in considering jurisdictional questions. *Blaisdell* v. *Pray*, 68 Me. 269, 272; *Culver's Appeal*, 48 Conn. 165, 173; *Coit* v. *Haven*, 30 Conn. 190; *Finneran* v. *Leonard*, 7 Allen (Mass.), 54.

A probate court is not a court of general jurisdiction. *Fowle* v. *Coe*, 63 Me. 248; *People's Savings Bank* v. *Wilcox*, 15 R. I. 258; *Sears* v. *Terry*, 26 Conn. 273. See *Smith* v. *Wildman*, 178 Pa. 245. Compare *Macey* v. *Stark*, 116 Mo. 481; *Clark* v. *Costello*, 59 N. J. L. 234; *State* v. *Mobile, etc., R. Co.*, 108 Ala. 29, 30.

The jurisdiction of inferior courts is not presumed, but must be made to appear. *Coit* v. *Haven*, 30 Conn. 190; *Galpin* v. *Page*, 18 Wall. 350; *Fahey* v. *Mottee*, 67 Md. 250; *Smith* v. *Clausmeier*, 136 Ind. 120; *State* v. *Mobile, etc., R. Co.*, 108 Ala. 31; *Richardson* v. *Seevers*, 84 Va. 259.

The jurisdiction of courts of limited and inferior jurisdiction can be collaterally attacked, and if the want of jurisdiction in fact exists, the judgment is an absolute nullity. *Culver's Appeal*, 48 Conn. 173.

Fraud.— A party cannot attack a judgment collaterally for fraud *aliunde* the record; a stranger can. *Davis* v. *Davis*, 61 Me. 395; *Granger* v. *Clark*, 22 Me. 128; *Smith* v. *Abbott*, 40 Me. 442; *Sidensparker* v. *Sidensparker*, 52 Me. 481, 83 Am. Dec. 527; *Blanchard* v. *Webster*, 62 N. H. 468; *Great Falls Mfg. Co.* v. *Worster*, 45 N. H. 110; *Atkinson* v. *Allen*, 12 Vt. 620, 36 Am. Dec. 361; *Ogle* v. *Baker*, 137 Pa. 378; *In re Burdick*, 162 Ill. 48; *Greene* v. *Greene*, 2 Gray (Mass.), 361, 61 Am. Dec. 454; *Homer* v. *Fish*, 1 Pick. (Mass.) 435, 11 Am. Dec. 218; *M'Rae* v. *Mattoon*, 13 Pick. (Mass.) 57; *Downs* v. *Fuller*, 2 Metc. (Mass.) 135, 35 Am. Dec. 393; *Vose* v. *Morton*, 4 Cush. (Mass.) 27.

Reversal.— The fact that the court which gave judgment has been reversed may be proved. *Smith* v. *Frankfield*, 77 N. Y. 414.

But during the pendency of an appeal the judgment continues to have the effect of an estoppel. *Parkhurst* v. *Berdell*, 110 N. Y. 386.

New Jersey.

Lack of jurisdiction.— A judgment may be impeached collaterally for lack of jurisdiction. *Hess* v. *Cole*, 23 N. J. L. 116 (of the person); *McCahill* v. *Life Assur. Soc.*, 26 N. J. Eq. 531.

Though a judgment is not admissible to prove a fact over which the court had no jurisdiction, yet it is admissible in so far as it decides questions over which the court had jurisdiction. *Williamson* v. *Gordon*, Spen. 77. See *Davis* v. *Headley*, 22 N. J. Eq. 115.

Lack of jurisdiction may be proved. *Bray* v. *Neill*, 21 N. J. Eq. 343.

Fraud.— A stranger may attack a judgment collaterally for fraud. *Vanderveere* v. *Gaston*, 24 N. J. L. 818.

Fraud in securing a judgment, when a party was not able to defend in the original suit on that ground and was without fault him-

self, will justify equity in setting aside the judgment. *Doughty* v. *Doughty*, 27 N. J. Eq. 315.

Grounds of collateral attack.— Defective service of process is not ground for collateral attack. *Dickinson* v. *Trenton*, 33 N. J. Eq. 63.

Judgment against A in a court of general jurisdiction in which he was never served with process but in which an attorney appeared for him without authority cannot be impeached by him collaterally but may be in a direct proceeding. *Mutual Life Ins. Co.* v. *Pinner*, 43 N. J. Eq. 52.

A judgment cannot be collaterally attacked by showing that it was based on a gambling contract. *McCanless* v. *Smith*, 51 N. J. Eq. 505

A judgment which is relevant as evidence cannot be objected to on the ground of irregularity or error. *Stothoff* v. *Dunham*, 4 Harr. 181; *Lutes* v. *Alpaugh*, 3 Zab. 165; *Hendrickson* v. *Norcross*, 19 N. J. Eq. 417: *Diehl* v. *Page*, 3 N. J. Eq. 143; *Obert* v. *Hammel*, 18 N. J. L. 73.

Decree may be attacked collaterally on the ground that it was a usurpation. *Young* v. *Rathbone*, 16 N. J. Eq. 224; *Munday* v. *Vail*, 34 N. J. L. 418.

Orphans' Court decree.— Orphans' Court is one of superior jurisdiction in New Jersey. *Clark* v. *Costello*, 59 N. J. L. 234; *Den.* v. *Hammel*, 3 Harr. 73; *Den.* v. *O'Hanlon*, 1 Zab. 582; *Hess* v. *Cole*, 3 Zab. 116; *Quidort's Admr.* v. *Pergeaux*, 18 N. J. Eq. 472; *Plume* v. *Howard Sav. Inst.*, 46 N. J. L. 211.

Decree of Orphans' Court that due notice was given of a final settlement is conclusive. *Boulton* v. *Scott*, 3 N. J. Eq. 231.

Orphans' Court decree on the probate of a will is not admissible to prove invalid a will of real estate in an action of ejectment. *Den.* v. *Ayres*, 1 Green, 153; *Cozens* v. *Colson*, Pen. 877; *Hazen* v. *Tillman*, 5 N. J. Eq. 363.

Miscellaneous.— A judgment is conclusive even though erroneous. *Manley* v. *Mickle*, 53 N. J. Eq. 155.

Judgment in a court of law is conclusive of the fact in a court of equity. *Phillips* v. *Pullen*, 45 N. J. Eq. 830.

Judgment of a justice court conclusive. *Van Doren* v. *Horton*, 25 N. J. L. 205.

The verity of the record of a judgment cannot be attacked by proving the minutes of the court. *Den.* v. *Downam*, 1 Green, 135.

Maryland.

Lack of jurisdiction.— A judgment may be attacked collaterally for lack of jurisdiction. *Baltimore* v. *Porter*, 18 Md. 284.

The jurisdiction of inferior courts is not presumed, but must be made to appear. *Fahey* v. *Mottee*, 67 Md. 250.

A decree of a court of equity cannot be impeached collaterally in a court of law when there was jurisdiction. *Gardiner* v. *Miles*, 5 Gill, 94.

Judgment of Orphans' Court is conclusive as to matters within its jurisdiction. *Shultz* v. *Houck*, 29 Md. 24.

Fraud and error.— A judgment cannot be attacked collaterally for fraud by the parties or their privies. *Taylor* v. *State*, 73 Md. 208.

The judgment of a court having jurisdiction cannot be attacked for mere irregularity. *Long* v. *Long*, 62 Md. 33.

A judgment cannot be impeached collaterally for mere error. *Gordon* v. *Baltimore*, 5 Gill, 231; *Barrick* v. *Horner*, 78 Md. 253.

Judgment reversed.— A reversed judgment is no evidence. *Richardson* v. *Parsons*, 1 H. & J. 253.

Pennsylvania.

Want of jurisdiction.— Any one may attack a judgment for want of jurisdiction. *Wall* v. *Wall*, 123 Pa. 545.

Want of jurisdiction may be shown in a collateral action to impeach a judgment. *Forster's Estate*, 2 Lanc. L. Rev. 206.

A void judgment concludes no one. *Caldwell* v. *Walters*, 18 Pa. 79.

A decree on a rule to show cause why a judgment should not be set aside on the ground of fraud is conclusive. *Haneman* v. *Pile*, 161 Pa. 599; *Heilman* v. *Kroh*, 155 Pa. 1.

Character of the court.— Judgment of a court of probate is conclusive as to matters within its jurisdiction. *Vensel* v. *Colner*, 31 Leg. Int. 373. See *Smith* v. *Wildman*, 178 Pa. 245.

A decree of the Orphans' Court as to matters within its jurisdiction is as conclusive as that of other courts. *McPherson* v. *Cunliff*, 11 S. & R. 422; *Painter* v. *Henderson*, 7 Pa. 48; *Lockhart* v. *John*, 7 Pa. 137; *Torrance* v. *Torrance*, 53 Pa. 505; *Brooks' Estate*, 8 Pa. Co. Ct. 514; *Herr* v. *Herr*, 5 Pa. 428.

Judgments of a court of merely statutory jurisdiction are just as conclusive as those of other courts. *Billings* v. *Russell*, 23 Pa. 189.

Fraud.— A party cannot attack a judgment collaterally for fraud *aliunde* the record; a stranger can. *Ogle* v. *Baker*, 137 Pa. 378.

A judgment may be attacked collaterally by a stranger for fraud or collusion. *Sager* v. *Mead,* 164 Pa. 125; *Rowland's Estate,* 7 Pa. L. J. 312; *Phelps* v. *Benson,* 161 Pa. 418; *Appeal of McNaughton,* 101 Pa. 550; *Woodward* v. *Schmitt,* 5 Phila. 152.

Creditors may attack a judgment collaterally for fraud or collusion. *Watson* v. *Willard,* 9 Pa. 89; *Appeal of Thompson,* 57 Pa. 175; *Appeal of Nat. Bank,* 85 Pa. 528; *Appeal of McNaughton,* 101 Pa. 550; *Appeal of Meckley,* 102 Pa. 536.

Mere error or irregularity.— A judgment is conclusive even though erroneous. *Gratz* v. *Bank,* 17 S. & R. 278; *Myers* v. *Clark,* 3 W. & S. 535.

A judgment of a court with jurisdiction cannot be attacked collaterally for mere irregularity. *Lewis* v. *Smith,* 2 S. & R. 142; *Cyphert* v. *McClune,* 22 Pa. 195; *Yaple* v. *Titus,* 41 Pa. 195.

A judgment cannot be collaterally attacked on the ground of defective service. *Sloan* v. *McKinstry,* 18 Pa. 120; *Cockley* v. *Rehr,* 12 Pa. Co. Ct. 343.

A decree of distribution of the Orphans' Court cannot be collaterally attacked by showing want of actual notice. *Ferguson* v. *Yard,* 164 Pa. 586.

A judgment cannot be attacked collaterally on the ground that it was rendered against one after his death. *Yaple* v. *Titus,* 41 Pa. 195; *Carr* v. *Townsend,* 63 Pa. 202; *Murray* v. *Weigle,* 118 Pa. 159.

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.[35]

[35] The cases on this subject are collected in the note on the *Duchess of Kingston's Case,* 2 Smith's L. C. 765–800. A list of the cases will be found in Roscoe's N. P. 203–205. The last leading cases on the subject are *Goddard* v. *Gray,* L. R. 6 Q. B. 139, and *Castrique* v. *Imrie,* 1870, L. R. 4 H. L. 414. See, too, *Schisby* v. *Westenholz,* 1870, L. R. 6 Q. B. 155; *Rousillon* v. *Rousillon,* 1880, 14 Ch. Div. at p. 370; *Novion* v. *Freeman,* 1889, 15 App. Ca. 1; and *Sirdar Gurdyal Singh* v. *Faridkote,* [1894], A. C. 670.

AMERICAN NOTE.

General.

Authorities.— 2 Wharton on Evidence, sec. 802; 13 Am. & Eng. Encyclopædia of Law, p. 977 *et seq.; Hilton* v. *Guyot,* 159 U. S. 113, 206, 207; *Fisher, Brown & Co.* v. *Fielding,* 67 Conn. 91.

Full faith and credit are to be given the judgments of sister States. U. S. Const., art. 4, sec. 1.

They are to have the same faith and credit as they would have in the State of their rendition. U. S. Rev. Stat., sec. 905; *Huntington* v. *Attrill,* 146 U. S. 657; *Dow* v. *Blake,* 148 Ill. 76; *Fairchild* v. *Fairchild,* 53 N. J. Eq. 678; *Harrington* v. *Harrington,* 154 Mass. 517.

The judgments of sister States may be attacked collaterally for want of jurisdiction whatever may be the jurisdictional averments of the record. *Gregory* v. *Gregory,* 78 Me. 187; *Thompson* v. *Whitman,* 18 Wall. 457; *Graham* v. *Spencer,* 14 Fed. Rep. 603; *Price* v. *Schoeffler,* 161 Pa. 530; *Napton* v. *Leaton,* 71 Mo. 358; *Pennywait* v. *Foote,* 27 O. St. 600; *Greenzweig* v. *Sterlinger,* 103 Cal. 278; *Gilman* v. *Gilman,* 126 Mass. 26, 27.

No greater effect is to be given to a judgment rendered in another country, or another State of the United States, in a suit upon it here, than it would have where rendered. *Wood* v. *Watkinson,* 17 Conn. 505, 508; *Stanton* v. *Embry,* 46 Conn. 65, 595.

The judgment of a State court, when proved in the manner provided by law, has the same effect in every other State as in the State where it was pronounced; and no pleas, which would not be good there, can be pleaded to an action on it in another State. *Warren Mfg. Co.* v. *Ætna Ins. Co.,* 2 Paine, 508; *Bank of North America* v. *Wheeler,* 28 Conn. 439.

But a plea showing that the court where it was rendered had no jurisdiction of the person is admissible. *Warren Mfg. Co.* v. *Ætna Ins. Co.,* 2 Paine (U. S.), 510, 515.

The recitals of foreign judgments are *prima facie* evidence only of jurisdiction. *Wright* v. *Andrews,* 130 Mass. 149.

A foreign judgment may be attacked collaterally for lack of jurisdiction. *Rothrock* v. *Dwelling-House Ins. Co.,* 161 Mass. 423; *Ritchie* v. *McMullen,* 159 U. S. 235; *McEwan* v. *Zimmer,* 38 Mich. 765; *Roth* v. *Roth,* 104 Ill. 35; *Smith* v. *Grady,* 68 Wis. 215.

A party cannot impeach a judgment of a sister State collaterally for fraud. *Mooney* v. *Hinds,* 160 Mass. 467.

Judgments of sister States.— The judgments of sister States may be attacked collaterally for want of jurisdiction whatever may be the jurisdictional averments. *Cross* v. *Cross*, 108 N. Y. 628. As for instance for fraud. *Stanton* v. *Crosby*, 9 Hun, 370. See *Davis* v. *Cornue*, 151 N. Y. 172; *Hunt* v. *Hunt*, 72 N. Y. 217. And fraud in procuring a judgment may be claimed as an equitable defense thereto. *Dobson* v. *Pearce,* 12 N. Y. 156.

But judgments cannot be attacked on the merits for error or irregularity. *Pringle* v. *Woodworth*, 90 N. Y. 502.

A judgment by default rendered in another State, where the process was served by publication on a nonresident or foreign corporation and an attachment of property recovered, has no validity as a judgment *in personam*, and can only avail to reach the property attacked. *Fitzsimons* v. *Marks*, 66 Barb. 333; *Ward* v. *Boyce*, 152 N. Y. 191. See *Durant* v. *Abendroth*, 97 N. Y. 132.

Foreign judgments.— A foreign judgment, although regarded as conclusive upon the merits, may be attacked collaterally for want of jurisdiction. *Shepard* v. *Wright*, 113 N. Y. 582; *Dunston* v. *Higgins*, 138 N. Y. 70.

New Jersey.

Judgments in Federal Courts.— *Wittemore* v. *Malcomson*, 9 N. J. L. J. 338.

Judgments of sister States.— *Bank* v. *Wallis*, 59 N. J. L. 46; *Jardine* v. *Reichert*, 39 N. J. L. 165; *Robert* v. *Hodges*, 16 N. J. Eq. 299.

The judgment of another State cannot be attacked on the ground that there would have been a good defense had the action been brought in New Jersey. *McCanless* v. *Smith*, 51 N. J. Eq. 505.

They are to have the same faith and credit as they would have in the State of their rendition. *Fairchild* v. *Fairchild*, 53 N. J. Eq. 678.

Want of jurisdiction over the person may be shown. *Ward* v. *Price*, 25 N. J. L. 225.

Judgment in a sister State may be impeached collaterally for lack of jurisdiction even though the record contains recitals showing jurisdiction. *Royal Arcanum* v. *Carley*, 52 N. J. Eq. 642.

One not a party to a suit in a sister State is not bound by the judgment. *Chew* v. *Brumagim*, 21 N. J. Eq. 520.

An order of removal of a pauper entered by justices of another State is conclusive. *Elizabeth* v. *Westfield*, 2 Hal. 439.

Judicial proceeding of another State presumed to be valid and regular. *Royal Arcanum* v. *Carley*, 52 N. J. Eq. 642.

A judgment in a sister State not impeachable on the merits for error or irregularity. *National Bank* v. *Wallis*, 59 N. J. L. 46. See *Nichols* v. *Nichols*, 25 N. J. Eq. 60.

A judgment of a sister State will not be enforced if it shows fraud and imposition on the face of it. *Davis* v. *Headley*, 22 N. J. Eq. 115.

Comity of States.— If the jurisdiction assumed by a foreign court is unreasonable, contrary to natural justice, and the principles of international law, comity does not require the judgment to be recognized as valid. *Moulin* v. *Insurance* Co., 24 N. J. L. 222.

Recitals of jurisdiction of the person.— A recital in a foreign judgment that the defendant was summoned or appeared may be contradicted. G. S. 1895, "Evidence," 17.

Maryland.

Judgments in a sister State.— *Harryman* v. *Roberts*, 52 Md. 64; *Duvall* v. *Fearson*, 18 Md. 502; *Zimmerman* v. *Helser*, 32 Md. 274.

The judgment of a court of a sister State is as conclusive as it would be in the State where rendered. *McCormick* v. *Deaver*, 22 Md. 187.

The judgment of a court of a sister State is not impeachable on the merits for mere error or irregularity. *Harryman* v. *Roberts*, 52 Md. 64.

Jurisdiction may be inquired into. *Wernwag* v. *Pawling*, 5 G. & J. 500; *Bank of United States* v. *Merchants' Bank*, 7 Gill, 415.

A judgment of a sister State may be attacked for want of jurisdiction over the person. *Sewing Mach. Co.* v. *Radcliffe*, 66 Md. 511.

The certificate of the clerk of the court of a sister State is sufficient authentication of the record. *Case* v. *McGee*, 8 Md. 9.

Judgments of Federal courts.— *Barney* v. *Patterson*, 6 Har. & J. 182.

Judgments of courts of foreign countries.— *Taylor* v. *Phelps*, 1 Har. & J. 492; *Owings* v. *Nicholson*, 4 Har. & J. 66; *Insurance Co.* v. *Bathurst*, 5 G. & J. 159.

Statute.— As to effect of foreign judgments, see P. G. L. 1888, art. 35, sec. 37.

Pennsylvania.

Judgments of Federal courts.— *Buchanan* v. *Biggs*, 2 Yeates, 232; *Re Williamson*, 26 Pa. 9.

Judgments of sister States.— *Guthrie* v. *Lowry*, 84 Pa. 533; *Curran* v. *Rowley*, 2 Pa. Co. Ct. 539; *Bowersox* v. *Gitt*, 12 Pa. Co. Ct. 81.

The judgments of sister States may be attacked collaterally for want of jurisdietion whatever may be the jurisdictional averments of the record. *Price* v. *Schaeffer*, 161 Pa. 530. See *Wetherill* v. *Stillman*, 65 Pa. 105.

A judgment of a sister State is not entitled to full faith and credit if rendered without jurisdiction of the person. *Railroad Co.* v. *Mercer*, 11 Phila. 226; *Noble* v. *Oil Co.*, 79 Pa. 354; *Steel* v. *Smith*, 7 W. & S. 447.

Judgments of courts in foreign countries.— *Rapalje* v. *Emory*, 2 Dall. 51, 231; *Messier* v. *Amery*, 1 Yeates, 533; *Pearson's Estate*, 6 Pa. Co. Ct. 298; *Cheriot* v. *Foussat*, 3 Binn. 220; *Snell* v. *Foussat*, 3 Binn. 239.

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, except in the cases specified in this chapter.

Illustration.

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 expressed by the letters which they addressed to him in his lifetime, are deemed to be irrelevant.[1]

AMERICAN NOTES.

General.

Authorities.— 1 Wharton on Evidence, sec. 509 *et seq.;* 1 Greenleaf on Evidence (15th ed.), sec. 440, and notes, and vol. 2, sec. 371; 12 Am. & Eng. Encyclopædia of Law (2d ed.), sec. 488 *et seq.;* Lawson on Expert and Opinion Evidence, chaps. 1–7; *Conn. Ins. Co.* v. *Lathrop*, 111 U. S. 612, 618; *Graham* v. *Pa. Co.*, 139 Pa. 149; *Coates* v. *Burlington, etc., R. Co.*, 62 Ia. 486. See *Cannon* v. *People*, 141 Ill. 270.

Witnesses may give their opinions in connection with facts when the matter cannot otherwise be reproduced or made palpable. *Fayette* v. *Chesterville*, 77 Me. 28, 52 Am. Rep. 741; *Lester* v. *Pittsford*, 7 Vt. 158; *Morse* v. *Crawford*, 17 Vt. 499; *Cram* v. *Cram*, 33 Vt. 15; *Bates* v. *Sharon*, 45 Vt. 474; *Clifford* v. *Richardson*, 18

* See Note XXIV.

[1] *Wright* v. *Doe* d. *Tatham*, 1837, 7 A. & E. 313.

Vt. 620; *Cavendish* v. *Troy*, 41 Vt. 99; *Shelby* v. *Clagett*, 46 O. St. 549; *State* v. *Rainsberger*, 71 Ia. 746; *People* v. *Rolfe*, 61 Cal. 540; *Chicago R. Co.* v. *Van Vleck*, 143 Ill. 480; *Cook* v. *Ins. Co.*, 84 Mich. 12.

Where the circumstances are such that opinion evidence is the best that can be had, eye-witnesses may state their opinions. *Hardy* v. *Merrill*, 56 N. H. 227, 241, 22 Am. Rep. 441. See, also, dissenting opinion of Doe, J., in *State* v. *Pike*, 49 N. H. 408; *Vanderpool* v. *Richardson*, 52 Mich. 336; *State* v. *Stackhouse*, 24 Kan. 445; *Com.* v. *Sturtivant*, 117 Mass. 122, 123, 19 Am. Rep. 401.

A nonexpert may state his opinion as to the following matters: Identity of persons, things or handwriting; size, color or weight; time or distance; character of sounds and whence they proceed. *Com.* v. *Sturtivant*, 117 Mass. 122, 123, 19 Am. Rep. 401.

Kindly treatment. *Baldwin* v. *Parker*, 99 Mass. 79.

Character of a foundation. *Bardwell* v. *Conway Ins. Co.*, 122 Mass. 90.

Rate of expenditure of a person. *Griffin* v. *Brown*, 2 Pick. (Mass.) 304.

That one seemed sad. *Culver* v. *Dwight*, 6 Gray (Mass.). 444.

Or took no interest in what was going on. *Com.* v. *Piper*, 120 Mass. 185.

Whether a road is dangerous. *Lund* v. *Tyngsborough*, 9 Cush. (Mass.) 36; *Kelleher* v. *Keokuk*, 60 Ia. 473.

Whether "horn chains" are fragile. *Sweet* v. *Shumway*, 102 Mass. 365.

As to a person's age. *Com.* v. *O'Brien*, 134 Mass. 198; *Elsner* v. *Supreme Lodge*, 98 Mo. 640.

Whether hairs are those of a human being. *Com.* v. *Dorsey*, 103 Mass. 412; *Com.* v. *Sturtivant*, 117 Mass. 122.

Whether a foot and footprints correspond. *Com.* v. *Pope*, 103 Mass. 440.

As to whether one was careful and temperate. *Gahagan* v. *B. & L. R. R. Co.*, 1 Allen (Mass.), 187; *Cook* v. *Ins. Co.*, 84 Mich. 12.

Where the opinion of one is a relevant fact he may state that opinion. *Allen* v. *Hartford Life Ins. Co.*, 72 Conn. 697.

A witness cannot be asked whether a previous witness, who has testified to certain things, "had any ground" for so testifying. *Lovell* v. *Hammond Co.*, 66 Conn. 501.

Opinions of persons not experts may be admitted when they are

those of practical and observing men, of the result of their own observations and knowledge, upon a question the particular elements of which are so numerous and the character of which is such that it is impracticable for them to state the facts fully. *Barber* v. *Manchester*, 72 Conn. 684.

Sanity.—A nonexpert witness, having stated the extent of his personal acquaintance, may give an opinion as to sanity. *State* v. *Cross*, 72 Conn. 722.

The mere opinion of a nonexpert witness concerning the mental condition of a testator is never admissible. It is admissible only in connection with the particular facts on which it is based or after the witness has been shown to have sufficient means and opportunities of personal observation to enable him to form a reasonably correct conclusion. They are received rather as statements of impressions or conclusions in the nature of facts of which the witness has knowledge than as opinions. *Turner's Appeal*, 72 Conn. 315.

A nonexpert who has had sufficient opportunity of observation may be asked, "Was the testator, in your opinion, a person of sound mind" or whether he possessed sufficient understanding to be able to transact the ordinary business matters incident to the management of his household affairs and property, or to compare his mental power with that of an average child of seven or eight years. *Turner's Appeal*, 72 Conn. 316.

Upon the issue of sanity, witnesses to particular facts may give their opinion in connection with such facts. *Hardy* v. *Merrill*, 56 N. H. 227, 22 Am. Rep. 441; *Ct. Ins. Co.* v. *Lathrop*, 111 U. S. 612; *Foster's Ex.* v. *Dickerson*, 64 Vt. 233; *Elcessor* v. *Elcessor*, 146 Pa. St. 359; *N. Y., etc., R. Co.* v. *Luebeck*, 157 Ill. 595; *Newcomb* v. *Newcomb*, 96 Ky. 120; *Holland* v. *Zollner*, 102 Cal. 633; *Fishburne* v. *Ferguson*, 84 Va. 87.

The mere opinion of a nonexpert witness concerning the mental condition of a testator is never admissible. But he may state acts and conversations of such testator falling within his personal knowledge, and then, upon these as a basis, state his opinion as to their rationality or irrationality, or whether or not these were the acts and conversations of a rational person. Judgment and order (1895), 36 N. Y. Supp. 283, 91 Hun, 165, affirmed: *Johnson* v. *Cochrane*, 54 N. E. 1092, 159 N. Y. 555.

Value — Damages.— Upon the question of the depreciation in value resulting from the erection of telegraph poles in front of plaintiff's

property, opinion evidence is irrelevant. *Comesky* v. *Postal Telegraph Cable Co.*, 58 N. Y. Supp. 467, 41 App. Div. 245.

A witness cannot testify as to the value of chattels, in the absence of evidence of the chattels themselves or their quality and quantity, even if the witness has personal acquaintance with such facts. Judgment (City Ct. N. Y., 1899), 60 N. Y. Supp. 1000, reversed; *Smith* v. *Smith*, 65 N. Y. Supp. 497, 32 Misc. Rep. 702.

Admissible opinion and evidence similar to opinion evidence.—Under certain circumstances, nonexperts may give opinions. *C. & A. R. R. Co.* v. *Truitt*, 68 Ill. App. 76; *Carter* v. *Carter*, 152 Ill. 434.

One can testify as to whether a person appears sick or well, and may compare appearance at different times and state whether assistance was necessary under certain circumstances. *Salem* v. *Webster*, 192 Ill. 369, 61 N. E. 323, affirming 95 Ill. App. 120.

Any one may testify that one is sick. *Shawneetown* v. *Town of Mason*, 82 Ill. 337.

A witness may be asked as to the appearance of the party with reference to pain and suffering. *Cicero & P. St. Ry. Co.* v. *Priest*, 190 Ill. 592, 68 N. E. 814, 89 Ill. App. 304.

Any one is competent to testify as to the smell of liquors. *Marschall* v. *Laughran*, 47 Ill. App. 29.

A nonexpert witness may testify as to the necessity for medical assistance. *C., B. & Q. R. R. Co.* v. *George*, 19 Ill. 510.

Upon the question of whether a preacher has departed from the faith of the church, opinions of a witness are admissible. *Happy* v. *Morton*, 33 Ill. 399.

An ordinary witness may testify that a bridge constituted a material obstruction to navigation. *I. R. P. Co.* v. *Peoria Bridge Assn.*, 38 Ill. 467.

Opinion evidence is admissible as to the sense in which slanderous words were used. *Nelson* v. *Borchenious*, 52 Ill. 236.

In order to testify as to value, a witness must show his knowledge. *Cooper* v. *Randall*, 59 Ill. 317; *C. & N. W. Ry. Co.* v. *Ingersoll*, 65 Ill. 399.

In a negligence suit, one may give his opinion as to the rate of speed of a train and whether it was under control. *C., B. & Q. R. R. Co.* v. *Johnson*, 103 Ill. 512; *Dowden* v. *Wilson*, 12 Brad. 297, 299.

Nonexpert witnesses may testify as to the capacity of a testator. *Ring* v. *Lawless*, 190 Ill. 520, 60 N. E. 881.

One may testify that he knew where another was going. *N. Y., C. & St. L. R. R. Co.* v. *Luebeck*, 157 Ill. 595.

A question as to whether a train can be seen from a given point is admissible. *C., C., C. & St. L. Ry. Co.* v. *Moss*, 89 Ill. App. 1.

Witnesses who have driven a horse a number of times, or seen it driven formerly, are competent to testify as to its disposition. *Pioneer Fire Proof Instruction Co.* v. *Sunderland*, 188 Ill. 341, 58 N. E. 928, affirming 87 Ill. App. 213.

In order that a witness be allowed to give an opinion, he must be shown to be competent. *Grand Lodge* v. *Randolph*, 186 Ill. 59, 57 N. E. 882, affirming 84 Ill. App. 220.

A witness may be asked "Who was in possession and control of the premises." *Knight* v. *Knight*, 178 Ill. 553, 53 N. E. 306.

In a breach of promise case, a question "Did he court her?" is admissible. *Greenup* v. *Stoker*, 3 Gilm. 202.

On questions of solvency, a witness may be asked if he is the owner of property. *Corgan* v. *Frew*, 39 Ill. 31.

The question of whether a sidewalk is properly constructed or not is one admitting nonexpert testimony. *Alexander* v. *Mt. Sterling*, 71 Ill. 366.

Custom.— Custom may be shown by nonexpert evidence. *Wilson* v. *Bauman*, 80 Ill. 493.

Question of damages.— In replevin, testimony may sometimes properly include both matters of fact and opinion upon the question of damages. *Butler* v. *Mehrling*, 15 Ill. 488.

One who has examined premises may give his opinion as to the damage done to them. *O. G. L. & C. Co.* v. *Graham*, 35 Ill. 346.

In condemnation proceedings, witnesses may give their opinions as to benefits and damages. *Hayes* v. *O. O. & R. V. R. R. Co.*, 54 Ill. 373.

A jury may consider evidence given without objection as to the opinion of witnesses with reference to the extent of damage to a right of way. *R., R. I. & St. L. R. R. Co.* v. *Coppinger*, 66 Ill. 510.

Witnesses may testify as to the amount of damage to the owner of land from the construction of a railroad. *K. & E. R. R. Co.* v. *Henry*, 79 Ill. 290; *G. & I. W. R. R. Co.* v. *Haslam*, 73 Ill. 494.

Witnesses who have testified as to personal knowledge of injuries and detailed their character may give their opinions as to damages. *C. & St. L. R. R. Co.* v. *Woosley*, 85 Ill. 370.

Opinion evidence is admissible in condemnation proceedings. *Chicago, P. & St. L. R. R. Co.* v. *Nix*, 137 Ill. 138; *C. & N. W. Ry. Co.* v. *Cicero*, 154 Ill. 656.

A witness with knowledge of the facts may testify as to benefits resulting from a pavement. *Peyton* v. *Morgan Park,* 172 Ill. 102, 49 N. E. 1003.

Putting witness in place of jury.—A witness cannot be put in the place of the jury. *Wabash Ry. Co.* v. *Smillie,* 97 Ill. App. 7; *N. Gaslight & F. Co.* v. *Miethke,* 35 Ill. App. 629, 632.

Witnesses cannot give their opinions in such a way as to cover the very matter to be submitted to a jury. *C. & A. R. R. Co.* v. *S. & N. W. Ry. Co.,* 67 Ill. 142.

A question as to whether an unusual amount of goods has been purchased by a firm is for the jury, and not a matter of opinion evidence. *Gilbert* v. *Kuppenheimer,* 67 Ill. App. 251.

Form of question where opinion is admissible.— Hypothetical questions involving assumptions of facts, as to which there is testimony, may be allowed. *Frambers* v. *Risk,* 2 Brad. 499.

In stating an inference involving facts, it is not necessary to detail the facts. *Lake Sh. & M. S. R. R. Co.* v. *Lassan,* 12 Brad. 659.

Question of qualification.— The competency of a nonexpert witness is for the court. *Colee* v. *State,* 75 Ind. 511.

Opinion admissible as to identity and appearance, etc.— Nonexperts may give their opinions on questions of identity, resemblance, sickness, health, value, conduct, and bearing, whether friendly or hostile, and the like, in connection with the facts. *Smith* v. *Indianapolis, etc., R. R. Co.,* 80 Ind. 233, 235; *Loshbaugh* v. *Birdsell,* 90 Ind. 466, 467; *Terre Haute, etc., R. R. Co.* v. *Crawford,* 100 Ind. 550, 556; *Carthage, etc., Co.* v. *Andrews,* 102 Ind. 138, 142 (health); *Louisville, etc., Ry. Co.* v. *Holsapple,* 12 Ind. App. 301 (health).

A nonexpert witness may testify as to a culvert; that a horse is gentle; that a certain substance is "hard-pan;" that a highway was in good or bad repair; that a certain liquid was whiskey; that a train was running at a specified rate of speed; that the weather was cold enough to freeze potatoes, and that a dam was sufficient. *Bennett* v. *Meehan,* 83 Ind. 566, 569.

The soundness of animals may be shown by opinion evidence. *House* v. *Fort,* 4 Blackf. 293.

A nonexpert witness may give an opinion as to the speed at which a train was moving. *Louisville, etc., Ry. Co.* v. *Jones,* 108 Ind. 551. 565; *Evansville, etc., Ry. Co.* v. *Crist,* 116 Ind. 446, 457; *Louisville, etc., Ry. Co.* v. *Hendricks,* 128 Ind. 462, 463; *Stonnes* v. *Lunon,* 7 Ind. App. 435, 438.

Where, in an action for personal injury, a nonprofessional witness is testifying to the condition and appearance of the injured party before and after the injury, an expression by the witness that the party had grown worse is competent. *Louisville, etc., Ry. Co.* v. *Wood*. 113 Ind. 544, 551.

As to opinion evidence as to shades of granite, see *Githens* v. *McDonald*, 24 Ind. App. 395.

Conclusions.— Witnesses cannot state their conclusions. *Anderson* v. *Thunder Bay, etc., Co.*, 61 Mich. 489; *Lemon* v. *Chicago & Grand Trunk Ry. Co.*, 59 Mich. 618; *Taylor* v. *Adams*, 58 Mich. 188.

A witness cannot give his conclusions based upon facts in evidence. *Dundas* v. *Lansing*, 75 Mich. 499; *Tice* v. *Bay City*, 78 Mich. 209, 44 N. W. 52; *Jones* v. *Portland*, 88 Mich. 598, 50 N. W. 731.

Speculation.—A witness cannot give a mere speculation. *Bissel* v. *Star*, 32 Mich. 297.

New Jersey.

Authorities.— Opinions of persons not experts upon matters upon which ordinary persons are regarded as able to form reliable opinions are admissible, when the facts cannot be recited to the jury so as to enable them to form a trustworthy opinion themselves. *Koccis* v. *State*, 56 N. J. L. 44, *e. g.*, whether one was drunk or sober; *Castner* v. *Sliker*, 33 N. J. L. 507.

Opinion as to insolvency excluded. *Brundred* v. *Machine Co.*, 4 N. J. Eq. 295.

An expert testifying as to cost of certain repairs may not also testify as to the opinion of another now dead who was employed to estimate such cost in conjunction with the witness. *Collins* v. *Langan*. 58 N. J. L. 6.

Sanity.— Opinion of attesting witness admissible as to testator's sanity. *Clifton* v. *Clifton*, 47 N. J. Eq. 227.

Opinion of one not an expert as to sanity is admissible when given in connection with the facts upon which the opinion is founded. *Genz* v. *State*, 58 N. J. L. 482; *Vanauken's Case*, 10 N. J. Eq. 192.

Weight of opinion evidence.— *Life Ins. Co.* v. *Brown*, 30 N. J. Eq. 193; *Brown* v. *Life Ins. Co.*, 32 N. J. Eq. 809; *In re Gordon's Will*, 50 N. J. Eq. 397; *Black* v. *Black*, 30 N. J. Eq. 215; *Childs* v. *Jones*, 41 N. J. Eq. 74. 42 N. J. Eq. 458.

Maryland.

General rule.— *Tall* v. *Steam Packet Co.*, 90 Md. 248.

A witness may not state whether in his opinion a person's life was in danger from one attacking. *Tucker* v. *State*, 89 Md. 471.

Sanity — Nonexperts.— Opinion of one not an expert as to sanity is admissible when given in connection with the facts upon which the opinion is based. *Chase* v. *Winans*, 59 Md. 475; *Jones* v. *Collins*, 94 Md. 403; *Brashears* v. *Orme*, 93 Md. 442; *Berry Will Case*, 93 Md. 560.

Nonexpert opinion as to the mental condition of a person can be given only with the facts upon which such opinion is based. *Kerby* v. *Kerby*, 57 Md. 345; *Stewart* v. *Spedden*, 5 Md. 433; *Stewart* v. *Redditt*, 3 Md. 67.

Opinions of personal friends as to one's sanity or mental capacity are admissible if accompanied by the facts upon which they are based. *Williams* v. *Lee*, 47 Md. 321; *Waters* v. *Waters*, 35 Md. 531; *Weems* v. *Weems*, 19 Md. 334; *Dorsey* v. *Warfield*, 7 Md. 65.

As to the sufficiency of facts to which a witness must testify before he may give his opinion as to sanity, see *Brashears* v. *Orme*, 93 Md. 442; *Berry Will Case*, 93 Md. 560.

Subscribing witnesses to a will.— The subscribing witnesses to a will may state their opinion as to the sanity of the testator without giving the facts upon which the opinion is based. *Williams* v. *Lee*, 47 Md. 321.

The opinion of a subscribing witness to a will as to the testator's sanity is admissible without showing that he made any special investigation. *Jones* v. *Collins*, 94 Md. 403.

Value.— Nonexpert opinion as to the value of cigarettes allowed. *Archer* v. *State*, 45 Md 33.

The opinion of one specially qualified to form an opinion is admissible to show the value of property, services, etc. *Wallace* v. *Schaub*, 81 Md. 594.

Opinion of real estate dealer conversant with values in the locality is admissible to prove value of a certain lot. *Mayor of Baltimore* v. *Smith*, 80 Md. 458.

Damages.— Opinion evidence is admissible on the question of the amount of damage caused by the building of a railway. *Lake Roland Ry. Co.* v. *Weir*, 86 Md. 273; *Lake Roland Ry. Co.* v. *Frick*, 86 Md. 259.

Opinion based on hearsay.— A witness may not testify as to the value of certain articles of hardware, when his whole knowledge on the subject is based on information derived from others, and it is possible to produce witnesses who manufacture and sell such articles. *Green* v. *Caulk*, 16 Md. 556.

Opinions as to the value of property must be based upon knowledge and not upon mere hearsay. *Railroad Co.* v. *Shipley*, 39 Md. 251.

Pennsylvania.

Opinion evidence is generally rejected.— *Barre* v. *Railway Co.*, 155 Pa. 170; *Smith* v. *Cohn*, 170 Pa. 132; *Heath* v. *Slocum*, 115 Pa. 549; *Auberle* v. *McKeesport*, 179 Pa. 321; *Cookson* v. *Railway Co.*, 179 Pa. 184; *Graham* v. *Pennsylvania Co.*, 139 Pa. 149.

Opinion as to the cause of an ice jam not received. *Shaw* v. *Susquehanna Boom Co.*, 125 Pa. 324.

Witness' opinion as to whether a certain place on a road was dangerous was excluded. *Kitchen* v. *Union Twp.*, 171 Pa. 145; *Graham* v. *Pennsylvania Co.*, 139 Pa. 149; *Siegler* v. *Mellinger*, 203 Pa. 256.

Opinion evidence not admitted as to the safety of a sluice in a public road. *Platz* v. *McKean Twp.*, 178 Pa. 601.

It was not error to exclude the opinion of a witness that a motorman had used good judgment in allowing his car to proceed. *Woeckner* v. *Motor Co.*, 187 Pa. 206.

Opinion evidence is not proper as to what may have caused trouble between a testator and his wife. *Miller* v. *Miller*, 187 Pa. 572.

Opinion as to one's ability to understand a contract is not admissible. *Aiman* v. *Stout*, 42 Pa. 114.

The attesting witnesses to a deed cannot express their opinion as to the grantor's acting under undue influence. *Dean* v. *Fuller*, 40 Pa. 474.

Legal conclusions.— A witness' opinion that two parties made a contract is not admissible. *Monument Co.* v. *Johnson*, 144 Pa. 61.

The opinion of a secretary of a building association as to whether a person is a member of the association is not admissible. *Building Society* v. *Holt*, 184 Pa. 572.

A railroad inspector cannot give his opinion as to what were the duties of his assistants when the instructions given them are before the court. *Dooner* v. *Canal Co.*, 164 Pa. 17.

A witness must testify as to what was said and done, not as to his opinion of the legal effect of the words and acts. *Irwin* v. *Nolde*, 164 Pa. 205.

Nonexperts.—The opinion of a nonexpert witness cannot be brought out by asking him hypothetical questions. *Beardslee* v. *Columbia Twp.*, 188 Pa. 496; *Graham* v. *Pennsylvania Co.*, 139 Pa. 149; *Dooner* v. *Canal Co.*, 164 Pa. 17; *Cookson* v. *Railway Co.*, 179 Pa. 184; *Auberle* v. *McKeesport*, 179 Pa. 321.

Opinions of nonexperts generally not admissible. *Rouch* v. *Zehring*, 59 Pa. 74.

Nonexpert opinion as to the effect of an injury on health excluded. *Water Co.* v. *Stewartson*, 96 Pa. 436; *Passenger Ry. Co.* v. *Christian*, 124 Pa. 114.

Where description is inadequate.—The opinion of a witness is proper when mere descriptive language is not adequate to convey the facts to the jury. *Whitaker* v. *Campbell*, 187 Pa. 113.

Opinion evidence is not admissible where the circumstances can be fully and accurately described to the jury, and their bearing on the issue estimated without special knowledge or training. *Reese* v. *Clark*, 198 Pa. 312; *Graham* v. *Railroad Co.*, 139 Pa. 149.

A witness who has examined the place of an accident may give his opinion as to its dangerous character. *Beatty* v. *Gilmore*, 16 Pa. 463; *Hughes* v. *Stevens*, 36 Pa. 320; *McNerney* v. *Reading*, 150 Pa. 611. See *Kitchen* v. *Union Twp.*, 171 Pa. 145; *Graham* v. *Pennsylvania Co.*, 139 Pa. 149; *Siegler* v. *Mellinger*, 203 Pa. 256.

Opinion of witnesses of experience admitted to show that one injured acted in the only manner possible. *Kehler* v. *Schwenk*, 151 Pa. 505.

Special knowledge and experience.—Opinions of persons having special knowledge and experience are admissible to show value of property, services, etc. *McElheny* v. *Bridge Co.*, 153 Pa. 108.

It is proper to ask a doctor whether an ax would have caused such a wound as was found on deceased's head. *Com.* v. *Bubnis*, 197 Pa. 542.

One must be shown to be competent before he may express his opinion. *Wallace* v. *Gas Co.*, 147 Pa. 205; *Lineoski* v. *Coal Co.*, 157 Pa. 153.

Mental capacity.—Opinions of nonexperts are admissible on questions of mental capacity after giving the facts upon which such opinions are based. *Rambler* v. *Tryon*, 7 S. & R. 90; *Wilkinson* v.

Pearson, 23 Pa. 117; *Pidcock* v. *Potter*, 68 Pa. 342; *Titlow* v. *Titlow*, 54 Pa. 216; *Roche* v. *Wegge*, 202 Pa. 169; *Hepler* v. *Hosack*, 197 Pa. 631; *Elcessor* v. *Elcessor*, 146 Pa. 359. But not without stating such facts. *Dickinson* v. *Dickinson*, 61 Pa. 401.

Subscribing witnesses to will may give their opinion as to the testator's sanity without stating the facts upon which such opinion is based. *Logan* v. *McGinnis*, 12 Pa. 27; *Titlow* v. *Titlow*, 54 Pa. 216; *Pidcock* v. *Potter*, 68 Pa. 342; *Wright's Estate*, 202 Pa. 395; *Egbert* v. *Egbert*, 78 Pa. 326.

Laymen allowed to testify that they saw no indication of insanity in an accused, after stating their opportunities of knowledge. *Com.* v. *Gearhardt*, 205 Pa. 387.

Value of land — Authorities.— *Water Co.* v. *Iron Co.*, 84 Pa. 279; *Railway Co.* v. *Robinson*, 38 Leg. Int. 22; *S. C.*, 95 Pa. 426; *Railway Co.* v. *Reed*, 6 Atl. 838; *Railway Co.* v. *Vance*, 115 Pa. 325; *Railway Co.* v. *Playford*, 14 Atl. 355; *Myers* v. *Railway Co.*, 5 Pa. Co. Ct. 634; *Curtin* v. *Railway Co.*, 135 Pa. 20; *Gallagher* v. *Kemmerer*, 144 Pa. 509; *Michael* v. *Pipe-Line Co.*, 159 Pa. 99; *Pennock* v. *Pipe-Line Co.*, 170 Pa. 372.

An opinion as to the value of land given by one never in the neighborhood is not admissible. *Mewes* v. *Pipe-Line Co.*, 170 Pa. 364, 369.

One's opinion as to the value of land is admissible if he is acquainted with land values in the neighborhood. He need not be an expert. *McElheny* v. *Bridge Co.*, 153 Pa. 108; *Pennsylvania, etc., Canal Co.* v. *Bunnell*, 81 Pa. 414; *Lee* v. *Springfield Co.*, 176 Pa. 223.

Opinion evidence as to value of land taken for a reservoir admitted. *Gearhart* v. *Water Co.*, 202 Pa. 292.

The best evidence of the market price of land is the opinion of witnesses in view of the location, productiveness, and prevailing prices in the vicinity. *Railroad Co.* v. *Rose*, 74 Pa. 362; *Railroad Co.* v. *Hiester*, 40 Pa. 53.

Value of chattels.— *Betz* v. *Hummel*, 13 Atl. 938.

Competency on the question of damages.— *Gorgas* v. *Railway Co.*, 144 Pa. 1; *Dawson* v. *Pittsburgh*, 159 Pa. 317; *Lee* v. *Water Co.*, 176 Pa. 223; *Lewis* v. *Water Co.*, 176 Pa. 230.

Real estate agent with experience admitted as an expert to testify as to the damage caused to a lot by the opening of a street. *Darlington* v. *Allegheny City*, 189 Pa. 202.

In proceedings to assess damages, opinion evidence as to value is admissible. *Watson* v. *Railroad Co.*, 37 Pa. 469.

Weight of opinion evidence.— *Hoffman* v. *Bloomsburg R. Co.*, 143 Pa. 503; *Rothchild* v. *Central R. of N. J.*, 163 Pa. 49; *Pannell* v. *Com.*, 86 Pa. 260.

It may be proper for the court to charge that opinion as to one's testamentary capacity is not of as much weight as evidence concerning his business transactions. *Messner* v. *Elliott*, 184 Pa. 41.

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,[2] 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.[3]

It is the duty of the judge to decide, subject to the opinion of the Court above, whether the skill of any person

[2] 1 Smith's Leading Cases, 474 *et seq.:* (note to *Cater* v. *Boehm*, 1663), 28 Vict. c. 18, s. 8.

[3] *Baron de Bode's Case*, 1845, 8 Q. B. 267; *Di Sora* v. *Phillipps*, 1863. 10 H. L. Ca. 624; *Castrique* v. *Imrie*. 1870, L. R. 4 H. L. at p. 434: see, too, *Picton's Case*, 1806. 30 S. T. 510 *et seq.*

in the matter on which evidence of his opinion is offered is sufficient to entitle him to be considered as an expert.[4]

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.[5]

Illustrations.

(*a*) The question is, whether the death of A was caused by poison.

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.[6]

(*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.[7]

(*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.[8]

(*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.

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[4] *Bristow* v. *Sequeville*, 1850, 6 Ex. 275; *Rowley* v. *L. & N. W. Railway*, 1873, L. R. 8 Ex. 221. *In the Goods of Bonelli*, 1875, L. R. 1 P. D. 69; and see *In the Goods of Dost Aly Khan*, 1880, L. R. 6 P. D. 6.

[5] 1 Ph. 520; Taylor, 1421.

[6] *R.* v. *Palmer*, 1856 (*passim*). See my 'History of Crim. Law,' iii. 389.

[7] *R.* v. *Dove*, 1856 (*passim*). 'History Crim. Law,' iii. 426.

[8] 28 Vict. c. 18, s. 8.

AMERICAN NOTES.

General.

Authorities.— Lawson on Expert and Opinion Evidence (2d ed.), chaps. 1–7; 12 Am. & Eng. Encyclopædia of Law (2d ed.), p. 414 *et seq.*

First paragraph of text. *Page* v. *Parker*, 40 N. H. 47, 58; *Hammond* v. *Woodman*, 41 Me. 177, 66 Am. Dec. 219, n.; *Spring Co.* v. *Edgar*, 99 U. S. 645, 657; *Coyle* v. *Com.*, 104 Pa. St. 117; *Muldowney* v. *Ill. Cent. R. Co.*, 36 Ia. 462. See *Louisville, etc., R. Co.* v. *Lucas*, 119 Ind. 583.

Subjects of expert testimony.— The test as to the admissibility of expert testimony is not whether the subject-matter is uncommon, or whether many have knowledge of it, but whether the witnesses have any peculiar knowledge or experience not common to the world. *Taylor* v. *Monroe*, 43 Conn. 44.

Within the meaning of the rule, every business or employment which has a particular class devoted to its pursuit is a science or art. Lawson on Expert and Opinion Evidence (2d ed.), p. 3.

Among the persons whose testimony may be admitted as that of experts are the following: Assayers. *State* v. *Knight*, 43 Me. 19. Photographers. *Marston* v. *Dingley*, 88 Me. 546. Surveyors. *Barron* v. *Cobleigh*, 11 N. H. 557, 35 Am. Dec. 505; *Wallace* v. *Goodale*, 18 N. H. 439.

The following are proper subjects of expert evidence: How much sand is used with a cask of lime. *Miller* v. *Shay*, 142 Mass. 598.

Whether the end of a drain in a cellar should be open. *Stead* v. *Worcester*, 150 Mass. 241.

As to the normal condition of the private parts of a girl. *Com.* v. *Lynes*, 142 Mass. 577.

But not whether a certain piece of land is large enough for a house and stable. *Pierce* v. *Boston*, 164 Mass. 92.

He may testify as to the cause of death. *Com.* v. *Thompson*, 159 Mass. 56.

The law of the forum cannot be proved by the testimony of lawyers. *Gaylor's Appeal*, 43 Conn. 82.

Foreign law.— *Barrows* v. *Downs*, 9 R. I. 447, 11 Am. Rep. 283; *Charlotte* v. *Chouteau*, 33 Mo. 194, 200.

The common law of another State may be proven by expert evidence. *Jenne* v. *Harrisville,* 63 N. H. 405; *Ennis* v. *Smith,* 14 How. (U. S.) 400; *Mowry* v. *Chase,* 100 Mass. 79; *In re Roberts' Will,* 8 Paine (U. S.), 446.

Practicing lawyers of another State may testify as to the law of that State. *Dyer* v. *Smith,* 12 Conn. 386. But in some States one need not be a practitioner. *Seckinger* v. *Mfg. Co.,* 129 Mo. 590; *Mowry* v. *Chase,* 100 Mass. 79.

A magistrate, who is not a lawyer, may be a competent witness as to the law of his jurisdiction. *Rickard* v. *Bailey,* 26 N. H. 169. To the same effect is *Hall* v. *Costello,* 48 N. H. 179.

In the absence of proof of a foreign law, the common law of the forum is applied. *Carpenter* v. *Grand Trunk R. R. Co.,* 72 Me. 388; *O'Reilly* v. *N. Y., etc., R. R. Co.,* 16 R. I. 389; *Musser* v. *Stauffer,* 178 Pa. St. 99; *Slaughter* v. *Bernards,* 88 Wis. 111.

In the absence of proof, the foreign law is presumed to be the same as that of the forum. *Kelley* v. *Kelley,* 161 Mass. 111; *Dickson* v. *United States,* 125 Mass. 311; *McIntyre* v. *B. & M. R. R. Co.,* 163 Mass. 189.

A printed book, purporting to be a copy of the statutes of another State, is not evidence of such statutes. *Bostwick* v. *Bogardus,* 2 Root (Conn.), 250.

To prove a foreign written law, expert evidence is admissible either with or without a copy of such law. *Barrows* v. *Downs,* 9 R. I. 446.

As to proving laws and treaties of the United States, see U. S. Rev. Stat., sec. 908.

As to authentication of the laws of other States and territories of the United States and countries subject to its jurisdiction, see U. S. Rev. Stat., sec. 905.

In some States, by statute, the law reports of another State may be read in evidence. Maine Rev. Stat., chap. 82, secs. 108, 109; 2 How. Stat. (Mich.) 7508, 7509.

Examination of handwriting.— *Withee* v. *Rowe,* 45 Me. 571, 589; *Moody* v. *Rowell,* 17 Pick. (Mass.) 490, 28 Am. Dec. 317.

Question of qualification for the judge.— Sustaining text. *Perkins* v. *Stickney,* 132 Mass. 217; *Hawks* v. *Charlemont,* 110 Mass. 110; *Com.* v. *Williams,* 105 Mass. 68; *Struthers* v. *Phila., etc., R. Co.,* 174 Pa. St. 291; *Stillwell, etc., Co.* v. *Phelps,* 130 U. S. 520. See *Stevens* v. *Minneapolis,* 42 Minn. 136; *State* v. *Main,* 69 Conn. 141.

Testimony as to facts.—*Spear* v. *Richardson*, 37 N. H. 23, 34; *Dexter* v. *Hall*, 15 Wall. 9, 26; *Quinn* v. *Higgins*, 63 Wis. 664, 53 Am. Rep. 305 and note; *Walker* v. *Rogers Exr.*, 24 Md. 232, 242.

Form of question.—*Jewett* v. *Brooks*, 134 Mass. 505; *Meeker* v. *Meeker*, 74 Ia. 352; *Hicks* v. *Citizens' R. Co.*, 124 Mo. 115.

It is the proper way, in examining an expert, to state all the particulars upon which his opinion is sought. But the direction of the matter lies within the discretion of the presiding judge. *Roraback* v. *Pennsylvania Co.*, 58 Conn. 294.

Where an expert is asked his opinion upon certain facts proved, the weight of authority is that the facts should be stated in the question. *Barber's Appeal*, 63 Conn. 408.

Qualification.— The acceptance of a public office and the performance of its duties are circumstances which a court may consider in determining whether to permit the incumbent to testify as an expert in matters relating to his duty, even if he should not be regarded as presumably qualified by virtue of his office. *State* v. *Main*, 69 Conn. 124.

Question of qualification.— The court in determining the competency of an expert need not confine itself to his statements, but may consider the evidence of other witnesses in regard to such competency. *Wright* v. *Schnaier*, 70 N. Y. Supp. 128.

A person in reality a medical expert can give his opinion, although he has no license to practice; however, the court will receive his testimony only when made satisfied of his competency as an expert. *People* v. *Rice*, 54 N. E. 48, 159 N. Y. 400.

Subjects not properly for expert evidence.— Experts cannot testify as to matters of common knowledge. *C. & A. Ry. Co.* v. *Lewondowski*, 190 Ill. 301, 60 N. E. 497; *Brewster* v. *Weir*, 93 Ill. App. 588; *North Kankakee St. R. R. Co.* v. *Blatchford*, 81 Ill. App. 609; *Hughes* v. *Richter*, 161 Ill. 409.

The condition of a bridge at the time of an accident is not a subject of expert evidence. *T., P. & W. R. R. Co.* v. *Conroy*, 68 Ill. 560.

Whether one is drunk or not does not present a question for expert testimony. *Aurora* v. *Hillman*, 90 Ill. 61; *Dimmick* v. *Downes*, 82 Ill. 570.

The location of the line of danger from passing trains is not a proper subject of expert testimony. *C. & N. Ry. Co.* v. *Moranda*, 108 Ill. 576.

Defining terms.— Experts may define terms of art. *Reed* v. *Hobbs,* 2 Scam. 297; *Jupitz* v. *People,* 34 Ill. 516.

Putting expert in place of jury.— The experts, in their opinions, cannot pass upon the question to be submitted to the jury. *Hoener* v. *Koch,* 84 Ill. 408; *Myers* v. *Lockwood,* 85 Ill. App. 251; *C., R. I. & P. R. R. Co.* v. *Moffitt,* 75 Ill. 524; *Pyle* v. *Pyle,* 158 Ill. 289.

Qualifying expert.— Before giving his opinion, an expert must qualify as an expert. *McCormick H. M. Co.* v. *Burandt,* 37 Ill. App. 167.

In order to be an expert witness, one must have had experience. *Citizens' Gaslight & Heat. Co.* v. *O'Brien,* 15 Ill. App. 400.

An expert must be qualified by experience as well as knowledge of theory. *Citizens' Gaslight & Heat. Co.* v. *O'Brien,* 15 Brad. 400.

A witness, in order to give an opinion, must have an acquaintance with the subject-matter. *M. W. S. El. R. R. Co.* v. *Dickinson,* 161 Ill. 22.

Lawyers as experts.— Lawyers may testify as experts. *L., N. A. & C. Ry. Co.* v. *Wallace,* 136 Ill. 92.

Experts cannot construe a contract. *Lord* v. *Owen,* 35 Ill. App. 383.

Title cannot be proved by the opinion of lawyers. *Leahy* v. *Hair,* 33 Ill. App. 461, 464; *Mead* v. *Altgeld,* 33 Ill. App. 373, 381.

Physicians as experts.— Medical men may testify as experts. *S., N. A. & C. R. R. Co.* v. *Shires,* 108 Ill. 617.

Physicians may testify as to the union of broken bones and as to the advisability of an operation. *Morton* v. *Zwierzykowski,* 192 Ill. 328, 61 N. E. 413, affirming 91 Ill. App. 462.

An attending physician may testify as to the probable effect of an injury. *T., W. & W. Ry. Co.* v. *Baddeley,* 54 Ill. 20.

The fact of paralysis may be proved by an expert. *C. W. D. Ry. Co.* v. *Lambert,* 119 Ill. 257.

A surgeon may testify whether external violence might produce a certain result. *L. E. & W. R. R. Co.* v. *Wills,* 39 Ill. App. 655; *Wabash West. Ry. Co.* v. *Friedman,* 41 Ill. App. 275.

A medical witness may testify that a given accident would be apt to result in a given injury. *Illinois Cent. R. R. Co.* v. *Treat,* 75 Ill. App. 327. Compare *Chicago St. Ry. Co.* v. *Smith,* 69 Ill. App. 69.

The chance of survival of a seven months' child may be shown by expert evidence. *People* v. *Johnson,* 70 Ill. App. 634.

An expert may testify as to whether or not a child of thirteen months was probably a seven months' child. *People* v. *Johnson,* 70 Ill. App. 634.

A physician may give his opinion as to the effect of injuries. *S. C. Ry. Co.* v. *Welsch,* 155 Ill. 511.

An expert cannot testify as to the effect of morphine on a person whose brain is affected. *Ætna Ins. Co.* v. *Shoemaker,* 59 Ill. App. 643.

The jury may determine damages in personal injury cases without opinion evidence. *Norton* v. *Volzke,* 158 Ill. 402.

Expert testimony as to the period of gestation, in a bastardy case, is admissible in evidence. *People* v. *Johnson,* 70 Ill. App. 634.

Form of question.—Hypothetical questions are admissible. *C. & A. Ry. Co.* v. *Harrington,* 192 Ill. 9, 61 N. E. 622, affirming 90 Ill. App. 638; *G. L. Co.* v. *Wiggin,* 52 Ill. App. 69; *T. Mfg. Co.* v. *Hoyle,* 39 Ill. App. 539; *M'Fall* v. *Smith,* 32 Ill. App. 463, 472.

If the evidence introduced tends to establish the facts assumed in a hypothetical question, it is proper to allow the question. *People* v. *Johnson,* 70 Ill. App. 634.

Hypothetical questions are proper on cross-examination to test the skill and accuracy of an expert. *West Chicago St. Ry. Co.* v. *Fishman,* 169 Ill. 196, 48 N. E. 447.

All material undisputed facts bearing on the matter should be included in a hypothetical question. *Catlin* v. *Traders' Ins. Co.,* 83 Ill. App. 40; *Levison* v. *Sands,* 81 Ill. App. 578; *Decatur* v. *Fisher,* 63 Ill. 241.

Hypothetical questions based upon facts as each other's evidence are admissible in examining an expert. *Frambers* v. *Risk,* 2 Brad. 499.

Railway experts — Engineers.—An expert may testify as to the efficiency of a spark-arresting device. *Evansville R. R. Co.* v. *Keith,* 8 Ind. App. 57.

The engineer cannot testify that the blowing of a whistle was unnecessary. *Chicago, etc., R. Co.* v. *Cummings,* 24 Ind. App. 192.

A railroad man can testify as to the danger of running a train backwards. *Chicago, etc., R. Co.* v. *Grim,* 25 Ind. App. 494.

The relative manner of coupling cars equipped with single and double deadwoods, and the increased danger attending the coupling of cars constructed with the latter, are proper subject for expert testimony. *Louisville, etc., Ry. Co.* v. *Frawley,* 110 Ind. 18, 27.

A man who has handled hand cars, or assisted in their management, may express an opinion as to the rate of speed at which a hand car was moving. *Evansville, etc., R. R. Co.* v. *Crist*, 116 Ind. 446, 457.

A competent expert may give an opinion as to the distance at which it is safe to stop before going upon a crossing. *N. Y., etc., Ry. Co.* v. *Grand Rapids, etc., R. R. Co.*, 116 Ind. 60, 63.

Whether a railroad was finished at a certain date is a question of fact, involving science and skill, and not a mixed question of law and fact, and the opinion of experts is admissible concerning it. *Hilton* v. *Mason*, 92 Ind. 157, 168.

Expert contractors in railroad building, may testify that, but for delays caused by the railroad company and its engineers, the work contracted for could have been completed in the time fixed in the contract. *Louisville, etc., Ry. Co.* v. *Donnegan*, 111 Ind. 179, 191.

Mechanical experts.— Bridge builders may state whether, if a bridge had been kept in repair, it would have borne safely a certain load. *Bonebrake* v. *Board, etc.*, 141 Ind. 62.

One experienced in handling derricks may testify as to whether a particular rope used with a derrick was of sufficient strength. *Con. Stone Co.* v. *Williams*, 26 Ind. App. 131.

Expert evidence as to how far a cage in a mine would drop before the safety catch would stop it is admissible. *Diamond, etc., Co.* v. *Edmonson*, 14 Ind. App. 594.

An expert may testify as to whether a complicated machine can do the work for which it was intended. *Buckeye Mfg. Co.* v. *Woolley, etc., Works*, 26 Ind. App. 7.

Experts may testify as to similar appliances. *Indiana Bituminous Coal Co.* v. *Buffey*, 62 N. E. 279.

Where the defendant produced an expert witness who testified as to the result of an examination of the heel of a boot worn by the deceased at the time of the accident, it was proper for the court to permit the plaintiff to introduce a shoemaker as a witness in rebuttal on this question. *Lake Erie, etc., R. R. Co.* v. *Mugg*, 132 Ind. 168, 175.

A machinist who repaired an engine two years after its purchase may testify to defects in its structure and general character, where the issue is to its fulfillment of the warranty given upon its sale. *National Bank, etc., Co.* v. *Dunn*, 106 Ind. 110, 114.

Value of property and services.— It is competent to prove values by witnesses who have a knowledge of the matter in controversy, and a proper acquaintance with the general value of services, articles, or things of like character. *Bowen* v. *Bowen*, 74 Ind. 470; *Smith* v. *Indianapolis, etc., Ry. Co.* 80 Ind. 233, 235; *Ætna Life Ins. Co.* v. *Nexsen*, 84 Ind. 347, 351; *Yost* v. *Conroy*, 92 Ind. 464; *Terre Haute, etc., R. R. Co.* v. *Crawford*, 100 Ind. 550, 556; *City of Lafayette* v. *Nagle*, 113 Ind. 425, 428; *Evansville, etc., R. R. Co.* v. *Feltig*, 130 Ind. 61, 63; *Grave* v. *Pemberton*, 3 Ind. App. 71, 73; *Soy* v. *Petty*, 3 Ind. App. 241, 244.

Experts may testify as to the value of property or services. *Board* v. *Chambers*, 75 Ind. 409; *Penn. Co.* v. *Hunsley*, 23 Ind. App. 37 (land); *Huber* v. *Beck*, 6 Ind. App. 484 (growing crop).

The best and only legitimate evidence of the value of land at the time of its sale is the opinion of witnesses who have personal knowledge of the land, and, from their own observation, have become acquainted with its value. *Crouse* v. *Holman*, 19 Ind. 30.

One who has examined property and inquired of qualified persons as to its value may testify to its value, although not a resident of the city where it is situated. *Jones* v. *Snyder*, 117 Ind. 229, 232.

A witness is not competent to testify as to how much a person's life-estate would be worth at sheriff's sale, considering his age and physical condition, when he is not shown to have the slightest knowledge of the matter upon which he necessarily gave an opinion in answering the question, viz.: upon the effect of the person's physical condition upon his expectancy of life. *Wilson* v. *Bennett*, 132 Ind. 210, 211.

Every person who has arrived at the age of maturity must have had more or less experience in caring for the sick or seeing it done, and when one has seen such services as they are being rendered, he is competent to give facts and then his opinion as to the value of such services, the weight of such evidence to be determined by the jury. *Stomis* v. *Lemon*, 7 Ind. App. 435, 437.

In an action by a physician for services rendered in conducting post-mortem examinations for the coroner, it is immaterial, in determining the value of such services, what is or has been the average daily income of such physician from his profession. *Board, etc.* v. *Chambers*, 75 Ind. 409, 410.

Where in such action expert witnesses testified as to the value of such services, there was no error in refusing to strike out such evidence. *Soy* v. *Petty*, 3 Ind. App. 241, 244.

Evidence as to the price other physicians could have been procured to perform such services was incompetent. *Soy* v. *Petty*, 3 Ind. App. 241, 244.

Works of science, scientific facts.— The rule that scientific publications are not admissible in evidence does not, of course, prevent their use as a means of ascertaining the learning and the competency of an expert. They may be referred to on cross-examination, and an expert may be asked if he has read them; if he agrees with the conclusions of their authors, the questions based upon their contents may be asked. *Hess* v. *Lowrey*, 122 Ind. 233.

An expert may not only give his opinion, but may state facts which are the result of scientific knowledge or professional skill. *Jones* v. *Angell*, 95 Ind. 376, 378.

The phase of the moon and the condition of the atmosphere on a given night may be shown to the jury, but experts cannot testify as to the quantity and quality of the light. *Green* v. *State*, 154 Ind. 655.

Testamentary capacity.— On questions of testamentary capacity, evidence as to the capacity of the testator to do business is incompetent. *Brackney* v. *Fogle*, 156 Ind. 535.

Surveyors and engineers.—A civil engineer may testify as to whether a hole was dangerous and needed protection. *Cross* v. *Lake Sh. & M. S. R. R. Co.*, 69 Mich. 363.

A surveyor may state his opinion that the corners of land in dispute were in accordance with the original government survey. *Hockmoth* v. *DesGrands Champs*, 71 Mich. 520.

A surveyor's testimony as to a fence is admissible only in connection with his data. *Jones* v. *Lee*, 77 Mich. 35.

Boundary lines cannot be proven by the opinions of surveyors. *Burt* v. *Busch*, 82 Mich. 506.

New Jersey.

Subjects of expert testimony.— Opinions of experts are not admissible as to matters of common knowledge and experience. *New Jersey Traction Co.* v. *Brabban*, 57 N. J. L. 691.

Expert opinion not admissible on matters of which nonexperts are competent to judge. *Cook* v. *State*, 4 Zab. 844.

Expert opinion not admissible on a matter which it is the jury's function to determine. *Traction Co.* v. *Bliss*, 62 N. J. L. 410.

Expert opinion not admissible to prove that a foreigner was able to use and understand certain English words. *Koccis* v. *State*, 56 N. J. L. 44.

Qualification as an expert.— The qualification of an expert requires either study or practice, not mere observation. *Wheeler & Wilson Co.* v. *Buckhout*, 60 N. J. L. 102.

Witness' opinion competent only when he has special knowledge on the subject. *Laing* v. *United N. J. R. & C. Co.*, 54 N. J. L. 576.

Opinion of a miller as to quantity of grain a mill could grind. *Read* v. *Barker*, 30 N. J. L. 378, 32 N. J. L. 477.

Experienced fireman an expert as to the increased risk from fire because of alterations in a building. *Schenck* v. *Insurance Co.*, 4 Zab. 448.

A farmer is an expert as to damage caused by a railroad to land due to the changed agricultural conditions but not as to the damage caused by the exposure to fire. *Pennsylvania R. Co.* v. *Root*, 53 N. J. L. 253.

The decision of the trial court as to whether a witness is qualified as an expert is conclusive unless very clearly wrong. *New Jersey Zinc Co.* v. *Lehigh Zinc Co.*, 59 N. J. L. 189.

Laws of another State.— The existence and meaning of written and unwritten laws of another State may be proved by opinions of expert witnesses. *Trust Co.* v. *Potteries Co.*, 56 N. J. Eq. 441.

Opinions of medical experts.— *State* v. *Powell*, 2 Hal. 244; *Castner* v. *Sliker*, 33 N. J. L. 95, 507.

Expert opinion as to probable duration of disability is admissible. even though based in part upon statements made by the disabled person. *Consolidated Traction Co.* v. *Lambertson*, 59 N. J. L. 297.

Value.— Real estate agents as experts on the subject of rents. *Haulenbeck* v. *Conkright*, 23 N. J. Eq. 407.

As to opinion of real estate dealers as to value of a certain lot, see *Laing* v. *United N. J. R. Co.*, 54 N. J. L. 576.

Expert testimony as to the value of shade trees to a lot. *Elvins* v. *Telegraph Co.*, 63 N. J. L. 243.

Expert opinion not admitted to show difference in value of property caused by the construction of a railroad. *Thompson* v. *Pennsylvania R. Co.*, 51 N. J. L. 42.

Handwriting.— Expert testimony admissible as to handwriting. *West* v. *State*, 2 Zab. 212.

Qualification of a handwriting expert. *Wheeler & Wilson Co.* v. *Buckhout*, 60 N. J. L. 102.

The opinion of a handwriting expert is of little weight unless accompanied by an ocular demonstration. *Gordon's Case*, 50 N. J. Eq. 397, 52 N. J. Eq. 317.

Evidence of handwriting experts is of low degree. *Life Ins. Co.* v. *Brown*, 30 N. J. Eq. 193, 32 N. J. Eq. 809.

Hypothetical questions.— Opinion of an expert as to the cause of an accident must be elicited by hypothetical questions unless he personally knows all the facts. *Traction Co.* v. *Bliss*, 62 N. J. L. 410.

Form of hypothetical questions put to an expert. *Lindenthal* v. *Hatch*, 61 N. J. L. 29.

The fact that an expert has an interest affects the weight of his testimony, not its competency. *New Jersey Zinc Co.* v. *Lehigh Zinc Co.*, 59 N. J. L. 189.

Maryland.

Subjects of expert testimony.— Expert testimony is admissible as to matters requiring special experience or study. *Davis* v. *State*, 38 Md. 15.

Expert evidence is not admissible as to matters which can be determined without special skill or study and the jury can themselves decide upon the facts. *Stumore* v. *Shaw*, 68 Md. 11; *Hardy* v. *Chesapeake Bank*, 51 Md. 562.

Expert opinion is not admissible upon questions concerning which the jury are competent to form an opinion. *Berry* v. *Safe Deposit Co.*, 96 Md. 45; *Bank* v. *Manion*, 87 Md. 68.

Qualification as an expert.— An experienced grazier is qualified as an expert concerning matters likely to affect the health of cattle. *B. & O. R. Co.* v. *Thompson*, 10 Md. 76.

The trial court's ruling as to the competency of one to testify as an expert is reviewable on appeal. *Dashiell* v. *Griffith*, 84 Md. 363.

One not an expert is competent to describe a person's physical appearance after an injury. *Baltimore, etc., Ry. Co.* v. *Nugent*, 86 Md. 349.

Manner of eliciting expert opinion.— An expert who has heard all the testimony given as to the sanity of a person may be asked his opinion thereon, on the supposition that such testimony is true. *Jerry* v. *Townshend*, 9 Md. 145. But see *B. & O. R. Co.* v. *Thompson*, 10 Md. 76.

When an expert has heard the evidence which has been given, he may be asked his opinion thereon, assuming it to be true, without putting it in the form of a hypothetical question. *Passenger Ry. Co.* v. *Tanner*, 90 Md. 315.

Hypothetical questions.— Hypothetical questions asked experts are improper unless they present the facts fairly as they have actually been given in evidence. *The Berry Will Case*, 93 Md. 560.

Where the facts are yet to be determined by the jury, the opinion of an expert must be elicited by hypothetical questions. *Walker* v. *Rogers*, 24 Md. 237; *Jerry* v. *Townshend*, 9 Md. 145.

If the facts as to an injury are doubtful a physician may give his opinion as an expert upon a hypothetical case. *Turnpike Co.* v. *Cassell*, 66 Md. 419.

As to form of hypothetical questions, see *Williams* v. *State*, 64 Md. 384.

Medical experts.— *Passenger Ry. Co.* v. *Tanner*, 90 Md. 315.

A medical expert may testify as to what in his opinion caused a hole in the skull of deceased. *Davis* v. *State*, 38 Md. 15.

An attending physician is competent to testify as to the capacity of a testator, without stating the facts upon which his opinion is based. *Crockett* v. *Davis*, 81 Md. 134.

A medical expert may testify whether an abnormal condition could have been caused by the injury in question. *United Railways Co.* v. *Seymour*, 92 Md. 425.

Expert testimony to show a woman incapable of having issue is not admissible, for purpose of dissolving a trust for her children. *Ricards* v. *Safe Deposit Co.*, 55 Atl. 384.

The testimony of a medical expert as to the sanity of a testator whom he has never seen is not properly admissible when there is no evidence before the court indicating insanity. *Berry* v. *Safe Deposit Co.*, 96 Md. 45.

A medical expert may testify as to the effect of a disease upon the intellectual faculties. *Berry* v. *Safe Deposit Co.*, 96 Md. 45.

A medical expert may testify as to whether a woman had ever had a child. *Jackson* v. *Jackson*, 80 Md. 176.

Expert opinion is admissible as to the nature and effect of an injury and also as to how it was caused. *Williams* v. *State*, 64 Md. 384.

Laws of another State.— The unwritten law of another State may be proved by the testimony of one acquainted with it. *Green* v.

Trieber, 3 Md. 11; *Wilson* v. *Carson*, 12 Md. 54; *Railroad Co.* v. *Glenn*, 28 Md. 287; *Zimmerman* v. *Helser*, 32 Md. 274.

A practicing lawyer is qualified to testify as to what are the requisites of a valid marriage in his State. *Jackson* v. *Jackson*, 82 Md. 17.

A lawyer of mature age who resides in another State is qualified as an expert as to the law of that State. *Insurance Co.* v. *Cashow*, 41 Md. 59.

Pennsylvania.

Subjects of expert testimony.— Practical railroad men may testify as to safe methods of passing trains on a one-track road. *Lewis* v. *Seifert*, 116 Pa. 628.

Expert evidence as to a defect in a freight car. *Dooner* v. *Canal Co.*, 164 Pa. 17.

Expert evidence is admissible on the question of whether an examination for coal has been thorough and exhaustive. *Wells* v. *Leek*, 151 Pa. 431.

Expert opinion as to whether a title is good is not admissible. *Murray* v. *Ellis*, 112 Pa. 485.

Expert or other opinion is not admissible as to matters that can be adequately described to the jury so that ordinary men can estimate their true bearing upon the issue. *Whitaker* v. *Campbell*, 187 Pa. 113; *Musick* v. *Latrobe Borough*, 184 Pa. 375; *Dooner* v. *Canal Co.*, 164 Pa. 17.

Science and art.— Expert opinion receivable on questions of science. *Forbes* v. *Caruthers*, 3 Yeates, 527; *O'Mara* v. *Com.*, 75 Pa. 424; *Coyle* v. *Com.*, 104 Pa. 117.

Technical terms.— Expert testimony as to the meaning of technical terms. *Miller* v. *Railway Co.*, 179 Pa. 350.

Insurance risk.— Expert evidence is not admissible to show that the danger from fire has been increased. *Fire Ins. Co.* v. *Gruver*, 100 Pa. 266.

An expert in life insurance is competent as to the relative hazard of different occupations. *Hartman* v. *Insurance Co.*, 21 Pa. 466.

Questions of law.— The testimony of persons not lawyers of the particular State, if they are acquainted with the law, is admissible. *American Life Ins. Co.* v. *Rosenagle*, 77 Pa. 507.

A Maryland lawyer is competent as an expert on Maryland law. *Bollinger* v. *Gallagher*, 163 Pa. 245, 170 Pa. 84.

Expert testimony as to the patentable character of an invention. *Haley* v. *Flaccus*, 193 Pa. 521.

In the absence of proof of a foreign law, the common law of the forum is applied. *Musser* v. *Stauffer*, 178 Pa. 99.

Handwriting.— Expert evidence as to handwriting. *Ulmer* v. *Gentner*, 3 Penny. 453; *Graham* v. *Spang*, 16 Atl. 91.

Expert opinion is admissible to prove handwriting. *Travis* v. *Brown*, 43 Pa. 9; *Fulton* v. *Hood*, 34 Pa. 365; *Burkholder* v. *Plank*, 69 Pa. 225; *Ballentine* v. *White*, 77 Pa. 20.

Forgery.— Expert testimony in forgery and counterfeiting. Pepper & Lewis' Digest of Laws, "Criminal Procedure," sec. 85; "Witnesses," sec. 7.

The evidence of a handwriting expert alone is not sufficient to establish forgery. *Bank* v. *Haldeman*, 1 P. & W. 161; *Travis* v. *Brown*, 43 Pa. 9.

Handwriting experts permitted to testify to other facts in connection with writing besides its genuineness. *Travis* v. *Brown*, 43 Pa. 9.

Value.— *Boteler* v. *Phila., etc., R. Co.*, 164 Pa. 397; *Fire Ins. Co.* v. *Braden*, 96 Pa. 81; *Mish* v. *Wood*, 34 Pa. 451.

One may become qualified to give opinion as to value by making inquiries for the purpose. *O'Brien* v. *Railroad Co.*, 194 Pa. 336.

Damages.— Earning power of an individual is not a subject for expert testimony. *Goodhart* v. *Penna. R. Co.*, 177 Pa. 1.

Expert medical testimony.— *Com.* v. *Buccieri*, 153 Pa. 535.

A medical expert is competent on questions of mental capacity. *Bitner* v. *Bitner*, 65 Pa. 347; *Pidcock* v. *Potter*, 68 Pa. 342.

Medical experts as to the nature and properties of powders. *Mertz* v. *Detweiler*, 8 W. & S. 376.

Expert opinion as to length of time one might have lived and been useful to his family. *Penna. R. Co.* v. *Henderson*, 51 Pa. 315.

Expert opinion is allowed as to the permanency of an injury. *Wilt* v. *Vickers*, 8 Watts, 227.

Evidence of physician that certain spots on overalls were blood admissible. *Com.* v. *Crossmire*, 156 Pa. 304. See *McLain* v. *Com.*, 99 Pa. 86.

Whether a horse died of fright or of disease. *Piollet* v. *Simmers*, 106 Pa. 95.

Hypothetical questions.— *Olmsted* v. *Gere,* 100 Pa. 127; *Miller's Estate,* 26 Pittsb. Leg. J. (N. S.) 428; *Reber* v. *Herring,* 115 Pa. 599.

Competency of experts.— *Perry* v. *Jensen,* 142 Pa. 125 (advertising business); *Ballard* v. *Erie R. Co.,* 126 Pa. 141 (construction of railroad); *Hass* v. *Marshall,* 14 Atl. 421 (chemist); *Lincoski* v. *Susq. Coal Co.,* 157 Pa. 153 (coal mining); *Schaeffer* v. *Phila. & R. R. Co.,* 168 Pa. 209 (mules injured in shipping); *Fraim* v. *Fire Ins. Co.,* 170 Pa. 151; *Griswold* v. *Gebbie,* 126 Pa. 353 (value of real estate); *Spring City Gaslight Co.* v. *Penna., etc., R. Co.,* 167 Pa. 6 (same); *Struthers* v. *Phila., etc., R. Co.,* 174 Pa. 291 (same).

A woman who has borne four children may testify as to whether a child was fully developed at birth. *Appeal of Allen,* 99 Pa. 196.

An undertaker's assistant held not to be qualified as an expert to testify as to when *rigor mortis* sets in after death. *Com.* v. *Farrell,* 187 Pa. 408.

An estimate of an experienced builder is competent evidence as to the value of carpenter work. *Worden* v. *Connell,* 196 Pa. 281.

A surveyor as an expert on questions of boundary. *Kinley* v. *Crane,* 34 Pa. 146.

One expert may testify as to the skill of another. *Laros* v. *Com.,* 84 Pa. 200.

The warden of a penitentiary allowed to testify that feigning insanity is common among criminals, and that experts have often been deceived. *Com.* v. *Wireback,* 190 Pa. 138.

Questions for the trial court.— Whether a witness is an expert and whether the subject requires expert testimony are matters mainly within the discretion of the trial judge. *Ryder* v. *Jacobs,* 182 Pa. 624; *Oil Co.* v. *Gilson,* 63 Pa. 146; *Sorg* v. *St. Paul,* 63 Pa. 156; *Towboat Co.* v. *Starrs,* 69 Pa. 36; *Stevenson* v. *Coal Co.,* 203 Pa. 316; *Struthers* v. *Phila. R. Co.,* 174 Pa. 291.

Expert opinion based upon the testimony of others.— *Yardley* v. *Cuthbertson,* 108 Pa. 395.

Expert testimony as to sanity not allowed when based on the testimony of others and the facts are controverted. *Coyle* v. *Com.,* 104 Pa. 117.

ARTICLE 50.*

FACTS BEARING UPON OPINIONS OF EXPERTS.

Facts, not otherwise relevant, have in some cases been permitted to be proved, as supporting or being inconsistent with the opinions of experts.

Illustrations.

(*a*) The question was, whether A was poisoned by a certain poison.

The fact that other persons, who were poisoned by that poison, exhibited certain symptoms alleged to be the symptoms of that poison, were deemed to be relevant.[9]

(*b*) The question is, whether an obstruction to a harbour is caused by a certain bank. An expert gives his opinion that it is not.

The fact that other harbours similarly situated in other respects, but where there were no such banks,[10] began to be obstructed at about the same time, is deemed to be relevant.

AMERICAN NOTE.

General.

Authorities.— See *Com.* v. *Leach*, 156 Mass. 99; *Lincoln* v. *Taunton Mfg. Co.*, 9 Allen (Mass.), 181; *Tilton* v. *Miller*, 66 Pa. 388;

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* I have altered the wording of this article, so as to make it less absolute than it was in earlier editions. The admission of such evidence is rare and exceptional, and must obviously be kept within narrow limits. At the time of Palmer's trial only two or three cases of poisoning by strychnine had occurred.

[9] *R.* v. *Palmer*, 1856, printed trial, p. 124, &c., 'Hist. Crim. Law,' iii. 389. In this case 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.

[10] *Foulkes* v. *Chadd*, 1782, 3 Doug. 157.

City of Ripon v. *Bittel*, 30 Wis. 614, 619; *City of Bloomington* v. *Shrock*, 110 Ill. 219, 51 Am. Rep. 678.

In an action for injuries against a street railroad company, it is error to admit the testimony of the physician, who examined the passenger a few days before the trial, which takes place about five years after the alleged injury, that his condition as then ascertained might have been either a constitutional ailment or caused by some external force. *Maimone* v. *Dry-Dock, E. B. & B. R. Co.*, 68 N. Y. Supp. 1073. See, also, *Doyle* v. *N. Y. Infirmary*, 80 N. Y. 631.

Reading books to a medical expert is permissible in order to test his knowledge. *City of Bloomington* v. *Shrock*, 110 Ill. 219; *Davison* v. *People*, 90 Ill. 221; *Conn. Mut. Life Ins. Co.* v. *Ellis*, 89 Ill. 516.

Scientific books are not admissible to contradict evidence of experts. *Forest C. Ins. Co.* v. *Morgan*, 22 Ill. App. 198.

If an expert bases his opinion upon an author, books may be read to contradict him. *City of Bloomington* v. *Shroek*, 110 Ill. 219.

The interest of a witness may be shown to affect the value of his opinion evidence. *C. & A. Ry. Co.* v. *Shannon*, 43 Ill. 339.

One who has testified to value may state the reasons for his opinion. *Chicago, etc., R. R. Co.* v. *Kern*, 9 Ind. App. 505. See, also, *Jones* v. *Angell*, 95 Ind. 376, 378.

Experts may give the grounds of their opinions. *Beunk* v. *Valley Desk Co.*, 8 Det. L. N. 767, 87 N. W. 793.

Maryland.

Medical books are not admissible either to support or to contradict an expert. *Davis* v. *State*, 38 Md. 15.

Pennsylvania.

Illustrating text.—*Tilton* v. *Miller*, 66 Pa. 388; *Olmsted* v. *Gere*, 100 Pa. 127.

An expert may be cross-examined as to details on which his opinion is based. *Harris* v. *Schuylkill R. Co.*, 141 Pa. 242.

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.

A person is deemed to be acquainted with the handwriting of another person when he has at any time seen that person write, 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, or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him.[11]

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.[12]

The opinion of E, who saw A write once twenty years ago, is also relevant.[13]

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11 See Illustration.

12 *Doe v. Sackermore*, 1836, 5 A. & E. 705 (Coleridge, J.); 730 (Patteson, J.); 739–740 (Denman, C. J.).

13 *R. v. Horne Tooke*, 1794, 25 S. T. 71–72.

AMERICAN NOTE.

General.

Authorities.— 1 Greenleaf on Evidence (15th ed.), sec. 577; Lawson on Expert and Opinion Evidence (2d ed.), tit. 2, chap. 2; *Hammond's Case*, 2 Greenl. (Me.) 33, 11 Am. Dec. 38; *Keith* v. *Lathrop*, 10 Cush. (Mass.) 453; *People* v. *Molineux*, 168 N. Y. 266.

In case of handwriting the witness states the result of his observation or judgment as a fact rather than an opinion. *Chamberlain* v. *Platt*, 68 Conn. 130.

One who has become familiar with another's handwriting in the course of his business (*e. g.*, as clerk of a court), may testify, although he has never seen him write. *Com.* v. *Carey*, 2 Pick. (Mass.) 47; *Amherst Bank* v. *Root*, 2 Metc. (Mass.) 522; *Berg* v. *Peterson*, 49 Minn. 420; *Rogers* v. *Ritter*, 12 Wall. (U. S.) 317; *Burdell* v. *Taylor*, 89 Cal. 613.

But a teller of a bank does not come within this rule, where he seeks to testify whether some of the checks which went through his hands in the usual way were forged or not. *Brigham* v. *Peters*, 1 Gray (Mass.), 139.

One may be a competent witness to handwriting who cannot read or write. *Foye* v. *Patch*, 132 Mass. 105.

One who has seen him write.— *Diggin's Estate*, 68 Vt. 198; *Com.* v. *Hall*, 164 Mass. 152; *State* v. *Harvey*, 131 Mo. 339; *Karr* v. *State*, 106 Ala. 1; *State* v. *Farrington*, 90 Ia. 673.

It is enough that he has seen him write once to render the testimony competent. *Com.* v. *Nefus*, 135 Mass. 533; *Keith* v. *Lathrop*, 10 Cush. (Mass.) 453; *Brigham* v. *Peters*, 1 Gray (Mass.), 139; *McNair* v. *Com.*, 26 Pa. St. 388; *State* v. *Stair*, 87 Mo. 268.

To prove handwriting of a party, evidence is admissible from one who has seen him write, that he believes the writing in question to be his, but cannot determine it to be his, except by comparing it with other writings proved to be genuine. *Lyon* v. *Lyman*, 9 Conn. 59.

One who has received letters.— *Chaffee* v. *Taylor*, 3 Allen (Mass.), 598; *Clark* v. *Freeman*, 25 Pa. 133; *Thomas* v. *State*, 103 Ind. 419; *Riggs* v. *Powell*, 142 Ill. 453; *Empire Mfg. Co.* v. *Stuart*, 46 Mich. 482. *Compare White* v. *Tolliver*, 110 Ala. 300.

It is not enough that he has seen letters addressed to others. *Neines* v. *Perry*, 113 Mass. 274; *Phila., etc., R. Co.* v. *Hickman*, 28 Pa. 318; *Gibson* v. *Trowbridge Co.*, 96 Ala. 257.

On the question of whether or not the signature to a bill of sale is in the handwriting of a certain party, a witness, after testifying that he is familiar with this party's handwriting by virtue of having received numerous letters from him, may be asked whether or not this signature is that of such party. *Gross* v. *Sormani*, 64 N. Y. Supp. 300, 50 App. Div. 531.

A person is deemed to be acquainted with the handwriting of another so as to be able to give his opinion thereon when he has received letters, subsequently acknowledged by word or acts, to be genuine by the person whose handwriting is questioned. *Johnson* v. *Daverne*, 19 Johns. 134.

Handwriting may be proved by one who has seen letters or who has seen a party write. *Woodford* v. *McClenahan*, 4 Gilm. 85.

Expert evidence is admissible upon questions of forgery. *Pate* v. *People*, 3 Gilm. 644.

Handwriting may be proved by the opinion of experts. *Bowen* v. *A. Nat. Bank*, 39 Ill. App. 579; *Rogers* v. *Tyley*, 144 Ill. 652.

As to opinions with reference to any writing, see *Massey* v. *F. Nat. Bank of Virginia*, 104 Ill. 327; *Snyder* v. *McKeever*, 10 Brad. 188.

One who has seen a party write may testify that he believes that an instrument was signed by him. *Fash* v. *Blake*, 38 Ill. 363.

One who has seen a party write but once is competent. *Cross* v. *People*, 47 Ill. 152.

One may have sufficient knowledge to testify as to handwriting even though he has not seen the party write. *Board of Trustees* v. *Misenheimer*, 78 Ill. 22.

One who has received letters may testify. *Riggs* v. *Powell*, 142 Ill. 453.

Form of question.—A witness as to handwriting should be asked first if he is acquainted with the handwriting, then the manner in which he became acquainted. *Pate* v. *People*, 3 Gilm. 643.

Insufficient basis of knowledge.—A letter purporting to come from one and signed in his name will not furnish a sufficient basis of knowledge to permit the one who received such letter to give an

opinion respecting the genuineness of the signature of the putative writer to another instrument, unless the one whose name was signed to the letter in some manner subsequently acknowledged the signature to be his. *Talbot* v. *Hedge*, 5 Ind. App. 555, 558.

Testimony of a witness who stated that he used to be acquainted with the decedent's signature, but had not seen it for several years; that it looked like and probably might be her signature; that it was probably her signature; that it had a general likeness to her signature as he remembered it, shows such acquaintance with the signature of the decedent as to enable him to have an impression or belief amounting practically to an opinion, the genuineness of the signature being disputed. *Talbot* v. *Hedge*, 5 Ind. App. 555, 556.

New Jersey.

One who has corresponded with a person is a competent witness as to his handwriting. *West* v. *State*, 2 Zab. 212.

But not if he has merely seen writings addressed to others. *Goldsmith* v. *Bane*, 3 Hal. 87.

One who has seen a person write is a competent witness as to his handwriting. *West* v. *State*, 2 Zab. 212; *Cook* v. *Smith*, 30 N. J. L. 387.

But not when he saw the person write for the purpose of thereafter being a witness. *Whitmore* v. *Corey*, 1 Harr. 267.

Maryland.

A witness is competent if he has seen the party write once, or if he has corresponded with such party. *Smith* v. *Walton*, 8 Gill, 77; *Edelen* v. *Bennett*, 8 Gill, 87.

In attacking a witness' opinion as to handwriting, it is permissible to prove that the party's style of writing has changed. *Armstrong* v. *Thurston*, 11 Md. 148.

Pennsylvania.

Authorities.— If the witness says that he believes the handwriting to be that of the person in question, his evidence is admissible. *Watson* v. *Brewster*, 1 Pa. 381; *Cabarga* v. *Seeger*, 17 Pa. 514; *Shitler* v. *Bremer*, 23 Pa. 413; *Clark* v. *Freeman*, 25 Pa. 133.

It is sufficient if the witness testifies that "he knows a paper to

be the handwriting of the party" if the adverse party does not choose to cross-examine. *Whittier* v. *Gould*, 8 Watts, 485.

An opinion may go to the jury even though it be a doubtful one. *Shitler* v. *Bremer*, 23 Pa. 413.

A witness may not testify as to his knowledge of a signature made by making a mark. *Shinkle* v. *Crock*, 17 Pa. 159.

Preliminary proof.— There must be preliminary proof that a witness knows the handwriting before he may give his opinion. *Slaymaker* v. *Wilson*, 1 P. & W. 216; *Taylor* v. *Sutherland*, 24 Pa. 333; *Railroad Co.* v. *Hickman*, 28 Pa. 318.

Witness competent if he has seen person write.— It is enough that he has seen him write once to render the testimony competent. *McNair* v. *Com.*, 26 Pa. 388.

Witness competent who had seen person write his name twice thirty-two years before and once twenty-three years before. *Wilson* v. *Van Leer*, 127 Pa. 371.

A witness is not competent merely because he says he has often seen a person's signature on letters and papers. *Allan* v. *Bahner*, 4 Pa. Co. Ct. 16.

An expert is not competent when the basis of his testimony is that he observed the person write several times for the purpose of testifying later. *Reese* v. *Reese*, 90 Pa. 89.

One who has received letters.— *Clark* v. *Freeman*, 25 Pa. 133.

Witness who has become acquainted with handwriting through an official correspondence is competent to testify as to its genuineness. *Com.* v. *Smith*, 6 S. & R. 568; *U. S.* v. *Simpson*, 3 P. & W. 437.

It is not enough that he has seen letters addressed to others. *Phila., etc., R. Co.* v. *Hickman*, 28 Pa. 318.

ARTICLE 52.

COMPARISON OF HANDWRITINGS.

Comparison of a disputed handwriting with any writing proved to the satisfaction of the judge to be genuine is permitted 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.[14]

AMERICAN NOTE.

General.

Authorities.— 1 Greenleaf on Evidence (15th ed.), sec. 579 *et seq.*; 15 Am. & Eng. Encyclopædia of Law (2d ed.), p. 272; *State* v. *Thompson*, 80 Me. 194; *State* v. *Hastings*, 53 N. H. 452; *Rowell* v. *Fuller*, 59 Vt. 688; Gen. Stats. of Rhode Island, chap. 246, sec. 44. Substantially the English doctrine is held in *Hauriot* v. *Sherwood*, 82 Va. 1; *Andrews* v. *Hayden's Admr.*, 88 Ky. 455; *Powers* v. *McKenzie*, 90 Tenn. 167; *Wilson* v. *Beauchamp*, 50 Miss. 24; *Koons* v. *State*, 36 O. St. 195; *Saukey* v. *Cook*, 82 Ia. 125; *State* v. *Zimmerman*, 47 Kan. 242; *Marshall* v. *Hancock*, 80 Cal. 82; *Holmes* v. *Goldsmith*, 147 U. S. 150; *Costello* v. *Crowell*, 139 Mass. 588; *Costello* v. *Crowell*, 133 Mass. 352; *Com.* v. *Andrews*, 143 Mass. 23; *People* v. *Molineux*, 168 N. Y. 267.

Papers may be admitted in some States for the sole purpose of comparison. *State* v. *Thompson*, 80 Me. 194, 6 Am. St. Rep. 172, 13 Atl. 892; *Com.* v. *Allen*, 128 Mass. 46. *Contra*, *Snider* v. *Burks*, 84 Ala. 53; *People* v. *Parker*, 67 Mich. 222; *State* v. *Thompson*, 132 Mo. 301; *Himrod* v. *Gilman*, 147 Ill. 293; *Hazleton* v. *Union Bank*, 32 Wis. 34; *Stokes* v. *U. S.*, 157 U. S. 187.

On cross-examination a person's signature, written in court, may sometimes be used. *Chandler* v. *Le Barron*, 45 Me. 534. But

[14] 28 Vict. c. 18. s. 8, re-enacting 17 & 18 Vict. c. 125, s. 25, now repealed. See *R.* v. *Silverlock*, [1894], 2 Q. B. 766, where it was held that the solicitor for the prosecution was a proper witness to compare handwriting proved to be that of the prisoner with that in which documents produced by the prosecution were written. It seems to be the case that such a witness must be "skilled" or, as Lord Russell said, "peritus;" but he need not "have become peritus in the way of his business or in any definite way;" *vulgo*, he need not be a professional expert.

only in cross-examination. *Com.* v. *Allen*, 128 Mass. 46; *King* v. *Donahue*, 110 Mass. 155; *U. S.* v. *Mullancy*, 32 Fed. Rep. 370; *Bradford* v. *People*, 22 Col. 157.

Whether the court has authority to require a party to write his name in court, in order that the jury may compare writings, *quære*. It probably has such power. But where the disputed writing had so faded out that it could not be traced, so that it could not be seen by the jury, but only described to them, it was held, that it was not a case for such an order. *Smith* v. *King*, 62 Conn. 521, 522.

In a libel suit, to prove the libel to be in the defendant's handwriting, experts, as cashiers of banks, may be admitted to testify that they have compared the paper with other writings proved to be his, and that, in their opinion, the paper was written by him, in a disguised hand. *Lyon* v. *Lyman*, 9 Conn. 59.

Letter-press copies cannot be used in comparison. *Com.* v. *Eastman*, 1 Cush. (Mass.) 189; *Cohen* v. *Teller*, 93 Pa. St. 123.

But photographic copies may when the originals are in court. *Marcey* v. *Barnes*, 169 Mass. 161. Compare *Lowe* v. *Parkersburgh, etc., R. Co.*, 39 Md. 36.

Comparison of a disputed signature may be made with writings admittedly genuine and introduced without objection as evidence bearing on the issues of the case. Judgment (1895), 35 N. Y. Supp. 909, 90 Hun, 374, affirmed. *Shaw* v. *Bryant*, 53 N. E. 1132, 157 N. Y. 715.

So with exhibits introduced by the defendant "to show signatures only" when he testifies on the cross-examination that these are genuine. Judgment (1895), 35 N. Y. Supp. 909, 90 Hun, 374, affirmed. *Shaw* v. *Bryant*, 53 N. E. 1132, 157 N. Y. 715.

In order to prove handwriting by comparison with a standard, the standard must be properly in evidence. *Martin* v. *Leslie*, 93 Ill. App. 44.

Papers may be admitted in some States for the sole purpose of comparison. *Himrod* v. *Gilman*, 147 Ill. 293.

Experts may testify as to alteration of a writing. *Rass* v. *Sebastian*, 160 Ill. 602.

A disputed signature may be compared with another signature. *N. F. Ins. Co.* v. *Sweet*, 46 Ill. App. 598.

Testimony as to identity of handwritings is admissible. *Groff* v. *Mutual Life Ins. Co.*, 92 Ill. App. 207.

Evidence to prove the signature to papers, with a view to comparison by experts with the signature in dispute, is not admissible. *Hazzard* v. *Vickery*, 78 Ind. 64, 66; *Shorb* v. *Kinzie*, 100 Ind. 429, 431; *Walker* v. *Stull*, 121 Ind. 436, 440; *Swalis* v. *Grubbs*, 126 Ind. 106, 110; *Newlon* v. *Teyner*, 126 Ind. 466, 472; *Merritt* v. *Straw*, 6 Ind. App. 360, 364; *Leak* v. *Thorn*, 13 Ind. App. 335.

Writings cannot be admitted for the purpose of comparison only. *Shank* v. *Butsch*, 28 Ind. 19; *Huston* v. *Schindler*, 46 Ind. 38.

The Supreme Court will not make a comparison of signatures. *Burdick* v. *Hunt*, 43 Ind. 381.

Comparisons may be made partly out of court. *Campbell* v. *Conner*, 15 Ind. App. 23.

The alteration of a writing may be proved by expert testimony. *Nelson* v. *Johnson*, 18 Ind. 329.

The standard.— In the comparison of handwriting, the standard must be conceded to be genuine. *Bowen* v. *Jones*, 13 Ind. App. 193; *Merritt* v. *Straw*, 6 Ind. App. 360.

A witness who has testified that a signature was a forgery cannot be shown purported signatures and then asked whether, with his present knowledge, he regards the writing as a forgery. *McDonald* v. *McDonald*, 142 Ind. 55. See *Shorb* v. *Kinzie*, 80 Ind. 500, 502.

The standard of comparison must be connected with the case. *White Co.* v. *Gordon*, 124 Ind. 495; *Jones* v. *State*, 60 Ind. 241.

Writings in evidence which are confessedly genuine may be used by the jury as the standard of comparison. *Shorb* v. *Kinzie*, 100 Ind. 429; *Chance* v. *Gravel Road Co.*, 32 Ind. 472; *White Co.* v. *Gordon*, 124 Ind. 495.

Experts may express an opinion on comparing a signature with one of known authenticity. *Forgey* v. *Bank*, 66 Ind. 123; *Walker* v. *Steele*, 121 Ind. 436; *Burdick* v. *Hunt*, 43 Ind. 381; *Chance* v. *Gravel Road Co.*, 32 Ind. 472; *Huston* v. *Schindler*, 46 Ind. 38.

Or proved to have been respected, treated, and acted upon as such by all parties. *Clark* v. *Wyatt*, 75 Ind. 271.

A microscopic enlargement of a disputed signature, where the original is in court, and where it is not proposed to compare it with enlarged copies of signatures admitted to be genuine, cannot be submitted to the jury for inspection. *White Sewing, etc., Co.* v. *Gordon*, 124 Ind. 495, 498.

As to the cross-examination of witnesses, who testify as to the comparison of handwritings, see *Johnston Harvester Co.* v. *Miller*, 72 Mich. 265.

Comparison is not allowed with papers not in evidence. *Howard* v. *Patrick*, 43 Mich. 121.

Papers cannot be admitted in evidence for the sole purpose of making comparisons. *People* v. *Parker*, 67 Mich. 222; *Dietz* v. *Bank*, 69 Mich. 287.

The standard must be proved to be the writing of the persons whose handwriting is in question. *Van Sickle* v. *People*, 29 Mich. 61.

Where an accommodation maker sued upon a note and defends upon the ground that it has been altered by filling in a space, which was left blank by him, it is an error to allow him to compare by introducing in evidence other notes subsequently written for the jury's notice. *Weidman* v. *Symes*, 116 Mich. 619.

New Jersey.

Authorities.— Handwriting may be proved by inspection and by a comparison by an expert. *Yeomans* v. *Petty*, 40 N. J. Eq. 495.

A witness must be allowed to see enough of a writing to make a fair comparison, though he need not see all of it. *West* v. *State*, 2 Zab. 212, 240.

The jury not allowed to compare handwriting. *Crissman* v. *Schoonover*, Pen. 525.

Statute.— Comparison may be made by witnesses, but the writing used for comparison must have been made prior to the dispute. G. S. 1895, "Evidence," 19.

Maryland.

Authorities.— See as to allowing comparison as a basis for expert opinion, Code, art. 35, sec. 6.

Earlier cases not allowing such opinion are: *Herrick* v. *Swomley*, 56 Md. 439; *Niller* v. *Johnson*, 27 Md. 6; *Tome* v. *Railroad Co.*, 39 Md. 36; *Armstrong* v. *Thurston*, 11 Md. 148.

Direct comparison of hands not allowed, but a genuine writing may be handed to a witness to refresh his recollection. *Smith* v. *Walton*, 8 Gill, 77.

Handwriting admittedly genuine may be handed to a witness who has given his opinion as to the genuineness of another writing in order to test that opinion. *Bank* v. *Armstrong*, 66 Md. 113.

Letters admittedly genuine may be given to the jury for comparison, but such letters should be selected for that purpose whose con-

tents are not likely to influence the jury in any way. *Gambrill* v. *Schooley*, 95 Md. 260.

The jury may compare a disputed handwriting with one admittedly genuine already in evidence for another purpose. *Williams* v. *Drexel*, 14 Md. 566.

As to photographic copies when the originals are in court, see *Lowe* v. *Parkersburgh R. Co.*, 39 Md. 36.

Statute.— Witnesses are allowed to make comparison of writings. P. G. L. 1888, art. 35, sec. 6.

Pennsylvania.

Authorities.— Genuine signatures are admissible for use by the jury in comparing. *Ulmer* v. *Gentner*, 3 Penny. 455.

Comparison of handwriting can be made only by the jury. *Haycock* v. *Greup*, 57 Pa. 438; *Clayton* v. *Siebert*, 3 Brewst. 176; *Aumick* v. *Mitchell*, 82 Pa. 211.

Comparisons of genuine writings with the one questioned may be made by the jury, but not by experts. *Rockey's Estate*, 155 Pa. 453.

Comparison allowed on a question of forgery. *Guffey* v. *Deeds*, 29 Pa. 378.

Comparison allowed as corroborative evidence. *Bank* v. *Whitehill*, 10 S. & R. 110; *Bank* v. *Haldeman*, 1 P. & W. 161; *Callan* v. *Gaylord*, 3 Watts. 321; *Baker* v. *Haines*, 6 Whart. 284; *Travis* v. *Brown*, 43 Pa. 9.

A witness may refresh his memory of handwriting by inspecting a genuine paper, but he must testify independently of the comparison. *McNair* v. *Com.*, 26 Pa. 388.

Comparison of handwriting is not alone sufficient evidence if better is obtainable. *Vickroy* v. *Skelley*, 14 S. & R. 372; *O'Connor* v. *Layton*, 2 Am. L. Reg. 120; *Leslie* v. *Heald*, 3 Phila. 55.

Testimony that a signature is genuine, based on mere comparison, is not admissible. *Aumick* v. *Mitchell*, 82 Pa. 211; *Berryhill* v. *Kirchner*, 96 Pa. 489; *Rockey's Estate*, 155 Pa. 453.

The test papers.— Writing offered as a test for comparison must be proved conclusively to be genuine. *Baker* v. *Haines*, 6 Whart. 284; *Depue* v. *Place*, 7 Pa. 428; *Travis* v. *Brown*, 43 Pa. 9.

A check is not admissible in evidence merely on the testimony of a witness who says the signature looked like that of the person

it represented, especially as a test paper. *Fullam* v. *Rose*, 181 Pa. 138.

A letter-press copy of handwriting cannot be used for comparison. *Cohen* v. *Teller*, 93 Pa. 123.

Nor may photographic copies be so used. *Vanderslice* v. *Snyder*, 4 Pa. Dist. 424; *Ulmer* v. *Gentner*, 3 Penny. 453.

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.[15]

AMERICAN NOTE.

General.

Authorities.— Greenleaf on Evidence (15th ed.), vol. 1, sec. 107; vol. 2, sec. 462 *et seq.*; Abbott's Trial Evidence (2d ed.), p. 104.

First paragraph of the text. *Young* v. *Foster*, 14 N. H. 114, 118; *State* v. *Sherwood*, 68 Vt. 419 (citing this article); *Greenwalt* v. *McEnelley*, 85 Pa. St. 352; *Maryland* v. *Baldwin*, 112 U. S.

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15 *Morris* v. *Miller*, 1767, 4 Burr. 2057; *Birt* v. *Barlow*, 1779, 1 Doug. 170; and see *Catherwood* v. *Caslon*, 1844, 13 M. & W. 261. Compare *R.* v. *Mainwaring*, 1856, Dear. & B. 132. See, too, *De Thoren* v. *A. G.*, 1876, 1 App. Cas. 686; *Piers* v. *Piers*, 1849, 2 H. L. Ca. 331. Some of the references in the report of *De Thoren* v. *A. G.* are incorrect.

490; *Wallace's Case*, 49 N. J. Eq. 530; *Peet* v. *Peet*, 52 Mich. 464; *White* v. *White*, 82 Cal. 427; *Blackburn* v. *Crawford*, 3 Wall. (U. S.) 175, 191; *Budington* v. *Munson*, 33 Conn. 487; *Erwin* v. *English*, 61 Conn. 509; *State* v. *Schweitzer*, 57 Conn. 537, 538; *Hammick* v. *Bronson*, 5 Day (Conn.), 293; *Means* v. *Welles*, 12 Metc. (Mass.) 356; *Newburyport* v. *Boothbay*, 9 Mass. 414; *Com.* v. *Holt*, 121 Mass. 61; *Com.* v. *Harley*, 14 Gray (Mass.), 411.

Marriage cannot be proven by reputation in criminal prosecutions for bigamy, incest, adultery, unlawful cohabitation or criminal conversation. *State* v. *Hodgskins*, 19 Me. 155; *Green* v. *State*, 21 Fla. 403; *Hutchins* v. *Kimmell*, 31 Mich. 126; *Hiler* v. *People*, 156 Ill. 577; *Com.* v. *Littlejohn*, 15 Mass. 163; *Com.* v. *Norcross*, 9 Mass. 492; *State* v. *Roswell*, 6 Conn. 446; *Hammick* v. *Bronson*, 5 Day (Conn.), 293.

But *aliter* in prosecution for nonsupport. *State* v. *Schweitzer*, 57 Conn. 537, 538.

Evidence that the relation between a man and a woman is reputed to be adulterous is not admissible against proof of a formal marriage. *Northrop* v. *Knowles*, 52 Conn. 523.

Any one (not simply a member of the family), is a competent witness to prove repute. *Knower* v. *Wesson*, 13 Metc. (Mass.) 143.

When marriage is in issue on a writ of right, it may be shown by cohabitation and repute. *Mears* v. *Welles*, 12 Metc. (Mass.) 356.

The repute may be in another country. *Com.* v. *Johnson*, 10 Allen (Mass.), 196.

The presumption of marriage from evidence of cohabitation and repute is rebuttable. *Clayton* v. *Wardell*, 4 N. Y. 230.

Marriage cannot be proven by reputation in criminal prosecutions for bigamy, incest, adultery, unlawful cohabitation, or criminal conversation. *Hayes* v. *People*, 25 N. Y. 390. But as to evidence of reputation in divorce suits, see *Collins* v. *Collins*, 80 N. Y. 10.

As to proof of marriage by admissions in both civil and criminal cases, see *Eisenlord* v. *Clum*, 126 N. Y. 552, 562.

Marriage may be shown by proof of living together as husband and wife for a series of years, always recognizing each other as such, and being so treated and reputed in the community. The court or jury trying the case will judge of the sufficiency of the evidence. *Bruner* v. *Briggs*, 33 Ohio St. 478.

Or by reputation that they lived together as husband and wife. *Stewart* v. *Welch*, 41 Ohio St. 483, 497.

Where a man and woman live together as husband and wife his admissions are competent evidence to prove marriage. *Wolverton* v. *State*, 16 Ohio, 173; *Stanglein* v. *State*, 17 Ohio St. 453.

Marriage may be shown by reputation. *Miller* v. *White*, 80 Ill. 580; *Lowry* v. *Coster*, 91 Ill. 582.

Marriage may be inferred from the conduct of the parties. *Port* v. *Port*, 70 Ill. 484.

Marriage may be presumed from cohabitation and repute. *Cartright* v. *M'Gowan*, 121 Ill. 388, 395.

Marriage is not established by proof of cohabitation alone. *Wyatt* v. *Wyatt*, 44 Ill. 473. Compare *Miller* v. *White*, 80 Ill. 580; *Hiler* v. *People*, 156 Ill. 511.

Bigamy — Criminal conversation.—In bigamy prosecution and prosecution for criminal conversation, actual marriage must be proved. *Miller* v. *White*, 80 Ill. 580.

Marriage cannot be proven by reputation in criminal prosecutions for bigamy, incest, adultery, unlawful cohabitation, or criminal conversation. *Hiler* v. *People*, 156 Ill. 511.

The marriage license is admissible upon a bigamy trial. *King* v. *Dale*, 1 Scam. 513; *Jackson* v. *People*, 2 Scam. 231.

Opinion as to marriage — First paragraph of the text.— *Peet* v. *Peet*, 52 Mich. 464.

Reputation is admissible as tending to establish a marriage. *Peet* v. *Peet*, 52 Mich. 464; *Proctor* v. *Bigelow*, 38 Mich. 282; *Perry* v. *Lovejoy*, 49 Mich. 529; *Leonard* v. *Pope*, 27 Mich. 145.

A marriage is shown *prima facie* by proof of a present agreement followed by cohabitation. *Hutchins* v. *Kimmell*, 31 Mich. 126; *Webster* v. *Webster*, 96 U. S. 76 (Mich. case); *Peet* v. *Peet*, 52 Mich. 464.

Marriage cannot be proven by reputation in criminal prosecutions for bigamy, incest, adultery, unlawful cohabitation, or criminal conversation. *Hutchins* v. *Kimmell*, 31 Mich. 126.

New Jersey.

First paragraph of the text.—*Wallace's Case*, 49 N. J. Eq. 530.

Marriage may be established by proof of open cohabitation and repute. *Costill* v. *Hill*, 55 N. J. Eq. 679.

The presumption of marriage arising from repute and cohabitation is rebuttable. *Collins* v. *Voorhees*, 47 N. J. Eq. 555.

Maryland.

Authority.— *Crockett* v. *Davis*, 81 Md. 134.

Marriage may be proved by general reputation, cohabitation, and acknowledgment, except in cases for criminal conversation and for bigamy. *Jackson* v. *Jackson*, 80 Md. 176.

A witness cannot be asked whether in his opinion certain persons were married or not. *Jackson* v. *Jackson*, 80 Md. 176.

A religious ceremony will be presumed on proof of general reputation, cohabitation, and acknowledgment. *Richardson* v. *Smith*, 80 Md. 89.

Pennsylvania.

Authorities.— *Greenwalt* v. *McEnelley*, 85 Pa. 352.

The presumption of marriage arises from proof of cohabitation and repute, but is rebuttable. *Senser* v. *Bower*, 1 P. & W. 450; *Grimm's Estate*, 131 Pa. 199.

To establish the fact that deceased was claimant's wife the following evidence was admitted:

An official certificate of the birth of a child naming the parties as husband and wife;

Checks indorsed by deceased in her married name;

A letter addressed to deceased as a married woman;

A life insurance policy describing deceased as "his wife;"

A deed to deceased in her married name;

Repute in the neighborhood;

The fact that children by a former wife treated deceased as their mother. *Strauss' Estate*, 168 Pa. 561.

Reputation in the family is admissible to prove marriage. *Pickens' Estate*, 163 Pa. 14.

Marriage record.— Certified copy of the record made *prima facie* evidence. Pepper & Lewis' Digest of Laws, "Marriage," sec. 14.

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.

Illustration.

An expert may give an account of experiments performed by him for the purpose of forming his opinion.

AMERICAN NOTE.

General.

Authorities.— Lawson on Expert and Opinion Evidence (2d ed.), p. 209 *et seq.;* 12 Am. & Eng. Encyclopædia of Law (2d ed.), p. 489; *Woodman* v. *Dana,* 52 Me. 9; *Steam Mill Co.* v. *Water Power Co.,* 78 Me. 274; *Sexton* v. *North Bridgewater,* 116 Mass. 200; *Leslie* v. *Granite R. R. Co.,* 172 Mass. 468, 52 N. E. 542; *Hawkins* v. *Fall River,* 119 Mass. 94; *Dickerson* v. *Fitchburg,* 13 Gray (Mass.), 555; *Keith* v. *Lathrop,* 10 Cush. (Mass.) 457; *Demerritt* v. *Randall,* 116 Mass. 331; *Emerson* v. *Lowell Gas Co.,* 6 Allen (Mass.), 146.

This is true in case of experts. *Hawkins* v. *Fall River,* 119 Mass. 94; *Eidt* v. *Cutler,* 127 Mass. 522.

An expert may give an account of experiments performed by him for the purpose of forming his opinion. *Eidt* v. *Cutler,* 127 Mass. 522; *Sullivan* v. *Com.,* 3 Pa. St. 284; *Moore* v. *State,* 96 Tenn. 209; *Lindsay* v. *People,* 63 N. Y. 143, 156; *People* v. *Morrigan,* 29 Mich. 5.

And these experiments may be performed before the jury. *Leonard* v. *So. Pac. Co.,* 21 Ore. 555; *McKay* v. *Lasher,* 121 N. Y. 477; *Penn. Coal Co.* v. *Kelly,* 156 Ill. 9.

But such evidence is inadmissible, if the experiments do not take place under conditions similar to those in the case before the court. *Com.* v. *Piper,* 120 Mass. 105; *People* v. *Slack,* 90 Mich. 448; *State* v. *Fletcher,* 24 Ore. 295. Compare *People* v. *Conkling,* 111 Cal. 616.

An expert may perform experiments before the jury in explanation of his testimony. *McKay* v. *Lasher,* 121 N. Y. 477.

An expert may state the grounds of his opinion. *Koons* v. *State,* 36 Ohio St. 195.

Where a portion of the experts only state the facts upon which they base their opinions, the court need not charge that the facts are entitled to greater weight than the opinions. *Breck* v. *State,* 4 Ohio Circ. Ct. 160, 180.

Stating results of experiments.— A witness may state the results of experiments made under like conditions. *Smith* v. *State,* 2 Ohio St. 511.

Exhibiting article to jury.— In an action to recover damages received by a bicycle, a witness having testified that all bicycles are made on practically the same principle, it was not error to allow such witness to exhibit his bicycle to the jury in connection with his testimony. *Taylor* v. *McGrath*, 9 Ind. App. 30, 33.

New Jersey.

Authorities.— Declarations to a physician as to symptoms are admissible as part of the basis of his opinion. *State* v. *Gedicke*, 43 N. J. L. 86.

When an expert quotes books of science as the basis of his opinion they may be admitted to contradict him. *N. J. Zinc Co.* v. *Lehigh Zinc Co.*, 59 N. J. L. 189.

Opinion evidence should be given in connection with evidence of the facts. *Sloan* v. *Maxwell*, 3 N. J. Eq. 563.

Pennsylvania.

Authorities.— *Brown* v. *Corey*, 43 Pa. 495.

A nonexpert witness must give the facts upon which his opinion is founded, so far as is possible. *Ex parte Springer*, 4 Clark, 188; *Austin* v. *Austin*, 4 Pa. Co. Ct. 368.

A witness who has given his opinion as to the aggregate value of property may give also the list of items from which he made up his opinion. *King* v. *Faber*, 51 Pa. 387. And see *Selover* v. *Rexford*, 52 Pa. 308.

Reasons upon which a medical expert's opinion is founded. *Ex parte Springer*, 4 Clark, 188.

An expert may give an account of experiments performed by him for the purpose of forming his opinion. *Sullivan* v. *Com.*, 3 Pa. 284.

A diagram drawn by a handwriting expert to illustrate his meaning is not evidence, but may be used by him and by counsel in argument to present the theory upon which the witness' opinion is based. *Hagan* v. *Carr*, 198 Pa. 606.

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.

AMERICAN NOTE.

General.

Authorities.— 1 Greenleaf on Evidence (15th ed.), secs. 54, 55; 5 Am. & Eng. Encyclopædia of Law (2d ed.), p. 850; *Dunham* v. *Rackliffe,* 71 Me. 345; *Thayer* v. *Boyle,* 30 Me. 475; *Dame* v. *Kenney,* 25 N. H. 318; *Boardman* v. *Woodman,* 47 N. H. 120; *Lander* v. *Seaver,* 32 Vt. 114, 124, 76 Am. Dec. 156; *Hampson* v. *Taylor,* 15 R. I. 83, 8 Atl. 331; *Wright* v. *McKee,* 37 Vt. 161; *Chase* v. *Maine Central R. R. Co.,* 77 Me. 62; *Porter* v. *Seiler,* 23 Pa. St. 424, 430, 62 Am. Dec. 341; *Simpson* v. *Westernberger,* 28 Kan. 756, 42 Am. Rep. 195, *n.; Fahey* v. *Crotty,* 63 Mich. 383, 6 Am. St. Rep. 305; *O'Bryan* v. *O'Bryan,* 13 Mo. 16, 53 Am. Dec. 128; *Lamagdelaine* v. *Trombly,* 162 Mass. 339, 39 N. E. 38; *Boynton* v. *Kellogg,* 3 Mass. 189; *Atwood* v. *Dearborn,* 1 Allen (Mass.), 483, 79 Am. Dec. 755; *Day* v. *Rose,* 154 Mass. 13; *Heywood* v. *Reed,* 4 Gray (Mass.), 574; *McDonald* v. *Savoy,* 110 Mass. 49; *Com.* v. *Worcester,* 3 Pick. (Mass.) 462; *McCarty* v. *Leary,* 118 Mass. 509; *Clement* v. *Kimball,* 98 Mass. 535; *Leonard* v. *Allen,* 11 Cush. (Mass.) 241; *Tenney* v. *Tuttle,* 1 Allen (Mass.), 185.

In civil proceedings, unless the character of the party be directly put in issue by the proceeding itself, evidence of his general char-

* See note XXV.

acter is not admissible. *Humphrey* v. *Humphrey*, 7 Conn. 118; *Bennett* v. *Hyde*, 6 Conn. 26; *Vawter* v. *Hultz*, 112 Mo. 633; *Am. Ins. Co.* v. *Hazen*, 110 Pa. St. 530; *Elliott* v. *Russell*, 92 Ind. 526; *Hollzman* v. *Hoy*, 118 Ill. 534; *Leinkauf* v. *Brinker*, 62 Miss. 255; *Williams* v. *Edmunds*, 75 Mich. 92; *Hall* v. *Rankin*, 87 Ia. 261.

In actions for seduction and the like the woman's bad character as to chastity may be shown. *Sanborn* v. *Neilson*, 4 N. H. 501; *Mitchell* v. *Work*, 13 R. I. 645; *Van Storch* v. *Griffin*, 71 Pa. St. 240; *White* v. *Murtland*, 71 Ill. 250.

In malicious prosecution, the plaintiff's bad character is admissible on the issue of probable cause. *McIntyre* v. *Levering*, 148 Mass. 546; *Woodworth* v. *Mills*, 61 Wis. 44. *Compare Am. Express Co.* v. *Patterson*, 73 Ind. 430.

The character of a witness for veracity may always be attacked and defended. *Fay* v. *Harlan*, 128 Mass. 244; *Com.* v. *Stevenson*, 127 Mass. 446; *Gertz* v. *Fitchburg R. R. Co.*, 137 Mass. 77.

To show that a book account, produced in an action of book debt, is not entitled to credit, evidence is not admissible that the party who made the charges and with whom the business relating to the account was transacted is generally reputed to keep inaccurate, false and fraudulent accounts: and that the books produced are generally reputed to be of that character. *Roberts* v. *Ellsworth*, 11 Conn. 292.

That the character for honesty of the parties to a conveyance is bad cannot be shown to prove it fraudulent. *Woodruff* v. *Whittlesey*, Kirby (Conn.), 62.

In civil proceedings, unless the character of the party be directly put in issue by the proceeding itself, evidence of his general character is not admissible. *Fowler* v. *Ætna Ins. Co.*, 6 Cow. 673, 675, 16 Am. Dec. 460; *Corning* v. *Corning*, 6 N. Y. 97; *Dain* v. *Wyckoff*, 18 N. Y. 45; *Gough* v. *St. John*, 16 Wend. 646.

If, however, the adverse party attack the character of any party or person interested in the action, his good character can be shown in rebuttal. *Pratt* v. *Andrews*, 4 N. Y. 493. See *Young* v. *Johnson*, 123 N. Y. 226.

In actions for seduction and the like, the woman's bad character as to chastity may be shown. *Hogan* v. *Cregan*, 6 Rob. (Super. Ct.) 138. See also on this subject *Ford* v. *Jones*, 62 Barb. 484; *Wandell* v. *Edwards*, 25 Hun, 498; *Ayer* v. *Smith*, 81 Hun, 322.

The character of the plaintiff is not admissible in malicious prosecution. *Skidmore* v. *Bricker*, 77 Ill. 164; *Horne* v. *Sullivan*, 83 Ill. 30.

In a suit for assault and battery, the plaintiff's want of chastity cannot be shown. *Dimick* v. *Downs*, 82 Ill. 570.

In trespass for personal violence, character is inadmissible. *Cummins* v. *Crawford*, 88 Ill. 312.

Partnership cannot be proved by general reputation. *Bowen* v. *Rutherford*, 60 Ill. 41.

In actions for seduction and the like the woman's bad character as to chastity may be shown. *White* v. *Murtland*, 71 Ill. 250.

Character, how proved.— Moral character can be shown by general reputation only, and not by proof of particular acts. *Robertson* v. *Hamilton*, 16 Ind. App. 328; *Griffith* v. *State*, 140 Ind. 163; *Indianapolis, etc., Co.* v. *Pugh*, 6 Ind. App. 510; *Stalcup* v. *State*, 146 Ind. 270; *Bessette* v. *State*, 101 Ind. 85; *Cunningham* v. *State*, 65 Ind. 377; *Long* v. *Morrison*, 14 Ind. 595; *Meyneke* v. *State*, 68 Ind. 401; *Rawles* v. *State*, 56 Ind. 433; *Speneer* v. *Robbins*, 106 Ind. 580.

Character put in issue.— In a suit to set aside a conveyance for fraud, the reputation of the grantor for honesty is admissible. *Vansickle* v. *Shenk*, 150 Ind. 413.

In a civil action based upon an act done by the defendant which charges the plaintiff with being guilty of a crime, the plaintiff may prove his good character. *Blizzard* v. *Hays*, 46 Ind. 166.

If the defendant, in an action for false imprisonment, introduces evidence casting suspicion on the plaintiff's character, he may offer evidence in support of it. *Amerienn Co.* v. *Patterson*, 73 Ind. 430.

A witness to character may be asked if he has ever heard of the accused being charged with similar crimes. *Shears* v. *State*, 147 Ind. 51.

Where one has testified as to present character as a saloon-keeper. he may be asked on cross-examination whether he has heard that he has run a gambling concern in connection with the saloon. *Baehner* v. *State*, 25 Ind. App. 597.

One who has testified as to the defendant's good character, but has said on cross-examination that he never heard any one say anything about it, may be asked as to facts on which he based his answer. *Baehner* v. *State*, 25 Ind. App. 597.

In divorce suits.—Where a plaintiff in divorce alleges instances of unchastity, defendant may prove her general good reputation for chastity. *Hilker* v. *Hilker*, 153 Ind. 425.

Admissible to prove want of probable cause in malicious prosecution.— *Am. Express Co.* v. *Patterson*, 73 Ind. 430.

Character of witnesses.— Proof as to general character of a witness is inadmissible unless there is an attempt to impeach him. *Johnson* v. *State*, 21 Ind. 329.

Witnesses may be impeached by showing bad character in a criminal case. *Morrison* v. *State*, 76 Ind. 335; *Walton* v. *State*, 88 Ind. 9.

But on a charge of incest, the unchaste character of the female cannot be shown for purposes of impeachment. *Kidwell* v. *State*, 63 Ind. 384.

If the character of a witness is attacked, it may be sustained by proof of good reputation. *Clackner* v. *State*, 33 Ind. 412; *Clem* v. *State*, 33 Ind. 418; *Clark* v. *Bond*, 29 Ind. 555; *Harris* v. *State*, 30 Ind. 131; *Railway Co.* v. *Frawley*, 110 Ind. 18; *Sieger* v. *Pfeifer*, 35 Ind. 13. Compare *Fisher* v. *Hamilton*, 49 Ind. 341.

When one testifies as to the reputation of another, he may be cross-examined as to what he means by reputation. *Hutts* v. *Hutts*, 62 Ind. 214; *Wachstetter* v. *State*, 99 Ind. 290.

Bad character for chastity cannot be proved by particular immoral acts with other persons. *Robertson* v. *Hamilton*, 16 Ind. App. 328.

Maryland.

When proof of marriage is sought to be made by proof of general reputation and cohabitation, the character of the woman for chastity is admissible. *Jackson* v. *Jackson*, 80 Md. 176. But not her reputation *after* she and her alleged husband have separated. *Jackson* v. *Jackson*, 82 Md. 17.

The fact that one is reputed to be tricky and likely to commit forgery is not admissible to prove that he did commit fraud or forgery. *Martin* v. *Good*, 14 Md. 399.

Reputation of one not a witness is not admissible. *Hoffman* v. *State*, 93 Md. 388.

Where a deed is impeached for fraud, the grantee cannot give evidence of his good character in order to sustain the deed. *Brooke* v. *Berry*, 2 Gill, 83.

Pennsylvania.

Authorities.— In civil proceedings, unless the character of the party be directly put in issue by the proceeding itself, evidence of his general character is not admissible. *Am. Ins. Co.* v. *Hazen*, 110 Pa. 530; *Atkinson* v. *Graham*, 5 Watts, 411; *Porter* v. *Seiler*, 23 Pa. 424; *Nash* v. *Gilkeson*, 5 S. & R. 352; *Anderson* v. *Long*, 10 S. & R. 55.

Reputation of a party for truth may be proved against him if he becomes a witness. *Barber* v. *Bull*, 7 W. & S. 391.

Character of one neither a witness nor a party not admitted. *Blackburn* v. *Holliday*, 12 S. & R. 140.

Proof of specific acts not admissible to prove character. *Frazier* v. *Railroad* Co., 38 Pa. 104.

Evidence of plaintiff's bad character not admitted in action for malicious prosecution. *Winebiddle* v. *Porterfield*, 9 Pa. 137; *Russell* v. *Shuster*, 8 W. & S. 308.

In actions for seduction and the like the woman's bad character as to chastity may be shown. *Van Storch* v. *Griffin*, 71 Pa. 240.

In action for seduction the good reputation of the girl in one place may be proved to rebut evidence of her bad reputation in another place. *Milliken* v. *Long*, 188 Pa. 411.

One's reputation may be proved to be good by evidence that it was not talked about. *Milliken* v. *Long*, 188 Pa. 411.

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; 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.

A person charged with an offence and called as a witness in pursuance of the Criminal Evidence Act, 1898, may not

be asked, and if asked may not be required to answer, any question tending to show that he has committed, or been convicted of, or been charged with any offence other than that whereof he is then charged,

or is of bad character,

unless

(i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged;[1] or

(ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character,

or has given evidence of his own good character;

or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor, or the witnesses for the prosecution; or

(iii) he has given evidence against any other person charged with the same offence.[2]

When any person gives evidence of his good character other than his own sworn testimony, who—

Being on his trial for any felony not punishable with death, has been previously convicted of felony;[3]

Or, who being upon his trial for any offence punishable under the Larceny Act, 1861, has been previously con-

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1 See Article 11 and the concluding paragraphs of this article.

2 61 & 62 Vict. c. 36, s. 1 (*f*).

3 6 & 7 Will. IV. c. 111, referring to 7 & 8 Geo. IV. c. 28, s. 11. If "not punishable with death" means not so punishable at the time

victed of any felony, misdemeanour, or offence punishable upon summary conviction:[4]

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.[5]

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.[6]

In this article the word "character" means reputation as distinguished from disposition, and, except as previously mentioned in this article, evidence may be given only of general reputation and not of particular acts by which reputation or disposition is shown.[7]

AMERICAN NOTE.

General.

Authorities.— 3 Greenleaf on Evidence (15th ed.), sec. 25; 5 Am. & Eng. Encyclopædia of Law (2d ed.), p. 866 *et seq.; State* v. *Tozier,* 49 Me. 404; *Com.* v. *Webster,* 5 Cush. (Mass.) 295, 324, 52 Am. Dec. 711; *Miller* v. *Curtis,* 158 Mass. 127, 35 Am. St. Rep. 469; *Com.* v. *Leonard,* 140 Mass. 473.

The character must be as to points which would tend to show

when 7 & 8 Geo. IV, c. 28 was passed (21 June, 1827), this narrows the effect of the article considerably.

4 24 & 25 Vict. c. 96, s. 116.

5 24 & 25 Vict. c. 99, s. 37.

6 See each of the Acts above referred to.

7 *R.* v. *Rowton,* 1865, 1 L. & C. 520. *R.* v. *Turberfield,* 1864. 1 L. & C. 495, is a case in which the character of a prisoner became incidentally relevant to a certain limited extent.

that it was unlikely that the defendant committed the crime in question. *Com.* v. *Nagle,* 157 Mass. 554.

In a prosecution for adultery, evidence of the good character for chastity of the woman with whom the adultery was alleged to have been committed is admissible. *Com.* v. *Gray,* 129 Mass. 474.

In rape, evidence of the general character of the plaintiff respecting the subject-matter of the charge may be introduced by the defendant. *Seymour* v. *Merrills,* 1 Root (Conn.), 459; *Brunson* v. *Lynde,* 1 Root (Conn.), 354.

Whether the general character for truth of the complainant in a prosecution for rape, or attempted rape, may not always be shown in chief by the State, *quære.* *State* v. *De Wolf,* 8 Conn. 100.

Except in prosecutions for rape or attempted rape, evidence is not admissible in support of the general character of a witness for truth, unless a direct attempt has been made to impeach it, or he is a stranger. *Rogers* v. *Moore,* 10 Conn. 16, 17.

A witness may not testify as to the disposition of the accused. *State* v. *Renton,* 15 N. H. 169.

Evidence of good character.— First paragraph of text. *Com.* v. *Gazzolo,* 123 Mass. 220; *Edgington* v. *U. S.,* 164 U. S. 361; *Com.* v. *Cleary,* 135 Pa. St. 64; *Jackson* v. *State,* 81 Wis. 127; *People* v. *Harrison,* 93 Mich. 594; *State* v. *Howell,* 100 Mo. 628; *State* v. *Rodman,* 62 Ia. 456.

Good character may be shown in defense in a murder trial. *Com.* v. *Hardy,* 2 Mass. 303, 317; *Com.* v. *Webster,* 5 Cush. (Mass.) 296.

The rule that good character is not to be considered unless the jury are in doubt on the other evidence is no longer law. *Com.* v. *Leonard,* 140 Mass. 479.

Evidence of bad character.— *State* v. *Lapage,* 57 N. H. 245, 24 Am. Rep. 69; *State* v. *Ellwood,* 17 R. I. 763, 24 Atl. 782; *State* v. *Hull,* 18 R. I. 207, 26 Atl. 191, 20 L. R. A. 609; *People* v. *Fair,* 43 Cal. 137; *Com.* v. *Sacket,* 22 Pick. (Mass.) 394; *Com.* v. *Hardy,* 2 Mass. 303, 317; *Com.* v. *O'Brien,* 119 Mass. 345; *Rex* v. *Doaks,* Quincy, 90.

General reputation, not particular acts.— *State* v. *Lapage,* 57 N. H. 245, 24 Am. Rep. 69; *Com.* v. *O'Brien,* 119 Mass. 342, 345, 20 Am. Rep. 325; *Com.* v. *Harris,* 131 Mass. 336. Compare *Com.* v. *Robinson,* Thacher Cr. Cas. 230; *Snyder* v. *Com.,* 85 Pa. St. 519; *McQueen* v. *State,* 108 Ala. 54; *Berneker* v. *State,* 40 Neb. 810; *State* v.

Lapage, 57 N. H. 245; *Betts* v. *Lockwood,* 8 Conn. 488, 489; *State* v. *Ferguson,* 71 Conn. 227.

This must be that had by a person in his own community. *Conkey* v. *People,* 1 Abb. Dec. 418.

New Jersey.

General rule.— *State* v. *Wells,* Coxe, 424.

The State may attack the character of an accused only when he introduces evidence that it is good, and even then the State may not prove any specific facts, but is restricted to evidence as to general reputation. *Bullock* v. *State,* 65 N. J. L. 557.

Evidence of the character or reputation of an accused acquired subsequent to the commission of the offense is inadmissible. *State* v. *Sprague,* 64 N. J. L. 419.

In a prosecution for having carnal knowledge of a woman under the age of consent, the defendant may prove his "reputation for morality, virtue, and honesty in living." *State* v. *Snover,* 63 N. J. L. 383.

Character of accused for truthfulness.— Evidence of a witness' reputation for truthfulness may be given as it exists at the time such witness testifies, though the witness is also the defendant in a criminal prosecution. *State* v. *Sprague,* 64 N. J. L. 419.

Chastity.— In prosecutions for rape the bad character of the prosecutrix for chastity prior to the offense is admissible. *O'Blenis* v. *State,* 47 N. J. L. 279.

Reputation for chastity may be proved by witnesses who move in the same circle and have never heard the woman's chastity questioned. *State* v. *Brown,* 64 N. J. L. 414; *Zabriskie* v. *State,* 43 N. J. L. 644.

In bastardy proceedings the accused may prove his previous good character for morality. *Hawkins* v. *State,* 1 Zab. 630; *Dally* v. *Woodbridge,* 1 Zab. 491.

Maryland.

In a prosecution for keeping a bawdy-house, the general reputation of the house is not admissible, but the general reputation of those who frequent the house is admissible. *Beard* v. *State,* 71 Md. 275. In such a case a particular instance of lewdness is admissible. *Id.*

Defendant may prove the character of the deceased as a dangerous man. *Jenkins* v. *State,* 80 Md. 72.

Evidence that defendant was transported as a convict from England is admissible to prove bad character. *State* v. *Ridgely*, 2 Har. & McH. 120.

That one is a common thief may be proved by general reputation. *World* v. *State*, 50 Md. 49.

Pennsylvania.

General rule.— *Com.* v. *Weiland*, 1 Brewst. 312; *Com.* v. *Clegget*, 3 Leg. Gaz. 9; *Com.* v. *Winnemore*, 1 Brewst. 356.

General reputation of a witness for the State in a murder trial cannot be shown. *Com.* v. *Payne*, 205 Pa. 101.

Evidence of the turbulent character of the deceased may be admissible on the question of self-defense. *Alexander* v. *Com.*, 105 Pa. 1.

In rape, the repute of the female is admissible, including evidence of specific unchaste acts. *Com.* v. *Davis*, 3 Pa. Dist. 271.

Evidence of good character.— First paragraph of text. *Com.* v. *Cleary*, 135 Pa. 64.

Not only where a doubt of guilt exists on other proof, but to raise such a doubt. *Com.* v. *Clegget*, 3 Leg. Gaz. 9.

Testimony as to the defendant's good character must be confined to general reputation and cannot include specific acts. *Snyder* v. *Com.*, 85 Pa. 519.

Proof of good character alone may be sufficient to raise a reasonable doubt. *Com.* v. *Bargar*, 2 Law T. (N. S.) 37; *Becker* v. *Com.*, 9 Atl. 510; *Com.* v. *Shaub*, 5 Lanc. Bar. 121; *Com.* v. *Harmon*, 199 Pa. 521.

Previous good character cannot avail when there is clear proof of guilt. *Com.* v. *Smith*, 6 Am. Law Reg. (O. S.) 257; *Com.* v. *Platt*, 33 Leg. Int. 436; *Heine* v. *Com.*, 91 Pa. 145.

Defendant may show that he had been sent to a reform school through no fault of his own. *Abernethy* v. *Com.*, 101 Pa. 322.

ARTICLE 57.

CHARACTER AS AFFECTING DAMAGES.

In civil cases, the fact that a person's general reputation is bad, may it seems be given in evidence in reduction of damages; but evidence of rumours that his reputation was

bad, and evidence of particular facts showing that his disposition was bad, cannot be given in evidence.[8]

In actions for libel and slander in which the defendant does not by his defence assert the truth of the statement complained of, the defendant is not entitled on the trial to give evidence in chief with a view to mitigation of damages, as to the circumstances under which the libel or slander was published, or as to the character of the plaintiff, without the leave of the judge, unless seven days at least before the trial he furnishes particulars to the plaintiff of the matters as to which he intends to give evidence.[9]

AMERICAN NOTE.

General.

Authorities.— Ogden on Libel and Slander (Am. ed.), p. 305, note (*a*); 5 Am. & Eng. Encyclopædia of Law (2d ed.), p. 850 *et seq.; Stone* v. *Varney,* 7 Metc. (Mass.) 86, 39 Am. Dec. 762; *McIntyre* v. *Levering,* 148 Mass. 546; *Clark* v. *Brown,* 116 Mass. 504; *Howland* v. *Blake Mfg. Co.,* 156 Mass. 543, 568.

This rule, in this country, at least, is restricted to actions for injury to character. The case cited by the author applies it to cases of slander and libel.

Evidence of good general moral character may be introduced in libel cases. *Sickra* v. *Small,* 87 Me. 493; *Clark* v. *Brown,* 116 Mass. 504; *Duval* v. *Davey,* 32 O. St. 604, 612; *Post Publishing Co.* v. *Hallam,* 59 Fed. Rep. 530. And evidence of the general bad reputation of the plaintiff may be offered to mitigate damages. *Nellis* v. *Cramer,* 86 Wis. 337; *Drown* v. *Allen,* 91 Pa. St. 393; *Bathrick* v. *Detroit Post Co.,* 50 Mich. 629.

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[8] *Scott* v. *Sampson,* 1882, 8 Q. B. D. 491, in which all the older cases are minutely examined in the judgment of Cave, J.

[9] R. S. C., Order XXXVI., rule 37.

In suit for defamation, evidence to show bad character, so far as integrity and moral worth or the traits involved in the libel are concerned is alone admissible. *Leonard* v. *Allen,* 11 Cush. (Mass.) 241.

Such evidence is admissible in a suit for malicious prosecution. *Bacon* v. *Towne,* 4 Cush. (Mass.) 217.

That reports were circulated, charging the plaintiff with the act imputed in the slanderous statement, cannot be shown. *Sickra* v. *Small,* 87 Me. 493; *Mahoney* v. *Belford,* 132 Mass. 393; *Pease* v. *Shippen,* 80 Pa. St. 513; *Hauners* v. *McClelland,* 74 Ia. 318. Nor can they in malicious prosecution if the defendant did not know of the reports. *Lathrop* v. *Adams,* 133 Mass. 471; *Larrabee* v. *Minn. Tribune Co.,* 36 Minn. 141.

The plaintiff may give evidence in chief of his good character and need not wait until the defendant has adduced evidence of his bad character. *Bennett* v. *Hyde,* 6 Conn. 24.

The defendant may show in mitigation of damages that it had become a matter of common and general report that the facts charged by the slanderous words were true, before he uttered them; both as showing that the plaintiff's reputation was not unsullied, and as evidence of the defendant's innocent intent. *Case* v. *Marks,* 20 Conn. 251, 252.

In an action of slander for imputing certain practices to the plaintiff, the defendant may show that the reputation of the plaintiff is disparaged by there having been reports in the neighborhood that he had been guilty of practices similar to those imputed to him. *Bailey* v. *Hyde,* 3 Conn. 466.

General reputation, not particular acts.— The defendant is restricted to proof of general reputation. He cannot show specific wrongful acts. *McLaughlin* v. *Cowley,* 131 Mass. 70; *Miller* v. *Curtis,* 158 Mass. 127, 131; *Hallowell* v. *Guntle,* 82 Ind. 554.

Proof of general reputation is solely competent. Specific wrongful acts cannot be shown. *Hart* v. *McLaughlin,* 64 N. Y. Supp. 827, 51 App. Div. 411. See *Hilton* v. *Carr,* 58 N. Y. Supp. 134, 40 App. Div. 490.

New Jersey.

Libel and slander.— Proof of general reputation is allowed in slander. *Sayre* v. *Sayre,* 25 N. J. L. 235.

In slander, evidence that the words were commonly used of the plaintiff by others is admissible. *Cook* v. *Barkley,* Pen. 169.

The defendant in slander or libel may show that he did not originate the calumnious charge, in mitigation of damages. *Hoboken Printing Co.* v. *Kahn,* 58 N. J. L. 359.

Malicious prosecution.— In action for malicious prosecution evidence of the bad character of the plaintiff is admissible. *O'Brien* v. *Frasier,* 47 N. J. L. 349.

Breach of promise.— Lewd conduct after the promise by the plaintiff in breach of promise can be shown in mitigation of damages. *Budd* v. *Crea,* 1 Hal. 370.

Maryland.

In breach of promise, the character of the plaintiff's mother is not admissible in mitigation of damages or otherwise. *Lewis* v. *Tapman,* 90 Md. 294.

Libel and slander.— In actions for libel and slander, the character of the plaintiff may be proved. *Dorsey* v. *Whipps,* 8 Gill, 457; *Shilling* v. *Carson,* 27 Md. 175.

Pennsylvania.

In breach of promise, plaintiff's bad character for chastity is admissible in mitigation of damages. *Van Storch* v. *Griffin,* 71 Pa. 240.

In libel and slander, the defendant may prove the plaintiff's bad reputation. *Henry* v. *Norwood,* 4 Watts, 347; *Steinman* v. *McWilliams,* 6 Pa. 170; *Conroe* v. *Conroe,* 47 Pa. 198; *Moyer* v. *Moyer,* 49 Pa. 210; *Drown* v. *Allen,* 91 Pa. 393.

Plaintiff in a libel case may give evidence of his good reputation after the defendant has attacked it. *Clark* v. *North American Co.,* 203 Pa. 346; *Chubb* v. *Gesell,* 34 Pa. 114.

That reports were circulated, charging the plaintiff with the act imputed in the slanderous statement, cannot be shown. *Pease* v. *Shippen,* 80 Pa. 513.

Evidence of bad character is not admissible in an action on a promissory note. *Battles* v. *Laudenslager,* 84 Pa. 446.

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 authority 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]

(3) The general course of proceeding and privileges of Parliament and of each House thereof, and the date and

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* See note XXVI.

[1] 1 Ph. Ev. 460–1; Taylor, s. 5; and see 36 & 37 Vict. c. 66 (Judicature Act of 1873), s. 25.

[2] 52 & 53 Vict. c. 63 (The Interpretation Act, 1889), s. 9.

place of their sittings, but not transactions in their journals.[3]

(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 which have been duly certified to and recorded in any such court.[4]

(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 procedure 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.[5]

(6) The accession and [*semble*] the sign manual of Her Majesty and her successors.[6]

(7) The existence and title of every State and Sovereign recognised by Her Majesty and her successors.[7]

(8) The accession to office, names, titles, functions, and when attached to any decree, order, certificate, or other

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[3] 1 Ph. Ev. 460; Taylor, s. 5; but see 8 & 9 Vict. c. 113, s. 3, as to journals of the Houses of Parliament.

[4] 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*, 1845, 14 M. & W. 649–50. *Ex parte Powell, In re Matthews*, 1875, 1 Ch. Div. 505–7, contains some remarks by Lord Justice Mellish as to proving customs till they come by degrees to be judicially noticed.

[5] 1 Ph. Ev. 462–3; Taylor, s. 20.

[6] 1 Ph. Ev. 458; Taylor, ss. 18, 14.

[7] 1 Ph. Ev. 460; Taylor, s. 4.

judicial or official documents, the signatures of all the judges of the Supreme Court of Justice.[8]

(9) The Great Seal, the Privy Seal, the seals of the Superior Courts of Justice,[9] and all seals which any Court is authorised to use by any Act of Parliament,[10] certain other seals mentioned in Acts of Parliament,[10] the seal of the Corporation of London,[11] and the seal of any notary public in the Queen's dominions.[12]

(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.[13]

(11) The ordinary course of nature, natural and artificial divisions of time, the meaning of English words.[14]

(12) All other matters which they are directed by any statute to notice.

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8 1 Ph. 462: Taylor, s. 14; 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).

9 The Judicature Acts confer no seal on the Supreme or High Court or its divisions.

10 *Doe* v. *Edwards*, 1839, 9 A. & E. 555. See a list in Taylor, s. 6.

11 1 Ph. Ev. 464; Taylor, s. 6.

12 *Cole* v. *Sherard*, 1855, 11 Ex. 482. As to foreign notaries, see *Earl's Trust*, 1858, 4 K. & J. 300.

13 1 Ph. Ev. 466, 460, 458; and Taylor, s. 17.

14 1 Ph. Ev. 465-6; Taylor, s. 16.

AMERICAN NOTE.

General.

Authorities.— 1 Greenleaf on Evidence (15th ed.), sec. 4 *et seq.;* 17 Am. & Eng. Encyclopædia of Law (2d ed.), p. 892 *et seq.*

The instances of facts taken judicial notice of can be multiplied indefinitely. A few illustrative ones only appear in the note. Reference is made for others to the authorities cited here and to the various digests.

Courts will take judicial notice of the geographical divisions of the State. *Harney* v. *Wayne,* 72 Me. 430; *Bellows* v. *Elliott,* 12 Vt. 569; *Ham* v. *Ham,* 39 Me. 266; *State* v. *Jackson,* 39 Me. 291; *Goodwin* v. *Appleton,* 22 Me. 453; *Jones* v. *U. S.,* 137 U. S. 202; *State* v. *Wagner,* 61 Me. 178; *Mossman* v. *Forrest,* 27 Ind. 233, 236; *Rogers* v. *Cady,* 104 Cal. 288; *People* v. *Waller,* 70 Mich. 237; *State* v. *Cunningham,* 81 Wis. 440; *Pitts* v. *Lewis,* 81 Ia. 51. And of the boundaries of the State, as claimed by it. *State* v. *Dunwell,* 3 R. I. 127. But not of the limits of a place which is not a public corporation. *Blandin* v. *Sargent,* 33 N. H. 239, 66 Am. Dec. 720. And of the geographical features of the State, as its large lakes, rivers, and mountains. *Winnipiseogee Lake Co.* v. *Young,* 40 N. H. 420; *People* v. *Brooks,* 101 Mich. 98; *State* v. *Thompson,* 85 Me. 189.

But not of the fact that gin and turpentine are "inflammable liquids," within the terms of an insurance policy. *Mosley* v. *Vt. Mut. Fire Ins. Co.,* 55 Vt. 142.

Courts take judicial notice of the fact that vacant buildings are more exposed to fire than those occupied. *White* v. *Phœnix Ins. Co.,* 83 Me. 279, 22 Atl. 167.

Judicial notice is superior to proof as a means of proving facts. *State* v. *Main,* 69 Conn. 136.

The court will interpret language by the aid of those facts which pertain to that common and general fund of knowledge and information which belongs to the domain of things of which all courts are bound to take judicial notice. *Robinson* v. *Clapp,* 65 Conn. 395.

Our courts take judicial notice of the seal of a foreign government. *Griswold* v. *Pitcairn,* 2 Conn. 89.

Courts take judicial notice of the date of the rising of the general assembly. *Perkins* v. *Perkins,* 7 Conn. 564. And of the local

divisions of the State into towns and counties. *State* v. *Powers*, 25 Conn. 50. And of the laws governing courts and of the jurisdiction of inferior courts whose judgments they revise. *Clapp* v. *Hartford*, 35 Conn. 74. And of railroad lines, mail facilities, and telegraph communication. *Morgan* v. *Farrel*, 58 Conn. 428. And of the hours of sunrise and sunset, but an almanac may be read on the trial to refresh the memory of the court and jury. *State* v. *Morris*, 47 Conn. 180. And that some colored paper is dyed with poisonous substances and some is not. *O'Keefe* v. *National, etc., Co.*, 66 Conn. 45. And that peach "yellows" exists and is a serious disease. *State* v. *Main*, 69 Conn. 135. And that blasting with dynamite is intrinsically dangerous. *Norwalk Gas-Light Co.* v. *Norwalk*, 63 Conn. 528. And that the term "policy playing" was in current use at the time a certain ordinance was passed. *State* v. *Carpenter*, 60 Conn. 102.

Courts will take judicial notice of an English statute concerning prize causes. *Hooker* v. *Pagan*, 7 Dane Abr. 645. So of the Constitution of another State. *Buffum* v. *Stimpson*, 5 Allen (Mass.), 591. So of the judges of lower courts. *Com.* v. *Jeffts*, 14 Gray (Mass.), 19; *Vahle* v. *Brackenseik*, 145 Ill. 231; *State* v. *Wright*, 16 R. I. 518; *State* v. *Higgins*, 124 Mo. 649; *Kennedy* v. *Com.*, 78 Ky. 447; *Kilpatrick* v. *Com.*, 31 Pa. St. 198; *People* v. *McConnell*, 155 Ill. 192. So of the various counties. *Com.* v. *Desmond*, 103 Mass. 445. So of the jurisdiction of a court. *Com.* v. *Desmond*, 103 Mass. 445. So of the navigability of a river. *Com.* v. *King*, 150 Mass. 221, 22 N. E. 905, 5 L. R. A. 536. So of the fact that tobacco and cigars sold by a tobacconist are not drugs. *Com.* v. *Marzynski*, 149 Mass. 68, 21 N. E. 228.

Treaty.— A treaty must be judicially noticed, for it is the supreme law of the land. *People ex rel. Young* v. *Stout*, 81 Hun, 336; affirmed, on opinion below, in 144 N. Y. 699.

The cession of the "Pulteney estate" to Massachusetts, by the treaty of 1786 will be judicially noticed and likewise the extinguishment of the Indian title thereto. *Howard* v. *Moot*, 64 N. Y. 262, 2 Hun, 475.

Great seal.— The courts will take judicial notice of the seal of a foreign State. *Lincoln* v. *Battelle*, 6 Wend. 475.

And of the mode of affixing the great seal, whether by appending

it to a patent as formerly, or by impressment. *Williams* v. *Sheldon*, 10 Wend. 654.

Common law and statutes.—The court will take judicial notice of the existence of the common law in England at the time of the American Revolution, and will presume, unless it is otherwise proved, that this law remains unchanged. *Stokes* v. *Macken*, 62 Barb. 145. And also that the common law does not prevail in France. *In re Hall*, 70 N. Y. Supp. 406. But the statute laws of another State, not in harmony with the common law, will not be judicially noticed. *Harris* v. *White*, 81 N. Y. 532; *Holmes* v. *Broughton*, 10 Wend. 75; *Hosford* v. *Nichols*, 1 Paige, 220; *Humphreys* v. *Chamberlain*, 1 Code Rep. (N. S.) 387.

Statutes.— Judicial notice will be taken of statutes which define boundaries. *Ross* v. *Reddick*, 1 Scam. 73.

Of public acts. *Ross* v. *Reddick*, 1 Scam. 73; *Illinois Cent. R. R. Co.* v. *Wren*, 43 Ill. 77; *Binkert* v. *Jansen*, 94 Ill. 283; *R., R. I. & St. L. R. R. Co.* v. *Lynch*, 67 Ill. 149; *Grob* v. *Cushman*, 45 Ill. 119.

Of a public act not pleaded. *Vance* v. *Rankin*, 194 Ill. 625, 62 N. E. 807, reversing 95 Ill. App. 562.

Of duties under statutes. *People* v. *Hill*, 163 Ill. 186.

Acts of Congress.— Of acts of Congress. *Gooding* v. *Morgan*, 70 Ill. 275; *Smith* v. *Stevens*, 82 Ill. 554; *Dickenson* v. *Breeden*, 30 Ill. 279.

Of the charter of a city. *People* v. *Wilson*, 3 Brad. 368.

Of the charter of Springfield. *Browning* v. *Springfield*, 17 Ill. 143, 147.

Judicial facts.— Of the terms of the Circuit Court. *Buckles* v. *Northern Bank*, 63 Ill. 268.

Of the Chicago courts and where they are held. *Hearson* v. *Grandine*, 87 Ill. 115.

Of the reports of legal decisions. *McDeed* v. *McDeed*, 67 Ill. 546.

Of the laws of other States in so far as is necessary in ascertaining the faith and credit to be given to their judgments. *Hull* v. *Webb*, 78 Ill. App. 617.

Of the persons who are justices. *Livingston* v. *Kettelle*, 1 Gilm. 116; *Graham* v. *Anderson*, 42 Ill. 515; *Shattuck* v. *People*, 4 Scam. 478; *Irving* v. *Brownell*, 11 Ill. 403.

Of judges and the organization of courts. *Vahle* v. *Brackenseck*, 145 Ill. 231.

Of the judges of lower courts. *Vahle* v. *Brackenseck*, 145 Ill. 231; *People* v. *McConnell*, 155 Ill. 192.

Of the resignation of a judge. *People* v. *McConnell*, 155 Ill. 192.

Of attorneys. *Ferriss* v. *Com. Nat. Bank*, 55 Ill. App. 218; *Kuehne* v. *Goit*, 54 Ill. App. 596.

That a certain firm are attorneys-at-law. *Ferriss* v. *Com. Nat. Bank*, 158 Ill. 237.

Of the records of the court itself. *Rochester* v. *Brown*, 82 Ill. 279.

Of an order in the case at bar. *Barley* v. *Kerr*, 180 Ill. 412, 54 N. E. 165.

Of a record on a former appeal. *World's Columbian Exposition Co.* v. *Lehigh*, 94 Ill. App. 433.

Of the jurisdiction of the Supreme Court of another commonwealth. *Rae* v. *Hurlbut*, 17 Ill. 572, 577.

Public officers.— Of who are public officers. *Dyer* v. *Flint*, 21 Ill. 80; *Brush* v. *Lemma*, 77 Ill. 496; *Stout* v. *Slattery*, 12 Ill. 162; *Dyer* v. *Last*, 51 Ill. 179; *Thielmann* v. *Burg*, 73 Ill. 293.

Of the residence of a notary. *Hertig* v. *People*, 159 Ill. 237.

Customs.— Of certain customs. *Munn* v. *Burch*, 25 Ill. 35.

Of the usual mode of transacting business. *Nash* v. *Classen*, 163 Ill. 409.

That a letter mailed at Utica, Ill., will ordinarily reach Des Moines, Iowa, within seven or eight days. *National Masonic Accident Assn.* v. *Seed*, 95 Ill. App. 43.

Geographical facts.— Of the organization of a township. *County of Rock Island* v. *Steele*, 31 Ill. 543.

Of a township number. *Kile* v. *Yellowhead*, 80 Ill. 208.

Of the location of towns and counties. *People* v. *Suppiger*, 103 Ill. 434.

Of subdivisions of city and town land in questions of homestead. *Sever* v. *Lyon*, 170 Ill. 395, 48 N. E. 926.

Of the counties in Illinois. *Higgins* v. *Bullock*, 66 Ill. 37.

That a city was incorporated under the law of 1872. *Brush* v. *Lemma*, 77 Ill. 496.

Of the population of various counties. *Worcester Nat. Bank* v. *Cheney*, 94 Ill. 430.

Of the meaning of initials employed in describing land. *Paris* v. *Lewis*, 85 Ill. 597; *Kile* v. *Yellowhead*, 80 Ill. 208.

Facts commonly known.— Of facts commonly observed. *C., B. & Q. R. R. Co.* v. *Warner*, 108 Ill. 538.

That the owner of an omnibus line is a common carrier. *Parmalee* v. *McNulty,* 9 Ill. 556.

Of the nature of a clearance card given by a railroad to its employee. *C., C., C. & St. L. Ry. Co.* v. *Jenkins,* 174 Ill. 398, reversing 75 Ill. App. 17.

Of the current rate of exchange. *Lowe* v. *Bliss,* 24 Ill. 169.

Public facts.— Of the result of an election as to removing a county seat. *Andrews* v. *Knox County,* 70 Ill. 65.

Of what appropriation had been made for a capitol and its locality. *People* v. *Stuart,* 97 Ill. 123.

That a city had been incorporated under the general law. *Potwin* v. *Johnson,* 108 Ill. 70.

Of the incorporated cities of Illinois. *Spring Valley* v. *Spring Valley Coal Co.,* 71 Ill. App. 432.

Of the Federal census. *C. & A. Ry. Co.* v. *Baldridge,* 172 Ill. 329, 52 N. E. 263.

Of the meaning of "Sec. 23, 38, 14." *McChesney* v. *Chicago,* 173 Ill. 75, 50 N. E. 191.

Qualities of matter.— *The court will take judicious notice* that whiskey is intoxicating. *Wasson* v. *First Nat. Bank,* 107 Ind. 206, 219; *State* v. *Jones,* 3 Ind. App. 121, 122.

That brandy is intoxicating. *Fenton* v. *State,* 100 Ind. 598, 599.

That beer is a malt liquor, and that it is intoxicating (overruling *Lathrope* v. *State,* 50 Ind. 555; *Schlosser* v. *State,* 55 Ind. 82; *Shaw* v. *State,* 56 Ind. 188; *Plunkett* v. *State,* 69 Ind. 68, and *Kurz* v. *State,* 79 Ind. 488); *Myers* v. *State,* 93 Ind. 251, 253; *Mullen* v. *State,* 96 Ind. 304, 306; *Dant* v. *State,* 106 Ind. 79, 80; *Wasson* v. *First Nat. Bank,* 107 Ind. 206, 219. See also *Klare* v. *Smith,* 43 Ind. 483.

That natural gas is dangerous, inflammable and explosive. *Jamieson* v. *Indiana Natural Gas & Oil Co.,* 128 Ind. 555, 12 L. R. A. 652, 28 N. E. 76.

The court will not take judicial notice that wine is not intoxicating. *Jackson* v. *State,* 19 Ind. 312.

As to the amount of leakage from natural gas mains. *Mississinewa Min. Co.* v. *Patton,* 129 Ind. 127, 28 Am. St. Rep. 203, 28 N. E. 1113.

Judicial matters.— *The court will take judicial notice* of the time and duration of terms of court as fixed by law. *McCrory* v. *Anderson,* 103 Ind. 12, 15; *Carmody* v. *State,* 105 Ind. 546, 550; *Durre* v. *Brown,* 7 Ind. App. 127, 34 N. E. 577.

Of the terms of other courts in different counties in the State. *Taylor* v. *Canaday*, 155 Ind. 671; *Sanders* v. *Hartze*, 17 Ind. App. 243.

Of the sessions of the Circuit Courts in the various counties when the question arises in the Supreme Court. *McGinnis* v. *State*, 24 Ind. 500.

Of its own officers, and the genuineness of their signatures. *Hipes* v. *State*, 73 Ind. 39, 40; *Mountjoy* v. *State*, 78 Ind. 172, 174; *Choen* v. *State*, 85 Ind. 209, 210; *Beller* v. *State*, 90 Ind. 448, 449; *Deitz* v. *State*, 123 Ind. 85, 86; *Hammann* v. *Mink*, 99 Ind. 279.

Of the signature of the clerk. *Buell* v. *State*, 72 Ind. 523.

Of the persons who are judges of the Circuit Courts, the question arising in the Supreme Court. *Negley* v. *Wilson*, 14 Ind. 215.

Of the previous orders in the case. *Cluggish* v. *Koons*, 15 Ind. App. 599, 609; *Mode* v. *Beasley*, 143 Ind. 306, 325. (Inspecting its records even in another case, either on its own motion or on the motion of counsel), *Derry* v. *State*, 144 Ind. 503, 517.

The court will not take judicial notice of the records and proceedings in another case in the same court. *Grusenmeyer* v. *City of Logansport*, 76 Ind. 549, 552; *Le Plante* v. *Lee*, 83 Ind. 155, 156.

Public events.— *The court will take judicial notice* of matters of public history. *Williams* v. *State*, 64 Ind. 553, 31 Am. Rep. 135; *Heuthorn* v. *Shepherd*, 1 Blackf. 157; *Brooke* v. *Filer*, 35 Ind. 402 (Civil War); *Carr* v. *McCampbell*, 61 Ind. 97 (Clarke's grant).

Of the results of the United States census. *Stultz* v. *State*, 65 Ind. 492; *Hawkins* v. *Thomas*, 3 Ind. App. 399, 29 N. E. 157.

Of a proclamation of the Governor. *Dunning* v. *N. A. & S. R. Co.*, 2 Ind. 437.

That national bank stock constitutes a considerable part of the capital of the State. *Wesson* v. *First Nat. Bank*, 107 Ind. 206, 8 N. E. 97.

Of the accession of the President or Governor. *Hizer* v. *State*, 12 Ind. 330.

That the trustee of the civil, is also trustee of the school, township. *Inglis* v. *State*, 61 Ind. 212.

That the requisite steps for the relocation of the county seat of Crawford county were taken. *Mode* v. *Beasley*, 163 Ind. 306, 42 N. E. 727.

Of the fact that certain records were kept in the office of the State Adjutant-General. *Monroe County Comrs.* v. *May*, 67 Ind. 562.

The court will not take judicial notice of the time of division of counties and the erection of new ones by commissioners under the general law. *Buckinghouse* v. *Gregg*, 19 Ind. 401.

Geographical facts.— *The court will take judicial notice* of the prominent geographical features of the country. *Hays* v. *State*, 8 Ind. 425; *Mossman* v. *Forrest*, 27 Ind. 233; *Terre Haute, etc., R. R. Co.* v. *Pierce*, 95 Ind. 496, 502; *Wasson* v. *First Nat. Bank*, 107 Ind. 206, 220; *Peck* v. *Sims*, 120 Ind. 345, 348; *Board, etc.* v. *Castetter*, 7 Ind. App. 309, 312.

Of the general geographical features of their own country, State, or judicial district as to the existence and location of its principal mountains, rivers, and cities. *Mossman* v. *Forrest*, 27 Ind. 233, 236.

Of the political divisions of the State. *Indianapolis R. R. Co.* v. *Stephen*, 28 Ind. 429.

Of a county created by public statute. *Buckinghouse* v. *Gregg*, 19 Ind. 401.

Of the county where certain places are located. *Indianapolis & C. R. R. Co.* v. *Case*, 15 Ind. 42; *L., N. A. & C. Ry. Co.* v. *McAfee*, 15 Ind. App. 442, 43 N. E. 36; *Indianapolis & C. R. R. Co.* v. *Stephens*, 28 Ind. 429.

Of the area of a county. *Jasper County Comrs.* v. *Spitler*, 13 Ind. 235.

Of the national surveys and of the boundaries of counties. *Dutch* v. *Boyd*, 81 Ind. 146, 148; *Wilcox* v. *Moudy*, 82 Ind. 219, 220; *Brown* v. *Ogg*, 85 Ind. 234, 236; *Keepfer* v. *Force*, 86 Ind. 81, 87; *Brown* v. *Anderson*, 90 Ind. 93, 95; *Richardson* v. *Hedges*, 150 Ind. 53; *Stockwell* v. *State ex rel.*, 101 Ind. 1, 7; *Bryan* v. *Scholl*, 109 Ind. 367, 371; *Dawson* v. *James*, 64 Ind. 162; *Mossman* v. *Forrest*, 27 Ind. 233; *Murphy* v. *Hendricks*, 57 Ind. 593; *Burton* v. *Ferguson*, 69 Ind. 486; *Buchanan* v. *Whitam*, 36 Ind. 257 (Ripley county lands); *Bannister* v. *Grassy Fork Ditching Assn.*, 52 Ind. 178; *Rich* v. *Grassy Fork Ditching Assn.*, 52 Ind. 187.

Of the location of counties with reference to each other. *Denny* v. *State*, 144 Ind. 503; *Board, etc.* v. *State*, 147 Ind. 476.

Of the various county seats. *Mode* v. *Beasley*, 143 Ind. 306.

Whether or not they are incorporated. *Thorntown* v. *Fingate*, 21 Ind. App. 537.

And if incorporated — of the incorporating statute. *Evansville* v. *Frazer*, 24 Ind. App. 628.

Of county boundaries, and that a certain distance from a certain place is within the same county, the question arising in the Supreme

Court. *Louisville, etc., Ry. Co.* v. *Breckenridge*, 64 Ind. 113, on this point overruled; *Terre Haute, etc., R. R. Co.* v. *Pierce*, 95 Ind. 496, 502; *Wasson* v. *First Nat. Bank*, 107 Ind. 206, 220.

Of the county in which is located land described by township and range. *Bryan* v. *Scholl*, 109 Ind. 367, 370.

Of the county in which a highway, passing through lands described by sections, townships, and ranges, is located. *Adams* v. *Harrington*, 114 Ind. 66, 72, 14 N. E. 603.

Of the county in which is located a public ditch going between named points and passing through lands described by section, township, and ranges. *Smith* v. *Clifford*, 99 Ind. 113, 115.

Of the position of towns in a county. *Indianapolis & C. R. R. Co.* v. *Stephens*, 28 Ind. 429.

Of the mode of subdividing congressional townships into sections. *Mossman* v. *Forrest*, 27 Ind. 233.

As to what subdivisions in a section of land are fractional parts. *Peck* v. *Sims*, 120 Ind. 345, 348; *State ex rel.* v. *Gramelspacher*, 126 Ind. 398, 403.

Of the position of the falls of the Ohio. *Cash* v. *Auditor of Clark County*, 7 Ind. 227.

That White river in Marion county is not a navigable stream. *Ross* v. *Faust*, 54 Ind. 471, 23 Am. Rep. 655.

Of the course of the Ohio river. *Hays* v. *State*, 8 Ind. 425.

Of the location of cities and towns, and in what counties they are. *Louisville, etc., R. R. Co.* v. *Hixon*, 101 Ind. 337, 338.

Of the facilities of travel between certain points, and the time required. *Fitzpatrick* v. *Papa*, 89 Ind. 17, 20; *Wasson* v. *First Nat. Bank*, 107 Ind. 206, 220.

Of the usual route and the speed of travel from a point in Indiana (*i. e.*, Centreville), to one in New York (*i. e.*, Rochester), (distinguishing 1 Blackf. 400). *Hipes* v. *Cochran*, 13 Ind. 175; *Manning* v. *Gasharie*, 27 Ind. 399.

Of the navigation or navigability of streams. *Neaderhouser* v. *State*, 28 Ind. 257.

Of the time when counties were divided and new ones expected by commissioners under the general law. *Buckinghouse* v. *Gregg*, 19 Ind. 401.

That a particular legal subdivision of a section is not practical. *Peck* v. *Sims*, 120 Ind. 345, 22 N. E. 313.

Of the location of stations on railroads. *Louisville, etc., R. R. Co.*

v. *McCaffee,* 15 Ind. App. 442; *Indianapolis & C. R. R. Co.* v. *Case,* 15 Ind. 42; *Indianapolis & C. R. R. Co.* v. *Stephens,* 28 Ind. 429.

The court will not take judicial notice of the precise boundaries of the political divisions of the State further than described in public statutes. *Indianapolis & C. R. R. Co.* v. *Stephens,* 28 Ind. 429.

Of the limits of a town or city. *Grusenmeyer* v. *City of Logansport,* 76 Ind. 549, 552; *City of Indianapolis* v. *McAvoy,* 86 Ind. 587, 589; *Town of Cicero* v. *Williamson,* 91 Ind. 541, 542.

As to whether a railroad company owns and operates a road through a particular county. *Indianapolis & C. R. R. Co.* v. *Stephens,* 28 Ind. 429; *Indianapolis & C. R. R. Co.* v. *Kibby,* 28 Ind. 479.

As to whether we are at war or peace with a certain nation. *Baby* v. *Dubois,* 1 Blackf. 255.

Relations with foreign nations.— *The court takes judicial notice.*

Course of nature, etc.— *The court will take judicial notice.*

The course of the seasons and of husbandry and that the use of land is worth more during the cropping season than in winter. *Ross* v. *Boswell,* 60 Ind. 235.

Of the days on which fall Sundays and holidays. *Swales* v. *Grubbs,* 126 Ind. 106, 110, 25 N. E. 877; *Chrisman* v. *Tuttle,* 59 Ind. 155.

Or other days. *Williamson* v. *Brandenberg,* 6 Ind. App. 97, 32 N. E. 1055.

Of the usual method of computing time. *Hedderich* v. *State,* 101 Ind. 564, 571, 1 N. E. 47, 51 Am. Rep. 768.

That twenty years had not elapsed from April 23, 1842, to January 30, 1862. *Harding* v. *Third Presbyterian Church,* 20 Ind. 71.

Of seed time and harvest. *Abshire* v. *Mather,* 27 Ind. 381 (suit on note due "after harvest").

Of the laws of nature, including electricity. *City of Crawfordsville* v. *Braden,* 130 Ind. 149, 158.

The court will not take judicial notice of the various modes of generating, transmitting, and using electricity. *City of Crawfordsville* v. *Braden,* 130 Ind. 149, 158.

Meaning of words.— *The court will take judicial notice* of the usual abbreviations. *Heddrich* v. *State,* 101 Ind. 564, 571.

Such as "C O D." *United States Express Co.* v. *Keefer,* 59 Ind. 263.

That the abbreviation "oteb." in a *scire facias,* stands for October. *Kearns* v. *State,* 3 Blackf. 334.

That a note payable at "Citizens' Bank, Noblesville, Ind.," is payable in Indiana. *Burroughs* v. *Wilson*, 59 Ind. 536.

Matters of general knowledge.— *The court takes judicial notice* of matters of general knowledge. *Heddrich* v. *State*, 101 Ind. 564, 571; *Indianapolis, etc., Ry. Co.* v. *Clay*, 4 Ind. App. 282, 285.

That employees of a bank other than the cashier must have access to the funds. *La Rose* v. *Logansport Nat. Bank*, 102 Ind. 332, 1 N. E. 805.

The court will not take judicial notice of the fact that a signature in script, purporting to be written, was placed there by some mechanical contrivance. *Rosenstein* v. *State*, 9 Ind. App. 290, 291.

That electric light is safer and more healthful than ordinary light. *City of Crawfordsville* v. *Braden*, 130 Ind. 149, 159.

Of the mode in which business is usually carried on by insurance agents. *Howe* v. *Provident Fund Soc.*, 7 Ind. App. 586, 594.

Of the duties of railroad trainmen. *Indianapolis, etc., Ry. Co.* v. *Clay*, 4 Ind. App. 282, 285.

Of reasonable time for a passenger train to stop under ordinary circumstances (*i. e.*, three minutes). *Louisville, etc., R. R. Co.* v. *Costello*, 9 Ind. App. 462, 468.

As to whether a fence sufficient to restrain sheep will restrain hogs. *Endere* v. *McDonald*, 5 Ind. App. 297, 31 N. E. 1056.

Changing rules.— By making provisions as to proof of facts, the statute may change the rule otherwise in force as to judicial notice of such facts. *People* v. *Murphy*, 93 Mich. 41.

New Jersey.

Of what judicial notice will be taken.— Judicial notice will be taken of the value of coins (*State* v. *Stimson*, 4 Zab. 9); of distances (*State* v. *Ferguson*, 31 N. J. L. 289); of occupation of streets by horse railroads (*Jersey City & B. Co.* v. *Jersey City & H. Co.*, 20 N. J. Eq. 61); of an estuary of the sea (*Edwards* v. *Elliott*, 21 Wall. 532); of cities (*State* v. *Helmes*, 3 N. J. L. 600); of the waters of Raritan bay as tidal waters (*Metzger* v. *Post*, 44 N. J. L. 77); of the ordinary meaning of words (*Smith* v. *Clayton*, 29 N. J. L. 367); of the almanac, from which it appears that a certain date fell on a Sunday (*Reed* v. *Wilson*, 41 N. J. L. 29); of the Constitution of another State (*Curtis* v. *Martin*, Pen. 399. See

Print Works v. *Lawrence*, 3 Zab. 595); of the law merchant as a part of the common law (*Reed* v. *Wilson*, 41 N. J. L. 29); of the provisions of public acts of the Legislature (*Newark* v. *Stout*, 52 N. J. L. 35; *Stephens, etc., Co.* v. *Central R. Co.*, 33 N. J. L. 229; *Rader* v. *Union Twp.*, 39 N. J. L. 509, 43 N. J. L. 518); of the fact that a wall near windows will materially diminish the supply of light and air (*Ware* v. *Chew*, 43 N. J. Eq. 493); that blowing a whistle is a customary railroad signal (*Bittle* v. *Railroad*, 55 N. J. L. 615); of the fact that the return on safe investments has been diminishing (*Collins* v. *Wardell*, 63 N. J. Eq. 371).

When the charter of a city is declared to be a public act, supplements thereto will also be judicially noticed. *Stephens, etc., Co.* v. *Central R. Co.*, 33 N. J. L. 229; *Hawthorne* v. *Hoboken*, 32 N. J. L. 172.

Laws of other States.— Judicial notice of the printed statutes and decisions of other States. G. S. 1895, "Evidence," 22, 23.

Of what judicial notice will not be taken.— Judicial notice will not be taken of the appointment of a justice of the peace (*State* v. *Hutchinson*, 5 Hal. 242. But see *Campbell* v. *Dewick*, 20 N. J. Eq. 186); of the laws of other States and nations (*Campion* v. *Kille*, 14 N. J. Eq. 229, 15 N. J. Eq. 476; *Condit* v. *Blackwell*, 19 N. J. Eq. 193; *Uhler* v. *Semple*, 20 N. J. Eq. 288; *Ball* v. *Franklinite Co.*, 32 N. J. L. 102); of private acts of the Legislature (*Bridge Co.* v. *Perdicaris*, 29 N. J. L. 367; *Black* v. *Canal Co.*, 24 N. J. Eq. 455, 480); of the seal on a diploma of the New Jersey Medical Society (*Vaughn* v. *Hankinson*, 35 N. J. L. 79); of a custom of a board of freeholders (*Morris* v. *Freeman*, 44 N. J. L. 634).

Ordinances of a subdepartment of a city will not be judicially noticed by the police justice of the city as a whole. *State* v. *Trenton*, 51 N. J. L. 495; *Wright* v. *Trenton*, 51 N. J. L. 497.

A court is not required to notice judicially that bankruptcy proceedings have been begun against a party to a pending suit. *Esterbrook* v. *Ahern*, 30 N. J. Eq. 341.

Maryland.

Of what judicial notice will be taken.— The court will take judicial notice of the public acts of the Legislature (*Day* v. *Day*, 22 Md. 530; *State* v. *Jarrett*, 17 Md. 309; *Brady* v. *State*, 26 Md. 290; *Towson* v. *Havre de Grace*, 6 H. & J. 47); of acts of Congress

(*Eastwood* v. *Kennedy*, 44 Md. 563); of the political relations of countries (*Stewart* v. *McIntosh*, 4 H. & J. 233); of the regulations of the Land Office in relation to property (*Hammond's Lessee* v. *Warfield*, 2 H. & J. 151); of public local laws, as well as general (*Slymer* v. *State*, 62 Md. 237); of facts of history (*Wirgman* v. *Mactier*, 1 G. & J. 150); of a private act of the Legislature when it affects the charter of a corporation which is a public law (*Planters' Bank* v. *Bank of Alexandria*, 10 G. & J. 346); of the calendar, including the days of the week upon which the days of the month fall (*Railroad Co.* v. *Lehman*, 56 Md. 209; *Kilgour* v. *Miles*, 6 G. & J. 268; *Ecker* v. *Bank*, 64 Md. 292); of *dies non juridici*, Sundays, Christmas, and the like (*Sasscer* v. *Bank*, 4 Md. 409); of the meaning of common expressions (*Baltimore* v. *State*, 15 Md. 376, 484); of the boundaries of the counties of the State (*Acton* v. *State*, 80 Md. 547).

The difference between a faro table and a billiard table is of such notoriety that the court will take judicial notice of it. *State* v. *Price*, 12 G. & J. 260.

Judicial notice will be taken of acts of the Legislature concerning the local affairs of counties and election districts. *Higgins* v. *State*, 64 Md. 419.

An appellate court, in reviewing the judgment of an inferior court, does not take judicial notice of the latter's rules of practice. *Cherry* v. *Baker*, 17 Md. 75. See *Oliver* v. *Palmer*, 11 G. & J. 426.

The seal of a court of this State proves itself; but the seal of a court of a foreign country must be authenticated by evidence. *De Sobry* v. *De Laistre*, 2 H. & J. 191.

Courts take judicial notice of acts of Congress of a public character. *Dickey* v. *Bank*, 89 Md. 280.

Judicial notice will be taken of a statute authorizing clerks of court to accept a certain corporation as sole surety on bonds. *Miller* v. *Matthews*, 87 Md. 464.

Courts will take judicial notice of public statutes fixing the duties of public officers. *Graham* v. *Harford Co.*, 87 Md. 321.

Courts take judicial notice of a usage of such universal prevalence that it has become part of the existing law. *Insurance Co.* v. *Wilson*, 2 Md. 217.

Of what judicial notice will not be taken.— The court will not take judicial notice of a private act of the Legislature (*Whitcroft*

v. *Dorsey*, 3 H. & McH. 357); of municipal ordinances (*Bank* v. *Baltimore*, 71 Md. 515; *Shaufelter* v. *Baltimore*, 80 Md. 483; *Field* v. *Malster*, 88 Md. 691); of the character of the disease of glanders (*State* v. *Fox*, 79 Md. 514).

The court cannot take judicial notice of the result of a local option election. *Whitman* v. *State*, 80 Md. 410.

Laws of foreign countries must be proved as matters of fact. *De Sobry* v. *De Laistre*, 2 H. & J. 191; *Baptiste* v. *De Volunbrun*, 5 H. & J. 86.

Pennsylvania.

Of what judicial notice will be taken.— The courts will take judicial notice of the agreement between Lord Baltimore and William Penn as to the boundary (*Thomas* v. *Stigers*, 5 Pa. 480); of a public local law (*Van Swartow* v. *Com.*, 24 Pa. 131); of the laws of a sister State for the purpose of ascertaining the faith and credit required to be given them by the United States Constitution (*Ohio* v. *Hinchman*, 27 Pa. 479); of the custom of merchants to charge interest on goods sold after six months (*Koons* v. *Miller*, 3 W. & S. 271; *Watt* v. *Hoch*, 25 Pa. 411); of the official character of a justice of the peace (*Hibbs* v. *Blair*, 14 Pa. 413; *Kilpatrick* v. *Com.*, 31 Pa. 198); that a local election has been held deciding adversely to license (*Rauch* v. *Com.*, 78 Pa. 490); of the time the suit was begun (*Withers* v. *Gillespy*, 7 S. & R. 10); of the aldermen of Philadelphia as public officers (*Fox* v. *Com.*, 81 Pa. 511); of the official acts of a collector of internal revenue and his deputy (*Lerch* v. *Snyder*, 112 Pa. 161); of the corporate seal of a city (*Duffey* v. *Presb. Congregation*, 48 Pa. 46); of the division of counties into boroughs (*Borough* v. *Brown*, 11 Pa. Co. Ct. 272); of the distance between cities and the usual running time of trains between (*Pearce* v. *Langfit*, 101 Pa. 507); of the calendar and computation of time (*Hautch* v. *Levan*, 1 Woodw. Dec. 456; *Wilson* v. *Van Leer*, 127 Pa. 371.

Appellate courts will take judicial notice of the persons who occupy the bench in inferior courts. *Kilpatrick* v. *Com.*, 31 Pa. 198.

The seal of the United States Circuit Court proves itself. *Williams* v. *Wilkes*, 14 Pa. 228.

Of what judicial notice will not be taken.— Judicial notice will not be taken of a private statute (*Handy* v. *Railroad Co.*, 1 Phila.

31; *Packer* v. *Com'rs*, 1 Pittsb. 249; *Timlow* v. *Railroad Co.*, 99 Pa. 284); of a special act for the survey of a particular tract (*Allegheny* v. *Nelson*, 25 Pa. 332); of the charter of a bank (*Clarion Nat. Bank* v. *Gruber*, 87 Pa. 468); of the laws of sister States (*Ripple* v. *Ripple*, 1 Rawle, 386; *Electric Co.* v. *Geiger*, 147 Pa. 399).

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.[15]

AMERICAN NOTE.

General.

Authorities.—McKelvey on Evidence, p. 36; 1 Taylor on Evidence (Chamberlayne's 9th ed.), p. 2139; *Wagner's Case*, 61 Me. 178; *Nix* v. *Hedden*, 149 U. S. 304; *Vahle* v. *Brackenseik*, 145 Ill. 236; *Bowen* v. *Mo. Pac. R. Co.*, 118 Mo. 541; *Hefferman* v. *Harvey*, 41 W. Va. 766; *Wilson* v. *Van Leer*, 127 Pa. 372; *State* v. *Clare*, 5 Ia. 509; *State* v. *Morris*, 47 Conn. 179.

Evidence is inadmissible of that of which courts take judicial notice. *White* v. *Phœnix Ins. Co.*, 83 Me. 279, 22 Atl. 167; *Com.* v. *Marzynski*, 149 Mass. 72, 21 N. E. 228.

15 Taylor (from Greenleaf), s. 21. *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 has been recognised.

Facts of which the courts take judicial notice need not be proved. *Secrist* v. *Petty*, 109 Ill. 188; *Vahle* v. *Brackenseik*, 145 Ill. 236.

No evidence of facts judicially noticed.— Evidence is not to be admitted of facts judicially noticed. Rev. Stat., 1901, sec. 377; *State ex rel. Brown* v. *Bailey*, 16 Ind. 46; followed in *Mattock* v. *Ind. & Ill. Cent. R. R. Co.*, 16 Ind. 176; *State* v. *Downs*, 148 Ind. 324; *Ervin* v. *State*, 150 Ind. 332; *Grusenmayer* v. *City of Logansport*, 76 Ind. 549, 552; *Town of Albion* v. *Hetrick*, 90 Ind. 545, 551; *Pennsylvania Co.* v. *Horton*, 132 Ind. 189, 194.

The court may properly charge the jury that a certain day falls on Sunday. *Swales* v. *Grubbs*, 126 Ind. 106, 110.

Not to be pleaded.— Matters judicially noticed are not to be pleaded. *City of Logansport* v. *Wright*, 25 Ind. 512; *West* v. *Blake*, 4 Blackf. 234.

Judge informs himself.— The court informs itself as best it can of matters of which it is to take judicial notice. *State ex rel. Brown* v. *Bailey*, 16 Ind. 46; followed in *Mattock* v. *Ind. & Ill. Cent R. R. Co.*, 16 Ind. 176.

Maryland.

Mode of ascertaining facts required to be judicially noticed. *Boteler* v. *State*, 8 Gill & J. 359; *Legg* v. *Annapolis*, 42 Md. 203; *Strauss* v. *Heiss*, 48 Md. 292.

Pennsylvania.

Authority.— *Wilson* v. *Van Leer*, 127 Pa. 372.

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.[16] Provided that in a trial for felony the prisoner can make no admissions

16 R. S. C., O. XXXII. 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*, 1878, 11 Ch. Div. at p. 150.

so as to dispense with proof, though a confession may be proved as against him, subject to the rules stated in Articles 21–24.[17]

AMERICAN NOTE.

General.

Authorities.— 11 Am. & Eng. Encyclopædia of Law (2d ed.), p. 488; Gould on Pleading, chap. 3, sec. 168; *Gulliver* v. *Fowler*, 64 Conn. 556, 566; *Waldron* v. *Waldron*, 156 U. S. 361; *McGowan* v. *McDonald*, 111 Cal. 57; *State* v. *Brooks*, 99 Mo. 137; *Atkinson* v. *Linden Co.*, 138 Ill. 187; *Musselman* v. *Wise*, 84 Ind. 248.

A demurrer is not an admission if an issue of fact is subsequently joined. *State's Attorney* v. *Branford*, 59 Conn. 402, 414. See, also, *Tyler* v. *Waddingham*, 58 Conn. 389.

Where the defendant pleads in confession and avoidance, the plaintiff is not required to prove a breach. *Cotheal* v. *Talmadge*, 1 E. D. Smith, 573.

A party cannot offer evidence to controvert his admissions contained in the pleadings. *Getty* v. *Hamlin*, 46 Hun, 1.

By demurrer facts sufficiently pleaded are admitted, but solely for the objects of the argument on the demurrer; a demurrer cannot be claimed as evidence of such facts when the case goes to trial upon the issue of fact. *Gray* v. *Gray*, 143 N. Y. 354. But see *Cutler* v. *Wright*, 22 N. Y. 472.

A demurrer is not an admission if an issue of fact is subsequently joined. *Gray* v. *Gray*, 143 N. Y. 354. See *Cutler* v. *Wright*, 22 N. Y. 472.

If a defendant claims that the plaintiff's bill of particulars admits his counterclaim, he must raise this point at the trial and object to evidence offered for the purpose of defeating such claim. *Case* v. *Pharis*, 106 N. Y. 114.

An admission in an answer that a written lease sued on was made, together with a proving of his own signature by the subscribing witness, cannot be objected to by the defendant on the ground of want of sufficient identification to be admissible. *Hall* v. *Beston*, 59 N. E. 1123, affirming 26 App. Div. 105, 49 N. Y. Supp. 811.

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[17] 1 Ph. Ev. 391, n. 6. In *R.* v. *Thornhill*, 1838, 8 C. & P., Lord Abinger acted upon this rule in a trial for perjury.

Facts admitted in the pleadings need not be proved. *Grange M. Co.* v. *Western Assur. Co.*, 118 Ill. 398; *Fein* v. *Covenant Mut. Benefit Assn.*, 60 Ill. App. 275; *Atkinson* v. *Linden Co.*, 138 Ill. 187; *Grace* v. *Ohio Bldg. Assn.*, 63 Ill. App. 339.

One has no right to prove admitted facts. *Cor., etc., Assn.* v. *Spies*, 114 Ill. 467; *La Minie* v. *Carley*, 114 Ill. 198; *Champaign* v. *Maguire*, 56 Ill. App. 618.

Parties may agree on the evidence. *Bolton* v. *Johnson*, 163 Ill. 234.

Admissions in open court operate as estoppels. *Hensoldt* v. *Petersburg*, 63 Ill. 111; *Stribling* v. *Prettyman*, 57 Ill. 371.

Facts admitted in an affidavit for a continuance cannot afterwards be denied. *Supervisors of Fulton County* v. *M. & W. R. R. Co.*, 21 Ill. 368.

Evidence need not be offered of facts proved by the other side. *Hesterberg* v. *Clark*, 166 Ill. 241.

But an incidental remark by counsel in his opening statement is not such an admission as to do away with the necessity of evidence on the part of the other side. *Lake Erie, etc., Co.* v. *Rooker*, 13 Ind. App. 600.

Facts of record.—Admissions in pleadings are conclusive. *Colter* v. *Calloway*, 68 Ind. 219; *Plankroad Co.* v. *Stallcup*, 62 Ind. 345; *School Town* v. *Grant*, 104 Ind. 168.

Admissions on the trial are made part of the record by bills of exceptions. *Clem* v. *State*, 31 Ind. 480.

Where a case is submitted, the facts being agreed upon, there can be no recovery unless all of the facts are covered by the agreement. *Brown* v. *Rogers*, 61 Ind. 449.

Facts admitted.—One cannot, by admitting a fact, exclude proof offered by the other side. *Kimball, etc., Co.* v. *Vroman*, 35 Mich. 310; *John Hancock, etc., Co.* v. *Moore*, 34 Mich. 41; *Baumier* v. *Antiau*, 79 Mich. 509; *Decamp* v. *Scofield*, 75 Mich. 449, 42 N. W. 962.

New Jersey.

Authorities.—*Wills* v. *McKinney*, 30 N. J. Eq. 465; *Warbasse* v. *Insurance Co.*, 42 N. J. L. 203; *Schenck* v. *Schenck*, 5 Hal. 276; *Mitchell* v. *Mitchell*, 26 N. J. Eq. 497; *Truax* v. *Truax*, Pen. 166; *Bordine* v. *Combs*, 3 Green, 412.

Admission by counsel that a document is lost admits secondary evidence without further evidence of loss. *Culver* v. *Culver*, 31 N. J. Eq. 448.

Testimony not allowed to disprove a fact admitted in the pleadings. *Evans* v. *Huffman*, 5 N. J. Eq. 254.

Admissions in open court dispense with the necessity of evidence. *Marsh* v. *Mitchell*, 26 N. J. Eq. 497.

Maryland.

Where the defense to an action on a contract under seal is payment, no evidence of the execution of the contract need be offered. *Zihlman* v. *Glass Co.*, 74 Md. 303.

Where all the facts are admitted, the party has a right to have the jury instructed as to their verdict. *Insurance Co.* v. *Evans*, 9 Md. 1.

Pennsylvania.

The admission by the maker of a note that the signature is his renders proof of the fact unnecessary. *Williams* v. *Floyd*, 11 Pa. 499.

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.

AMERICAN NOTE.

General.

The payment of a mortgage may be proved by parol. *Mauzey* v. *Bowen*, 8 Ind. 193; *Cowgill* v. *Wooden*, 2 Blackf. 332.

However, parol evidence to establish a resulting trust must be received with great caution. *Fausler* v. *Jones*, 7 Ind. 277.

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;

* See Note XXVII.

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;

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.

AMERICAN NOTE.

General.

Authorities.— 12 Am. & Eng. Encyclopædia of Law (2d ed.), p. 488; also vol. 11, p. 536; *Rea* v. *Harrington*, 58 Vt. 181.

A witness may give the impression if gained from facts personally perceived. *Humphries* v. *Parker*, 52 Me. 502; *Leach* v. *Bancrofts*, 61 N. H. 411; *Whitman* v. *Morey*, 63 N. H. 448, 457; *Fiske* v. *Gowing*, 61 N. H. 431; *State* v. *Ward*, 61 Vt. 153; *Dexter* v. *Harrison*, 146 Ill. 169; *Lovejoy* v. *Howe*, 55 Minn. 353; *Lait* v. *Hall*, 71 Cal. 149; *Devall's Exe'r* v. *Darby*, 38 Pa. 56; *Ala. South. R. Co.* v. *Hill*, 93 Ala. 515. But not otherwise. *Kingsbury* v. *Moses*, 45 N. H. 222.

Objects may be shown to the jury. *State* v. *Ward*, 61 Vt. 153; *Louisville, etc., R. Co.* v. *Wood*, 113 Ind. 544; *Lanark* v. *Dougherty*, 153 Ill. 163; *Langworthy* v. *Green*, 95 Mich. 93.

The property in dispute may be inspected by the trier. *McGar* v. *Bristol*, 71 Conn. 652.

The court, in its discretion, may prevent the exhibition to the jury of what would be indecent or offensive. *Knowles* v. *Crampton*, 55 Conn. 336.

By statute, generally, the jury may, by order of court, be taken to view property in controversy. 1 Thompson on Trials, sec. 882, p. 168; *Vane* v. *Evanston*, 150 Ill. 616.

A person may be exhibited to the jury. *Com.* v. *Emmons*, 98 Mass. 6; *Hermann* v. *State*, 73 Wis. 248. *Contra, Louisville, etc., R. Co.* v. *Wood*, 113 Ind. 544, 550.

Photographs may be admissible evidence. *Dyson* v. *N. Y., etc., R. R. Co.*, 57 Conn. 9; *State* v. *Griswold*, 67 Conn. 290; *Com.* v. *Rob-*

ertson, 162 Mass. 90; *Gilbert* v. *West End R. R. Co.*, 160 Mass. 403: *Miller* v. *Louisville, etc., R. Co.*, 128 Ind. 16, 25 Am. St. Rep. 416; *Kansas City, M. & B. R. R. Co.* v. *Smith*, 90 Ala. 25, 24 Am. St. Rep. 753; *Udderzook* v. *Com.*, 76 Pa. St. 340; *White Sewing Machine Co.* v. *Gordon*, 124 Ind. 495, 19 Am. St. Rep. 109.

A photograph is secondary evidence. To admit it without proof of its correctness is error. The testimony of the photographer is not essential. That of any one with knowledge of the fact of its correctness is sufficient. *McGar* v. *Bristol*, 71 Conn. 655; *Cunningham* v. *Fair Haven & Westville R. R. Co.*, 72 Conn. 251.

The preliminary question of whether it is a correct representation is for the trial court and will not be reviewed. *Van Houten* v. *Morse*, 162 Mass. 414, 422, 44 Am. St. Rep. 373.

A witness may probably be ordered to write his name in court where his signature is denied. *Smith* v. *King*, 62 Conn. 521.

Conversations by telephone if the parties can recognize the voices of one another are admissible evidence. *People* v. *Ward*, 3 N. Y. Cr. 511; *Murphy* v. *Jack*, 142 N. Y. 215, 40 Am. St. Rep. 590, 36 N. E. 882; *People* v. *McKane*, 143 N. Y. 455, 457.

A witness may give the impression if gained from facts personally received. *Blake* v. *People*, 73 N. Y. 586. But not otherwise. *Mather* v. *Parsons*, 32 Hun, 338. See *Rickerson* v. *Hart Ins. Co.*, 149 N. Y. 307; *Baylies* v. *Cockroft*, 81 N. Y. 363; *Mfrs. & Traders' Bank* v. *Koch*, 105 N. Y. 630; *Ward* v. *Kilpatrick*, 85 N. Y. 413; *Nicholay* v. *Unger*, 80 N. Y. 54.

A party may testify to the amount received by him upon a sale at auction; it is not absolutely necessary to call the auctioneer. *Recknagel* v. *Le Cocq*, 6 N. Y. St. R. 527, 26 Wkly. Dig. 241.

Objects exhibited.— Objects may be shown to the jury. *People* v. *Gonzalez*, 35 N. Y. 49; *King* v. *N. Y. C. R. Co.*, 72 N. Y. 607.

Viewing premises.— The jury may view the premises in course of criminal trial. Code Cr. Pro., sec. 411.

Photographs.— A photograph or drawing may be introduced in evidence if properly verified. *Cowley* v. *People*, 83 N. Y. 464, 38 Am. Rep. 464; *People* v. *Johnson*, 140 N. Y. 350; *Alberti* v. *N. Y., L. E. & W. R. Co.*, 118 N. Y. 77.

Compelling production of person for examination.— The court may compel the production of a person before the jury. *Mulhado* v. *Brooklyn, etc., R. Co.*, 30 N. Y. 370.

Evidence unlawfully obtained.— Letters and papers if obtained unlawfully are still admissible in evidence. *Siebert* v. *People*, 143 Ill. 571.

Production of objects and persons.— Objects may be produced for the inspection of the jury. *Springer* v. *Chicago*, 135 Ill. 552, 561; *A., T. & S. F. R. R. Co.* v. *Schneider*, 127 Ill. 144, 149; *Tudor I. W.* v. *Weber*, 129 Ill. 535; *Lanark* v. *Dougherty*, 153 Ill. 163.

By statute, generally, the jury may, by order of court, be taken to view property in controversy. *Vane* v. *Evanston*, 150 Ill. 616.

An injured member may be shown to the jury. *Grand Lodge* v. *Randolph*, 186 Ill. 89, 57 N. E. 882, affirming 84 Ill. App. 220; *Swift* v. *O'Neil*, 58 N. E. 416, affirming 88 Ill. App. 162; *Lanark* v. *Dougherty*, 153 Ill. 163; *Chicago St. Ry. Co.* v. *Grenell*, 90 Ill. App. 30.

In injury cases, the plaintiff may strip in the presence of the jury. *C. & A. R. R. Co.* v. *Clausen*, 70 Ill. App. 550.

One may be allowed to exhibit to the jury a rupture, in the discretion of the court. *C. & A. R. R. Co.* v. *Clausen*, 173 Ill. 100, 50 N. E. 680, affirming 70 Ill. App. 550.

An eye which has been removed, or a piece of bone, may be exhibited to the jury. *Seltzer* v. *Saxton*, 71 Ill. App. 229.

The exhibition of an injury to a jury is within the discretion of the court. *C. & A. R. R. Co.* v. *Clausen*, 70 Ill. App. 550.

The person injured may show the jury to what extent he can move the injured arm. *Prichard* v. *Moore*, 75 Ill. App. 553.

It is within the discretion of the court to allow the portion of the body injured to be exhibited to the jury. *Jefferson Ice Co.* v. *Zwicokoski*, 78 Ill. App. 646.

Child in bastardy.— In bastardy proceedings, the child cannot be shown in evidence to show resemblance to the putative father. *Robnett* v. *People*, 16 Ill. App. 300.

Experiments.— A fact which illustrates by way of experiment is admissible. *C. & N. W. R. R. Co.* v. *Hart*, 22 Ill. App. 207; *J. & E. Ry. Co.* v. *Reese*, 70 Ill. App. 463.

Chemical experiments to determine the explosive character of dust are admissible, but should be admitted with caution. *Shufeldt* v. *Searing*, 59 Ill. App. 341.

Chemical experiments conducted under the same conditions are admissible. *Fein* v. *C. M. Benefit Assn.*, 60 Ill. App. 274.

Experiments may be allowed with a model before the jury. *Pennsylvania Coal Co.* v. *Kelly*, 156 Ill. 9.

Photographs.— Photographs may be admissible evidence. *Miller* v. *Louisville, etc., R. Co.*, 128 Ind. 16, 25 Am. St. Rep. 416; *White Sewing Machine Co.* v. *Gordon*, 124 Ind. 495.

A photograph of a person or thing must be shown by the testimony of witnesses to have been taken at a proper time to reproduce a correct appearance or likeness. *White Sewing Machine Co.* v. *Gordon*, 124 Ind. 495.

Evidence of inspection may be considered.— An injured member may be exhibited to the jury. *Indiana Co.* v. *Parker*, 100 Ind. 181; *Louisville, etc., Ry. Co.* v. *Falvey*, 104 Ind. 409, 422; *Louisville, etc., Ry. Co.* v. *Wood*, 113 Ind. 544, 548; *Hess* v. *Lowrey*, 122 Ind. 225, 232.

So witness's injuries in connection with his testimony. *Brennan* v. *Hutchinson*, 15 Ind. App. 639; *Citizens, etc., R. Co.* v. *Willoeby*, 134 Ind. 563.

Objects may be shown to the jury. *Louisville, etc., R. Co.* v. *Wood*, 113 Ind. 544; *Taylor* v. *McGrath*, 9 Ind. App. 30; *Thrawley* v. *State*, 153 Ind. 275 (skull).

Inspection of documentary evidence.— In order to compel the production of writings in the hands of a party an order is required. *Whitman* v. *Weller*, 39 Ind. 515; *Duke* v. *Brown*, 18 Ind. 111.

The propriety of making such an order depends upon the averments of the pleadings and issues joined, and, unless from the offered evidence itself a sufficient reason for excluding it appears, it is not error to admit it over general objections. *Wabash Valley, etc.* v. *James*, 8 Ind. App. 449, 453. Compare *Houser* v. *State ex rel.*, 93 Ind. 228, 229.

The other papers in a case are already before the court, but may be formally introduced in evidence. *Bell* v. *Pavey*, 7 Ind. App. 19; *Manor* v. *Board, etc.*, 137 Ind. 367.

On the question of paternity a child cannot be submitted to the jury to show resemblance. *Reitz* v. *State*, 33 Ind. 187.

New Jersey.

Authorities.— Witness must state facts not inferences. *Berckmans* v. *Berckmans*, 16 N. J. Eq. 122.

The best evidence possible must be produced. *Hoffman* v. *Rodman*, 39 N. J. L. 252.

Direct evidence not required to prove adultery; circumstantial evidence will be sufficient if the opportunity and the will to commit

the crime are established. *Berckmans* v. *Berckmans*, 16 N. J. Eq. 122, 17 N. J. Eq. 453; *Day* v. *Day*, 4 N. J. Eq. 444; *Adams* v. *Adams*, 17 N. J. Eq. 324.

Photographs.— Photographs are admissible when the trial judge has been satisfied that they are correct representations. *Goldsboro* v. *Central R. Co.*, 60 N. J. L. 49.

Examination of person.— Physical examination of a plaintiff in an action for damages allowed under statute. *McGovern* v. *Hope*, 63 N. J. L. 77.

Jury allowed to compare putative father and child to note resemblance. *Gaunt* v. *State*, 50 N. J. L. 490.

A witness or a party may be required to stand up to be identified. *Rice* v. *Rice*, 47 N. J. Eq. 559.

View.— Inspection of chattels or premises by the jury or by witnesses. G. S. 1895, "Evidence." 24.

Maryland.

Authorities.— Where the intention of a party is material he may himself testify as to what it was. *Phelps* v. *Georges Creek Co.*, 60 Md. 536.

In testifying as to a conversation, the witness must give either the language or its substance; he cannot give his impression. *Elbin* v. *Dean*, 33 Md. 135.

The letter of a party excluded because the writer was present and could testify directly as to the matter in question. *Bland* v. *Dowling*, 9 G. & J. 19.

A witness may state the result of his examination of numerous documents. *Blum* v. *State*, 94 Md. 375.

In prosecution for rape the crime cannot be proved by evidence of declarations of the prosecutrix made after the event. *Parker* v. *State*, 67 Md. 329.

Photographs.— Photographs are admissible when shown to be correct. *Dorsey* v. *Habersack*, 84 Md. 117.

A sketch or painting of the scene of an accident is admissible. *Commissioners of Harford* v. *Wise*, 71 Md. 43.

Exhibiting objects to the jury.— Child may be offered as an exhibit to prove resemblance to its putative father. *Jones* v. *Jones*, 45 Md. 144.

To prove that defendant injured certain rails and shingles, the plaintiff cannot introduce some of the rails and shingles, but is

restricted to testimony of witnesses who have made examination. *Jacobs* v. *Davis*, 34 Md. 204.

During the trial parties may submit documents themselves for the inspection of the jury, but not afterward. *Moore* v. *McDonald*, 68 Md. 321.

View by the jury.— With the consent of both parties, the jury may be taken to view the scene of an accident. *Arnold* v. *Green*, 95 Md. 217.

Pennsylvania.

Authorities.— A witness may not testify as to what he would have done under other circumstances. *Swan* v. *Scott*, 11 S. & R. 155.

A witness cannot testify as to a conclusion which it is the province of the jury to draw. *Reiter* v. *McJunkin*, 194 Pa. 301; *Smith* v. *Cohn*, 170 Pa. 132.

A witness may not testify as to inferences he drew from certain facts. *Given* v. *Albert*, 5 W. & S. 333.

A witness may give the impression if gained from facts personally perceived. *Devall's Exr.* v. *Darby*, 38 Pa. 56.

A belief not founded on knowledge is no evidence. *Carmalt* v. *Post*, 8 Watts, 406.

Evidence obtained by the prosecutor's having body of deceased exhumed is admissible to prove murder. *Com.* v. *Grether*, 204 Pa. 203.

Any one who saw the fact may testify, though one not called might be a better witness than the one testifying. *Richardson* v. *Milburn*, 17 Md. 67.

The oral testimony of one witness is admissible, though the testimony of others not called might be stronger. *Western Union Co.* v. *Stevenson*, 128 Pa. 442; *Canfield* v. *Johnson*, 144 Pa. 61.

Undue influence may be shown by any lawful evidence, direct or indirect. *Robinson* v. *Robinson*, 203 Pa. 400.

Witness testifying in a foreign language. *Com.* v. *Greason*, 204 Pa. 64.

Photographs.— Photographs are admissible after preliminary proof of care and accuracy in taking them. *Beardslee* v. *Columbia Twp.*, 188 Pa. 496.

Photograph admissible on question of size. *Com.* v. *Keller*, 191 Pa. 122.

Photographs and portraits are admissible to prove identity. *Udderzook* v. *Com.*, 76 Pa. 340; *Com.* v. *Connors*, 156 Pa. 147; *Bryant's Estate*, 176 Pa. 309.

Demonstrative evidence.—Jury may infer minority from looking at the person. *Snodgrass* v. *Bradley*, 2 Grant, 43.

A specimen of paving stone is admissible to show quality. *Philadelphia* v. *Rule*, 93 Pa. 15.

Defendant cannot be compelled to make a foot print for comparison. *Stokes* v. *State*, 8 Leg. Gaz. 166.

To prove malpractice, an injured limb was exhibited to the jury. *Fowler* v. *Sergeant*, 1 Grant, 355.

A plat made by an engineer from his notes of survey is admissible. *Bassett* v. *Penna. Co.*, 201 Pa. 226.

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.

AMERICAN NOTE.

General.

Where the production of primary evidence is in the power of a party, secondary evidence cannot be given. *New York Car Oil Co.* v. *Richmond*, 6 Bosw. 213, 19 How. Pr. 505. Even in reduction of damages. *Coleman* v. *Southwick*, 9 Johns. 45; *Hasbrouck* v. *Baker*, 10 Johns. 248. And see *Dygert* v. *Coppernoll*, 13 Johns. 210; *Brewster* v. *Countryman*, 12 Wend. 446.

Where part of a document is offered, the other side can call for the remainder of it if it relates to the same subject-matter. *Imperial Hotel Co.* v. *H. B. Claflin Co.*, 55 Ill. App. 338.

The objection to the admission of a writing in evidence must be made at the trial. *Lake* v. *Brown*, 116 Ill. 83, 87.

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 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:

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.[2]

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;[3] but where they are all copies of a common original, no one of them is primary evidence of the contents of the original.[4]

AMERICAN NOTE.

General.

Authorities.— Wharton on Evidence, secs. 92, 1091, 1092; 1 Greenleaf on Evidence (15th ed.), secs. 96, 203.

First paragraph of text. *Morey* v. *Hoyt*, 62 Conn. 542, 556, 557, 26 Atl. 127 (quoting this article with approval); *Edgerton* v. *Edgerton*, 8 Conn. 6; *Davis* v. *Kingsley*, 13 Conn. 285.

The recorded vote of the directors of a corporation is the only

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1 *Slatterie* v. *Pooley*, 1840, 6 M. & W. 664.

2 *Roe* d. *West* v. *Davis*, 1806, 7 Ea. 362.

3 *R.* v. *Watson*, 1817, 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.

4 *Nodin* v. *Murray*, 1812, 3 Camp. 227.

proper evidence of their acts. If it has been lost, secondary evidence may be introduced. *Hurd* v. *Hotchkiss*, 72 Conn. 480.

An executed contract, signed by one party only, is admissible in evidence against the party not signing in a suit by a stranger. *Watson* v. *New Milford*, 72 Conn. 566.

A paper purporting to be signed by a party is not admissible against him without some proof of the genuineness of the signature. *Neil* v. *Miller*, 2 Root (Conn.), 117; *Canfield* v. *Squire*, 2 Root (Conn.), 300.

Admissions.— The contents of an instrument may be proved by admissions. *Blackington* v. *Rockland*, 66 Me. 332; *Loomis* v. *Wadhams*, 8 Gray (Mass.), 557; *Smith* v. *Palmer*, 6 Cush. (Mass.) 513; *Crichton* v. *Smith*, 34 Md. 42, 47; *Edger* v. *Richardson*, 33 O. St. 581; *Taylor* v. *Peck*, 21 Gratt. 11; *Edwards* v. *Tracy*, 62 Pa. St. 374; *Hoefling* v. *Hambleton*, 84 Tex. 517. *Contra*, *Cumberland Ins. Co.* v. *Giltinan*, 48 N. J. L. 495.

Telegrams.— The message received has been held primary evidence of that sent. *Nickerson* v. *Spindell*, 164 Mass. 28; *Durkee* v. *Vt. R. Co.*, 29 Vt. 127; *Howley* v. *Whipple*, 48 N. H. 487; *Ayer* v. *Tel. Co.*, 79 Me. 493, 500; *Saveland* v. *Green*, 40 Wis. 431; *Anheuser-Busch Assn.* v. *Hutmacher*, 127 Ill. 652; *Magie* v. *Herman*, 50 Minn. 424.

Meaning of primary evidence.— Sustaining the text. *McCormick* v. *Mulvihill*, 1 Hilt. 131; *Baird* v. *Baird*, 81 Hun, 300; affirmed in 145 N. Y. 659; *Mengis* v. *Fifth Avenue Ry. Co.*, 81 Hun, 480, 63 N. Y. St. R. 192; *Collins* v. *Shaffer*, 78 Hun, 512, 61 N. Y. St. R. 222.

Where the by-laws of the defendant were identified by an original corporator and trustee, and were signed by all of the incorporators but two, which signatures were proved, and purported to be the defendant's by-laws, this evidence of authenticity was deemed sufficient proof thereof. *Church of St. Stanislaus* v. *Verein*, 58 N. E. 1086, 164 N. Y. 606.

Where in an action for libel a previous publication by the plaintiff was offered as evidence, but an objection was taken to it, the judge may require that it be first submitted to him for his perusal, before allowing it to be read in the hearing of the jury. *Gould* v. *Weed*, 12 Wend. 12.

The adverse party cannot compel a party reading a portion of a statement or correspondence to read all of it: if it is material and he desires it, the adverse party can himself read it. *Parmenter* v. *Boston, Hoosac Tunnel R. R. Co.*, 37 Hun, 354.

Document in several parts.— Each duplicate original is primary evidence. *Lewis* v. *Payn*, 8 Cow. 71; *Hubbard* v. *Russell*, 24 Barb. 404; *Martin* v. *Martin*, 1 Misc. Rep. 181, 48 N. Y. St. R. 689. See *Crossman* v. *Crossman*, 95 N. Y. 145.

Document in counterpart.— *Nicoll* v. *Burke*, 8 Abb. N. C. 213.

Instruments are not now usually executed in counterpart. *Roland* v. *Pinckney*, 8 Misc. Rep. 458.

Documents printed, lithographed, photographed, etc., uniformly.— *Huff* v. *Bennett*, 4 Sandf. 120.

Copies of a common original.— Letter-press copies of correspondence are secondary evidence only. *Foot* v. *Bently*, 44 N. Y. 166, 4 Am. Rep. 652.

Counterpart.— *Weaver* v. *Shipley*, 127 Ind. 526, 535 (lease).

New Jersey.

Authorities.— The original document is admissible even though certified copies are also admissible. *Oram* v. *Young*, 3 Harr. 57.

A judgment must be proved by the original entry. *Brookfield* v. *Winans*, 7 Hal. 338.

When documents that are admissible are produced and referred to by witnesses they may become evidence without any formal offer. *Convery* v. *Conger*, 53 N. J. L. 658; reversing *S. C.*, 53 N. J. L. 468.

The record of an instrument is primary evidence only when made such by statute. *Fox* v. *Lambson*, 3 Hal. 275.

Admissions of a party are not admissible to prove contents of a document except when secondary evidence is admissible. *Cumberland Ins. Co.* v. *Giltinan*, 48 N. J. L. 495.

Maryland.

Authorities.— An original telegram is the one sent to be transmitted, not the one received. *Smith* v. *Easton*, 54 Md. 138.

An original deed is not admissible without proof of its execution. *Gambrill* v. *Schooley*, 95 Md. 260.

Duplicates.— When a contract has been executed in duplicate, each copy is primary evidence. *Totten* v. *Bucy*, 57 Md. 446.

Admissions.— The contents of an instrument may be proved by admissions. *Crichton* v. *Smith*, 34 Md. 42, 47.

Pennsylvania.

Authorities.— A record of a court is primary evidence. *Eisenhart* v. *Slaymaker*, 14 S. & R. 153; *Garrigues* v. *Harris*, 17 Pa. 344.

The record of a judgment is admissible to prove a fact stated in the declaration. *Numbers* v. *Shelly,* 78 Pa. 426.

Docket entries are not admissible to prove issuance, service, and return of a writ. The writ itself is the primary evidence. *Vincent* v. *Huff,* 4 S. & R. 298.

Irish statutes proved by a printed copy. *Jones* v. *Maffet,* 5 S. & R. 523.

The statute-book is evidence of private and public laws. *Biddis* v. *James,* 6 Binn. 321; *Gray* v. *Navigation Co.,* 2 W. & S. 156.

Unstamped check allowed in evidence when not offered to sustain the plaintiff's claim or the defendant's defense. *Bryan* v. *Bank,* 205 Pa. 7.

Ownership of personal property may be proved by parol, though the sale is evidenced by a writing. *Gallagher* v. *Assurance Corp.,* 149 Pa. 25.

Counterparts.— A duplicate original is primary evidence. *Cobb* v. *Burns,* 61 Pa. 278.

A copy of a lost deed is not admissible if there be a counterpart in existence. *Kern* v. *Swope,* 2 Watts, 75.

Admissions.— The contents of an instrument may be proved by admissions. *Edwards* v. *Tracy,* 62 Pa. 374.

Statute.— Courts may compel the production of books and papers. Pepper & Lewis' Digest of Laws, "Evidence," sec. 6.

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: and in the cases mentioned in Article 66 by calling an attesting witness.

AMERICAN NOTE.

General.

Authorities.— 1 Greenleaf on Evidence (15th ed.), sec. 82 *et seq.;* McKelvey on Evidence, p. 342 *et seq.; Kelsey* v. *Hanmer,* 18 Conn. 317; *Waller* v. *Eleventh Sch. Dist.,* 22 Conn. 333; *Elwell* v. *Mersick,* 50 Conn. 276; *Richards* v. *Stewart,* 2 Day (Conn.), 328; *Hurd* v.

Hotchkiss, 72 Conn. 480; *Topping* v. *Bickford*, 4 Allen (Mass.), 120; *Binney* v. *Russell*, 109 Mass. 55; *Amherst Bank* v. *Conkey*, 4 Metc. (Mass.) 459; *Woods* v. *Burke*, 67 Mich. 674; *Martin* v. *McCray*, 171 Pa. St. 575. See, however, *Huston* v. *Ticknor*, 99 Pa. St. 231.

Where an instrument, having no subscribing witnesses, comes from the proper custody, proof of the handwriting of the party is sufficient; the presumption then is that it was executed at the time of its date. *St. John* v. *American Mutual Life Insurance Co.*, 2 Duer, 419.

Proof of deeds, leases, etc.—*Johnston* v. *Granger*, 17 Misc. Rep. 54, 39 N. Y. Supp. 848; *Brown* v. *Sullivan*, 1 Misc. Rep. 161, 48 N. Y. St. R. 685; *Drummond* v. *Fisher*, 43 N. Y. St. R. 135, 17 N. Y. Supp. 867.

Proof of insurance policies, etc.— *Read* v. *Metropolitan Life Ins. Co.*, 17 Misc. Rep. 307, 40 N. Y. Supp. 374; *Porter* v. *Valentine*, 18 Misc. Rep. 213, 41 N. Y. Supp. 507.

Written laws.— The written laws of other countries can be proved only by written evidence, but their interpretation may be shown by expert evidence. *Bierhous* v. *Western Union Tel. Co.*, 8 Ind. App. 246.

As to city records, see Burns' Stat., sec. 3503.

The written laws of other States cannot be proved by oral evidence. *Comparlt* v. *Jernegan*, 5 Blackf. 375; *Line* v. *Mack*, 14 Ind. 330.

Books of account.— When original books of account are accessible, parol proof of the contents is inadmissible. *Kane* v. *State*, 71 Ind. 559.

Evidence before coroner.— Evidence before a coroner reduced to writing cannot be proved by oral evidence. *Robinson* v. *State*, 87 Ind. 292.

Records.— The contents of court and other public records must be shown by the records themselves. *Bible* v. *Voris*, 141 Ind. 569; *Hamilton* v. *Shoaff*, 99 Ind. 63, 66; *Williams* v. *Jones*, 12 Ind. 561; *Metzer* v. *State*, 39 Ind. 596; *Bible* v. *Boris*, 141 Ind. 569; *Doe dem. Sutton* v. *Reagan*, 5 Blackf. 217; *Mills* v. *Barnes*, 4 Blackf. 438 (of justice); *Beatty* v. *Gates*, 4 Ind. 154 (to prove judgment); *Piersoll* v. *Craig*, 22 Ind. 394 (same); *Cline* v. *Gibson*, 23 Ind. 11.

By the statute (Rev. Stat., 1843, 518) the sale bill is the best evidence of an administrator's sale. *Meek* v. *Spencer*, 8 Ind. 118.

The proceedings of courts of other States are to be proved by their records. *Hamilton* v. *Shoaff*, 99 Ind. 63; *Teter* v. *Teter*, 88 Ind. 494.

Copies of the records of Federal courts in Indiana may be authenticated by the keeper of such records. *Bradford* v. *Russell*, 79 Ind. 64.

The record is the best evidence of admissions by pleading in a prior action. *Colborn* v. *Fry*, 23 Ind. App. 485.

Disagreement between original and copy.— Where the transcript of a judgment and the judgment itself do not agree, the judgment itself being the primary evidence controls. *Robinson* v. *Snyder*, 97 Ind. 56, 59; *Stratton* v. *Lockhart*, 1 Ind. App. 380, 384.

Award.—*Burke* v. *Voyles*, 5 Blackf. 190; *Williams* v. *Dewitt*, 12 Ind. 309.

Under section 454, Rev. Stat., 1894, instruments recording a sale cannot be introduced in evidence unless sealed. *Conkey* v. *Conder*, 134 Ind. 441.

Harmless error.— If the original is also in evidence the admission of a copy also is a harmless error. *Burk* v. *Andis*, 98 Ind. 59, 65.

Original must be in writing.— *Morrison* v. *King*, 4 Blackf. 125.

Dedication of a street may be shown by parol. *Wood* v. *Mansell*, 3 Blackf. 125.

Parol evidence is admissible to prove a verdict was rendered in a suit. *Abrams* v. *Smith*, 8 Blackf. 95.

Railroad rules may be proved by parol where it does not appear that they are in writing. *Pittsburgh, etc., R. R. Co.* v. *Martin*, 157 Ind. 216, 61 N. E. 229.

The common law of another State and the customs prevailing there may be proved by oral evidence. *Heberd* v. *Myers*, 5 Ind. 94.

New Jersey.

Authorities.— Parol evidence of the contents of a writing not admissible. *Sterling* v. *Potts*, 5 N. J. L. 773.

A judgment can be proved only by the judgment itself. *Brookfield* v. *Winans*, 7 Hal. 338.

Resolution of a city council cannot be proved by parol. *State* v. *McGrath*, 44 N. J. L. 227.

Contents of a document cannot be proved even by admissions of the defendant who executed it, while its absence is unaccounted for. *Fire Ins. Co.* v. *Giltinan*, 48 N. J. L. 495.

The only competent evidence of an assessment is the assessment itself. *Hopper* v. *Malleson*, 16 N. J. Eq. 382.

Maryland.

Authorities.— Parol evidence of the contents of a writing not admissible. *Mulliken* v. *Boyce*, 1 Gill, 60; *Marshall* v. *Haney*, 9 Gill, 251; *Dunnock* v. *Dunnock*, 3 Md. Ch. 140; *Morrison* v. *Welty*, 18 Md. 169.

By agreement, short abstracts of foreign records are receivable. *Bowman* v. *Franklin Ins. Co.*, 40 Md. 620.

The fact that an executor's powers have been revoked can be proved only by the court record. *Wright* v. *Gilbert*, 51 Md. 146.

A grant of letters testamentary may be proved by parol evidence in case it was the practice of the Orphans' Court to make no record. *Avon Coal Co.* v. *McCulloh*, 59 Md. 403.

If secondary evidence is introduced without objection it is as effectual as primary. *Marfield* v. *Davidson*, 8 G. & J. 209.

Sealed instruments. *Clarke* v. *State*, 8 G. & J. 111.

Pennsylvania.

Authorities.— *Martin* v. *McCray*, 171 Pa. 575; *Huston* v. *Ticknor*, 99 Pa. 231.

Certificate of an architect that plumbing work was according to contract must be proved by the document itself. *Brown* v. *Burr*, 160 Pa. 458.

An order of court granting a new trial can be proved only by the record. *Wentz* v. *Lowe*, 3 Atl. 878.

A discharge in insolvency can be proved only by the record. *Loughry* v. *McCullough*, 1 Pa. 503.

An execution can be proved only by the record. *Snyder* v. *Snyder*, 6 Binn. 483. And see *Bank* v. *Fordyce*, 1 Pa. 454.

The terms of a written contract cannot be proved by parol. *Barnett* v. *Barnett*, 16 S. & R. 51.

Parol evidence of the contents of a writing not admissible. *Campbell* v. *Wallace*, 3 Yeates, 271; *Brown* v. *Day*, 78 Pa. 129.

Contents of books of account cannot be proved by parol. *Renshaw* v. *Proctor*, 16 Wkly. Notes Cas. 495.

The assessment of property for taxes must be proved by the assessment itself. *Stark* v. *Shupp*, 112 Pa. 395.

The appointment of the guardian of a minor may be proved without producing the record of the Orphans' Court. *Appeal of Fink*, 101 Pa. 74.

Printed copies of statutes.— The contents of statutes of Pennsylvania may be proved by copies printed by authority. *Biddis* v. *James*, 6 Binn. 321; *Gray* v. *Navigation Co.*, 2 W. & S. 156. So also may the statutes of other States be proved. *Thompson* v. *Musser*, 1 Dall. 458; *Mullen* v. *Morris*, 2 Pa. 85; *Tenant* v. *Tenant*, 110 Pa. 478.

Deeds.— Copy of a deed not admissible. *Lodge* v. *Berrier*, 16 S. & R. 296; *Rank* v. *Shewey*, 4 Watts, 218.

ARTICLE 66.*

PROOF OF EXECUTION OF DOCUMENT REQUIRED BY LAW TO BE ATTESTED.

If a document is required by law to be attested, 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.

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.

The rule extends to cases in which—

the document has been burnt[5] or cancelled;[6]

the subscribing witness is blind;[7]

* See Note XXVIII.

[5] *Gillies* v. *Smither*, 1819, 2 Star. R. 528.

[6] *Breton* v. *Cope*, 1791, Pea. R. 43.

[7] *Cronk* v. *Frith*, 1839, 9 C. & P. 197.

the person by whom the document was executed is prepared to testify to his own execution of it;[8]

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,[9] unless such admission be made for the purpose of, or has reference to, the cause.

AMERICAN NOTE.

General.

Authorities.— 1 Greenleaf on Evidence (15th ed.), sec. 569 *et seq.;* McKelvey on Evidence, p. 351 *et seq.;* 3 Taylor on Evidence (American edition of 1897), p. 1229 *et seq.*

First paragraph of text. *Foye* v. *Leighton,* 24 N. H. 29; *Woodman* v. *Segar,* 25 Me. 90; *Harding* v. *Cragie,* 8 Vt. 501; *Whittemore* v. *Brooks,* 1 Me. 57; *Gage* v. *Wilson,* 17 Me. 378; *International, etc., R. Co.* v. *McRae,* 82 Tex. 614; *Brigham* v. *Palmer,* 3 Allen (Mass.), 450; *Barry* v. *Ryan,* 4 Gray (Mass.), 523.

The rules of this article are not abrogated by statutes making parties competent witnesses. *Brigham* v. *Palmer,* 3 Allen (Mass.), 450.

Other competent evidence is admissible if all the attesting witnesses are dead, incompetent, or beyond the reach of process. *Homer* v. *Wallis,* 11 Mass. 309; *Valentine* v. *Piper,* 22 Pick. (Mass.) 85; *Haynes* v. *Rutter,* 24 Pick. (Mass.) 242; *Amherst Bank* v. *Root,* 2 Metc. (Mass.) 522; *Packard* v. *Dunsmore,* 11 Cush. (Mass.) 282; *Tyng* v. *B. & M. R. R. Co.,* 12 Cush. (Mass.) 277; *Brigham* v. *Palmer,* 3 Allen (Mass.), 450.

So if the attesting witness fail to prove the document. *Whitaker* v. *Salisbury,* 15 Pick. (Mass.) 534. See, also, *Russell* v. *Coffin,* 8 Pick. (Mass.) 143; *Robinson* v. *Brennan,* 115 Mass. 582.

In a suit for fraud, in giving an invalid deed, the document may be proved without calling the attesting witnesses. *Skinner* v. *Brigham,* 126 Mass. 132.

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[8] *R.* v. *Harringworth,* 1815, 4 M. & S. at p. 353.

[9] *Call* v. *Dunning,* 1803, 4 Ea. 53. See, too, *Whyman* v. *Garth,* 1853, 8 Ex. 803; *Randall* v. *Lynch,* 1810, 2 Camp. 357.

Witness not found.— If no competent attesting witness can be found, signatures may be proved. *Woodman* v. *Segar*, 25 Me. 90.

Absence of witness.— Whether the absence from the State of the attesting witnesses of a bond is sufficient to admit proof of their handwriting, *quære*. *Hempstead* v. *Bird*, 2 Day (Conn.), 293.

The signature of an attesting witness, who is absent from the State, may be proved in the same way as though dead. *Trustees of Charities* v. *Connolly*, 157 Mass. 272; *Hanrick* v. *Patrick*, 119 U. S. 156; *Gallagher* v. *London Assur. Corp.*, 149 Pa. St. 25; *Ballinger* v. *Davis*, 29 Ia. 512; *N. J. Zinc Co.* v. *Lehigh Zinc Co.*, 59 N. J. L. 189.

In some States it is enough to prove the handwriting of the party alone. *Jones* v. *Roberts*, 65 Me. 273; *Cox* v. *Davis*, 17 Ala. 714; *Landers* v. *Bolton*, 26 Cal. 393; *Snider* v. *Burks*, 84 Ala. 53, 56 (either or both). Or of one witness. McKelvey on Evidence, p. 353; *Stebbins* v. *Duncan*, 108 U. S. 32.

One witness enough.— *White* v. *Wood*, 8 Cush. (Mass.) 413; *Gelott* v. *Goodspeed*, 8 Cush. (Mass.) 411; *Melcher* v. *Flanders*, 40 N. H. 139.

The testimony to the execution of a deed of one of two subscribing witnesses makes *prima facie* proof of its execution. *O'Sullivan* v. *Overton*, 56 Conn. 105, 106.

The court, in its discretion, may call for the testimony of all the attesting witnesses. *Burke* v. *Miller*, 7 Cush. (Mass.) 547. See, also, *Clark* v. *Houghton*, 12 Gray (Mass.), 38.

Admissions.— Last paragraph of text. *Kenney* v. *Flynn*, 2 R. I. 319; *Blake* v. *Sawin*, 10 Allen (Mass.), 340; *Jones* v. *Henry*, 84 N. C. 320; *Warner* v. *B. & O. R. R. Co.*, 31 O. St. 265; *Richmond, etc., R. Co.* v. *Jones*, 92 Ala. 218. *Compare Kingwood* v. *Bethlehem*, 13 N. J. L. 221; *Frost* v. *Deering*, 21 Me. 56.

Lost document.— If a document is lost, the rule is the same as that stated in the text with reference to burnt documents. *Kimball* v. *Morrell*, 4 Me. 368; *Wells* v. *Jackson Iron Co.*, 48 N. H. 491; *Porter* v. *Wilson*, 13 Pa. St. 641; *Kelsey* v. *Hanmer*, 18 Conn. 311.

Party prepared to testify to execution.— Sustaining text. *Barry* v. *Ryan*, 4 Gray (Mass.), 523; *Flitcher* v. *Perry*, 97 Ga. 368; *Hess* v. *Griggs*, 43 Mich. 397; *Russell* v. *Walker*, 73 Ala. 315. *Contra, Bowling* v. *Hax*, 55 Mo. 446; *Garrett* v. *Haushue*, 53 O. St. 482.

The disqualification, by his own act, of a subscribing witness to a note will prevent him from establishing its execution. *Edwards* v. *Perry*, 21 Barb. 600.

An erasure in a deed need not be proved by the attesting witness. *Penny* v. *Corwithe*, 18 Johns. 499.

First paragraph of text.—*Henry* v. *Bishop*, 2 Wend. 575; *Bond* v. *Root*, 18 Johns. 60; *King* v. *Smith*, 21 Barb. 158.

Witness dead or insane.—The signature of a witness who is dead or insane can be established as his by proof of his handwriting. *McKay* v. *Lasher*, 121 N. Y. 477; *Mott* v. *Doughty*, 1 Johns. Cas. 230; *Woodruff* v. *Cody*, 9 Cow. 140; *Van Rensselaer* v. *Jones*, 2 Barb. 643. See, also, *Fox* v. *Reil*, 3 John. 447.

Attested instruments.—The evidence of an attesting witness is not the only admissible evidence of execution. It is, however, the best evidence. *Pence* v. *Makepeace*, 65 Ind. 345.

As to attesting witnesses, see *Helms* v. *Kearns*, 40 Ind. 124; *Booker* v. *Bowles*, 2 Blackf. 90; *Jones* v. *Cooprider*, 1 Blackf. 47.

Papers executed by illiterate persons need not on that account be attested. *Shank* v. *Butsch*, 28 Ind. 19.

New Jersey.

Authorities.—*Williams* v. *Davis*, 2 Pen. 259; *Corlies* v. *Van Note*, 16 N. J. L. 324.

Proof of signature of attesting witness establishes *prima facie* the due execution, but it is customary to prove the signature of the party to the instrument also. *Servis* v. *Nelson*, 14 N. J. Eq. 94.

The absence of the attesting witness must be accounted for before other proof can be made. *Williams* v. *Davis*, Pen. 277; *Corlies* v. *Van Note*, 1 Harr. 324; *Anonymous*, 1 Harr. 355.

Deed must be proved by the attesting witness. *Williamson* v. *Wright*, Pen. 984.

Absent witness.—Handwriting may be proved if the witness is beyond the reach of process. *Lorrillard* v. *Van Houten*, 10 N. J. L. 270; *Van Doren* v. *Van Doren*, 3 N. J. L. 575.

The signature of an attesting witness, who is absent from the State, may be proved in the same way as though dead. *New Jersey Zinc Co.* v. *Lehigh Zinc Co.*, 59 N. J. L. 189.

Witness dead.—*Glover* v. *Armstrong*, 15 N. J. L. 186; *Newbold* v. *Lamb*, 2 South. 449.

Admissions.—Last paragraph of text. *Kingwood* v. *Bethlehem*, 13 N. J. L. 221.

An admission by a party that he executed a certain instrument does not relieve the other from proving the execution by the subscribing witnesses. *Hogland* v. *Sebring*, 4 N. J. L. 105.

Statutes.— Proof of acknowledgment and execution of deeds. G. S. 1895, "Conveyances," 4, 5, 7, 88, 100.

Depositions of subscribing witnesses to a will. G. S. 1895, "Orphans' Courts," 17.

Competency of attesting witnesses to wills. G. S. 1895, "Wills," 6.

Maryland.

Statute.— The general rule abrogated except as to wills. P. G. L. 1888, art. 35, sec. 6.

Under statute of 1825, proof of instruments except wills may be made without calling the attesting witnesses. *Pannell* v. *Williams*, 8 G. & J. 511; *Sheppard* v. *Bevans*, 4 Md. Ch. 408; *Keefer* v. *Zimmerman*, 22 Md. 274.

The testimony of an attesting witness is required as to the identity of the person signing by mark as well as to the execution of the instrument. *Eichelberger* v. *Sifford*, 27 Md. 320.

Proof of handwriting.— *Parker* v. *Fassitt*, 1 H. & J. 337.

It is sufficient for an attesting witness to identify his own signature, even though he has no independent recollection of having seen the instrument signed, sealed, or delivered. *Miller* v. *Honey*, 4 H. & J. 241.

Proof of the handwriting of a deceased witness is enough, without proving the handwriting of the maker. *Parker* v. *Fassitt*, 1 H. & J. 337.

Absent witness.— If an attesting witness cannot be located or resides beyond the jurisdiction, execution may be proved by proof of such witness' handwriting. *Dorsey* v. *Smith*, 7 H. & J. 345.

Temporary absence of the witness from the State is not sufficient to admit proof of his handwriting. *Gaither* v. *Martin*, 3 Md. 146.

Proof of the execution of documents not recorded in other States, attested and unattested. P. G. L. 1888, art. 35, secs. 39, 40.

Pennsylvania.

Authorities.— *January* v. *Goodman*, 1 Dall. 208; *Peters* v. *Condron*, 2 S. & R. 80; *Truby* v. *Byers*, 6 Pa. 347; *Davison* v. *Bloomer*, 1 Dall. 123.

One who sees an instrument signed and then subscribes it himself without being requested to do so is not an attesting witness in the sense that proof of his signature proves the execution. *Huston* v. *Ticknor*, 99 Pa. 231.

The admissions of a party to a negotiable instrument may be proved without first producing an attesting witness. *Williams* v. *Floyd,* 11 Pa. 499.

Evidence preliminary to proof of handwriting.— The handwriting of one witness cannot be proved so long as there is another witness unaccounted for. *Tams* v. *Hitner,* 9 Pa. 441.

Attesting witnesses must be produced or their absence satisfactorily explained, before evidence of handwriting is admissible. *January* v. *Goodman,* 1 Dall. 208; *Bura* v. *Thompson,* 2 Clark, 143. See *Williams* v. *Floyd,* 11 Pa. 499.

Proof of the obligor's handwriting may be made. *Clark* v. *Sanderson,* 3 Binn. 192.

The attesting witness to a lost receipt must be called or accounted for. *McMahan* v. *McGrady,* 5 S. & R. 314.

Only one subscribing witness need be called.— *McAdams* v. *Stilwell,* 13 Pa. 90.

Absent witness.— Handwriting may be proved when the witness cannot be located. *Gallagher* v. *London Assur. Corp.,* 149 Pa. 25.

Witnesses dead.— Proof of execution may be made by a party to the instrument who saw the witnesses sign. *Irvin* v. *Patchin,* 164 Pa. 51.

Insanity.— If a witness is insane, proof of his handwriting may be made. *Neely* v. *Neely,* 17 Pa. 227.

Lost document.— If a document is lost, the rule is the same as that stated in the text with reference to burnt documents. *Porter* v. *Wilson,* 13 Pa. 641.

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 any attesting witness, or to prove the handwriting of any such party or attesting witness—

* See Note XXVIII.

(1) When he is entitled to give secondary evidence of the contents of the document under Article 71 (*a*);[10]

(2) When his opponent produces it when called upon and claims an interest under it in reference to the subject-matter of the suit;[11]

(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, who has dealt with it as a document duly executed.[12]

AMERICAN NOTE.

General.

Authorities.— 1 Greenleaf on Evidence (15th ed.), secs. 570–575; 11 Am. & Eng. Encyclopædia of Law (2d ed.), p. 586 *et seq.*

The testimony of attesting witnesses is, probably, not necessary where the document is offered collaterally in a proceeding affecting only strangers to it. *Com.* v. *Castles,* 9 Gray (Mass.), 121; *Skinner* v. *Brigham,* 126 Mass. 132.

Where a document comes in incidentally in a suit between strangers, the attesting witnesses need not be called. *Ayers* v.

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10 *Cooke* v. *Tamswell,* 1818, 8 Tau. 450; *Poole* v. *Warren,* 1838, 8 A. & E. 582.

11 *Pearce* v. *Hooper,* 1810, 3 Tau. 60; *Rearden* v. *Minter,* 1843, 5 M. & G. 204. As to the sort of interest necessary to bring a case within this exception, see *Collins* v. *Bayntun,* 1841, 1 Q. B. 118.

12 *Plumer* v. *Briscoe,* 1847, 11 Q. B. 46. *Bailey* v. *Bidwell,* 1844, 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. 1852–3) 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.

Hewitt, 19 Me. 281, 285; *Curtis* v. *Belknap*, 21 Vt. 433; *Kitchen* v. *Smith*, 101 Pa. St. 452; *Steiner Bros.* v. *Tranum*, 98 Ala. 35; *Rand* v. *Dodge*, 17 N. H. 343, 357.

Recorded instruments.— In some States recorded instruments may be proved without calling the subscribing witnesses. *Knox* v. *Silloway*, 1 Fairf. (Me.) 201; *Kelsey* v. *Hanmer*, 18 Conn. 311, 318; *Gragg* v. *Learned*, 109 Mass. 167; *Burghart* v. *Turner*, 12 Pick. (Mass.) 534, 538; *Scanlon* v. *Wright*, 13 Pick. (Mass.) 523, 527, 25 Am. Dec. 344. See *Brown* v. *Oldham*, 123 Mo. 621.

Interest claimed by opponent.— Sustaining text. *McGregor* v. *Wait*, 10 Gray (Mass.), 72, 69 Am. Dec. 305; *Adams* v. *O'Connor*, 100 Mass. 515; *Woodstock Iron Co.* v. *Reed*, 84 Ala. 493; *Balliett* v. *Fink*, 28 Pa. St. 266.

Secondary evidence of contents.—*Jackson* v. *Woolsey*, 11 Johns. 446.

New Jersey.

Authorities.— An attesting witness to a lost deed need not be called when the object of proving its contents is not to establish title but to establish the fact of a covenant therein. *Ketcham* v. *Brooks*, 27 N. J. Eq. 347.

Wills probated in another State may be recorded in New Jersey, and such record dispenses with the necessity of producing attesting witnesses to prove the will. *Nelson* v. *Potter*, 50 N. J. L. 324.

Pennsylvania.

If the maker of a note admits his signature, the attesting witness need not be called. *Williams* v. *Floyd*, 11 Pa. 499.

Where a document comes in incidentally in a suit between strangers, the attesting witnesses need not be called. *Kitchen* v. *Smith*, 101 Pa. 452.

Interest claimed by opponent.— Sustaining text. *Balliett* v. *Fink*, 28 Pa. 266.

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.[13]

AMERICAN NOTE.

General.

Authorities.— 1 Greenleaf on Evidence (15th ed.), sec. 572; 11 Am. & Eng. Encyclopædia of Law (2d ed.), p. 598; *Frost* v. *Deering,* 21 Me. 156; *Whitaker* v. *Salisbury,* 15 Pick. (Mass.) 534, 544; *Thomas* v. *Le Baron,* 8 Metc. (Mass.) 355; *Tompson* v. *Fisher,* 123 Mass. 559; *Patterson* v. *Tucker,* 9 N. J. L. 322; *Hamsher* v. *Kline,* 57 Pa. St. 397; *Barnewall* v. *Murrell,* 108 Ala. 366; *Webb* v. *Dye,* 18 W. Va. 376. Compare *Frost* v. *Deering,* 21 Me. 156.

Sustaining rule of the text.—*Duckwall* v. *Weaver,* 2 Ohio, 13, holding that this is not impeaching the credit of one's own witness.

If a subscribing witness to a will fail to remember or deny seeing testator sign, it may be shown by other witnesses that he did see the signing. *Thompson* v. *Thompson,* 2 Weekly Law Mag. 84.

Where a writing is pleaded the execution need not be proved unless it is denied. *Belton* v. *Smith,* 45 Ind. 291; *Patterson* v. *Crawford,* 12 Ind. 241; *Kellar* v. *Boatman,* 49 Ind. 104; *Denny* v. *University,* 16 Ind. 220.

A recorded deed may be proved by the record, when the person offering the evidence is not a party to the conveyance and has not the control of it. *Doe dem. Gardner* v. *Vandewater,* 7 Blackf. 6.

The execution and contents of a lost deed need not be proved by the subscribing witness. *Raynor* v. *Norton,* 31 Mich. 210; *Eslow* v. *Mitchell,* 26 Mich. 500.

The record of a deed is, in the absence of statute, not primary evidence of genuineness. *Brown* v. *Cady,* 11 Mich. 535.

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13 "Where an attesting witness has denied all knowledge of the matter, the case stands as if there were no attesting witness:" *Talbot* v. *Hodson,* 1816, 7 Tau. 251, 254.

New Jersey.

Authorities.— *Patterson* v. *Tucker*, 9 N. J. L. 322; *Ketchum* v. *Johnson*, 4 N. J. Eq. 370.

Maryland.

If an attesting witness denies either his attestation or the due execution of the instrument, such fact may be proved by other evidence. *Handy* v. *State*, 7 H. & J. 42.

If a subscribing witness proves his signature but has no recollection of having seen the party to the instrument sign it, that fact may be proved by the circumstances. *Miller* v. *Honey*, 4 H. & J. 241. See *Edelen* v. *Gough*, 5 Gill, 103.

Pennsylvania.

If a subscribing witness' testimony is insufficient, other proof is admissible. *Harrington* v. *Gable*, 81 Pa. 406.

If an attesting witness has forgotten, other proof of execution is admissible. *Fritz* v. *Commissioners*, 17 Pa. 130.

If an attesting witness has forgotten the whole occurrence, but recognizes his signature, the document is admissible. *Bennett* v. *Fulmer*, 49 Pa. 155; *Hamsher* v. *Kline*, 57 Pa. 397.

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.[14]

AMERICAN NOTE.

General.

Authorities.— 3 Taylor on Evidence (Chamberlayne's 9th ed.), p. 1229⁶ *et seq.*; 11 Am. & Eng. Encyclopædia of Law (2d ed.), p. 593 (stating that the common-law rule is otherwise).

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[14] 28 & 29 Vict. c. 18, ss. 1, 7; re-enacting 17 & 18 Vict. c. 125, s. 26, now repealed.

Sustaining the text. *Houghton* v. *Jones*, 1 Wall. 702, 706; *Medary* v. *Cathers*, 161 Pa. St. 87.

Contra to text. *Thompson* v. *Fisher*, 123 Mass. 559; *Homer* v. *Wallis*, 11 Mass. 309; *Giannone* v. *Fleetwood*, 93 Ga. 491.

Relative to proving unattested documents, see *Seibold* v. *Rogers*, 110 Ala. 438; *Nichols* v. *Allen*, 112 Mass. 23; *Pullen* v. *Hutchinson*, 25 Me. 249.

The common law is contrary to the text. If a note be attested by witnesses, the genuineness of the signature cannot be proved by a comparison of hands, without calling them. *Law* v. *Atwater*, 2 Root (Conn.), 72; *Knap* v. *Sacket*, 1 Root (Conn.), 502.

The common-law rule is otherwise. See *Sackett* v. *Sackett*, 7 Wend. 94.

With reference to proving documents unattested, see *St. John* v. *Amer. Ins. Co.*, 2 Duer, 419.

As to the effect thereof where the circumstances of the case were peculiar, see *Sanger* v. *Merritt*, 131 N. Y. 614, 43 N. Y. St. R. 99, affirming 39 N. Y. St. R. 894. See 120 N. Y. 129.

Pennsylvania.

Sustaining the text. *Medary* v. *Cathers*, 161 Pa. 87.

ARTICLE 70.

SECONDARY EVIDENCE.

Secondary evidence means—

(1) Examined copies, exemplifications, office copies, and certified copies:[15]

(2) Other copies made from the original and proved to be correct:

(3) Counterparts of documents as against the parties who did not execute them:[16]

(4) Oral accounts of the contents of a document given by some person who has himself seen it.

[15] See Chapter X.

[16] *Munn* v. *Godbold*, 1825, 3 Bing. 292.

AMERICAN NOTE.

General.

Authorities.— 1 Greenleaf on Evidence (15th ed.), sec. 84 *et seq.;* 11 Am. & Eng. Encyclopædia of Law (2d ed.), pp. 535, 583 *et seq.*

In giving testimony, a witness must recollect the substance of the document. *Camden* v. *Belgrade,* 78 Me. 204; *Richard's Appeal,* 122 Pa. St. 547; *Mayor of Baltimore* v. *War,* 77 Md. 593.

The correctness of a copy may be proved by the testimony of one who compared it with a paper read as the original by another. *Lynde* v. *Judd,* 3 Day (Conn.), 500.

A copy of a copy may be competent evidence. It is not, however, if the original is in existence. *Cameron* v. *Peck,* 37 Conn. 555, 558; *Winn* v. *Patterson,* 9 Pet. (U. S.) 663.

Due diligence to procure the attendance of the subscribing witnesses must be proved before secondary evidence of the execution of a written contract can be admitted. *Mills* v. *Twist,* 8 Johns. 121; *Willoughby* v. *Carleton,* 9 Johns. 136. See *People* v. *Rowland,* 5 Barb. 449.

Proof of the genuineness of an instrument is always necessary, even if secondary evidence of its contents is admitted. *Nichols* v. *Kingdom Iron Ore Co.,* 56 N. Y. 618.

If a corporation has omitted to make a record of its actions, secondary evidence may be introduced. *St. Mary's Church* v. *Cagger,* 6 Barb. 576; *Smith* v. *Helmer,* 7 Barb. 416.

Where the defendant gave a copy to the plaintiff to guide him in performing his contract, this is evidence without accounting for the original. *Moore* v. *Belloni,* 10 J. & S. 184. But the draft of an unexecuted contract containing the supposed agreement of the parties is not evidence. *Flood* v. *Mitchell,* 4 Hun, 813, 68 N. Y. 507.

Examined, exemplified, office, and certified copies.— See articles 75–79, inclusive.

Other copies from the original.— *De Groot* v. *Fulton Fire Insurance Co.,* 4 Rob. 504; *Campbell* v. *Wright,* 8 N. Y. St. R. 471, 118 N. Y. 594.

A copy containing the entire account, which thereby duplicated items contained in the original, was not, by reason thereof, to be rejected, for the fact that the items were duplicated became apparent on inspection. *Hodnett* v. *Gault,* 71 N. Y. Supp. 831.

Letter-press copies of documents come under the head of secondary evidence. *Foot* v. *Bently,* 44 N. Y. 166, 4 Am. Rep. 652. See, also, *Haas* v. *Storner,* 21 Misc. Rep. 661; *Boyer* v. *Rhinehart,* 44 N. Y. St. R. 370, 17 N. Y. Supp. 346; affirmed, 137 N. Y. 564.

Counterparts.— Counterparts of documents are secondary evidence. *Nicoll* v. *Burke,* 8 Abb. N. C. 213. See *Roland* v. *Pinckney,* 8 Misc. Rep. 458.

Oral accounts of contents of a document.— *Artcher* v. *McDuffie,* 5 Barb. 147; *Scott* v. *Betts,* Lalor, 363; *Chrysler* v. *Griswold,* 43 N. Y. 209.

New Jersey.

Copies and parol proof.— *Smith* v. *Axtell,* 1 N. J. Eq. 494; *Seward* v. *Vandegrift,* Pen. 922.

A by-law of the board of freeholders not provable by a printed copy. *Downie* v. *Passaic,* 54 N. J. L. 223.

A copy of an entry in a family Bible not admissible. *Ryerson* v. *Grover,* Coxe, 458.

A compared copy.— *Tindall* v. *McIntyre,* 4 Zab. 147.

After proving that a document is lost, a copy may be introduced and proved to be correct. *Bozorth* v. *Davidson,* 3 N. J. L. 200.

Maryland.

Authorities.— The rules as to secondary evidence of the contents of lost instruments are the same in civil and in criminal law. *Brashears* v. *State,* 58 Md. 563.

Oral testimony of a fact is not necessarily secondary, even though there is written evidence of the same fact. In such case it is admissible because not given to prove the contents of a writing but to prove a fact outside thereof. *Glenn* v. *Rogers,* 3 Md. 312; *Cramer* v. *Shriner,* 18 Md. 140.

To prove value, evidence of the price of similar goods in the neighborhood is not secondary, though it is not so strong as the evidence of a witness who knows the price of these goods. *Williamson* v. *Dillon,* 1 H. & G. 444.

When a party has suppressed evidence the court will be more liberal in allowing the facts to be proved by weaker classes of evidence. *Love* v. *Dilley,* 64 Md. 238.

A telegram as delivered is only secondary evidence, and is admissible as such only on proof that it was actually sent by the person in question. *Smith* v. *Easton*, 54 Md. 138.

In giving testimony, a witness must recollect the substance of the document. *Mayor of Baltimore* v. *War*, 77 Md. 593.

Copies.— A copy of a document is only secondary evidence. *Hayward* v. *Carroll*, 4 H. & J. 518; *Green* v. *Caulk*, 16 Md. 556.

A press copy of a letter is secondary evidence. *Marsh* v. *Hand*, 35 Md. 123.

Pennsylvania.

Authorities.— Evidence is deemed secondary only when it indicates that there is better in existence. *Cutbush* v. *Gilbert*, 4 S. & R. 551.

The best evidence in one's power must be produced. *Hamilton* v. *Van Swearingen*, Add. 48; *Bank* v. *Whitehill*, 16 S. & R. 89; *Bryant* v. *Stilwell*, 24 Pa. 314; *White's Estate*, 32 Leg. Int. 430.

A book of original entry is not necessarily the best evidence of goods sold. *Adams* v. *Steamboat Co.*, 3 Whart. 75.

In proving foreign statutes as a fact, the best evidence rule is relaxed on the ground of convenience. *Phillips* v. *Gregg*, 10 Watts, 158.

Degrees in secondary evidence.— A *fac-simile* press copy of a letter is better evidence than oral testimony. *Stevenson* v. Hoy, 43 Pa. 191.

Copies.— Entries in a family Bible copied from another record are secondary evidence. *Curtis* v. *Patton*, 6 S. & R. 135.

A correct copy admissible only as secondary evidence. *Sweigart* v. *Lowmarter*, 14 S. & R. 200.

A copy is secondary evidence and admissible only in case the original cannot be produced. *Shortz* v. *Unangst*, 3 W. & S. 45.

A record of an instrument is not admissible, if not required by law to be kept. *Fitler* v. *Shotwell*, 7 W. & S. 14.

The witness testifying as to the contents of a document must have actual knowledge of it and be able to give its substance. *Appeal of Richards*, 122 Pa. 547.

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;[17]

(*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;[18]

(*c*) When the original has been destroyed or lost, and proper search has been made for it;[19]

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[17] *R.* v. *Watson*, 1788, 2 T. R. at p. 201. *Entick* v. *Carrington*, 1765, 19 S. T. at p. 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.

[18] *Miles* v. *Oddy*, 1834, 6 C. & P. at p. 732; *Marston* v. *Downes*, 1834, 1 A. & E. 31.

[19] 1 Ph. Ev. s. 452; 2 Ph. Ev. 281; Taylor (from Greenleaf), s. 429. The loss may be proved by an admission of the party or his attorney; *R.* v. *Haworth*, 1830, 4 C. & P. 254.

(*d*) When the original is of such a nature as not to be easily movable,[20] or is in a country from which it is not permitted to be removed;[21]

(*e*) When the original is a public document;[22]

(*f*) When the document is an entry in a banker's book, proof of which is admissible under Article 36.

(*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;[22] 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: provided that that result is capable of being ascertained by calculation.[23]

Subject to the provisions hereinafter contained any secondary evidence of a document is admissible.[24]

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 ordi-

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20 *Mortimer* v. *McCallan*, 1840, 6 M. & W. at pp. 67, 68 (referring to the case of a libel written on a wall); *Bruce* v. *Nicolopulo*, 1855, 11 Ex. 133 (the case of a placard posted on a wall).

21 *Alivon* v. *Furnival*, 1834, 1 C. M. & R. 277, 291–2.

22 See Chapter X.

23 *Roberts* v. *Doxen*, 1791, 1 Peake, 116; *Meyer* v. *Sefton*, 1817, 2 Star. at p. 276. The books, &c., should in such a case be ready to be produced if required. *Johnson* v. *Kershaw*, 1847, 1 De G. & S. at p. 264.

24 If a counterpart is known to exist, it is the safest course to produce or account for it: *Munn* v. *Godbold*, 1825, 3 Bing. 297; *R.* v. *Castleton*, 1795, 6 T. R. 236.

nary 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 the copy with the original entry and may be given orally or by affidavit.[25]

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.

AMERICAN NOTE.

General.

Authorities.— 1 Greenleaf on Evidence (15th ed.), sec. 558 *et seq.*; 1 Wharton on Evidence, sec. 150 *et seq.*

If there are several originals, all must be accounted for in order to let in secondary evidence. *Dyer* v. *Fredericks*, 63 Me. 173, 592.

Some authorities hold that, if a document comes in collaterally, secondary evidence may, in all cases, be introduced. *Phinney* v. *Holt*, 50 Me. 270.

In some States, as in England, there are no degrees in secondary evidence. *Com.* v. *Smith*, 151 Mass. 491.

In possession of adverse party.— *Thayer* v. *Middlesex Mut. Ins. Co.*, 10 Pick. (Mass.) 326; *Dana* v. *Kemble*, 19 Pick. (Mass.) 112; *Narragansett Bank* v. *Atlantic Silk Co.*, 3 Metc. (Mass.) 282; *Coolidge* v. *Brigham*, 5 Metc. (Mass.) 68; *Loring* v. *Whittemore*, 13 Gray

[25] 42 & 43 Vict. c. 11, ss. 3, 5.

(Mass.), 228; *Dooley* v. *Cheshire Glass Co.*, 15 Gray (Mass.), 494; *Day* v. *Floyd*, 130 Mass. 488; *Morse* v. *Woodworth*, 155 Mass. 233, 29 N. E. 525; *Com.* v. *Shurn*, 145 Mass. 150; *Dunbar* v. *U. S.*, 156 U. S. 185; *Bishop* v. *Amer. Preserver's Co.*, 157 Ill. 284; *Carland* v. *Cunningham*, 37 Pa. St. 228; *Keagle* v. *Pessell*, 91 Mich. 618; *Golden* v. *Conner*, 89 Ala. 598; *Overlock* v. *Hall*, 81 Me. 348; *Weston* v. *Hight*, 18 Me. 281; *Lowell* v. *Flint*, 20 Me., pt. 2, 401; *Orr* v. *Clark*, 62 Vt. 136, 19 Atl. 929; *Sedgwick* v. *Waterman*, 2 Root (Conn.), 434; *Morgan* v. *Minor*, 2 Root (Conn.), 220; *Ross* v. *Bruce*, 1 Day (Conn.), 100.

Document lost or destroyed.—*Tobin* v. *Shaw*, 45 Me. 331, 71 Am. Dec. 547; *Gates* v. *Bowker*, 18 Vt. 23; *Spear* v. *Tilson*, 24 Vt. 420; *Stebbins* v. *Duncan*, 108 U. S. 32; *Gorgas* v. *Hertz*, 150 Pa. 538; *McConnell* v. *Wildes*, 153 Mass. 487; *Hatch* v. *Carpenter*, 9 Gray (Mass.), 271; *Oriental Bank* v. *Haskins*, 3 Metc. (Mass.) 332, 37 Am. Dec. 140.

But one who has intentionally destroyed an instrument cannot give evidence as to its contents, without first giving evidence to rebut the suspicion of fraud, arising from the act. *Joannes* v. *Bennett*, 5 Allen (Mass.), 169; *Kelly* v. *Riggs*, 2 Root (Conn.), 128; *Kelsey* v. *Hanmer*, 18 Conn. 317; *Elwell* v. *Mersick*, 50 Conn. 274; *Bank of United States* v. *Sill*, 5 Conn. 106, 13 Am. Dec. 44.

Diligent search must be made. *McCollister* v. *Yard*, 90 Ia. 621; *Mullauphy Bank* v. *Schott*, 135 Ill. 655; *Darrow* v. *Pierce*, 91 Mich. 63. See *Gunther* v. *Bennett*, 72 Md. 384.

The amount of evidence required to prove the loss of a written instrument, for the purpose of admitting secondary evidence of its contents, depends much upon the nature of the instrument, the reasons for its preservation, and the circumstances of the case. *Waller* v. *Eleventh School District*, 22 Conn. 333.

The question whether the loss of a document has been satisfactorily proved, so that secondary evidence of its contents can be admitted, is wholly one of discretion with the judge trying the case, and cannot be reviewed on error. *Elwell* v. *Mersick*, 50 Conn. 274; *Witter* v. *Latham*, 12 Conn. 399, 400.

Where the plaintiff declares upon a writing, and alleges that it is lost or destroyed, the loss or destruction is a preliminary question for the court, not a material and traversable fact to be determined by the jury. *Witter* v. *Latham*, 12 Conn. 400; *Fitch* v. *Bogue*, 19 Conn. 289, overruling *Coleman* v. *Wolcott*, 4 Day (Conn.), 394, and *Paddock* v. *Higgins*, 2 Root (Conn.), 483.

Out of jurisdiction.— Where a document is out of the jurisdiction in the hands of a third party, secondary evidence is admissible. *Elwell* v. *Mersick*, 50 Conn. 274; *Shepard* v. *Giddings*, 22 Conn. 283; *Stevens* v. *Miles*, 142 Mass. 571; *L'Herbette* v. *Pittsfield Nat. Bank*, 162 Mass. 137; *Eaton* v. *Campbell*, 7 Pick. (Mass.) 10; *Knickerbocker* v. *Wilcox*, 83 Mich. 200; *Fosdick* v. *Van Horn*, 40 O. St. 459; *Burton* v. *Driggs*, 20 Wall. (U. S.) 125, 134; *Memphis, etc., R. Co.* v. *Hembree*, 84 Ala. 182; *Otto* v. *Trump*, 115 Pa. St. 425, 430; *Zallerbach* v. *Allenberg*, 99 Cal. 57; *Bowman* v. *Sanborn*, 5 Fost. (N. H.) 87, 112; *Beattie* v. *Hilliard*, 55 N. H. 428; *Knowlton* v. *Knowlton*, 84 Me. 283, 24 Atl. 847; *Burnham* v. *Wood*, 8 N. H. 334; *Little* v. *Paddleford*, 13 N. H. 167; *Lord* v. *Staples*, 23 N. H. 448.

In possession of third person.—*Sherwood* v. *Hubbel*, 1 Root (Conn.), 498; *Halsey* v. *Fanning*, 2 Root (Conn.), 101; *Lynde* v. *Judd*, 3 Day (Conn.), 499; *Stokoe* v. *St. Paul, etc., R. Co.*, 40 Minn. 545; *State* v. *Gurnee*, 14 Kan. 111; *Corbett* v. *Gibson*, 16 Blatchf. 334.

Not easily movable.— *North Brookfield* v. *Warren*, 16 Gray (Mass.), 171, 174; *Stearns* v. *Doe*, 12 Gray (Mass.), 482.

Numerous documents.— Sustaining text. *Boston & W. R. R. Co.* v. *Dana*, 1 Gray (Mass.), 83; *Burton* v. *Driggs*, 20 Wall. 125; *Chicago, etc., R. Co.* v. *Wolcott*, 141 Ind. 267; *Wolford* v. *Farnham*, 47 Minn. 95; *State* v. *Findley*, 101 Mo. 217.

Not produced on notice.— If a document is not produced on notice, secondary evidence is admissible. *Bishop* v. *Am. Preserve Co.*, 157 Ill. 284.

Preliminary evidence.—*Blakely* v. *Pease*, 95 Ill. App. 341.

A foundation must be laid for secondary evidence. *Chisholm* v. *Beaver L. S. Co.*, 18 Ill. App. 131; *Wing* v. *Sherrer*, 77 Ill. 200.

Before secondary evidence can come in, the absence of the original must be accounted for. *Massey* v. *Farmers' Nat. Bank*, 113 Ill. 334, 338.

As to the search necessary for the introduction of proof of the contents of tax receipts, under Hurd's Rev. Stat., 1899, p. 1420, chap. 120, sec. 163, see *Scott* v. *Bassett*, 194 Ill. 602, 62 N. E. 914; *Crocker* v. *Lowenthal*, 83 Ill. 579; *Hazen* v. *Pierson*, 83 Ill. 241; *McDonald* v. *Stark*, 176 Ill. 456, 52 N. E. 337; *Harrall* v. *Enterprise Sav. Bank*, 182 Ill. 538, 56 N. E. 63; *Hawley* v. *Hawley*, 187 Ill. 321, 58 N. E. 332; *Wells* v. *Miller*, 37 Ill. 276.

In order to admit copies of letters, the proper foundation for sec-

ondary evidence must be laid. *La Salle P. B. Co.* v. *Coe,* 53 Ill. App. 506.

Proof of loss in suit on a bond must be clear and satisfactory. *McCart* v. *Wakefield,* 72 Ill. 101.

In order to introduce secondary evidence, it is not necessary that proof of the loss be beyond the possibility of a mistake. *Western Union Tel. Co.* v. *Kemp Bros.,* 35 Ill. App. 583.

Preliminary proof of loss is necessary as required by 3 Star. & C. Annot. Stat., 1896, p. 3360, and 1 Star. & C. Annot. Stat., 1896, p. 955. *Glos* v. *Hallowell,* 90 Ill. App. 65, 60 N. E. 62.

Search for a paper, in order to let in secondary evidence, must be made at the place where it would naturally be found. *Doyle* v. *Wiley,* 15 Ill. 576; *Cook* v. *Hunt,* 24 Ill. 535, 550; *Stow* v. *People,* 25 Ill. 81; *Rankin* v. *Crow,* 19 Ill. 626; *Mariner* v. *Saunders,* 5 Gilm. 113.

In order to render a copy of a mortgage admissible, reasonable efforts to procure the original must have been made. *Roberts* v. *Haskell,* 20 Ill. 59.

Proof of loss is preliminary to the introduction of a copy. *Pardee* v. *Lindley,* 31 Ill. 174.

Affidavit of loss, etc.— Under Hurd's Rev. Stat., 1899, p. 409, chap. 30, sec. 36, the preliminary evidence necessary to render secondary evidence admissible may be by affidavit. *Scott* v. *Bassett,* 194 Ill. 602, 62 N. E. 914.

The preliminary proof of the loss of notes may be made by affidavit. *Wade* v. *Wade,* 12 Ill. 89; *Palmer* v. *Logan,* 3 Scam. 56; *Dormady* v. *State Bank of Illinois,* 2 Scam. 236; *Taylor* v. *McIrvin,* 94 Ill. 488.

The affidavit must show certainty. *Holbrook* v. *Trustees,* 28 Ill. 187; *Rogers* v. *Miller,* 4 Scam. 333; *Palmer* v. *Logan,* 3 Scam. 56.

The affidavit, however, of third parties competent to testify is not admissible. *Becker* v. *Quigg,* 54 Ill. 390.

The affidavit must give the details of the search. *Booth* v. *Cook,* 20 Ill. 129.

It is not enough to state simply that diligent search has been made. *Rankin* v. *Crow,* 19 Ill. 626.

An affidavit of a party "that he did not have the deed in his possession, that he did not know where it was," complies with the law. *Nixon* v. *Cobleigh,* 52 Ill. 387.

Any person having any knowledge of the facts may prove the loss. *Weis* v. *Tiernan,* 91 Ill. 27.

As to the diligence of the search for a lost deed, see *Taylor* v. *McIrvin*, 94 Ill. 488.

The preliminary proof of loss or destruction is for the court. *Loewe* v. *Reismann*, 8 Brad. 525.

Lost papers.— The contents of a lost instrument may be proved. *Kank. Coal Co.* v. *Crane B. Co.*, 38 Ill. App. 557, 99 Ill. App. 559, 561.

The contents of a lost note may be shown, proper foundation for the evidence having been laid. *Grimes* v. *Hillary*, 150 Ill. 141; *O'Neil* v. *O'Neil*, 123 Ill. 361, 363.

In order to prove the contents of a note and mortgage, the original must be shown to be lost. *Dowden* v. *Wilson*, 71 Ill. 485.

As to copies of indictments which have been lost or destroyed, see Hurd's Rev. Stat., chap. 38, sec. 413, p. 633.

When a proper foundation has been laid, a witness may state his recollection of the contents of a lost letter. *Case* v. *Lyman*, 66 Ill. 229.

The contents of an affidavit may be proved by parol. *Ashley* v. *Johnson*, 74 Ill. 392.

As to proof of bankruptcy discharge, see *Young* v. *Denslinger*, 2 Brad. 23.

Secondary evidence of a deed is admissible, the original being lost. *Tucker* v. *Shaw*, 158 Ill. 326; *Gillespie* v. *Gillespie*, 159 Ill. 84.

The execution of a lost deed must be proved. *Mariner* v. *Lamden*, 5 Gilm. 113.

Any witness who knows the facts may prove the contents of a lost paper. *Rankin* v. *Crow*, 19 Ill. 627.

The contents of a lost record of naturalization. *Kreitz* v. *Behrensmeyer*, 125 Ill. 141, 169.

The contents of a letter may be shown if it is lost. *Davis* v. *Ransom*, 26 Ill. 100.

A copy of a lost memorandum is admissible. *Ryan* v. *Miller*, 153 Ill. 138.

Lost pleading.— Where a pleading has been lost, one cannot file an alleged copy in order to use it as evidence, but the person assuming to know the contents must take the stand so as to be subjected to cross-examination. *Harley* v. *Harley*, 67 Ill. App. 138.

Lost deposition.— The contents of a lost deposition may be proved in the same manner as those of any other lost paper. *Stout* v. *Cook*, 47 Ill. 530; *Aulger* v. *Smith*, 34 Ill. 534.

The contents of a deposition cannot be proved where it can be retaken. *Stout* v. *Cook*, 47 Ill. 530; *Aulger* v. *Smith*, 34 Ill. 534.

The contents of a lost deposition cannot be shown by the attorney's minutes. *Stout* v. *Cook*, 57 Ill. 386.

A copy of a lost deposition may be read. *Gage* v. *Eddy*, 167 Ill. 102.

Papers destroyed.— There is a presumption against one who has destroyed writings. *Anderson* v. *Irwin*, 101 Ill. 411; *Tartar* v. *Keeler*, 61 Ill. App. 625.

One can only prove the contents of an instrument voluntarily destroyed by him when he repels inference of fraud. *Blake* v. *Fash*, 44 Ill. 302.

Where records are destroyed by fire, an abstract of title is competent. *Richley* v. *Farrell*, 69 Ill. 264.

The contents of a burnt record may be proved by parol. *Forsyth* v. *Vehmeyer*, 176 Ill. 359, 52 N. E. 55, affirming 75 Ill. App. 308.

The contents of a burnt record may be proved from the testimony of one who has examined it and of an abstract maker familiar with its contents. *Forsyth* v. *Vehmeyer*, 176 Ill. 359, 52 N. E. 55, affirming 75 Ill. App. 208.

The contents of lost deeds may be proved by parol. *Fletcher* v. *Shepperd*, 174 Ill. 262, 51 N. E. 212.

Wills.— As to secondary evidence of the contents of a will which has been destroyed, see *G. T. M. Mfg. & T. Co.* v. *Gill*, 111 Ill. 541.

In order to render a copy admissible, the loss of the original must be shown. *Anderson* v. *Jacobson*, 66 Ill. 522.

The proper foundation must be laid in order that a copy of a record be admissible. *Hanson* v. *Armstrong*, 22 Ill. 442. The record itself may be read by statute.

In possession of adverse party.—Where a party refuses to produce papers, secondary evidence is admissible. *Rector* v. *Rector*, 3 Gilm. 105; *Vestor* v. *Powell*, 2 Gilm. 119.

Where a party will not produce papers, the adverse party may give parol proof of the contents and the presumption will be against him. *Rector* v. *Rector*, 3 Gilm. 105.

If a party removes documents without the State, which it is called upon to produce, it cannot object to secondary evidence. *Suburban R. R. Co.* v. *Baultwill*, 94 Ill. App. 454.

Letter-press copies are admissible where the adverse party will not produce the originals. *Berry* v. *Allen*, 59 Ill. 149.

Where the opposite party will not produce books in evidence, parol evidence of their contents is admissible. *Cartier* v. *Troy L. Co.*, 138 Ill. 533.

Original public document.— The incorporation of a company may be proved in a suit against stockholders by a copy of the license recorded in the books of the company. *Culver* v. *Third Nat. Bank*, 64 Ill. 528.

Kinds of secondary evidence.— The most satisfactory kind of secondary evidence must be produced. *Wilson* v. *South Park Comrs.*, 70 Ill. 46.

If a contract has been destroyed, secondary evidence may be admitted, but not a copy of it taken from the report of the case. *Hoyt* v. *Shipherd*, 70 Ill. 309.

The execution docket is admissible, the execution having been lost. *Ellis* v. *Huff*, 29 Ill. 449; *Dunlap* v. *Berry*, 4 Scam. 327.

As to the admissibility of copies of deeds under 1 Star. & C. Annot. Stats. [2d ed.], p. 955, sec. 36, see *Scott* v. *Bassett*, 174 Ill. 390, 51 N. E. 577.

Parol evidence of the contents of an instrument which has been lost may be offered, unless it appears that copies, or other better evidence, exists. *C., C., C. & St. L. R. R. Co.* v. *Newlin*, 74 Ill. App. 638.

Where a copy of a contract is offered, any witness may testify that it is a copy. *Lombard* v. *Johnson*, 76 Ill. 599.

In case of lost execution a transcript from a docket is admissible. *Beeker* v. *Quigg*, 54 Ill. 390.

The contents of a lost record of election may be shown by oral evidence. *Maxey* v. *Williamson County*, 72 Ill. 207.

Proof of custom.— The contents of a lost bond cannot be proved by custom. *Jackson* v. *Bry*, 3 Brad. 586.

Abstract of title.— Abstracts of title may be admissible. *Heinsen* v. *Lamb*, 117 Ill. 549, 551; *Russell* v. *Mandell*, 73 Ill. 136.

A copy of an abstract is not admissible, even though the records have been burnt. *King* v. *Worthington*, 73 Ill. 161; *Compton* v. *Randolph*, 104 Ill. 555.

Where the record of deeds is destroyed, an abstract of title is admissible. *Alvis* v. *Morrison*, 63 Ill. 181.

In order to prove a judgment by secondary evidence, the loss or destruction of the record must be shown. *Comisky* v. *Breen*, 7 Brad. 369; *Thatcher* v. *Maack*, 7 Brad. 635.

Numerous documents.— *Chicago, etc., R. Co.* v. *Wolcott*, 141 Ind. 267.

Collateral fact.— Where a document is merely a collateral or subsequent memorial of the fact, parol evidence of such fact may be given. *Wabash & Erie Canal* v. *Reinhart*, 22 Ind. 463.

The contents of papers collaterally in issue may be proved. *Coonrad* v. *Madden*, 126 Ind. 197; *Carter* v. *Pomeroy*, 30 Ind. 438.

Objection to evidence.— Objection to secondary evidence must be made to be available. *Moore* v. *Hubbard*, 15 Ind. App. 84.

In public office.— The mere fact that a document is in a public office and cannot be removed does not of itself allow the introduction of parol evidence. *People* v. *Lambert*, 5 Mich. 349.

New Jersey.

Secondary evidence is admitted if the court is reasonably assured that better evidence is not withheld or suppressed. *Clark* v. *Hornbeck*, 17 N. J. Eq. 430.

Taking a receipt does not preclude other proof of payment. *Berry* v. *Berry*, 2 Harr. 440; *Chambers* v. *Hunt*, 2 Zab. 552.

In possession of adverse party.— Copies of deeds admissible on showing that the originals were formerly in possession of the defendant's attorney and notice to produce. *Popino* v. *McAllister*, 7 N. J. L. 46.

Lost instruments.— *Stafford* v. *Stafford*, 1 N. J. Eq. 525; *Bent* v. *Smith*, 22 N. J. Eq. 560; *Browning* v. *Flanagan*, 2 Zab. 567.

Secondary evidence of contents of a lost instrument admissible. Whether such instrument is lost and whether sufficient search has been made for it are preliminary questions of fact for the court. *Longstreth* v. *Korb*, 64 N. J. L. 112.

Secondary evidence not admissible where document is lost or destroyed through one's own negligence or fraud. *Price* v. *Tallman*, Coxe, 447; *Broadwell* v. *Stiles*, 8 N. J. L. 58.

Secondary evidence not admissible in favor of one who voluntarily destroyed the instrument. *Price* v. *Tallman*, Coxe, 447; *Broadwell* v. *Stiles*, 3 Hal. 58.

Secondary evidence admitted when the destruction was by mistake, though voluntary. *Wyckoff* v. *Wyckoff*, 16 N. J. Eq. 401; *Jones* v. *Knauss*, 31 N. J. Eq. 609.

Secondary evidence of a forged instrument that is lost or without the control of the State is admissible. *Mead* v. *State*, 53 N. J. L. 601

Secondary evidence of the contents of a lost affidavit admitted to prove perjury. *Gordon* v. *State*, 48 N. J. L. 611.

Evidence that instrument cannot be found by diligent search raises presumption of loss. *Clark* v. *Hornbeck*, 17 N. J. Eq. 430.

Proof of loss — Reasonable search.— *Johnson* v. *Arnwine*, 42 N. J. L. 451.

Instances where proof of loss was unsatisfactory. *Wills* v. *McDole*, 2 South. 502; *Sterling* v. *Potts*, 2 South. 773; *Fox* v. *Lambson*, 3 Hal. 275; *Smith* v. *Axtell*, 1 N. J. Eq. 494.

Instances where proof of loss was sufficient. *Kingwood* v. *Bethlehem*, 1 Green, 221; *Watson* v. *Kelty*, 1 Harr. 517, 526; *Insurance Co.* v. *Woodruff*, 26 N. J. L. 541; *Williamson* v. *Johnson*, 5 N. J. Eq. 537, 593, 615.

Laws of New Jersey.— The printed statute-books and pamphlet session laws are admissible. *Lawrence* v. *Finch*, 17 N. J. Eq. 234; *Condit* v. *Blackwell*, 19 N. J. Eq. 193, 22 N. J. Eq. 481; *Ball* v. *Consolidated Co.*, 32 N. J. L. 102; *Uhler* v. *Semple*, 20 N. J. Eq. 288.

Laws of another State.— Laws of New York provable by a printed copy. *Hale* v. *Ross*, Pen. 807. *Contra*, *Bennington Iron Co.* v. *Rutherford*, 3 Harr. 185.

Proving records in other States.— *Chase* v. *Caryl*, 57 N. J. L. 545.

Instrument not in issue.— Where the writing is only collateral to the question in issue, it need not be produced. *New Jersey Zinc Co.* v. *Lehigh Zinc Co.*, 59 N. J. L. 189.

Maryland.

General authorities sustaining text.— *Young* v. *Mertens*, 27 Md. 114; *Dowler* v. *Cushwa*, 27 Md. 354; *Marshall* v. *Haney*, 9 Gill, 251; *Mulliken* v. *Boyce*, 1 Gill, 60; *Dunnock* v. *Dunnock*, 3 Md. Ch. 140; *Morrison* v. *Welty*, 18 Md. 169; *Barnum* v. *Barnum*, 42 Md. 251.

A witness cannot state the *effect* of the document, or the result of his impression as to the contents, but must give the words or their substance. *Baltimore* v. *War*, 77 Md. 593.

As against one who has defaced or destroyed an instrument, slight evidence of its contents will generally be sufficient. *Love* v. *Dilly*, 64 Md. 238.

A party was allowed to bring out on cross-examination the contents of a paper, of the existence of which he could not have known in time to serve notice to produce or to account for its absence. *Hume* v. *Pumphrey*, 4 Gill, 181.

Payment of money may be proved without producing a receipt that was given therefor. *Wyeth* v. *Walzl,* 43 Md. 426.

The contents of a document may be proved by a copy, which the adverse party has admitted to be correct in another action. *Crichton* v. *Smith,* 34 Md. 42.

To contradict a witness, a printed copy of a letter written by him, admitted by him to be correct, is admissible without accounting for the original, the witness admitting that the original is not in his possession. *Gillespie* v. *State,* 92 Md. 171.

Lost or destroyed documents.— Secondary evidence of a document is admissible only when it is lost, destroyed, or in the possession of the adverse party. *Hayward* v. *Carroll,* 4 H. & J. 518; *Weber* v. *Fickey,* 52 Md. 398, 423, 515.

The minute-books of a corporation containing a copy of an agreement are admissible if the original is lost. *Harrison* v. *Morton,* 83 Md. 456.

Copies of the record of a deed not required by law to be recorded are not admissible unless the original is lost. *Gittings* v. *Hall,* 1 H. & J. 14; *Hurn* v. *Soper,* 6 H. & J. 276.

The existence of the document at one time must be established. *Young* v. *Mackall,* 4 Md. 362.

Preliminary proof of loss.— Proof that a paper was thrown away as useless is enough to let in secondary evidence without proving any search for it. *Wright* v. *State,* 88 Md. 436.

Diligent search must be made. See *Gunther* v. *Bennett,* 72 Md. 384.

It must be proved that the original once existed and sufficient evidence must be introduced to raise the presumption of loss or destruction. In case of loss, a reasonable search must have been made. *Brashears* v. *State,* 58 Md. 563.

Instances of insufficient search. *Basford* v. *Mills,* 6 Md. 385; *Clements* v. *Ruckle,* 9 Gill, 326; *Mulliken* v. *Boyce,* 1 Gill, 60.

An ordinary letter to one now dead may be presumed to have been destroyed without proof of search. *Jones* v. *Jones,* 45 Md. 144.

A more diligent search is required in case of important instruments not likely to be lost. *Union Bank* v. *Gittings,* 45 Md. 181; *Bartlett* v. *Wilbur,* 53 Md. 485; *Glenn* v. *Rogers,* 3 Md. 312.

Document illegible.— If records have become illegible through time or accident, secondary evidence is admissible. *Smith* v. *Wilson,* 17 Md. 460.

Possession of adverse party.— A copy of a letter may be introduced when notice has been given to produce the original and it is not produced. *Brailsford* v. *Williams,* 15 Md. 151.

Original in possession of adverse party and his failure to produce. *Walsh* v. *Gilmore,* 3 H. & J. 383.

Refusal to produce after service of notice admits secondary evidence. *Morrison* v. *Whiteside,* 17 Md. 452.

Pennsylvania.

Lost or destroyed in general.— *Gould* v. *Lee,* 55 Pa. 99. Records: *Bank* v. *Gilson,* 6 Pa. 51; *Miltimore* v. *Miltimore,* 40 Pa. 151; *Clark* v. *Trindle,* 52 Pa. 492; *Appeal of McFate,* 105 Pa. 323. Sealed instruments: *Edgar's Lessee* v. *Robinson,* 4 Dall. 132; *Paul* v. *Durborow,* 13 S. & R. 392; *Schall* v. *Miller,* 3 Whart. 250; *Huzzard* v. *Trego,* 35 Pa. 9; *Gorgas* v. *Hertz,* 150 Pa. 538.

It must be proved that the lost document actually existed and was genuine before secondary evidence of its contents is admissible. *Krise* v. *Neason,* 66 Pa. 253.

Lost letter. *Stern* v. *Stanton,* 184 Pa. 268.

Secondary evidence of the contents of a lost note is not to be excluded merely because the defendant produces what he claims to be the note when its genuineness is denied by the plaintiff. *Helzer* v. *Helzer,* 187 Pa. 243.

One who has lost or destroyed a document through fraud or negligence cannot introduce secondary evidence of its contents. *Wallace* v. *Harmstad,* 44 Pa. 492.

Preliminary proof of loss and search.— Proof of loss held sufficient. *Bank* v. *Field,* 143 Pa. 473; *Brown* v. *Day,* 78 Pa. 129.

Preliminary proof that instrument is lost is required. *McCredy* v. *Schuylkill Nav. Co.,* 3 Whart. 424; *Parke* v. *Bird,* 3 Pa. 360; *Caufman* v. *Congregation,* 6 Binn. 59; *Graff* v. *Railroad Co.,* 31 Pa. 359; *Brown* v. *Day,* 78 Pa. 129; *Trust Co.* v. *Rosenagle,* 77 Pa. 507.

A reasonably diligent search is required. *Spalding* v. *Bank,* 9 Pa. 28; *Transportation Co.* v. *Steele,* 70 Pa. 188.

A less diligent search is required in case of unimportant documents that are lost. *American Ins. Co.* v. *Rosenagle,* 77 Pa. 507.

Search for instrument held insufficient. *Burr* v. *Kase,* 168 Pa. 81; *Fire Ins. Co.* v. *Mardorf,* 152 Pa. 22; *Heller* v. *Peters,* 140 Pa. 648.

That an instrument once existed and is now lost may be shown by circumstantial evidence. *Bright* v. *Allan,* 203 Pa. 386.

Preliminary proof of loss is for the court. *Flinn* v. *McGonigle,* 9 W. & S. 75; *Railroad Co.* v. *Quick,* 61 Pa. 328; *Gorgas* v. *Hertz,* 150 Pa. 538; *Hemphill* v. *McClimans,* 24 Pa. 367; *Graff* v. *Railroad Co.,* 31 Pa. 489.

Documents in possession of a third party, see *Morris* v. *Vanderen,* 1 Dall. 64; *De Baril* v. *Pardo,* 8 Atl. 876.

In hands of adverse party.— Secondary evidence of the contents of a document in the hands of the adverse party is not admissible without showing notice to produce. *Buchanan* v. *Moore,* 10 S. & R. 275; *Carland* v. *Cunningham,* 37 Pa. 228; *Eilbert* v. *Finkbeiner,* 68 Pa. 243; *Underwriters' Assn.* v. *George,* 97 Pa. 238.

Out of jurisdiction.— Where a document is out of the jurisdiction in the hands of a third party, secondary evidence is admissible. *Otto* v. *Trump,* 115 Pa. 425, 430; *Ralph* v. *Brown,* 3 W. & S. 395; *McGregor* v. *Montgomery,* 4 Pa. 237.

Numerous documents.— Voluminous documents likely to be unintelligible to the jury may be summed up in a tabulated statement and such statement admitted in evidence. *Com.* v. *Work,* 3 Pitts. 493.

Not movable.— The contents of a posted notice may be proved by parol. *Whitesell* v. *Crane,* 8 W. & S. 369.

Court records.— Secondary evidence admitted where the document is a part of or attached to the record of a court of another State. *Otto* v. *Trump,* 115 Pa. 425.

Laws of other States.— Laws of a sister State proved in same way as those of a foreign country. *Ripple* v. *Ripple,* 1 Rawle, 386. They may be proved by a volume of its laws printed by public authority. *Thompson* v. *Musser,* 1 Dall. 458; *Kean* v. *Rice,* 12 S. & R. 203; *Mullen* v. *Morris,* 2 Pa. 85.

An attorney acquainted with the law of a sister State is a competent witness as to its unwritten law. *Dougherty* v. *Snyder,* 15 S. & R. 84.

Foreign law may be proved by any one acquainted with it, though not a lawyer. *Trust Co.* v. *Rosenagle,* 77 Pa. 507.

Degrees in secondary evidence.— The best kind of evidence obtainable is required. *Stevenson* v. *Hoy,* 43 Pa. 191.

To prove a transaction of sixty years ago, it is not necessary to

produce the best evidence of the fact that existed then, but only the best that exists now. *Howell* v. *Mellon*, 189 Pa. 169.

Giving a receipt does not prevent the proving of payment by parol. *Heckert* v. *Haine*, 6 Binn. 16; *Ramsey* v. *Johnson*, 3 P. & W. 293.

Statute.— Secondary evidence admissible when a witness persists in refusing to produce though served with *subpœna duces tecum* and punished. Pepper & Lewis' Digest of Laws, "Evidence," sec. 7.

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;[26] or has,

if the original is in the possession of a stranger to the action, served him with a *subpœna duces tecum* requiring its production;[27]

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.[28]

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* See Note XXIX.

[26] *Dwyer* v. *Collins*, 1852, 7 Ex. at p. 648.

[27] *Newton* v. *Chaplin*, 1850, 10 C. B. 356.

[28] *R.* v. *Llanfaethly*, 1853, 2 E. & B. 940.

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;

(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;[29]

(3) When it appears or is proved that the adverse party has obtained possession of the original from a person subpœnaed to produce it;[30]

(4) When the adverse party or his agent has the original in court.[31]

AMERICAN NOTE.

General.

Authorities.— 1 Taylor on Evidence (Chamberlayne's 9th ed.), sec. 440 *et seq.;* 1 Greenleaf on Evidence (15th ed.), sec. 561.

Notice to produce.— *Abbott* v. *Wood,* 22 Me. 541; *Inhabitants of Belfast* v. *Inhabitants of Washington,* 46 Me. 460; *Webster* v. *Clark,* 30 N. H. 245; *Curtis* v. *Ingham,* 2 Vt. 287; *Murray* v. *Mattison,* 67 Vt. 553, 32 Atl. 479; *Baker* v. *Pike,* 33 Me. 213; *People* v. *Walker,* 38 Mich. 159; *Dunbar* v. *U. S.,* 156 U. S. 185; *Mayor of Baltimore* v. *War,* 77 Md. 593, 603; *Eilbert* v. *Finkbeiner,* 68 Pa. St. 243; *Trelever* v. *No. Pac. R. Co.,* 89 Wis. 598; *Shepard* v. *Giddings,* 22 Conn. 282; *Draper* v. *Hatfield,* 124 Mass. 53; *Roberts* v. *Spencer,* 123 Mass. 397; *Bourne* v. *Buffington,* 125 Mass. 481; *Com.* v. *Sullivan,* 156 Mass. 229; *Com.* v. *Emery,* 2 Gray (Mass.), 80; *Bourne* v. *Boston,* 2 Gray

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[29] *How* v. *Hall.* 1811. 14 Ea. 274. In an action on a bond, no notice to produce the bond is required. See other illustrations in 2 Ph. Ev. 273: Taylor, s. 452.

[30] *Leeds* v. *Cook,* 1803, 4 Esp. 256.

[31] Formerly doubted, see 2 Ph. Ev. 278, but so held in *Dwyer* v. *Collins,* 1852, 7 Ex. 639.

(Mass.), 494; *Brackett* v. *Evans,* 1 Cush. (Mass.) 79; *Harris* v. *Whitcomb,* 4 Gray (Mass.), 433.

If the paper is in court, a verbal notice to produce is sufficient. *Overlock* v. *Hall,* 81 Me. 348.

Suit on assumption that adverse party has document.— *Dana* v. *Conant,* 30 Vt. 246, 257; *Morrill* v. *B. & M. R. R. Co.,* 58 N. H. 68; *State* v. *Mayberry,* 48 Me. 218; *Railway Co.* v. *Cronin,* 38 O. St. 122. *Compare People* v. *Swetland,* 77 Mich. 53.

Unlawful refusal of stranger to produce.—*Bull* v. *Loveland,* 10 Pick. (Mass.) 14.

Document itself a notice.—*Eagle Bank* v. *Chapin,* 3 Pick. (Mass.) 180; *Quinley* v. *Atkins,* 9 Gray (Mass.), 370; *Michigan, etc., Land Co.* v. *Republic Township,* 65 Mich. 628; *Pensacola R. Co.* v. *Brayton,* 34 Fla. 471; *Getkin* v. *Walker,* 59 Cal. 502; *Morrow* v. *Com.,* 48 Pa. St. 305; *Central Bank* v. *Allen,* 16 Me. 41.

In possession of third person.—*Brandt* v. *Klein,* 17 Johns. 335; *Lane* v. *Cole,* 12 Barb. 680.

A *subpœna duces tecum* may be served on a party. *Shelp* v. *Morrison,* 13 Hun, 110. If a corporation, by serving the proper officer. N. Y. Code Civ. Pro., sec. 868.

Adverse party has obtained document from person subpoenaed.— *Bonesteel* v. *Lynde,* 8 How. Pr. 226, 352.

Where the document was taken with intent to destroy, no notice need be given such party to produce the portion taken. *Scott* v. *Rentz,* 5 Sand. 572.

Adverse party has the original in court.— *McPherson* v. *Rathbone,* 7 Wend. 216, 219; *Brandt* v. *Klein,* 17 Johns. 335.

Requiring production.— The courts may require parties to produce books or writings. Hurd's Rev. Stat., chap. 51, sec. 9, p. 860.

Or papers. *Field* v. *Zemansky,* 9 Brad. 479.

As to requiring parties to produce writings, see *Allison* v. *Perry,* 130 Ill. 915; *Truesdale Mfg. Co.* v. *Hoyle,* 39 Ill. App. 532, 538; *Rigdon* v. *Conley,* 31 Ill. App. 630, 634, 635; *People* v. *West. M. M. I. Co.,* 40 Ill. App. 429.

Subpœna.— A witness who is unable to produce books or papers required by a *subpœna duces tecum* is excused by his inability, if after a diligent search he is unable to find them, and does not know where they are. *Lamb* v. *Lippincott,* 115 Mich. 611.

New Jersey.

Notice to produce.— Secondary evidence not admissible without showing a notice to produce. *Ford* v. *Munson,* 1 South. 93.

Notice required even though the document is in court. *Watkins* v. *Pintard,* Coxe, 378.

Notice to defendant's attorney held sufficient. *Den.* v. *McAllister,* 2 Hal. 46.

The document must be produced in evidence if relevant, but only during the one trial for which notice to produce was given. *Ellison* v. *Cruser,* 40 N. J. L. 444.

Time of notice.— Notice on the morning of trial is sufficient if the document be near at hand. *Board of Justices* v. *Fennimore,* 1 N. J. L. 242.

Subpœna duces tecum.— It is proper to issue a *subpœna duces tecum* to a party to the suit. *Murray* v. *Elston,* 23 N. J. Eq. 212; *Wills* v. *M'Dole,* 2 South. 501.

One is not obliged to produce a will in evidence, though an adjournment was taken to examine it. *State* v. *Lyon,* Coxe, 403, 412.

Maryland.

Notice to produce.— *Mayor of Baltimore* v. *War,* 77 Md. 593, 603.

Notice to produce a document in the hands of the adverse party is required before one may introduce evidence of its contents. *Kennedy* v. *Fowke,* 5 H. & J. 63.

Notice to produce is not required if the adverse party admits that the document is not in existence or not in his possession. *Union Banking Co.* v. *Gittings,* 45 Md. 181.

No notice to produce a document is necessary if it was executed in duplicate and the other copy is at hand. *Totten* v. *Bucy,* 57 Md. 446.

Document itself a notice.— Notice to produce a document itself a notice is not necessary. *Atwell* v. *Grant,* 11 Md. 101.

In hands of third person.— Evidence of the contents of a power of attorney in the hands of a third party is not admissible without proof of loss or the issuance of a *subpœna duces tecum.* *Rusk* v. *Sowerwine,* 3 H. & J. 97.

Time of notice.— Notice to produce must be given in such time as to afford the party a reasonable time to comply. *Ananias Divers* v. *Fulton,* 8 G. & J. 202.

A notice at the beginning of the trial is not in due time unless the document is in court or near at hand. *Glenn* v. *Rogers*, 3 Md. 312; *Atwell* v. *Miller*, 6 Md. 10.

Two days' notice held sufficient. *Divers* v. *Fulton*, 8 G. & J. 202.

Pennsylvania.

Notice to produce.— *Eilbert* v. *Finkbeiner*, 68 Pa. 243.

Party having document, absent from State. *Carland* v. *Cunningham*, 37 Pa. 228.

Notice is necessary though the document is in the courtroom. *Milliken* v. *Barr*, 7 Pa. 23.

Bringing the action is itself notice where its object is the possession of the instrument in question. *McClean* v. *Hertzog*, 6 S. & R. 154.

Parol evidence of the contents of a document in the hands of the adverse party is inadmissible until there has been a notice to produce. *Buchanan* v. *Moore*, 10 S. & R. 275; *Carland* v. *Cunningham*, 37 Pa. 228.

When notice to produce the written evidence of a contract has been disregarded, parol testimony is admissible. *Strawbridge* v. *Telegraph Co.*, 195 Pa. 118.

Document itself a notice.— Notice to produce a document itself a notice is unnecessary. *Morrow* v. *Com.*, 48 Pa. 305; *Gaskell* v. *Morris*, 7 W. & S. 32.

Statute.— As to compelling the production of documents, and the giving of secondary evidence, see Pepper & Lewis' Digest of Laws, "Evidence," secs. 6–9.

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]

AMERICAN NOTE.

General.

A paper which is identified by a stipulation does not thus become evidence. *Hankinson* v. *Giles,* 29 How. Pr. 478, 17 Abb. Pr. 251.

Until a document is read or its reading be waived, it does not become evidence, even though proved. *Clapp* v. *Wilson,* 5 Den. 285.

See also *Reynolds* v. *Schweinfus,* 27 Ohio St. 311; *Chapman* v. *Seely,* 8 Ohio Circ. Ct. 179.

A coroner's verdict may be admissible. *Fein* v. *Covenant Mutual Benefit Assn.,* 60 Ill. App. 274; *Grand Lodge, etc.,* v. *Wieting,* 68 Ill. App. 125; *Pyle* v. *Pyle,* 158 Ill. 289 (to show suicide); *N. G. Loge* v. *Jurg,* 65 Ill. App. 313 (in another State).

The dismissal of a case may be shown by the record. *Consolidated C. Co.* v. *Scheffer,* 135 Ill. 217.

The record of a judgment of a court not of record is not admissible. *Kopperl* v. *Nagy,* 37 Ill. App. 27.

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[1] See articles 36 & 90.

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.

AMERICAN NOTE.

General.

Authorities.— 1 Greenleaf on Evidence (15th ed.), secs. 479–484, 501; 1 Wharton on Evidence, sec. 635; *State* v. *Lynde*, 77 Me. 56; *Evanston* v. *Gunn*, 99 U. S. 660; *Taylor* v. *Adams*, 115 Ill. 570; *Phelps* v. *Hunt*, 43 Conn. 194. But see *Donnellan* v. *Hardy*, 57 Ind. 393; *Frost* v. *Frost*, 21 S. C. 501; *Richards' Appeal*, 122 Pa. St. 547.

As to proving records of other States, see U. S. Rev. Stats., secs. 905, 906.

As to proving foreign records, see *Watson* v. *Walker*, 23 N. H. 471, 496; *Spalding* v. *Vincent*, 24 Vt. 501, 504.

A record may be proved by its mere production, if such be had, as well as by a copy. *Gray* v. *Davis*, 27 Conn. 453.

Upon a writ of error from the judgment of a justice of the peace, each party produced a certified copy of the record below; but the copies did not agree. Held, that the court might send for the original record. *Allin* v. *Hiscock*, 1 Root (Conn.), 88.

Papers in another case in order to be admissible must be shown to be originals or transcripts. *Hughes* v. *Lehan*, 1 Ohio Circ. Ct. 9.

A plea of discharge in bankruptcy is provable by the certificate alone. *Strader* v. *Lloyd*, 1 Western Law Journal, 396.

A book of township records must be identified. *State* v. *Wallahan*, Tappan, 80.

The proper evidence of a patent is the document itself, authenticated by the certificate and seal of the commissioner. A single certificate that a paper is "a true copy from the records of that office of the specifications" is not admissible. *Davis* v. *Gray*, 17 Ohio St. 330.

Original executions are competent evidence; exemplified copies are received; are competent as public papers kept in the clerk's office. *Bank of U. S.* v. *White*, Wright, 51.

A public record may be admissible, even though some pages are missing. *People* v. *Board, etc.*, 21 Ill. App. 271.

A book of ordinances is evidence. *Lindsay* v. *Chicago*, 115 Ill. 121.

A certified copy of village ordinances, in pamphlet form, is admissible. *C. & E. I. Ry. Co.* v. *Beaver*, 96 Ill. App. 558.

An incumbrance may be shown by the record. *Conway* v. *Case*, 22 Ill. 129; *Stow* v. *People*, 25 Ill. 82.

As to proof of judgments in a county court, see Hurd's Rev. Stat., chap. 3, sec. 65, p. 115.

Certificates of redemption from tax sales are admissible. *Kraft* v. *Auw*, 192 Ill. 184, 61 N. E. 842.

Corporate existence may be shown by proving the charter and the exercise of the franchise. *P. & P. N. Ry. Co.* v. *P. & F. Ry. Co.*, 105 Ill. 110.

Corporate records duly authenticated are admissible. *Illinois Conference* v. *Plagge*, 177 Ill. 431, 53 N. E. 76, affirming 76 Ill. App. 468.

Original records, shown to have come from the legal custodian properly authenticated, are admissible, as are also certified transcripts. *Iles* v. *Watson*, 76 Ind. 359, 360; *Hall* v. *Bishop*, 78 Ind. 370, 372; *Reed* v. *Whitton*, 78 Ind. 579, 585; *Anderson* v. *Ackerman*, 88 Ind. 481, 492; *Baldwin* v. *Threlkeld*, 8 Ind. App. 312, 321.

Must be identified.— *Tyres* v. *Kennedy*, 126 Ind. 523, 526; *Kusler* v. *Crofoot*, 78 Ind. 579, 600 (foreign judgment).

As to authenticating statutes of other States, see *Ausley* v. *Meikle*, 81 Ind. 260, 262; *Anderson* v. *Ackerman*, 88 Ind. 481, 490 (transcript of judgment); *Marks* v. *Orth*, 121 Ind. 10, 14.

Assessment lists.— *Painter* v. *Hall*, 75 Ind. 208, 213; *Lefever* v. *Johnson*, 79 Ind. 554, 556; *Crume, Dunn & Co.* v. *Rauh*, 100 Ind. 247, 253; *Burket* v. *Pheister*, 114 Ind. 503, 504; *Cincinnati, etc., R. R. Co.* v. *McDougall*, 108 Ind. 179, 182; *Towns* v. *Smith*, 115 Ind. 480, 483; *Standard Oil Co.* v. *Bretz*, 98 Ind. 231, 235.

Federal land records.— Burns' Stat., sec. 1881.

New Jersey.

Making the record of an instrument admissible does not destroy the admissibility of the original, though not recorded. *Doremus* v. *Smith*, 4 N. J. L. 142.

The enrolled statute of a State conclusive proof of its enactment and contents. *Cable Co.* v. *Attorney-General*, 46 N. J. Eq. 270.

A judgment cannot be proved by parol. *Lomerson* v. *Hoffman*, 4 Zab. 674, 25 N. J. L. 625; *Tice* v. *Reeves*, 30 N. J. L. 314.

Original deeds as evidence.— G. S. 1895, "Conveyances," 31.

Maryland.

Authorities.— In the same court where a record is lodged, the record itself is evidence; the original papers may be laid before the court. *Morrill* v. *Gelston*, 34 Md. 413; *Lerian* v. *Rohr*, 66 Md. 95; *Boteler* v. *State*, 8 G. & J. 359; *Preston* v. *Evans*, 56 Md. 476.

Under statute the original papers of another suit are not admissible unless they are accompanied by a certified copy of the docket entries in the case. *Miller* v. *Matthews*, 87 Md. 464.

Though land records are not ordinarily admissible, they may be introduced to impeach the correctness of a certified copy. *Evans* v. *Horan*, 52 Md. 602.

The record of another court can be proved only by a transcript and not by the original entries. *Jones* v. *Jones*, 45 Md. 144; *Goldsmith* v. *Kilbourn*, 46 Md. 289. (But see statute.)

Bank-books, when relevant, may be themselves produced, or extracts taken from them. *Winder* v. *Diffenderfer*, 2 Bland, 166.

Pennsylvania.

Authorities.— Richards' Appeal, 122 Pa. 547.

One offering a document in evidence must offer it just as it is; and if there is anything on it to explain, the burden is on him to do so. *Cary* v. *Cary*, 189 Pa. 65.

Where a certified copy of a record is admissible, the original is equally so. *White* v. *Fitler*, 2 Pa. Law J. 302; *Lewis* v. *Bradford*, 10 Watts, 67; *Miller* v. *Hale*, 26 Pa. 432.

A certified copy is no better evidence than the original. *Boggs* v. *Miles*, 8 S. & R. 407.

Official papers taken from the files without authority are not admissible unless authenticated by the officer in whose custody they are. *Devling* v. *Williamson*, 9 Watts, 311; *Hockenbury* v. *Carlisle*, 1 W. & S. 282.

The original books of the county commissioners' office are admissible. *Miller* v. *Hale*, 26 Pa. 432. And they may be identified

by any one who knows them to be such. *Cuttle* v. *Brockway*, 24 Pa. 145.

The original records of another court are admissible when produced from proper custody. *Garrigues* v. *Harris*, 17 Pa. St. Rep. 344.

Justice's docket is admissible to prove its contents. *Cope* v. *Risk*, 21 Pa. 59; *Dean* v. *Connelly*, 6 Pa. 239; *Knapp* v. *Miller*, 133 Pa. 275.

The docket of a justice of the peace is admissible though obtained without his authority. *Dennison* v. *Otis*, 2 Rawle, 9.

ARTICLE 75.*

EXAMINED COPIES.

The contents of any public document whatever may in all cases be proved by an examined copy.

An examined copy is a copy proved by oral evidence to have been examined with the original and to correspond therewith. 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[2]) that each should alternately read both.[3]

AMERICAN NOTE.

General.

Authorities.— 1 Greenleaf on Evidence (15th ed.), secs. 91, 485, 501, 508; 1 Wharton on Evidence, sec. 94; *Amer. Life Ins. Co.* v. *Rosenagle*, 77 Pa. St. 507; *Moore* v. *Gaus Mfg. Co.*, 113 Mo. 98 (called a "sworn" copy); *State* v. *Clothier*, 30 N. J. L. 351 (called a "sworn" copy); *Lasater* v. *Van Hook*, 77 Tex. 650; *Whitehouse*

* See Note XXX., also *Doe* v. *Ross*, 1840, 7 M. & W. at p. 106.

2 *Slane Peerage Case*, 1835, 5 C. & F. at p. 42.

3 2 Ph. Ev. 200, 231; Taylor, s. 1545; R. N. P. 98.

v. *Beckford,* 9 Fost. (N. H.) 471, 480; *State* v. *Loughlin,* 66 N. H. 266; *State* v. *Lynde,* 77 Me. 561; *State* v. *Spaulding,* 60 Vt. 228.

Method of comparison.—*Lynde* v. *Judd,* 3 Day (Conn.), 500.

Examined copies are often called "sworn copies." *Hubbell* v. *Meigs,* 50 N. Y. 480, 492.

A sworn copy of a lost instrument is of as high an order of proof as the instrument itself, and cannot be varied by parol evidence. *Reed* v. *United States Express Co.,* 48 N. Y. 462.

Examined copy.— A nonjudicial record of another State may be proved by a sworn copy. *Hall* v. *Bishop,* 78 Ind. 370, 371. See, also, *Lake Erie, etc., R. R. Co.* v. *Bowker,* 9 Ind. App. 428, 431.

A sworn copy of a record which has been lost or destroyed is admissible. *Jones* v. *Levi,* 72 Ind. 586.

New Jersey.

Authorities.—*State* v. *Clothier,* 30 N. J. L. 351 (called a "sworn" copy).

Sworn copies of the records of a county in another State. *Condit* v. *Blackwell,* 19 N. J. Eq. 193.

Statutes of other States must be proved by exemplified copies, or at least by sworn copies. *Van Buskirk* v. *Mulock,* 18 N. J. L. 184.

A deposition taken in another suit must be proved by a certified or sworn copy of the original. *Railroad Co.* v. *Stewart,* 19 N. J. Eq. 343.

A sworn copy of a municipal record is admissible. *Fennimore* v. *Clothier,* 30 N. J. L. 351.

Sworn copy of the records of a township meeting are better evidence to prove what officers were elected than a certified copy of a list filed with the county clerk. *In re Prickett,* 20 N. J. L. 134.

Sworn copy of the town-book is the best evidence of the election of officers. *Myers* v. *Clark,* 41 N. J. L. 486.

Printed copies of laws.— G. S. 1895, "Evidence," 22, 23, 65; "Statutes," 38.

Maryland.

Examined copies of assessor's books are admissible. *Hughes* v. *Jones,* 2 Md. 178.

Printed copies.— Printed books to prove statutes and resolutions. P. G. L. 1888, art. 35, secs. 47–49.

Copy of the articles of a vessel, sworn to by the captain. P. G. L. 1888, art. 84, sec. 8.

Pennsylvania.

Authorities.— *Life Ins. Co.* v. *Rosenagle*, 77 Pa. 507; *Krise* v. *Neason*, 66 Pa. 253.

A copy must be proved by some one who has compared it with the original. *McGinniss* v. *Sawyer*, 63 Pa. 259; *Trust Co.* v. *Rosenagle*, 77 Pa. 507.

A sworn copy admitted after proof of the existence and loss of an instrument. *Blackstone* v. *White*, 41 Pa. 330.

Sworn copy of a justice's docket admissible. *Welsh* v. *Crawford*, 14 S. & R. 440; *Hibbs* v. *Blair*, 14 Pa. 413.

Official papers cannot be verified and proved by one having no connection with the office. *Hockenbury* v. *Carlisle*, 1 W. & S. 282.

An unsworn copy of an unofficial survey not admitted. *Kirkpatrick* v. *Vanhorn*, 32 Pa. 131.

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.[4]

AMERICAN NOTE.

General.

Authorities.— 1 Greenleaf on Evidence (15th ed.), sec. 499 *et seq.*

As to authentication of copies of the public records of the Federal government, see U. S. Rev. Stat., secs. 882–898; *Ballew* v. *U. S.*, 160 U. S. 191.

Acts of Congress are admissible. *Lane* v. *Bommelmann*, 17 Ill. 95.

The record of a case is admissible to show that suit was brought. *Fusselman* v. *Worthington*, 14 Ill. 135.

Corporation records are admissible to show the existence of an amendment to its charter. *Dows* v. *Naper*, 91 Ill. 44.

Statutes of other States are admissible under Rev. Stat., chap. 51, sec. 10. *Grand Pass Shooting Club* v. *Crosby*, 181 Ill. 266, 54 N. E. 913.

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[4] 1 & 2 Vict. c. 94, ss. 1, 12, 13.

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.

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.

An exemplification is equivalent to the original document exemplified.

AMERICAN NOTE.

General.

Authorities.— 1 Wharton on Evidence, secs. 95, 105, 107; 1 Greenleaf on Evidence (15th ed.), secs. 488, 501; Taylor on Evidence (Chamberlayne's 9th ed.), p. 1179 *et seq.*; *Traction Co.* v. *Board of Works*, 57 N. J. L. 316.

Copies of any records made by a public officer are sometimes called "office copies." *Elwell* v. *Cunningham*, 74 Me. 127. Or "certified copies." *Gragg* v. *Learned*, 109 Mass. 167; *Samuels* v. *Barrowscale*, 104 Mass. 207.

The term "exemplification" is also applied to foreign records. *Watson* v. *Walker*, 23 N. H. 471; *Spaulding* v. *Vincent*, 24 Vt. 501.

As to exemplification under act of Congress, see U. S. Rev. Stats., secs. 905, 906.

The term "exemplification" is also applied to foreign records as well as domestic, and these records may be judicial or nonjudicial in character. *Lincoln* v. *Battelle*, 6 Wend. 475; *Lazier* v. *Westcott*, 26 N. Y. 146; *Miller* v. *Livingston*, 1 Cai. 349; *Quay* v. *Eagle Fire Insurance Co.*, Anth. N. P. 237.

A record of a court certified by the clerk of court, the county clerk, and the presiding judge is sufficient, in the absence of specific defects pleaded, under the act of Congress (1 Stat. 122), which provides that

* See Note XXXI.

the record of foreign courts shall be certified by the judge, chief justice or presiding magistrate, although not attested by the secretary of state under the great seal, as Code, sec. 952 requires. *Talamo* v. *Ermano*, 62 N. Y. Supp. 246.

Letters of administration.— *Jenkins* v. *Robinson*, 4 Wend. 436; *Westcott* v. *Cady*, 5 Johns. Ch. 334.

New Jersey.

Authorities.— *Traction Co.* v. *Board of Works*, 57 N. J. L. 316.

Exemplified copy of a marriage certificate, without any proof of the latter's genuineness, is not admissible. *Rooney* v. *Rooney*, 54 N. J. Eq. 231.

An exemplified copy of the record of a mortgage in New York given the same faith and credit as it would have in New York. *Chase* v. *Caryl*, 57 N. J. L. 545.

Under a statute requiring the dockets of a deceased justice to be deposited with the county clerk, the latter is competent to exemplify transcripts therefrom. *Woodruff* v. *Woodruff*, 4 N. J. L. 375.

Foreign statutes may be proved by exemplified copies. *Van Buskirk* v. *Mulock*, 18 N. J. L. 184.

As to manner of proving an incorporation under the laws of another State, see *Stone* v. *State*, Spen. 401.

As to what is sufficient exemplification of the record of a court of another State, see *Garit* v. *Snowhill*, 26 N. J. L. 76.

Exemplified copy of an act of the Legislature, under the great seal, is conclusive of the existence and contents of the act. *Pangborn* v. *Young*, 32 N. J. L. 29.

Exemplification of colonial deeds.— G. S. 1895, "Conveyances," 118.

Maryland.

Example of the sufficient exemplification of the record of a court of Martinique. *De Sobry* v. *De Laistre*, 2 H. & J. 191.

An exemplified copy of the record of a deed is admissible only when the record shows that the original was duly executed. *Budd* v. *Brooke*, 3 Gill. 198.

The exemplification of a record not authorized by law to be kept is not admissible except as secondary evidence. *Wilson* v. *Inloes*,

6 Gill, 121; *Gittings* v. *Hall*, 1 H. & J. 14; *Hurn* v. *Soper*, 6 H. & J. 276.

A copy of a record of an instrument is not admissible when the instrument was improperly admitted to record. *Coale* v. *Harrington*, 7 H. & J. 147.

Exemplifications of debts of record in other States and nations. P. G. L. 1888, art. 35, sec. 36.

Pennsylvania.

Authorities.— Exemplification of a will admitted. *Weston* v. *Stammers*, 1 Dall. 2; *Morris* v. *Vanderen*, 1 Dall. 64; *Criswell* v. *Altemus*, 7 Watts, 565.

Exemplification of the record of the Orphans' Court in regard to the partition of real estate is not admissible unless it contain the whole record. *Hampton* v. *Speckenagle*, 9 S. & R. 212; *Christine* v. *Whitehill*, 16 S. & R. 98; *Coal Co.* v. *Quick*, 68 Pa. 189.

Exemplified copy of a mortgage is admissible without proving loss of the original. *Curry* v. *Raymond*, 28 Pa. 144.

Exemplified copy of a lost deed admitted. *Scott* v. *Leather*, 3 Yeates, 184.

An exemplification of the record of a deed is not admissible where the acknowledgment was insufficient. *Velott* v. *Lewis*, 102 Pa. 326.

An exemplified copy of a record was admitted even though the record itself was made after the suit was commenced. *Swank* v *Phillips*, 113 Pa. 482.

Exemplifications of court records.— Pepper & Lewis' Digest of Laws, "Court Records," sec. 3.

Exemplification of a docket entry not admissible to prove a *lis pendens*. *Ingham* v. *Craig*, 1 P. & W. 389.

A duly certified exemplification of the record of bankruptcy proceedings, schedules, etc., is admissible. *Bonesteel* v. *Sullivan*, 104 Pa. 9.

What is sufficient exemplification of a record under act of Congress. *Erb* v. *Scott*, 14 Pa. 20; *Van Storch* v. *Griffin*, 71 Pa. 240.

When exemplifications shall be evidence.— Pepper & Lewis' Digest of Laws, "Evidence," secs. 10–42.

ARTICLE 78.*

COPIES EQUIVALENT TO EXEMPLIFICATIONS.

A copy made by an officer of the Court, who is authorised to make it by a rule of Court, but not required by law to 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.

AMERICAN NOTE.

Authorities.— 1 Wharton on Evidence, secs. 104, 105; 1 Greenleaf on Evidence (15th ed.), sec. 507; *Traction Co.* v. *Board of Works*, 57 N. J. L. 316.

Maryland.

Judgments.— Full exemplified copy of the record of a judgment not required. Short copies. P. G. L. 1888, art. 35, sec. 59.

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.[5]

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* See Note XXXI.

[5] 8 & 9 Vict. c. 113, preamble. Many such statutes are specified in Taylor, ss. 1601 n.; 1611 n. See, too, R. N. P. 98, 99, and the Appendix to this work.

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 prescribed 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.[6]

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,[7] provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is intrusted. 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

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6 *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.*, Roscoe's N. P., p. 100; 2 Ph. Ev. 241; Taylor, 7th ed. 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 honourable member who did not know distinctly what he was about." They certainly add nothing to the sense.

7 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.

reasonable sum for the same, not exceeding fourpence for every folio of ninety words.[8]

AMERICAN NOTE.

General.

Authorities.— 2 Wharton on Evidence, secs. 1313, 1314; *Enfield* v. *Ellington*, 67 Conn. 459.

Certified copies, to be admissible, must be authorized by law. *Jay* v. *East Livermore*, 56 Me. 107; *Wayland* v. *Ware*, 109 Mass. 248; *People* v. *Lee*, 112 Ill. 113; *Frances* v. *Newark*, 58 N. J. L. 522. And also be properly authenticated. *Keichline* v. *Keichline*, 54 Pa. 75; *Galvin* v. *Palmer*, 113 Cal. 46; *Bixby* v. *Carskadden*, 55 Ia. 533; *Kingman* v. *Cowles*, 103 Mass. 283.

In some States such copies may be used, the custom from time immemorial justifying their admission. *Chamberlain* v. *Ball*, 15 Gray (Mass.), 352.

As to proof of foreign records, see *Butrick* v. *Allen*, 8 Mass. 273, 5 Am. Dec. 105.

Federal statutes.— U. S. Rev. Stat., secs. 882–900, 905, 906, 908. As to their construction, see 1 Greenleaf on Evidence (15th ed.), secs. 504–506.

A copy of the record of an examination in bankruptcy proceedings lacking the certificate of the judge required by United States Revised Statutes, section 905, is inadmissible in evidence. *Smith* v. *Brockett*, 69 Conn. 500.

First paragraph of text.— *St. John* v. *Croel*, 5 Hill, 573; *Haddock* v. *Kelsey*, 3 Barb. 100; *Devoy* v. *New York*, 35 Barb. 264, 22 How. Pr. 226; *Clute* v. *Ennerich*, 21 Hun, 122; *Redfort* v. *Snow*, 46 Hun, 370.

Certified copies, to be admissible, must be authorized by law. *People* v. *Lee*, 112 Ill. 113.

Ordinances may be proved by certified copies. *Lindsay* v. *Chicago*, 115 Ill. 121; *T. H. & I. R. R. Co.* v. *Voelker*, 31 Ill. App. 314, 318.

An ordinance, in the absence of charter provision, is to be proved as at common law. *C. & A. Ry. Co.* v. *Engle*, 76 Ill. 317.

Copies of patents from the State are admissible. *Jackson* v. *Berner*, 48 Ill. 203; Hurd's Rev. Stat., chap. 51, sec. 22, p. 861.

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[8] 14 & 15 Vict. c. 99, s. 14.

The official character of the clerk may be proved by the certificate of the Secretary of State. *Chambers* v. *People,* 4 Scam. 352.

In Illinois certified copies of court records may be under the hand of the clerk, or the judge, if there be no clerk. Hurd's Rev. Stat., chap. 51, sec. 13, p. 860.

Certified copies of municipal records and ordinances are admissible. Hurd's Rev. Stat., chap. 51, sec. 14, p. 860. As to the construction of this provision, see *Alton* v. *Hartford Fire Ins. Co.,* 72 Ill. 328.

A certified copy of a charter is competent evidence. *G. W. Tel. Co.* v. *Mears,* 154 Ill. 437.

Certified copies of corporation records are admissible in Illinois. Hurd's Rev. Stat., chap. 51, sec. 17, p. 860.

Certified copies of the records of justices are admissible. Hurd's Rev. Stat., chap. 51, sec. 17, p. 861.

Certified copies of wills are admissible. *Neceivander* v. *Neceivander,* 151 Ill. 158.

A transcript of the record is admissible if certified by the deputy clerk. *Schott* v. *Youree,* 142 Ill. 233.

A certificate of the Secretary of State to the effect that an instrument is not recorded is admissible. *Cross* v. *Pinckneyville Mill Co.,* 17 Ill. 54.

The certificate of the clerk to canvass evidence that a county seat has been changed is admissible. *People* v. *Warfield,* 20 Ill. 159. Compare *Prettyman* v. *Supervisors,* 19 Ill. 406.

If recorded in the wrong county, a certified copy is inadmissible. *Adams* v. *Buhler,* 131 Ind. 66.

In order to be admissible copies of public records or papers are only admissible when the records or papers are kept according to law. *Fry* v. *State,* 27 Ind. 348.

A certified copy of an unauthorized record is incompetent. *Starnes* v. *Allen,* 151 Ind. 108.

As to the form of certificate, see *Anderson* v. *Ackerman,* 88 Ind. 481; *Bradford* v. *Russell,* 79 Ind. 64; *Gale* v. *Parks,* 58 Ind. 117; *Kessling* v. *Truitt,* 30 Ind. 306; *Painter* v. *Hall,* 75 Ind. 208; *Tull* v. *David,* 27 Ind. 377; *Vail* v. *Rinehart,* 105 Ind. 6; *Wiseman* v. *Lynn,* 39 Ind. 250; *Yeager* v. *Wright,* 112 Ind. 230.

Mode of authentication.— Where the statute prescribes the mode of authenticating public instruments, no other authentication will be sufficient. *Painter* v. *Hall,* 75 Ind. 208, 214; *Board, etc.* v. *Hammond,* 83 Ind. 453, 459.

Judgments.— Judgments of the Superior Court may be proved by certified transcripts. *Donnellan* v. *Hardy*, 57 Ind. 393; *Anderson* v. *Ackerman*, 88 Ind. 481, 491; *Vail* v. *Rinehart*, 105 Ind. 6, 12; *Bailey* v. *Martin*, 119 Ind. 103, 108; *Yeager* v. *Wright*, 112 Ind. 230, 235 (justice records).

Recorded deed.— *Benefiel* v. *Aughe*, 93 Ind. 401, 406; *Mills* v. *Snypes*, 10 Ind. App. 19; *Midland Ry. Co.* v. *State ex rel.*, 11 Ind. App. 433; *Adams* v. *Buhler*, 131 Ind. 66.

Tax duplicate.—A copy of a tax duplicate from the office of the county auditor is admissible. *Standard Co.* v. *Bretz*, 98 Ind. 231; *Painter* v. *Hall*, 75 Ind. 208, 213; *Midland Ry. Co.* v. *State*, 11 Ind. App. 433; *McSweeney* v. *McMillen*, 96 Ind. 298, 301.

Bankruptcy records.— *Bradford* v. *Russell*, 79 Ind. 64, 73.

Transcript of survey and field notes.— *Bonewits* v. *Wygant*, 75 Ind. 41, 43.

Treasurer's settlement sheets.— *Board, etc.* v. *Benson*, 83 Ind. 469, 473.

Records of Adjutant-General's office.— *Board* v. *May*, 67 Ind. 562.

Records of other States.— As to authentication of records of other States, see *Ault* v. *Zehering*, 38 Ind. 429; *Dragoo* v. *Graham*, 17 Ind. 427; *English* v. *Smith*, 26 Ind. 445.

Certified copies.— A judgment may be proved by a certified copy. *Norris* v. *Mersereau*, 74 Mich. 687, 42 N. W. 153.

A certified copy of part of the journal entries in a criminal case is admissible. *McLeod* v. *Crosby*, 87 N. W. 883.

A recorded deed is admissible without preliminary proof. *Lacey* v. *Davis*, 4 Mich. 140.

In order to be admissible without preliminary proof, a deed must have been properly admitted to record (*e. g.*, must have been acknowledged). *People* v. *Marion*, 29 Mich. 31.

A deed of land outside the State does not prove itself. *Gualt* v. *Van Zile*, 37 Mich. 22.

As to copies of records of deeds of other States, see *Messenger* v. *Peter*, 8 Det. L. N. 867, 88 N. W. 209.

As to the form of certificate under the statute, see *Huntoon* v. *O'Brien*, 79 Mich. 227, 44 N. W. 601.

New Jersey.

The terms of an order of court can be proved only by the record or by a duly certified copy. *Michener* v. *Lloyd*, 16 N. J. Eq. 38.

To prove the election of town officers, there must be produced a certified copy of all the proceedings of the town meeting when the election took place. *State* v. *Clark,* 41 N. J. L. 486.

Recorded wills.— G. S. 1895, "Orphans' Courts," 253.

When certified copy of a will made in Great Britain is admissible. *McCarthy* v. *McCarthy,* 57 N. J. Eq. 587.

Making certified copies admissible evidence does not render the originals inadmissible. *Oram v. Young,* 3 Harr. 57.

Authority of officer.— Certified copies, to be admissible, must be authorized by law. *Francis* v. *Newark,* 58 N. J. L. 522; *Traction Co.* v. *Board of Works,* 57 N. J. L. 313; *Stokes* v. *Middleton,* 28 N. J. L. 32.

Copies certified by an officer merely intrusted with certain records, but not authorized to make copies, are inadmissible. *Golder* v. *Cake,* 24 N. J. L. 516.

The clerk of the Supreme Court may certify the day on which a judgment was entered, but not the hour. *Hunt* v. *Swayze,* 55 N. J. L. 33.

Official certificate.— A certificate from the Secretary of State is not evidence in the absence of statute. *Traction Co.* v. *Board of Public Works,* 57 N. J. L. 313.

Certificate of naturalization is sufficient proof of citizenship. *Chandler* v. *Wartman,* 6 N. J. L. J. 301.

A public officer's certificate that a certain fact appears of record is not sufficient; the record must be certified. *Francis* v. *Newark,* 58 N. J. L. 522.

Certificates of persons other than officials are not evidence. *Anderson* v. *Barnes,* Coxe, 203.

Certified copies of deeds.— G. S. 1895, "Conveyances," 29.

A certified copy of the record of a deed was admitted without any notice to produce the original. *Doremus* v. *Smith,* 4 N. J. L. 142.

Certified copies of recorded deeds are evidence. *Railroad Co.* v. *Suydam,* 2 Harr. 160.

A certified copy of the record of a deed is not admissible when it was not recorded within ten years from its execution. *Jones* v. *Crowley,* 57 N. J. L. 222.

Mortgages.— G. S. 1895, "Mortgages," 56, 39.

A transcript of a mortgage record of another State is admissible if it would be in such other State. *Chase* v. *Caryl,* 57 N. J. L. 545.

Assignments of judgments.— G. S. 1895, "Judgments," 19.

Justice's docket.— The transcript of a justice's docket is admissible. *French* v. *Shreeve,* 18 N. J. L. 147.

The transcript of a justice's docket is not admissible to prove facts not authorized to be stated therein. *Hunt* v. *Boylan,* 6 N. J. L. 211.

The transcript of a justice's docket may be certified by the clerk. *Woodruff* v. *Woodruff,* 1 South. 375.

Certified copies of laws.— G. S. 1895, "Secretary of State," 8.

Copies of records of boards of health.— G. S. 1895, "Evidence," 60–62.

Certified copies of official bonds.— G. S. 1895, "Municipal Corporations," 6.

Maryland.

Authorities.— A certified copy of the record of a deed is admissible even though the record be near at hand. *Preston* v. *Evans,* 56 Md. 476.

A certified copy of a record is not admissible unless the recording was required by law. *Cheney* v. *Watkins,* 1 H. & J. 527; *Connelly* v. *Bowie,* 6 H. & J. 141; *Coale* v. *Harrington,* 7 H. & J. 147; *Burgess* v. *Lloyd,* 7 Md. 178; *Miles* v. *Knott,* 12 G. & J. 442.

A certified copy of a paper filed in the Navy Department was admitted. *Maurice* v. *Worden,* 54 Md. 233.

Certified copy of a will admitted. *Raborg* v. *Hammond,* 2 H. & G. 42.

Certified copy of an official bond part of the record of a court. *Shipley* v. *Fox,* 69 Md. 572.

The regular entries of a foreign notary public are to be considered as records, and a copy under the hand and seal of the notary is admissible. *Bryden* v. *Taylor,* 2 H. & J. 396.

If the law requires a certain instrument to be recorded, a certified copy of the record is *prima facie* evidence of all facts necessary to the validity of the original. *Warner* v. *Hardy,* 6 Md. 525; *Craufurd* v. *State,* 6 H. & J. 231; *McCauley* v. *State,* 21 Md. 556.

Official certificates.— The Governor's certificate of an act within his authority is admissible. *Harwood* v. *Marshall,* 9 Md. 83.

Governor's certificate.— Certificate of the Governor as to the authority of commissioners. P. G. L. 1888, art. 18, sec. 6.

Court records.— The record of another court can be proved only by a transcript and not by the original entries. *Jones* v. *Jones*, 45 Md. 144; *Goldsmith* v. *Kilbourn*, 46 Md. 289. (But see statute.)

Certified copies of the records of courts of law and equity and of the register of wills are admissible. *Morrill* v. *Gelston*, 34 Md. 413.

A conviction may be proved by a transcript of the record. *Maguire* v. *State*, 47 Md. 485.

Manner of authentication.— A certificate of the clerk of a court of a sister State that the transcript is correct is sufficient authentication. *Case* v. *McGee*, 8 Md. 9.

A judgment is sufficiently authenticated by the words "True copy, test" followed by the signature of the clerk with his seal. *Mayfield* v. *Kilgour*, 31 Md. 240.

Authority of officer to certify.— A certified copy is not admissible unless certified by the officer authorized by law to do so. *Schnertzell* v. *Young*, 3 H. & McH. 502.

Certified copies of recorded deeds and other instruments.— P. G. L. 1888, art. 35, sec. 38.

Lost deeds, patents, certificates, etc.— P. G. L. 1888, art. 35, secs. 51–60.

By-laws of corporations.— P. G. L. 1888, art. 23, sec. 4.

Certificates of incorporation.— P. G. L. 1888, art. 23, sec. 46.

Registration and poll-books.— P. G. L. 1888, art. 33, sec. 24.

Unrecorded judgments.— P. G. L. 1888, art. 17, sec. 22.

Record of conviction.— Conviction of a crime may be proved by the certificate of the clerk under seal of the court, without producing the record. P. G. L. 1888, art. 35, sec. 5.

Evidence to prove the execution of instruments not recorded in other States. P. G. L. 1888, art. 35, sec. 39.

Pennsylvania.

Certified copies as evidence.— Pepper & Lewis' Digest of Laws, "Evidence," secs. 10–42.

Certified copy not admissible unless the original would be. *Penn* v. *Hartman*, 2 Dall. 230.

A certified copy of detached parts of a record is not admissible. *Susquehanna, etc., R. & Coal Co.* v. *Quick*, 68 Pa. 189.

Certified copies of a map of Philadelphia on file with the Surveyor-General are admissible. *Com.* v. *Alburger,* 1 Whart. 469; *Baird* v. *Rice,* 63 Pa. 489.

Certified copies of records in the office of Secretary of State are admissible whenever the originals would be. *Northumberland Co.* v. *Zimmerman,* 75 Pa. 26.

A certified copy of the proceedings of organization of a corporation in another State admitted to show the corporation's existence. *Hilliard* v. *Enders,* 196 Pa. 587.

Certified copy of the record of another State. *Clark* v. *Depew,* 25 Pa. 509.

Court records.— Certified copies of the records of foreign courts. *In re Gautier Steel Co.,* 2 Pa. Co. Ct. 399; *Pearson's Estate,* 46 Leg. Int. 16.

The cause of action in a foreign judgment may be proved only by a certified copy of the record. *Otto* v. *Trump,* 115 Pa. 425.

A certified copy of bankruptcy proceedings is admissible. *Berghaus* v. *Alter,* 5 Pa. 507.

A transcript of a judgment of a justice court filed elsewhere is not competent evidence while the primary evidence remains in the justice court. *O'Donnel* v. *Seybert,* 13 S. & R. 54. But see *Hibbs* v. *Blair,* 14 Pa. 413; *Magee* v. *Scott,* 32 Pa. 539.

Land records.— Certified copies of land-office records are admissible to show title. *Anderson* v. *Keim,* 10 Watts, 251; *Grant* v. *Leran,* 4 Pa. 393; *Oliphant* v. *Ferren,* 1 Watts, 57; *Fox* v. *Lyon,* 27 Pa. 9.

Certified copies of records of deeds. *Carkhaff* v. *Anderson,* 3 Binn. 4.

Authentication.— Certified copies, to be admissible, must be authorized by law, and also be properly authenticated. *Keichline* v. *Keichline,* 54 Pa. 75.

Certified copy of a record by one who is both judge and clerk of an inferior court. *Ohio* v. *Hinchman,* 27 Pa. 479.

The certificate of a deputy is the certificate of his superior. *Grant* v. *Leran,* 4 Pa. 393.

Official certificates.— A certificate from the Surveyor-General is admissible to prove the appointment of a deputy surveyor. *Vastbinder* v. *Wager,* 6 Pa. 339.

An official certificate is not admissible when not authorized by statute. *Garwood* v. *Dennis,* 4 Binn. 314.

Deeds and mortgages.— Pepper & Lewis' Digest of Laws, "Deeds and Mortgages," sec. 162.

Marriage record.— Pepper & Lewis' Digest of Laws, "Marriage," sec. 14.

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.[9]

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;

9 Consolidates 14 & 15 Vict. c. 99, ss. 9, 10, 11, 19. Sect. 9 provides that documents admissible in England shall be admissible in Ireland: sect. 10 is the converse of 9; sect. 11 enacts that documents admissible in either shall be admissible in the "British Colonies;" and sect. 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.[10]

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 authorised by King George III. or any of his predecessors, is conclusive evidence of the contents of such statutes.[11]

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

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[10] 8 & 9 Vict. c. 113, s. 3. Is there any difference between the Queen's printers and the printers to the Crown?

[11] 41 Geo. III. c. 90, s. 9.

column of the note[12] hereto, may be proved in all or any of the modes hereinafter mentioned; that is to say—

(1) By the production of a copy of the Gazette purporting to contain such proclamation, order, or regulation:

[12]

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.
The Local Government Board (which takes the place of the Poor Law Board, *inter alios*).	The President or an ex-officio member of the Board; or any Secretary or Assistant Secretary of the Board (34 & 35 Vict. c. 70, s. 5).

[Schedule to 31 & 32 Vict. c. 37.]

The Postmaster General.	Any Secretary or Assistant Secretary of the Post Office (33 & 34 Vict. c. 79, s. 21).
The Board of Agriculture.	The President or any member of the Board, or the Secretary of the Board, or any person authorised by the President to act on his behalf (58 Vict. c. 9, s. 1).

(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.[13]

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.[14]

Where any enactment, whether passed before or after June, 1882, provides that a copy of any Act of Parliament,

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13 31 & 32 Vict. c. 37, s. 2.

14 31 & 32 Vict. c. 37, s. 3.

proclamation, order, regulation, rule, warrant, circular, list, gazette, or document shall be conclusive evidence, or be evidence, or have any other effect when purporting to be printed by the Government printer, or the Queen's printer, or a printer authorised by Her Majesty, or otherwise under Her Majesty's authority, whatever may be the precise expression used, such copy shall also be conclusive evidence, or evidence, or have the said effect, as the case may be, if it purports to be printed under the superintendence or authority of Her Majesty's Stationery Office.[15]

ARTICLE 84.

FOREIGN AND COLONIAL ACTS OF STATE, JUDGMENTS, ETC.

All proclamations, treaties, and other acts of state of any foreign 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;

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[15] 45 Vict. c. 9, s. 2, Documentary Evidence Act, 1882. Sect. 4 extends the Act of 1868 to Ireland.

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 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.[16]

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

[16] 14 & 15 Vict. c. 99, s. 7.

other proper officer of the legislative body of the colony to be a true copy of 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.[17]

ARTICLE 84A.

ANSWERS OF SECRETARY OF STATE AS TO FOREIGN JURISDICTION.

The answers of a Secretary of State to questions in a document under the seal of a Court in Her Majesty's dominions or held under the authority of Her Majesty, framed so as to raise any question which has arisen in any proceedings, civil or criminal, in such Court, as to the existence, or extent, of any jurisdiction of Her Majesty in a foreign country, are conclusive evidence of the matters therein contained; and the decision of the Secretary of State, are for the purpose of the proceedings, final.[18]

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[17] 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.

[18] 53 & 54 Vict. c. 37, s. 4.

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, 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, 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.[1]

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 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.[2]

(*b*) In a petition for damages on the ground of adultery letters are produced between the husband and wife, dated before the alleged

[1] 1 Ph. Ev. 482–3; Taylor, s. 169; Best, s. 402.

[2] *Anderson* v. *Weston*, 1840, 6 Bing. N. C. at p. 301; ***Sinclair* v. *Baggallay***, 1838, 4 M. & W. 312.

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.[3]

AMERICAN NOTE.

General.

Authorities.— 2 Wharton on Evidence, secs. 977, 988, 1312; 8 Am. & Eng. Encyclopædia of Law (2d ed.), p. 729.

First clause of text. *Pullen* v. *Hutchinson,* 25 Me. 249; *Cutts* v. *York Mfg. Co.,* 18 Me. 190; *Sweetser* v. *Lowell,* 33 Me. 446; *Hill* v. *McNichol,* 80 Me. 209; *Brooks* v. *Chaplin,* 3 Vt. 282, 23 Am. Dec. 209; *Smith* v. *Porter,* 10 Gray (Mass.), 66, 68; *Cranson* v. *Goss,* 107 Mass. 439; *Pringle* v. *Pringle,* 59 Pa. 281. See *Scobey* v. *Walker,* 114 Ind. 254. Such presumption is rebuttable. *Parke* v. *Neely,* 90 Pa. 52; *Knisely* v. *Sampson,* 100 Ill. 573; *Dudley* v. *Cadwell,* 19 Conn. 218; *New Haven County Bank* v. *Mitchell,* 15 Conn. 206.

Order of execution.—*Loomis* v. *Pingree,* 43 Me. 299. Compare *Hagerty* v. *White,* 69 Wis. 317.

It presents a question for the jury. *Gilman* v. *Moody,* 43 N. H. 239.

If an attachment of lands and a deed of the same by the debtor are made on the same day, and the attachment appears on the town records to have been made six hours before the deed was lodged for record, it will be presumed, in the absence of all evidence to the contrary, that the deed was delivered after the attachment. *Bissell* v. *Nooney,* 33 Conn. 417.

In ejectment against a mortgagor, by one claiming under a deed with full covenants of title from the holder of a second mortgage, the plaintiff introduced, in proof of his grantor's title, a quitclaim deed to him from the holder of the first mortgage, executed on the same day with the deed to himself, and to which his own signature was affixed as one of the witnesses. Both deeds were also acknowledged before and witnessed by the same magistrate. Held, that it was unnecessary to introduce extraneous evidence to show that the quitclaim deed was executed and delivered before the other, as it was reasonable to suppose that such was the fact, and the transaction ought to be so construed as to carry out the obvious intent of the parties. *Dudley* v. *Cadwell,* 19 Conn. 225.

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[3] *Houlston* v. *Smith,* 1825, 2 C. & P. at p. 24.

Date presumed correct.— *Beck* v. *Cole*, 4 Sand. 79; *Livingston* v. *Arnoux*, 56 N. Y. 507, 519; *Robinson* v. *Wheeler*, 25 N. Y. 252; *Costigan* v. *Gould*, 5 Den. 290; *Harris* v. *Norton*, 16 Barb. 264. Compare *Remington Co.* v. *O'Dougherty*, 81 N. Y. 474.

A deed is presumed to have been delivered at its date. *L. E. & W. R. R. Co.* v. *Whittham*, 155 Ill. 514; *Miller* v. *Meers*, 155 Ill. 284; *Abrams* v. *Pomeroy*, 13 Ill. 133.

Such presumption is rebuttable. *Kinsely* v. *Sampson*, 100 Ill. 573; *Abrams* v. *Pomeroy*, 13 Ill. 133.

Parol evidence is admissible to show that an execution was issued before judgment was entered. *Baker* v. *Barber*, 16 Ill. App. 621, 623; *Humphreys, etc.* v. *Swain*, 21 Ill. App. 232.

Priority as to various writings may be established by parol evidence. *Schaeppi* v. *Glade*, 195 Ill. 62, 62 N. E. 847.

A blank indorsement is presumed to have been made at the date of the note. *Cecil* v. *Mix*, 6 Ind. 478; *Bradley, Holton & Co.* v. *Whicker*, 23 Ind. App. 380.

A note and guaranty, executed at the same time, are presumed to be upon the same consideration. *Bondurant* v. *Bladen*, 19 Ind. 160.

Deeds.—Deeds come within the rule. *Henthorn* v. *Doe*, 1 Blackf. 157.

New Jersey.

Authorities.— A deed is presumed to have been delivered on the day of its date. *Huber* v. *Diebold*, 25 N. J. Eq. 171. See *Halsey* v. *Ball*, 36 N. J. Eq. 161.

The date of the deed is *prima facie* evidence of the time title passed. *Ellsworth* v. *Central R. Co.*, 34 N. J. L. 94.

A post-dated check is conclusively presumed to have been issued on the date written. *Taylor* v. *Sip*, 30 N. J. L. 284.

Maryland.

Sustaining text.— *Williams* v. *Wood*, 16 Md. 220.

Pennsylvania.

First clause of text. *Pringle* v. *Pringle*, 59 Pa. 281.

Such presumption is rebuttable. *Parke* v. *Neely*, 90 Pa. 52.

ARTICLE 86.

PRESUMPTION AS TO STAMP OF A DOCUMENT.

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 duly attested, it is presumed to have been sealed and delivered, although no impression of a seal appears thereon.[6]

AMERICAN NOTE.

General.

Authorities.— 2 Wharton on Evidence, sec. 1314; *Ward* v. *Lewis*, 4 Pick. (Mass.) 518, 520; *Mill Dam Foundry* v. *Hovey*, 21 Pick. (Mass.) 417, 428; *Bradford* v. *Randall*, 5 Pick. (Mass.) 496; *Brolley* v. *Lapham*, 13 Gray (Mass.), 294; *Chilton* v. *People*, 66 Ill. 501; *State* v. *Humberd*, 54 Md. 327; *State* v. *Thompson*, 49 Mo. 188; *Cadell* v. *Allen*, 99 N. C. 542.

Modifying rule of text. *Boothbay* v. *Giles*, 68 Me. 160.

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[4] *Closmadeue* v. *Carrel*, 1856, 18 C. B. 36. 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 Company* v. *Haviside*, 1872, L. R. 5 H. L. 624.

[6] *Hall* v. *Bainbridge*, 1848, 12 Q. B. 699, at p. 710. *Re Sandilands*, 1871, L. R. 6 C. P. 411.

Any irregularity in this regard may be corrected in an equitable proceeding. *Harding* v. *Jewell,* 73 Me. 426. See also *State* v. *Peck,* 53 Me. 284, 286; *Barnett* v. *Abbott,* 53 Vt. 120; *Probate Ct.* v. *May,* 52 Vt. 182; *Hankleman* v. *Peterson,* 154 Ill. 419.

A deed, regular upon its face, and found in the hands of the grantee, is presumed to have been delivered. *Butrick* v. *Tilton,* 141 Mass. 93; *Harshburger* v. *Carroll,* 163 Ill. 636. Compare *Johnson* v. *Seidel,* 150 Pa. 397; *Stevens* v. *Castel,* 63 Mich. 111.

A deed regular upon its face, and found in the hands of the grantee, is presumed to have been delivered. *Harshburger* v. *Carroll,* 163 Ill. 636.

Any irregularity in this regard may be corrected in an equitable proceeding. *Henkleman* v. *Peterson,* 154 Ill. 419.

New Jersey.

The fact that a bond is in the hands of the obligee is *prima facie* evidence of delivery. *Farlee* v. *Farlee,* 1 Zab. 279; *Hill* v. *Beach,* 12 N. J. Eq. 31; *Smith* v. *Moore,* 4 N. J. Eq. 485.

Possession of a deed by the grantee is *prima facie* evidence of delivery. *Black* v. *Shreve,* 13 N. J. Eq. 455; *Benson* v. *Woolverton,* 15 N. J. Eq. 158; *Terhune* v. *Oldis,* 44 N. J. Eq. 146; *Vreeland* v. *Vreeland,* 48 N. J. Eq. 56, 49 N. J. Eq. 322.

The presumption that a scroll under the signature was intended as a seal and that the instrument was delivered arises from the use of the words "Witness my hand and seal." *Force* v. *Craig,* 2 Hal. 272; *Corlies* v. *Van Note,* 16 N. J. L. 324.

Presumption is that a grantee accepts a deed beneficial to him. *Vreeland* v. *Vreeland,* 48 N. J. Eq. 56, 49 N. J. Eq. 322.

Maryland.

Authorities.— *State* v. *Humberd,* 54 Md. 327.

Delivery of a bill or note is presumed from possession. *Keedy* v. *Moats,* 72 Md. 325.

Pennsylvania.

The presumption that a deed was delivered arises from proof of its signing, attestation, and acknowledgment. *Kern* v. *Howell,* 180 Pa. 315. See *Johnson* v. *Seidel,* 150 Pa. 397.

The presumption of delivery of a deed, which arises from proof of its signing, acknowledgment, and recording, cannot be overcome by proving declarations of the grantor that it was not delivered. *Ingles* v. *Ingles,* 150 Pa. 397.

The jury may infer delivery of a deed from the fact of signing and the sealing thereof if a seal appears, even though the deed contains no recital as to sealing. *Long* v. *Ramsay,* 1 S. & R. 72; *Miller* v. *Binder,* 28 Pa. 489.

Effect of a recital in the instrument that it is sealed. *Miller* v. *Binder,* 28 Pa. 489.

No deed complete without a seal. *Hacker's Appeal,* 121 Pa. 192; *Lorah* v. *Nissley,* 156 Pa. 329; *Taylor* v. *Glaser,* 2 S. & R. 502.

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; and the attestation or execution need not be proved, even if the attesting witness is alive and in court.

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.[7]

[7] 2 Ph. Ev. 245–8; Starkie, 521–6; Taylor, s. 87 and ss. 658–667; Best, s. 220.

AMERICAN NOTE.

General.

Authorities.— 1 Wharton on Evidence, secs. 194–199, 703, 732; 1 Greenleaf on Evidence (15th ed.), secs. 21, 142, 143, 144, 570; 2 Am. & Eng. Encyclopædia of Law (2d ed.), p. 324 *et seq.*; *Crane* v. *Marshall*, 16 Me. 27, 33 Am. Dec. 631; *Goodwin* v. *Jack*, 62 Me. 414; *Clark* v. *Wood*, 34 N. H. 447; *Lawrence* v. *Tennant*, 64 N. H. 532, 15 Atl. 543; *Applegate* v. *Lexington, etc., Mining Co.*, 117 U. S. 255; *Bell* v. *Brewster*, 44 O. St. 690; *Fowler* v. *Scott*, 64 Wis. 509; *Geer* v. *Lumber Co.*, 134 Mo. 85; *Scharff* v. *Keener*, 64 Pa. 376; *Stockbridge* v. *West Stockbridge*, 14 Mass. 257; *Floyd* v. *Tewksbury*, 129 Mass. 362; *Rust* v. *Boston Mill*, 6 Pick. (Mass.) 158; *Monumoi Great Beach* v. *Rogers*, 1 Mass. 159; *Pitt* v. *Temple*, 2 Mass. 538; *King* v. *Little*, 1 Cush. (Mass.) 436; *Boston* v. *Weymouth*, 4 Cush. (Mass.) 538; *Chenery* v. *Waltham*, 8 Cush. (Mass.) 327; *Boston* v. *Richardson*, 13 Allen (Mass.), 146; *Palmer* v. *Stevens*, 11 Cush. (Mass.) 147; *Tolman* v. *Emerson*, 4 Pick. (Mass.) 160; *Boston* v. *Richardson*, 105 Mass. 351; *Whitman* v. *Shaw*, 166 Mass. 451, 460; *Pettengill* v. *Boynton*, 139 Mass. 244, 29 N. E. 655; *Green* v. *Inhabitants of Chelsea*, 24 Pick. (Mass.) 71; *Whitman* v. *Heneberry*, 73 Ill. 109.

A document (*e. g.*, "land plans" of a railroad) produced from its proper custody where it has been kept more than thirty years is admitted without other proof of its authenticity, *i. e.*, that it was what it purported to be. *New Haven* v. *N. Y., N. H. & H. R. R. Co.*, 72 Conn. 232.

Deeds.— Deeds come within the rule. *Thruston* v. *Masterson*, 9 Dana (Ky.), 228; *Cook* v. *Totton*, 6 Dana (Ky.), 108; *Henthorn* v. *Doe*, 1 Blackf. (Ind.) 157; *Morris* v. *Callanan*, 105 Mass. 129.

Powers of attorney.— And powers of attorney. *Winn* v. *Patterson*, 9 Pet. (U. S.) 663.

Bonds.— And bonds. *Walton* v. *Coulson*, 1 McLean (U. S.), 120; *Coulson* v. *Walton*, 9 Pet. (U. S.) 62; *Hoddy* v. *Harryman*, 3 Har. & M. (Md.) 581; *Bennett* v. *Runyon*, 4 Dana (Ky.), 422.

Records.— And records. *Little* v. *Downing*, 37 N. H. 355; *Goodwin* v. *Jack*, 62 Me. 414.

Licenses.— And licenses. *Boston* v. *Richardson*, 105 Mass. 351.

Military pay-rolls.— And pay-rolls. *Bell* v. *Brewster*, 44 O. St. 690.

Surveys, field-books, and maps.— And surveys, field-books, and maps. *Aldrich* v. *Griffith*, 66 Vt. 390; *Hart* v. *Gage*, 6 Vt. 170; *Boston Water Power Co.* v. *Hanlan*, 132 Mass. 483; *Holt* v. *Maverick*, 5 Tex. Civ. App. 650.

Receipts and letters.— And letters and receipts. *McReynolds* v. *Langenberger*, 57 Pa. St. 13.

Computation of age.— The time is computed to the day when the instrument is admitted in evidence, not to that when the suit is instituted. *Johnson* v. *Shaw*, 41 Tex. 428; *Johnson* v. *Timmons*, 50 Tex. 521; *Bass* v. *Sevier*, 58 Tex. 567; *Gardner* v. *Granniss*, 57 Ga. 555.

In some States the age of a will is reckoned from the death of the testator. *Shaller* v. *Brand*, 6 Binn. (Pa.) 439, 6 Am. Dec. 482.

Possession under deed.— In case of deeds of land in order that the presumption arise as stated in the text, some courts hold that the grantee's possession of the land must be shown. *Waldron* v. *Tuttle*, 4 N. H. 371; *Bank of Middlebury* v. *Rutland*, 33 Vt. 414; *Horner* v. *Cilley*, 14 N. H. 85; *Clark* v. *Wood*, 34 N. H. 447; *Crane* v. *Marshall*, 16 Me. 29, 33 Am. Dec. 631.

The prevailing will is, however, to the contrary. 2 Am. & Eng. Encyclopædia of Law (2d ed.), p. 329, and cases cited. And it is generally held that the instrument may be shown to be genuine by other corroborative evidence. *Long* v. *McDow*, 87 Mo. 197; *Whitman* v. *Heneberry*, 73 Ill. 109; *Nowlin* v. *Burwell*, 75 Va. 551; *Walker* v. *Walker*, 67 Pa. 185; *Boston* v. *Richardson*, 105 Mass. 351.

Custody.— *Whitman* v. *Shaw*, 166 Mass. 460 (quoting this article).

Secondary evidence.— The contents of a lost ancient evidence may be proved by a copy. *Winn* v. *Patterson*, 9 Pet. (U. S.) 667. Or oral evidence. *McReynolds* v. *Langenberger*, 57 Pa. St. 33.

The execution of the original must, however, be proved by circumstances, such as possession or marks of age on the paper. *Schunior* v. *Russell*, 83 Tex. 95.

Wills.—Wills come within the rule. *Jackson* v. *Luquere*, 5 Cow. 221; *Fetherly* v. *Waggoner*, 11 Wend. 599; *Storing* v. *Bowen*, 6 Barb. 109.

Leases.— And so do leases. *Hewlett* v. *Cock*, 7 Wend. 371.

Alterations.— The one claiming under the ancient instrument should explain material alterations. *Herrick* v. *Malin*, 22 Wend. 388.

The presumption of genuineness arising from the age of a document is rebutted by proof of alterations in it. *Ridgely* v. *Johnson*, 11 Barb. 540.

New Jersey.

Authority.— *Havens* v. *Land Co.*, 47 N. J. Eq. 365.

It must be shown that possession accompanied the deed. *Osborne* v. *Tunis*, 25 N. J. L. 633; *Havens* v. *Land Co.*, 47 N. J. Eq. 365.

The recital in a deed of 1823, more than sixty years old, of the existence of an earlier deed of 1772, is admissible. *Baeder* v. *Jennings*, 40 Fed. 199.

Ancient deeds as evidence.— G. S. 1895, "Conveyances," 3.

Maryland.

Authorities.— *Carroll* v. *Norwood*, 1 H. & J. 167.

Signatures to documents thirty years old are presumed to be genuine. *Allender* v. *Vestry of Trinity Church*, 3 Gill, 166.

A will made 144 years before is presumed to have been duly executed. *Hall* v. *Gittings*, 2 H. & J. 112.

Receipts thirty years old.— *Allender* v. *Church*, 3 Gill, 166.

Bonds.— Bonds come within the rule. *Hoddy* v. *Harryman*, 3 Har. & M. 581.

Pennsylvania.

Authorities.— *Zeigler* v. *Houtz*, 1 W. & S. 533; *Lau* v. *Mumma*, 43 Pa. 267; *Lewis* v. *Lewis*, 4 W. & S. 378; *Union Canal Co.* v. *Loyd*, 4 W. & S. 393; *Scharff* v. *Keener*, 64 Pa. 376.

Documents purporting to be ancient should be carefully scrutinized as to genuineness and age. *Wilson* v. *Rulofson*, 201 Pa. 29.

A written instrument, thirty years old and in proper custody, needs no further proof, even though the subscribing witnesses be living. *McReynolds* v. *Longenberger*, 57 Pa. 13.

An ancient receipt admitted. *Urket* v. *Coryell*, 5 W. & S. 60.

A map sixty years old in proper custody is admissible as an ancient document to prove boundary. *Smucker* v. *Railroad Co.*, 188 Pa. 40.

A draft of a survey over 100 years old, made by a deputy surveyor and in his handwriting, is admissible to prove boundary. *Mining Co.* v. *Auten*, 188 Pa. 568.

Treasurer's tax receipts. *McReynolds* v. *Longenberger,* 57 Pa. 13.

Custody.— *Rogers* v. *Coal & Iron Co.,* 31 Leg. Int. 325.

Possession under deed.— If proof of possession cannot be made, the genuineness of an ancient deed may be otherwise established. *Walker* v. *Walker,* 67 Pa. 185; *Arnold* v. *Gorr,* 1 Rawle, 223; *McGennis* v. *Allison,* 10 S. & R. 197.

Proof of possession accompanying the deed ought to be made. *Healy* v. *Moul,* 5 S. & R. 181; *Walker* v. *Walker,* 67 Pa. 185. See *McGennis* v. *Allison,* 10 S. & R. 197.

A deed thirty years old, accompanied by possession, proves itself. *Bowser* v. *Cravener,* 56 Pa. 132; *Zeigler* v. *Houtz,* 1 W. & S. 533.

An ancient will admissible without proof of execution, after proof of thirty years' possession. *Shaller* v. *Brand,* 6 Binn. 435.

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.

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.[8]

Alterations and interlineations appearing on the face of a deed are, in the absence of all evidence relating to them,

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8 *Pigot's Case,* 1604, 11 Coke's Rep. 47; *Davidson* v. *Cooper,* 1843, 11 M. & W. 778; 1844, 13 M. & W. 343; *Aldous* v. *Cornwell,* 1868, 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.

presumed to have been made before the deed was completed.[9]

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.[10]

There is no presumption as to the time when alterations and interlineations, appearing on the face of writings not under seal, were made[11] except that it is presumed that they were so made that the making would not constitute an offence.[12]

An alteration is said to be material when, if it had been made with the consent of the party charged, it would have affected his interest or varied his obligations in any way whatever.

An alteration which in no way affects the rights of the parties or the legal effect of the instrument, is immaterial.[13]

AMERICAN NOTE.

General.

Authorities.— 2 Am. & Eng. Encyclopædia of Law (2d ed.), p. 181 *et seq.;* 1 Greenleaf on Evidence (15th ed.), sec. 564 *et seq.*

First paragraph of text. *Angle* v. *Life Ins. Co.*, 92 U. S. 330; *Russell* v. *Russell*, 36 Minn. 376; *Hunt* v. *Gray*, 35 N. J. L. 227; *Craighead* v. *McLoney*, 99 Pa. 211; *Charlton* v. *Reed*, 61 Ia. 166;

[9] *Doe* v. *Catomore*, 1851, 16 Q. B. 745.

[10] *Simmons* v. *Rudall*, 1880, 1 Sim. (N. S.) 136.

[11] *Knight* v. *Clements*, 1838, 8 A. & E. 215.

[12] *R.* v. *Gordon*, 1855, Dearsley & P. 592.

[13] This appears to be the result of many cases referred to in Taylor, ss. 1822, 1823; see also the judgments in *Davidson* v. *Cooper* and *Aldous* v. *Cornwell*, referred to above.

Starr v. ***Lyon,*** 5 Conn. 540; ***Coit*** v. *Starkweather,* 8 Conn. 293; ***Osgood*** v. ***Stevenson,*** 143 Mass. 399; *Warring* v. *Williams,* 8 Pick. (Mass.) 322; *Wheelock* v. *Freeman,* 13 Pick. (Mass.) 165; ***Davis*** v. ***Jenney,*** 1 Metc. (Mass.) 221; ***Boston*** v. *Benson,* 12 Cush. (Mass.) 61; ***Agawam Bank*** v. ***Scars,*** 4 Gray (Mass.), 95; ***Doane*** v. ***Eldridge,*** 16 Gray (Mass.), 255; ***Fay*** v. ***Smith,*** 1 Allen (Mass.), 477; *Stoddard* v. ***Penniman,*** 108 Mass. 366; ***Draper*** v. ***Wood,*** 112 Mass. 315; *Stoddard* v. ***Penniman,*** 113 Mass. 386; *Cape Ann Nat. Bank* v. *Burns,* 129 Mass. 596.

Some authorities hold that all alterations are presumed to have been made after execution. *Burnham* v. *Ayer,* 35 N. H. 351.

Others, that there is no presumption as to when alterations are made, but that the whole question is for the jury. *Boothby* v. ***Stanley,*** 34 Me. 515, 516; *Smith* v. *U. S.,* 2 Wall. 219, 232; *Citizens' Nat. Bank* v. ***Williams,*** 174 Pa. 66; ***Wilson*** v. *Hotchkiss' Est.,* 81 Mich. 172; ***Hodnett*** v. ***Pace,*** 84 Va. 873; *Sisson* v. *Pearson,* 44 Ill. App. 81; ***Wilde*** v. *Armsby,* 6 Cush. (Mass.) 314, 318; *Simpson* v. ***Davis,*** 119 Mass. 269, 270, 20 Am. Rep. 324.

In this country the rule does not extend to alterations made by a stranger without the consent of the person having custody. ***Nichols*** v. *Johnson,* 10 Conn. 192, 196; ***Hayden*** v. *Goodnow,* 39 Conn. 164; ***Bailey*** v. ***Taylor,*** 11 Conn. 541; *Mix* v. *Royal Ins. Co.,* 169 Pa. 639; ***Sewing Machine Co.*** v. ***Dakin,*** 86 Mich. 581; *Orlando* v. ***Gooding,*** 34 Fla. 244; ***Drum*** v. ***Drum,*** 133 Mass. 566; *State* v. *McGonigle,* 101 Mo. 353.

Immaterial alterations.—*Burnham* v. *Ayer,* 35 N. H. 351; *Robertson* v. *Hay,* 91 Pa. 242; *Pruden* v. *Nester,* 103 Mich. 540; *Ryan* v. *First Nat. Bank,* 148 Ill. 349; *Mersman* v. *Werges,* 112 U. S. 139; *Fuller* v. *Green,* 64 Wis. 159; *Kingston Bank* v. *Bosserman,* 52 Mo. App. 269 (*contra*); ***Church*** v. *Fowle,* 142 Mass. 12; *Brown* v. *Pinkham,* 18 Pick. (Mass.) 172; *Vose* v. *Dolan,* 108 Mass. 155, 11 Am. Rep. 333; ***Hatch*** v. ***Hatch,*** 9 Mass. 307; *Smith* v. *Crooker,* 5 Mass. 538; *Com.* v. *Emigrant Sav. Bank,* 98 Mass. 12; *Hunt* v. *Adams,* 6 Mass. 519; *Ames* v. ***Colburn,*** 11 Gray (Mass.), 390.

Any alteration in a deed, to render it void, must be a material one; that is, one which causes the deed to speak a language different in legal effect from that which it spoke originally. *Murray* v. ***Klinzing,*** 64 Conn. 85.

Alteration before delivery.—An alteration to vitiate must be made after execution and delivery. *Banning* v. *Vrooman,* 12 N. Y. St. R. 393.

Alteration by stranger.— Disapproving rule of the text. *Van Brunt* v. *Eoff*, 35 Barb. 501; *Dinsmore* v. *Duncan*, 57 N. Y. 573, 15 Am. Rep. 534; *Rees* v. *Overbaugh*, 6 Cow. 746; *Solon* v. *Williamsburgh Sav. Bank*, 114 N. Y. 122.

An agent acting without authority is a stranger. *Rees* v. *Overbaugh*, 6 Cow. 746.

Nonapparent alterations.— If no alteration appears on the face, the burden of showing it is upon the one claiming it. *Farmers' L. & T. Co.* v. *Siefke*, 144 N. Y. 354.

New Jersey.

An alteration in a deed, against the interest of the party producing the deed, need not be explained by him. *Farlee* v. *Farlee*, 1 Zab. 280.

Words through which a line has been drawn, but which are still legible, form part of the deed. *Rosenkrans* v. *Snover*, 19 N. J. Eq. 420.

Admissibility of altered document.— A document is admissible in evidence even though altered and no explanation is made; character of the alteration is for the jury. *Hoey* v. *Jarman*, 39 N. J. L. 523, 40 N. J. L. 379.

Alteration of a receipt by the party holding it renders it inadmissible in evidence; not, however, when such alteration is by a stranger. *Goodfellow* v. *Inslee*, 12 N. J. Eq. 355.

It is for the court to decide by inspection whether or not there seems to be an alteration in a bond. *Shinn* v. *White*, 6 Hal. 187.

Material alterations.— Material alteration of a memorandum of sale by the vendee annuls the instrument as a contract and as evidence in favor of the vendee. *Schmidt* v. *Quinzel*, 55 N. J .Eq. 792.

Propriety of a material alteration must be shown by a preponderance of the evidence. *Putnam* v. *Clark*, 33 N. J. Eq. 338.

Immaterial alterations made by a party, as avoiding the instrument. *Jones* v. *Crowley*, 57 N. J. L. 222.

Alteration of a bill or note in a material part by the payee renders it void, though made without fraudulent intent. *Lewis* v. *Schenck*, 18 N. J. Eq. 166.

Alteration by a party, even though in an immaterial part, avoids the deed. *Wright* v. *Wright*, 2 Hal. 175; *White* v. *Williams*, 3 N. J. Eq. 385.

By consent.— Alteration in a bond made with the consent of all parties does not invalidate it. *Camden Bank* v. *Hall,* 14 N. J. L. 583.

Time of alteration.— No presumption that an alteration on face of a note was made after its execution. *Bank* v. *Hall,* 1 Hal. 215.

Whether an alteration was made before or after execution of the instrument is for the jury. *Moore* v. *Moore,* Coxe, 363; *Bank* v. *Hall,* 1 Hal. 215; *Wright* v. *Wright,* 2 Hal. 175; *Richman* v. *Richman,* 5 Hal. 217; *Hunt* v. *Gray,* 35 N. J. L. 227; *White* v. *Williams,* 3 N. J. Eq. 385.

Alteration on the face of an assessment by commissioners is presumed to have been made before its execution. *N. Riv. Meadow Co.* v. *Shrewsbury Church,* 2 Zab. 424.

Alteration by stranger.— The document is not invalidated by material alterations made by a stranger if he acted without authority. *Hunt* v. *Gray,* 35 N. J. L. 227.

Maryland.

Authorities.— Mutilation or obliteration of an instrument raises the presumption that it was canceled. *Handy* v. *State,* 7 H. & J. 42.

An altered will not executed anew stands as if unaltered. *Eschbach* v. *Collins,* 61 Md. 478.

A party has no authority to fill unwritten spaces in a complete bill or note. *Burrows* v. *Klunk,* 70 Md. 451.

Alterations by strangers.— *Wickes* v. *Caulk,* 5 H. & J. 36.

Material alterations.— *Mitchell* v. *Ringgold,* 3 H. & J. 159; *Owen* v. *Hall,* 70 Md. 97.

Changing the date of maturity of a promissory note is a material alteration. *Avirett* v. *Barnhart,* 86 Md. 545.

Pennsylvania.

Authorities.— An intentional material alteration renders the instrument void, even though made without wrongful intent. *Craighead* v. *McLoney,* 99 Pa. 211.

Alterations in deed of land do not revest title in grantor. *Wallace* v. *Harmstad,* 15 Pa. 462.

Material alteration in negotiable note made by a party to it renders it void even against a *bona fide* purchaser. *Bank* v. *Chisolm,* 169 Pa. 564.

Where the alterations are not suspicious in character, the presumption is as stated in the text. *Zimmerman* v. *Camp,* 155 Pa. 152.

Where the alteration is suspicious and unexplained, the document may be excluded. *Burgwin* v. *Bishop,* 91 Pa. 336; *Hartley* v. *Corboy,* 150 Pa. 23.

As to filling blank spaces, see *Bell* v. *Kennedy,* 100 Pa. 215.

Presumption as to time.— There is no presumption as to when alterations are made, but the whole question is for the jury. *Citizens' Nat. Bank* v. *Williams,* 174 Pa. 66; *Robinson* v. *Myers,* 67 Pa. 9; *Jordan* v. *Stewart,* 23 Pa. 244.

Wills.— Authority for text as to alterations of a will. *Linnard's Appeal,* 93 Pa. 313.

An altered will not executed anew stands as if unaltered. *Simrell's Estate,* 154 Pa. 604.

By a stranger.— The rule does not extend to alterations made by a stranger without the consent of the person having custody. *Mix* v. *Royal Ins. Co.,* 169 Pa. 639.

Immaterial alterations.— *Robertson* v. *Hay,* 91 Pa. 242.

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.

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

* See Note XXXII.

[1] Illustrations (*a*) and (*b*).

that it is wrongly dated,[2] 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.[3]

(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.[4]

(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.[5]

(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.[6]

(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.[7]

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[2] *Reffell* v. *Reffell*, 1866, L. R. 1 P. & D. 139. Mr. Starkie extends this to mistakes in some other formal particulars. 3 Star. Ev. 787–8.

[3] Illustration (*e*).

[4] Illustrations (*d*) and (*e*).

[5] Illustrations (*f*) and (*g*).

[6] Illustration (*h*).

[7] *Wigglesworth* v. *Dallison*, 1779, and note thereto, S. L. C. 528–

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.[8]

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.[9]

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.[10]

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.[11]

(*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.[12]

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560. A late case is *Johnson* v. *Raylton*, 1881, 7 Q. B. D. 438, in which it was held that evidence was admissible of a custom that in a contract with a manufacturer for iron plates he warranted them to be of his own make.

[8] Illustration (*i*).

[9] Illustration (*j*).

[10] See authorities collected in 1 Ph. Ev. 449–50; Taylor, s. 171.

[11] *Weston* v. *Emes*, 1808, 1 Tau. 115.

[12] *Barton* v. *Dawes*, 1850, 10 C. B. 261–265.

(*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.[13]

(*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 the destruction of the rabbits. B may prove A's oral agreement as to the rabbits.[14]

(*e*) A and B agree orally 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 oral agreement that he should do so.[15]

(*f*) A and B enter into a written agreement for the sale of an interest in a patent, and at the same time agree orally that the agreement shall not come into force unless C approves of it. C does not approve. The party interested may show this.[16]

(*g*) A, a farmer, agrees in writing to transfer to B, another farmer, a farm which A holds of C. It is orally 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.[17]

(*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.[18]

(*i*) A sells B a horse, and orally warrants him quiet in harness. A also gives B a paper in these words: "Bought of A a horse for 17*l*. 2*s*. 6*d*."

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[13] Story's 'Equity Jurisprudence,' chap. v. ss. 153–162.

[14] *Morgan* v. *Griffiths*, 1871, L. R. 6 Ex. 70; and see *Angell* v. *Duke*, L. R. 1875, 10 Q. B. 174.

[15] *Lindley* v. *Lacey*, 1864, 17 C. B. (N. S.) 578.

[16] *Pym* v. *Campbell*, 1856, 6 E. & B. 370.

[17] *Wallis* v. *Littell*, 1861, 11 C. B. (N. S.) 369.

[18] *Goss* v. *Lord Nugent*, 1833, 5 B. & Ad. 58, 65.

B may prove the oral warranty.[19]

(*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.[20]

AMERICAN NOTE.

General.

Authorities.— 1 Greenleaf on Evidence (15th ed.), sec. 85 *et seq.*, 275 *et seq.;* McKelvey on Evidence, pp. 366–373.

The main rule.—*Seitz* v. *Brewers' Co.*, 141 U. S. 510; *Wodock* v. *Robinson*, 148 Pa. 503; *Johnson* v. *Glover*, 121 Ill. 283; *Boyd* v. *Paul*, 125 Mo. 9; *Tuttle* v. *Burgett*, 53 O. St. 498; *White Sewing Machine Co.* v. *Feeley*, 72 Conn. 184; *Hildreth* v. *Hartford, etc., Tramway Co.*, 73 Conn. 631; *Perry* v. *Bigelow*, 128 Mass. 129; *Bergin* v. *Williams*, 138 Mass. 544; *Colt* v. *Cone*, 107 Mass. 285; *Munde* v. *Lambie*, 122 Mass. 336; *Tower* v. *Richardson*, 6 Allen (Mass.), 351; *Doyle* v. *Dixon*, 12 Allen (Mass.), 576.

Fraud, mistake, etc.—*Fire Assn.* v. *Wickham*, 141 U. S. 564; *Koch* v. *Roth*, 150 Ill. 212; *Paul* v. *Rider*, 58 N. H. 119; *Farwell* v. *Ensign*, 66 Mich. 600; *Kiel* v. *Choate*, 92 Wis. 517; *Booth* v. *Robinson*, 55 Md. 419.

Sustaining text. *Brainerd* v. *Brainerd*, 15 Conn. 586; *Park Bros. & Co.* v. *Blodgett & Clapp Co.*, 64 Conn. 38; *Fox* v. *Tabel*, 66 Conn. 397; *Todd* v. *Munson*, 53 Conn. 589; *Feltz* v. *Walker*, 49 Conn. 98; *Martin* v. *Clark*, 8 R. I. 389, 5 Am. Rep. 586; *Fletcher* v. *Willard*, 14 Pick. (Mass.) 464; *Case* v. *Gerrish*, 15 Pick. (Mass.) 49.

The writing not a complete statement.—*Stivers* v. *Stivers*, 97 Cal. 518; *Stahelin* v. *Lowe*, 87 Mich. 124; *Hand* v. *Ryan Co.*, 63 Minn. 539; *Platt* v. *Ætna Ins. Co.*, 153 Ill. 113, 121; *Greening* v. *Steele*, 122 Mo. 287; *Caulfield* v. *Hermann*, 64 Conn. 327; *Averill* v. *Sawyer*, 62 Conn. 568; *Pacific Iron Works* v. *Newhall*, 34 Conn. 76; *Durkin* v. *Cobleigh*, 156 Mass. 108, 32 Am. St. Rep. 436; *Neal* v. *Flint*, 88 Me. 73.

Condition precedent.— *Burke* v. *Delaney*, 153 U. S. 228; *Smith* v. *Mussetter*, 58 Minn. 159; *Wendlinger* v. *Smith*, 75 Va. 309; *State* v. *Wallis*, 57 Ark. 73; *Keener* v. *Crago*, 81 Pa. 166; *Harrison* v. *Morton*, 83 Md. 456; *Faunce* v. *State Ins. Co.*, 101 Mass. 279; *Wilson* v. *Powers*, 131 Mass. 539; *Whitaker* v. *Salisbury*, 15 Pick. (Mass.) 534.

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[19] *Allen* v. *Prink*, 1838, 4 M. & W. 140.

[20] *R.* v. *Hull*, 1827, 7 B. & C. 611.

Sustaining text. *White Sewing Machine Co.* v. *Feeley*, 72 Conn. 184; *Atwater* v. *Hewitt*, 72 Conn. 238; *McFarland* v. *Sikes*, 54 Conn. 250; *Trumbull* v. *O'Hara*, 71 Conn. 172; *Burns & Smith Lumber Co.* v. *Doyle*, 71 Conn. 742; *Carter* v. *Bellamy*, Kirby (Conn.), 291; *Herd* v. *Bissel*, 1 Root (Conn.), 260; *Bull* v. *Talcot*, 2 Root (Conn.), 120; *Converse* v. *Moulton*, 2 Root (Conn.), 195; *Avery* v. *Chappel*, 6 Conn. 275; *Crocker* v. *Higgins*, 7 Conn. 349; *Hall* v. *Rand*, 8 Conn. 573; *Reading* v. *Weston*, 8 Conn. 121; *Jones* v. *Warner*, 11 Conn. 49; *Baldwin* v. *Carter*, 17 Conn. 205; *Beekley* v. *Munson*, 22 Conn. 312; *Clarke* v. *Tappin*, 32 Conn. 67; *Mead* v. *Strouse*, 41 Conn. 567; *Pierpont* v. *Longden*, 46 Conn. 499, 500; *Hotchkiss* v. *Higgins*, 52 Conn. 213; *Winchell* v. *Coney*, 54 Conn. 33; *West Haven Water Co.* v. *Redfield*, 58 Conn. 40; *King* v. *Killbride*, 58 Conn. 117; *Osborne* v. *Taylor*, 58 Conn. 441; *Beard* v. *Boylan*, 59 Conn. 187; *Stanton* v. *N. Y. & N. E. R. R. Co.*, 59 Conn. 288; *Butler* v. *Barnes*, 60 Conn. 186.

Subsequent agreement.— *Teal* v. *Billy*, 123 U. S. 578; *Holloway* v. *Frick*, 149 Pa. 178; *Pratt's Admr.* v. *U. S.*, 22 Wall. 496, 507; *Church* v. *Florence Iron Works*, 45 N. J. L. 129; *West Haven Water Co.* v. *Redfield*, 58 Conn. 40; *Stearns* v. *Hall*, 9 Cush. (Mass.) 31; *Munroe* v. *Perkins*, 9 Pick. (Mass.) 298; *Shaffer* v. *Sawyer*, 123 Mass. 294.

Custom.— *Page* v. *Cole*, 120 Mass. 37; *Robinson* v. *U. S.*, 13 Wall. 363; *Pennell* v. *Trans. Co.*, 94 Mich. 247; *Patterson* v. *Crowther*, 70 Md. 124; *Leavitt* v. *Kennicott*, 157 Ill. 235; *Kilgore* v. *Bulkeley*, 14 Conn. 392; *Bank of New Milford* v. *New Milford*, 36 Conn. 100.

Date.— *Pigott* v. *O'Halloran*, 37 Minn. 415; *Bayley* v. *Taber*, 5 Mass. 286; *Orcutt* v. *Moore*, 134 Mass. 48; *Davis S. M. Co.* v. *Stone*, 131 Mass. 384.

Consideration.— Sustaining text. *Clapp* v. *Terrell*, 20 Pick. (Mass.) 247; *Twomey* v. *Crowley*, 137 Mass. 184; *O'Connell* v. *Kelly*, 114 Mass. 97.

Conditional delivery.— Where the delivery of a deed is not absolute, parol evidence is admissible to show the terms upon which it was delivered. *Cutherell* v. *Cutherell*, 101 Ind. 375.

Existence of legal relation.— The official character of a person may be proved by parol; also, that he was the deputy of an officer. *Hall* v. *Bishop*, 78 Ind. 370, 372.

Showing existence of trust.— To establish a resulting trust, in opposition to the face of the deed, and to the answer of the trustee, the clearest and the strongest evidence is necessary. *Jenison* v. *Graves*, 2 Blackf. 440.

An attempt to establish, by parol, a resulting trust in land held by an absolute conveyance for more than thirty years, held, under the circumstances, not established. *Collier* v. *Collier*, 30 Ind. 32.

Receipts.— A receipt which expresses the purpose for which the money is paid cannot be contradicted by oral evidence. *Henry* v. *Henry*, 11 Ind. 236; *Tisloe* v. *Graeter*, 1 Blackf. 353.

A mere receipt, however, may be explained, controlled, qualified, or even contradicted by parol evidence. *Candy* v. *Hanmore*, 76 Ind. 125, 126; *Alcorn* v. *Morgan*, 77 Ind. 184, 186; *Scott* v. *Scott*, 105 Ind. 584, 588; *Lyon* v. *Lenon*, 106 Ind. 567, 569; *Adams* v. *Davis*, 109 Ind. 10, 21; *Ohio, etc., Ry. Co.* v. *Crumbo*, 4 Ind. App. 456, 459; *Lapping* v. *Duffy*, 65 Ind. 229; *Markel* v. *Spitler*, 28 Ind. 488; *Lash* v. *Rendell*, 72 Ind. 475; *Henry* v. *Henry*, 11 Ind. 236; *Moore* v. *Korty*, 11 Ind. 341; *Beedle* v. *State*, 62 Ind. 26; *Stewart* v. *Armel*, 62 Ind. 593; *Adams* v. *Davis*, 109 Ind. 10; *Lemmon* v. *Reed*, 14 Ind. App. 655; *Fox* v. *Cox*, 20 Ind. App. 61; *Robeson* v. *Wolf*, 27 Ind. App. 683; *Sherry* v. *Picken*, 10 Ind. 375; *Lewis* v. *Matlock*, 3 Ind. 120; *Markel* v. *Spitler*, 28 Ind. 488; *Travelers' Ins. Co.* v. *Chappelow*, 83 Ind. 429, 435.

Oral evidence is admissible to contradict the entry of satisfaction of a mortgage. *Lapping* v. *Duffy*, 65 Ind. 229.

But a receipt containing the contract cannot be varied. *Alcorn* v. *Morgan*, 77 Ind. 184, 186; *McKernan* v. *Mayhew*, 21 Ind. 291; *Henry* v. *Henry*, 11 Ind. 236.

Where a receipt was for a sum of money as having been received "on a decree" specified, parol evidence was not admissible to prove that it was given in full of the principal as such. *Hull* v. *Butler*, 7 Ind. 167.

Release.— Where a release was explained and qualified in a particular case, see *Scott* v. *Scott*, 105 Ind. 584, 588.

Payment.—Payment may be shown by parol. *Bond Co.* v. *Bruce*, 13 Ind. App. 550; *Swope* v. *Forney*, 17 Ind. 385.

Parol evidence is admissible to show whether or not a note or check given was in payment. *Rhodes* v. *Webb-Jameson Co.*, 19 Ind. App. 195; *Orner* v. *Sattley, etc., Co.*, 18 Ind. App. 122; *Sutton* v. *Baldwin*, 146 Ind. 361; *Cox* v. *Hayes*, 18 Ind. App. 220; *Wipperman* v. *Hardy*, 17 Ind. App. 142; *Price* v. *Barnes*, 7 Ind. App. 1; *Combs* v. *Bays*, 19 Ind. App. 263. And see *Zimmerman* v. *Adee*, 126 Ind. 15, 16.

Admission of parol evidence, secondary evidence.— Parol evidence is admissible of the time of the execution and delivery of a deed.

Davar v. *Cardwell,* 27 Ind. 478; *Uhl* v. *Moorhous,* 137 Ind. 445; *State ex rel.* v. *Gregory,* 132 Ind. 387; *Forgerson* v. *Smith,* 104 Ind. 246. But see *Woollen* v. *Wire,* 110 Ind. 251.

If no objection is made, parol evidence is admissible to prove title to real estate. *Stockwell* v. *State,* 101 Ind. 1; *Uhl* v. *Moorehous,* 137 Ind. 445, 448.

And the contents of a writ. *McFadden* v. *Fritz,* 110 Ind. 1, 5.

And to show that book entries were not made although these should have been. *Marks* v. *Orth,* 121 Ind. 10, 12.

The fact of a transaction, evidence by a writing may be shown by parol. *Stanley* v. *Sutherland,* 54 Ind. 339.

The writing evidencing a contract parity in writing is admissible. *Tomlinson* v. *Briles,* 101 Ind. 538; *File* v. *Springel,* 132 Ind. 312, 315.

Practice.— Admission without objection of parol evidence will sustain a finding, although it would have been held incompetent as not the best available evidence, if objection had been made. *Riehl* v. *Evansville, etc., Assn.,* 104 Ind. 70, 74; *Judd* v. *Small,* 107 Ind. 398, 399; *Yeager* v. *Wright,* 112 Ind. 230, 237; *Indiana, etc., Ry. Co.* v. *Finnell,* 116 Ind. 414, 422; *Graves* v. *State,* 121 Ind. 357, 359; *Poole* v. *McGahan,* 124 Ind. 583, 584; *Winemiller* v. *Thrash,* 125 Ind. 353, 354.

Parol evidence of the contents of a telegram is harmless, where it is shown that the information contained therein was orally communicated by the sender of the message to the receiver. *Terre Haute, etc., R. R. Co.* v. *Stockwell,* 118 Ind. 98, 103.

New Jersey.

General rule.— *Parker* v. *Jameson,* 32 N. J. Eq. 222; *Van Syckle* v. *Dalrymple,* 32 N. J. Eq. 233, 826; *Naumberg* v. *Young,* 44 N. J. L. 331; *Clark* v. *Elizabeth,* 40 N. J. L. 172; *Carlton* v. *Wine Co.,* 33 N. J. Eq. 466; *Fire Ins. Co.* v. *Martin,* 40 N. J. L. 568; *Bandholz* v. *Judge,* 62 N. J. L. 526; *Hanrahan* v. *National, etc., Assn.,* 66 N. J. L. 80; *Ellison* v. *Gray,* 55 N. J. Eq. 581; *Emery* v. *King,* 64 N. J. L. 529; *Schenck* v. *Spring Lake Co.,* 47 N. J. Eq. 44; *Van Horn* v. *Van Horn,* 49 N. J. Eq. 327; *Leslie* v. *Leslie,* 50 N. J. Eq. 155; *Dewees* v. *Insurance Co.,* 35 N. J. L. 366; *Chetwood* v. *Brittan,* 2 N. J. Eq. 438, 4 N. J. Eq. 334, 5 N. J. Eq. 628; *Locander* v. *Lounsbery,* 24 N. J. Eq. 417, 25 N. J. Eq. 554.

Collateral agreements.— Collateral agreements on a distinct subject may be proved by parol, but not when relating to the same

subject. *Naumberg* v. *Young*, 44 N. J. L. 331; *McTague* v. *Finnegan*, 54 N. J. Eq. 454.

Contemporaneous parol understanding not admissible. *Hotel Co.* v. *I'Anson*, 43 N. J. L. 442; *Remington* v. *Wright*, 43 N. J. L. 451; *Society* v. *Haight*, 1 N. J. Eq. 394; *McKelway* v. *Cook*, 4 N. J. Eq. 102; *Todd* v. *Philhower*, 4 Zab. 796; *Thibault's Case*, 4 Zab. 805.

Oral proof admitted to show a contemporaneous agreement that a promissory note might be satisfied in merchandise and that it had been so satisfied. *Buchanon* v. *Adams*, 49 N. J. L. 636.

An offer to prove such a contemporaneous agreement should be full, specific, and not doubtful. *Middleton* v. *Griffith*, 57 N. J. L. 442.

Supplementary agreements.— A document which upon its face does not represent a complete agreement may be supplemented by parol. *Naumberg* v. *Young*, 44 N. J. L. 331; *Ryle* v. *Ryle*, 41 N. J. Eq. 582, 597; *Perrine* v. *Cooley*, 39 N. J. L. 449; *Park* v. *Miller*, 27 N. J. L. 338; *Ackens* v. *Winston*, 22 N. J. Eq. 444; *Saltar* v. *Kirkbride*, 1 South. 223.

Offer in writing to do work for a gross sum accepted orally; evidence admitted as to oral agreement as to time of payment. *Bruce* v. *Pearsall*, 59 N. J. L. 62, 586.

Substituted agreements.— Parol evidence is admissible to prove a subsequent oral agreement rescinding the prior written one, or substituting a different one therefor. *McKinstry* v. *Runk*, 12 N. J. Eq. 60; *Church* v. *Florence Iron Works*, 45 N. J. L. 129; *Long* v. *Hartwell*, 34 N. J. L. 116. And see *Hogencamp* v. *Ackerman*, 4 Zab. 133; *French* v. *Griffin*, 18 N. J. Eq. 279.

A promise to extend the time of payment of a bond, made after its maturity, may be shown by parol. *Van Syckel* v. *O'Hearn*, 50 N. J. Eq. 173.

Rescission.— A written contract, while still executory, may be rescinded by parol. *Perrine* v. *Cheeseman*, 6 Hal. 174; *Rodman* v. *Zilley*, 1 N. J. Eq. 320; *King* v. *Morford*, 1 N. J. Eq. 274.

Instrument never in effect.— Parol evidence admitted to show that a writing was not in fact what it purported to be. *Globe Lamp Co.* v. *Kern Gaslight Co.*, 67 N. J. L. 279.

Parol evidence admissible to show that a deed was executed conditionally and that the condition never occurred. *Black* v. *Shreve*, 13 N. J. Eq. 455.

Custom and usage.— A custom or usage of a particular trade or business is admissible to explain a written contract but not to contradict its terms. *Steward* v. *Scudder,* 4 Zab. 96; *Schenck* v. *Griffen,* 38 N. J. L. 463; *Barton* v. *McKelway,* 2 Zab. 165; *Smith* v. *Clayton,* 29 N. J. L. 357.

A usage is not provable by parol if it is contrary to a rule of law. *Electric Co.* v. *Elizabeth,* 59 N. J. L. 134. See *Overman* v. *Bank,* 30 N. J. L. 61, 31 N. J. L. 563.

Agency.— Parol evidence is admissible to show that one signed as agent of an undisclosed principal, both in favor of and against such principal. *Smith* v. *Felter,* 63 N. J. L. 30; *Simanton* v. *Vliet,* 61 N. J. L. 595; *Borcherling* v. *Katz,* 37 N. J. Eq. 150. But see *Schenck* v. *Spring Lake Co.,* 47 N. J. Eq. 44.

Bill of lading.— The receipt of a carrier for goods is not conclusive as to their quantity or condition. *Ayres* v. *Railroad Co.,* 29 N. J. L. 397.

Receipts.— A receipt may be varied by parol unless it be also a contract. *Swain* v. *Frazier,* 35 N. J. Eq. 326; *Church* v. *Railroad Co.,* 63 N. J. L. 470; *Kenny* v. *Kane,* 50 N. J. L. 562; *Joslin* v. *Giese,* 59 N. J. L. 130; *Middlesex* v. *Thomas,* 20 N. J. Eq. 39; *Bird* v. *Davis,* 14 N. J. Eq. 467; *Cole* v. *Taylor,* 2 Zab. 59; *Crane* v. *Alling,* 3 Green, 423; *Wildrick* v. *Swain,* 34 N. J. Eq. 167, 35 N. J. Eq. 326; *Dorman* v. *Wilson,* 39 N. J. L. 474.

A tax receipt is only a voucher and does not estop the collector, as against a *bona fide* purchaser, from showing that it was given for a check which was never honored. *Kahl* v. *Love,* 37 N. J. L. 5.

Consideration.— Parol evidence of a different or an additional consideration is admissible. *Silvers* v. *Potter,* 48 N. J. Eq. 539; *Morris Canal Co.* v. *Ryerson,* 27 N. J. L. 457.

Recital of consideration in a deed does not estop one from showing that other consideration was agreed to be paid. *Stearns* v. *Stearns,* 23 N. J. Eq. 167; *Herbert* v. *Schofield,* 9 N. J. Eq. 492; *Speer* v. *Speer,* 14 N. J. Eq. 240; *Lloyd* v. *Newell,* 3 Hal. 296: *Bolles* v. *Beach,* 2 Zab. 680; *Morris Canal Co.* v. *Ryerson,* 27 N. J. L. 457.

But the consideration cannot be shown to be wholly different. *Adams* v. *Bank,* 10 N. J. Eq. 535.

Acknowledgment of receipt of the consideration in a deed is *prima facie* evidence of payment, but is not conclusive. *Herbert* v. *Schofield,* 9 N. J. Eq. 492: *Demarest* v. *Terhune,* 18 N. J. Eq. 532.

Statutes.— Fraud in the consideration of sealed instruments. G. S. 1895, "Evidence," 16.

When forgery or fraud in execution of a sealed instrument is the issue, parol evidence to show the consideration is admissible. *Waln* v. *Waln,* 53 N. J. L. 429.

A seal is only presumptive evidence of a consideration. G. S. 1895, "Evidence," 72.

Bills and notes.— *Wright* v. *Remington,* 41 N. J. L. 48, 43 N. J. L. 451; *Johnson* v. *Ramsay,* 43 N. J. L. 279; *Van Name* v. *Vanderveer,* 2 N. J. L. J. 125; *Honeyman* v. *Van Nest,* 4 N. J. L. J. 151; *Stiles* v. *Vandewater,* 48 N. J. L. 67; *Uhler* v. *Browning,* 28 N. J. L. 82; *Kean* v. *Davis,* 1 Zab. 683; *Paul* v. *Smith,* 32 N. J. L. 13; *Hutchinson* v. *Hendrickson,* 29 N. J. L. 180; *Chaddock* v. *Vanness,* 35 N. J. L. 517; *Watkins* v. *Kirkpatrick,* 26 N. J. L. 84; *Durant* v. *Banta,* 27 N. J. L. 624; *Jacques* v. *McKnight,* 26 N. J. L. 92.

Signer of a negotiable instrument not allowed to show that he signed as agent. *Schenck* v. *Spring Lake Co.,* 47 N. J. Eq. 44.

Accommodation maker of a promissory note not allowed to prove a contemporaneous parol agreement that a second indorser should be liable jointly with him. *Kling* v. *Kehoe,* 58 N. J. L. 529.

In equity.— Parol evidence admissible in equity to show that a deed absolute on its face is a mortgage. *Lokerson* v. *Stillwell,* 13 N. J. Eq. 357; *Vandegrift* v. *Herbert,* 18 N. J. Eq. 466; *Condit* v. *Tichenor,* 19 N. J. Eq. 43; *Van Keuren* v. *McLaughlin,* 19 N. J. Eq. 187, 575; *Washburn* v. *McLaughlin,* 19 N. J. Eq. 428; *Phillips* v. *Hulsizer,* 20 N. J. Eq. 308; *Melick* v. *Creamer,* 25 N. J. Eq. 430; *Sweet* v. *Parker,* 22 N. J. Eq. 453; *Cake* v. *Shull,* 45 N. J. Eq. 208; *Pace* v. *Bartles,* 47 N. J. Eq. 170; *Winters* v. *Earl,* 52 N. J. Eq. 52; *Vanderhoven* v. *Romaine,* 56 N. J. Eq. 1. *Contra* at law. *Abbott* v. *Hanson,* 4 Zab. 493.

Parol evidence admissible to show fraud, mistake, accident, or surprise. *Stoutenburgh* v. *Tompkins,* 9 N. J. Eq. 332.

Proof that a contract was induced by fraud must be clear and convincing, in order to justify a disregard of the written instrument. *Barr* v. *Chandler,* 47 N. J. Eq. 532.

Parol evidence admissible to establish a resulting trust. *Beck* v. *Beck,* 43 N. J. Eq. 39. Or a trust where the deed was absolute on its face. *Parker* v. *Snyder,* 31 N. J. Eq. 164.

Other illustrations.— Fact of holding a public office may be shown by parol. *Ritchie* v. *Widdemer,* 59 N. J. L. 290.

An omitted name cannot be supplied by parol. *Hoffman* v. *Larue*, Pen. 685.

Insurance policy not to be varied by parol. *Martin* v. *Insurance Co.*, 57 N. J. L. 623; *Bennett* v. *Insurance Co.*, 55 N. J. L. 377.

Oral evidence not admissible to alter a mortgage. *Van Ness* v. *Robbins*, 47 N. J. Eq. 329.

Maryland.

General rule.— *Fire Ins. Co.* v. *Langley*, 62 Md. 196; *Jones* v. *Syer*, 52 Md. 211; *Dixon* v. *Clayville*, 44 Md. 573; *Appleman* v. *Fisher*, 34 Md. 540; *McClernan* v. *Hall*, 33 Md. 293; *Artz* v. *Grove*, 21 Md. 456; *Bladen* v. *Wells*, 30 Md. 577; *Wesley* v. *Thomas*, 6 H. & J. 24; *Cassard* v. *McGlannan*, 88 Md. 168.

Declarations at the time of execution of a will that it shall be inoperative on a certain contingency are not admissible. *Sewell* v. *Slingluff*, 57 Md. 537.

Parol evidence is not admissible to change the name of a beneficiary inserted in a trust deed. *Bank* v. *Harlan*, 89 Md. 675.

Previous or contemporaneous parol agreements are not provable. *Merritt* v. *Peninsular Con. Co.*, 91 Md. 453.

Where a contract describes land sold as containing about sixty-five acres, the vendee cannot prove parol representations that it contained at least sixty-five acres. *Balto. Society* v. *Smith*, 54 Md. 187.

It may be for the jury to say whether a contract was intended to be wholly written or partly written and partly oral. *Roberts* v. *Bonaparte*, 73 Md. 191.

If the writing is merely a part of the execution of a previous parol agreement, it does not exclude parol testimony. *Harwood* v. *Jones*, 10 G. & J. 404.

A written contract cannot be explained by a subsequent letter of one of the parties. *Key* v. *Parnham*, 6 H. & J. 418.

Purpose and intent.— Parol evidence is not admitted to show a purpose or an intent in inserting a term of a contract different from the one manifested in the writing itself. *Barker* v. *Borzone*, 48 Md. 474; *Eckenrode* v. *Chemical Co.*, 55 Md. 51; *Farrow* v. *Hayes*, 51 Md. 498.

Preliminary negotiations.— Evidence of preliminary negotiations is not admissible, except to prove fraud, accident, or mistake. *Timms* v. *Shannon*, 19 Md. 296; *King* v. *Clogg*, 40 Md. 341; *Penni-*

man v. *Winner*, 54 Md. 127; *Dance* v. *Dance*, 56 Md. 433; *Gorsuch* v. *Rutledge*, 70 Md. 272; *Franklin* v. *Claflin*, 49 Md. 24.

Conversations not admissible. *Lazear* v. *National Union Bank*, 52 Md. 78; *Warren* v. *Keystone Co.*, 65 Md. 547.

Antecedent letters of the parties are not admissible. *Badart* v. *Foulon*, 80 Md. 579.

Merger of oral in written.— A verbal contract afterward reduced to writing is merged in the writing and cannot itself be proved. *Mills* v. *Matthews*, 7 Md. 315; *Worthington* v. *Bullitt*, 6 Md. 172.

Parol understandings.— When the contract appears to be complete, evidence of contemporaneous parol understandings is not admissible. *Delamater* v. *Chappell*, 48 Md. 244; *Neal* v. *Hopkins*, 87 Md. 19; *Blackistone* v. *Bank*, 87 Md. 302.

When a contract of sale is in writing, an oral warranty cannot be proved. *Nally* v. *Long*, 71 Md. 585; *King* v. *Clogg*, 40 Md. 341.

Additional terms.— An additional term cannot be added to a written contract that appears to be complete. *Thompson* v. *Gortner*, 73 Md. 474 (sale of corn; parol agreement as to quality); *Williams* v. *Kent*, 67 Md. 350 (lease); *Penniman* v. *Winner*, 54 Md. 127.

Parol evidence is admissible to show that a written memorandum of sale does not contain all the terms of the agreement, not to vary or contradict it, but to show that it does not satisfy the requirements of the Statute of Frauds. *Fisher* v. *Andrews*, 94 Md. 46.

Independent collateral agreements.— Parol proof is permissible to show an agreement collateral to a written one and not inconsistent therewith if it concerns an independent matter. *Creamer* v. *Stephenson*, 15 Md. 211; *McCreary* v. *McCreary*, 5 G. & J. 147; *Basshor* v. *Forbes*, 36 Md. 154; *Walker* v. *Schindel*, 58 Md. 360; *Stallings* v. *Gottschalk*, 77 Md. 429; *Furnace Co.* v. *Hooper*, 90 Md. 390.

The contract in a bill of lading may be added to by proving a parol supplementary agreement. *Atwell* v. *Miller*, 11 Md. 348.

When a written contract is silent as to the manner and terms of payment, they may be shown by parol. *Paul* v. *Owings*, 32 Md. 402.

Where an owner has contracted for the building of a house for a specified sum, it may be shown that he agreed by parol to pay the workmen. *Andre* v. *Bodman*, 13 Md. 241.

It may be shown that the vendor of a stock of goods undertook by parol not to open a similar store in the town, though the contract of sale be in writing. *Fusting* v. *Sullivan*, 41 Md. 162.

Agency.— One cannot, in order to escape liability himself, show that he was acting as an agent. *Standford* v. *Horwitz*, 49 Md. 525.

Subsequent agreements.— Additions and changes may be made in a written contract by subsequent parol agreement. *Coates* v. *Sangston*, 5 Md. 121; *Franklin* v. *Long*, 7 G. & J. 407; *Insurance Co.* v. *Hamill*, 5 Md. 170.

A subsequent waiver or abandonment may be shown by parol. *Allen* v. *Sowerby*, 37 Md. 410; *Kribs* v. *Jones*, 44 Md. 396; *Fire Ins. Co.* v. *Gusdorf*, 43 Md. 506; *Herzog* v. *Sawyer*, 61 Md. 344.

Instrument never in effect.— It may be shown by parol that a signed instrument was not intended to be a binding contract. *Advertising Co.* v. *Met. Shoe Co.*, 91 Md. 61.

It may be shown by parol that an instrument is void or was delivered on condition. *Leppoc* v. *Union Bank*, 32 Md. 136; *Beall* v. *Poole*, 27 Md. 645; *Harrison* v. *Morton*, 83 Md. 456.

Fraud.— Fraud, mistake, accident, or alteration may be proved by parol testimony. *Hurn* v. *Soper*, 6 H. & J. 276; *Davis* v. *Hamblin*, 51 Md. 525; *Booth* v. *Robinson*, 55 Md. 419.

A mistake in the date of a letter may be shown by parol. *Stockham* v. *Stockham*, 32 Md. 196.

The terms of a deed cannot be varied by parol, except to show fraud, accident, or mistake. *West Boundary Co.* v. *Bayless*, 80 Md. 495.

In equity.— The rule is the same in equity as at law; parol evidence is admitted to show fraud or a trust. *Watkins* v. *Stockett*, 6 H. & J. 435; *Harwood* v. *Jones*, 10 G. & J. 404.

A trust cannot be raised by proof of parol declarations inconsistent with the expressed intention of a deed. *Jones* v. *Slubey*, 5 H. & J. 372.

Parol evidence is receivable in equity to reform an instrument. *Planters' Ins. Co.* v. *Deford*, 38 Md. 382.

When a mortgage is attacked for fraud, parol evidence of its true character, its purpose, and the consideration may be given. *Price* v. *Gover*, 40 Md. 102.

A deed absolute on its face may be shown to be a mortgage. *Artz* v. *Grove*, 21 Md. 456; *Brown* v. *Reilly*, 72 Md. 489; *Bank of West.* v. *Whyte*, 1 Md. Ch. 536, 3 Md. Ch. 508.

Consideration.— It may be shown by parol that there was a further consideration not mentioned in the contract. *Fusting* v. *Sullivan*, 41 Md. 162. See *Boyce* v. *Wilson*, 32 Md. 122.

Receipts.— A receipt for money paid may be explained or contradicted by parol. *Wolfe* v. *Hauver*, 1 Gill, 84; *Trisler* v. *Williamson*, 4 H. & McH. 219; *Robinett* v. *Wilson*, 8 Md. 180; *Cramer* v. *Shriner*, 18 Md. 140; *Shepherd* v. *Bevin*, 9 Gill, 32.

Nature of the transaction.— Where a written contract is ambiguous, parol evidence is admissible to show in what capacity the parties signed and the true nature of the transaction. *Morrison* v. *Baechtold*, 93 Md. 319.

Usages and customs.— Usages may be proved in connection with a written contract; they must be general and well established. *Blake* v. *Stump*, 73 Md. 160; *Barker* v. *Borzon*, 48 Md. 474; *Duling* v. *Railroad* Co., 66 Md. 120; *Williams* v. *Woods*, 16 Md. 220; *Patterson* v. *Crowther*, 70 Md. 124.

Evidence of a local usage is admissible, if the parties can be shown to have known of it. *Insurance Co.* v. *Wilson*, 2 Md. 217.

A usage cannot be proved if it contradicts the terms of a contract. *Farmville Ins. Co.* v. *Butler*, 55 Md. 233; *Rich* v. *Boyce*, 39 Md. 314; *B. & O. R. Co.* v. *Green*, 25 Md. 72; *Gibney* v. *Curtis*, 61 Md. 192; *Bank* v. *Renshaw*, 78 Md. 475; *Balto. Baseball Club* v. *Pickett*, 78 Md. 375.

Time for objection.— If no objection is made on the trial to the introduction of parol evidence, no objection can be made on appeal. *Sentman* v. *Gamble*, 69 Md. 293.

Pennsylvania.

General parol evidence rule.— *Heebner* v. *Worrall*, 38 Pa. 376; *Harbold* v. *Kuster*, 44 Pa. 392; *Collins* v. *Baumgardner*, 52 Pa. 461; *Martin* v. *Berens*, 67 Pa. 459; *Keener* v. *Bank of U. S.*, 2 Pa. 237; *Leibert* v. *Heitz*, 193 Pa. 590; *Storage Co.* v. *Speck*, 194 Pa. 126; *Krueger* v. *Nicola*, 205 Pa. 38; *Burton* v. *Forest Oil Co.*, 204 Pa. 349; *King* v. *Gas Coal Co.*, 204 Pa. 628; *Ogden* v. *Traction Co.*, 202 Pa. 480; *Kaufman* v. *Friday*, 201 Pa. 178; *Dickson* v. *Manufacturing Co.*, 179 Pa. 343.

In the absence of fraud or mistake, parol evidence is not admissible to vary, alter, or contradict the terms of a written instrument. *Christine* v. *Whitehill*, 16 S. & R. 98 (deed); *Snyder* v. *Snyder*, 6 Binn. 483 (extent of land conveyed); *Collam* v. *Hocker*, 1 Rawle, 108 (reservation of a right of way); *Collingwood* v. *Irwin*, 3 Watts, 306 (covenant of warranty); *Fulton* v. *Hood*, 34 Pa. 365 (bond and warrant of attorney); *Hill* v. *Gaw*, 4 Pa. 493

(check); *Weisenberger* v. *Insurance Co.*, 56 Pa. 442 (insurance policy); *Wodock* v. *Robinson*, 148 Pa. 503 (lease); *Stull* v. *Thompson*, 154 Pa. 43 (manner of paying rent); *Gearing* v. *Carroll*, 151 Pa. 79 (contract of partnership).

General rule (contracts).—*Phillips* v. *Meily*, 106 Pa. 536; *Van Voorhis* v. *Rea*, 153 Pa. 19; *McClure* v. *Freight Ry. Co.*, 90 Pa. 269; *Horn* v. *Miller*, 142 Pa. 557; *Hallowell* v. *Lierz*, 171 Pa. 577; *Dixon-Woods Co.* v. *Glass Co.*, 169 Pa. 167; *Forrest* v. *Nelson*, 108 Pa. 481; *Ziegler* v. *McFarland*, 147 Pa. 607.

Parol evidence is not admissible to show that the principal sum secured by a mortgage was not to be repaid. *Schiehl's Estate*, 179 Pa. 308.

Parol testimony is admitted to explain a receipt or an entry in an account-book, or to show the purpose for which a note was given. *Sheaffer* v. *Sensenig*, 182 Pa. 634.

A parol contract with a school district may be proved even though the minutes contain nothing in regard to it. *Furniture Co.* v. *School Dist.*, 158 Pa. 35; *Roland* v. *School Dist.*, 161 Pa. 102.

Entries in the books of one of the parties setting out the contract do not render parol evidence inadmissible. *Chapin* v. *Cambria Iron Co.*, 145 Pa. 478.

Boundaries in deeds.—The boundaries of land conveyed by deed cannot be shown to be different from those set out in the deed. *Weiler* v. *Hottenstein*, 102 Pa. 499; *Merriman* v. *Bush*, 116 Pa. 276; *Fuller* v. *Weaver*, 175 Pa. 182.

Courses and distances may be shown by parol to vary from the monuments on the ground. *Mageehan* v. *Adams*, 2 Binn. 109.

Consideration.—Where the consideration of a writing consists of a verbal promise it may be proved by parol. *Coal Co.* v. *McShain*, 75 Pa. 238; *Shughart* v. *Moore*, 78 Pa. 469; *Graver* v. *Scott*, 80 Pa. 88. But an expressed pecuniary consideration cannot be disproved. *Allison* v. *Kurtz*, 2 Watts, 185.

Parol evidence is admissible to show another or a greater consideration than the one expressed. *Jack* v. *Dougherty*, 3 Watts, 151; *Buckley's Appeal*, 48 Pa. 491; *Lewis* v. *Brewster*, 57 Pa. 410; *Taylor* v. *Preston*, 79 Pa. 436; *Hayden* v. *Mentzer*, 10 S. & R. 329.

The actual consideration of a deed may be shown by parol. *Long* v. *Reed*, 16 Pa. Co. Ct. 110; *Audenried* v. *Walker*, 11 Phila. 183; *Wolf* v. *Kohr*, 133 Pa. 13; *Henry* v. *Zurflieh*, 203 Pa. 440.

The consideration may be shown not to be love and affection or the small sum of money mentioned, but an antenuptial parol agreement. *Barnes* v. *Black,* 193 Pa. 447.

Fraud.— Parol evidence is admissible to show fraud. *Hurst* v. *Kirkbride,* 1 Binn. 616; *Campbell* v. *McClenachan,* 6 S. & R. 171; *Overton* v. *Tracey,* 14 S. & R. 311; *Hultz* v. *Wright,* 16 S. & R. 345; *Maute* v. *Gross,* 56 Pa. 250; *Horn* v. *Brooks,* 61 Pa. 407; *Kostenbader* v. *Peters,* 80 Pa. 438; *Chew* v. *Gillespie,* 56 Pa. 309.

Evidence of fraud in procuring a release in full. *Clayton* v. *Traction Co.,* 204 Pa. 536.

A contemporaneous parol agreement, on the faith of which a note is given, is admissible in an action on the note to prove fraud. *Coal & Iron Co.* v. *Willing,* 180 Pa. 165.

Mistake.— Parol evidence is admissible to show that a clause was inserted by mistake. *Hamilton* v. *Asslin,* 14 S. & R. 448; *Mehaffy* v. *Share,* 2 P. & W. 361; *Finney's Appeal,* 59 Pa. 398; *Insurance Co.* v. *Webster,* 59 Pa. 227; *Schotte* v. *Meredith,* 192 Pa. 159.

Parol evidence is admissible to show a term of the contract omitted by mistake. *Hyndman* v. *Hogsett,* 111 Pa. 643; *Schotte* v. *Meredith,* 197 Pa. 496.

Mortgages.— An absolute deed may be shown by parol to be a mortgage. *Maffitt* v. *Rynd,* 69 Pa. 380; *Sweetzer's Appeal,* 71 Pa. 264; *Danzeisen's Appeal,* 73 Pa. 65; *Ballentine* v. *White,* 77 Pa. 20; *Brown* v. *Nickle,* 6 Pa. 390; *Kunkle* v. *Wolfersberger,* 6 Watts, 126. As to proving a trust, see *Zimmerman* v. *Barber,* 176 Pa. 1.

Contemporaneous parol agreement not provable.— *Streator* v. *Paxton,* 201 Pa. 135; *Baker* v. *Flick,* 200 Pa. 13; *Melcher* v. *Hill,* 194 Pa. 440; *Irwin* v. *Irwin,* 169 Pa. 529; *Hunter* v. *McHose,* 100 Pa. 38; *Car Mfg. Co.* v. *Lumber Co.,* 99 Pa. 605; *Callan* v. *Lukens,* 89 Pa. 134; *Chartiers R. Co.* v. *Hodgens,* 85 Pa. 501.

Parol evidence admitted to prove a contemporaneous oral agreement which induced the execution of the written contract, even though its effect is to vary the writing. *Sutch's Estate (No. 1),* 201 Pa. 305.

Understanding of the parties.— What one understood at the time cannot be introduced to vary the terms of a written contract. *Bartley* v. *Phillips,* 179 Pa. 175.

As against a corporation the minutes of the board of directors are conclusive, and the parol understanding of individual directors cannot be shown. *McGowan* v. *Consolidated Co.,* 181 Pa. 55.

A contract provides that a dam shall be built "in a good and substantial manner." The understanding of the parties may be shown. *Quigley* v. *De Haas*, 98 Pa. 292.

Negotiations and declarations.— Conversations and declarations of the parties are not provable. *Wallace* v. *Baker*, 1 Binn. 610; *Reichart* v. *Castator*, 5 Binn. 109; *Christine* v. *Whitehill*, 16 S. & R. 98; *Ellmaker* v. *Insurance Co.*, 5 Pa. 183; *Yaryan Co.* v. *Glue Co.*, 180 Pa. 480. Negotiations leading up to the contract are admissible only to prove fraud or trust. *McGinity* v. *McGinity*, 63 Pa. 38. Subsequent declarations are admissible only to corroborate. *Rearick* v. *Rearick*, 15 Pa. 66; *Wager* v. *Chew*, 15 Pa. 323.

Bills and notes.— *Heydt* v. *Frey*, 13 Atl. 475; *Bank* v. *Stadelman*, 153 Pa. 634; *Allen* v. *Clarke*, 132 Pa. 40; *Hauer* v. *Patterson*, 84 Pa. 274; *Temple* v. *Baker*, 125 Pa. 634.

Not admissible to show that a note was to be renewable at maturity. *Anspach* v. *Bast*, 52 Pa. 356; *Hacker* v. *Refining Co.*, 73 Pa. 93; *Wharton* v. *Douglass*, 76 Pa. 273.

Parol evidence allowed to show that one of several joint makers of a note was in reality a mere surety. *Miller* v. *Stem*, 2 Pa. 286.

Receipts.— A mere acknowledgment of payment may be explained or contradicted by parol. *Batdorf* v. *Albert*, 59 Pa. 59; *Shoemaker* v. *Stiles*, 102 Pa. 549; *Jessop* v. *Ivory*, 172 Pa. 44; *Borlin* v. *Highberger*, 104 Pa. 143; *Shepherd* v. *Busch*, 154 Pa. 149; *Haverly* v. *Railway Co.*, 125 Pa. 116; *Mason Fruit-Jar Co.* v. *Smucker*, 174 Pa. 87; *Atkins* v. *Payne*, 190 Pa. 5; *Sargeant* v. *Insurance Co.*, 189 Pa. 341; *Berryghill's Appeal*, 35 Pa. 245.

Parol evidence is admissible to show that a note was taken as collateral security only and not in full settlement, even though a receipt in full was given. *Trymby* v. *Andress*, 175 Pa. 6; *Shepherd* v. *Busch*, 154 Pa. 149.

When a receipt is a part of a written contract it cannot be varied by parol. *Wood* v. *Donahue*, 94 Pa. 128; *Jessop* v. *Ivory*, 172 Pa. 44.

Acknowledgment of payment in a contract for the conveyance of land is not conclusive of the fact of payment. *Watson* v. *Blaine*, 12 S. & R. 131.

A receipt is *prima facie* evidence of payment as stated. *Barclay* v. *Morrison*, 16 S. & R. 129; *Hamsher* v. *Kline*, 57 Pa. 397.

A receipt in full is not conclusive of a settlement. *Horton's Appeal*, 38 Pa. 294; *Hamsher* v. *Kline*, 57 Pa. 397.

Receipt in full may act as an estoppel as against third parties. *Ebert* v. *Johns*, 206 Pa. 395.

Acknowledgment of payment in a deed is not conclusive of payment. *Hamilton* v. *McGuire*, 3 S. & R. 355; *Weigley* v. *Weir*, 7 S. & R. 309. Nor is it conclusive as to the amount paid. *Strawbridge* v. *Cartledge*, 7 W. & S. 394.

Bills of lading.— Bill of lading not to be varied by parol. *Keller* v. *B. & O. R. Co.*, 196 Pa. 57.

A bill of lading is not such a contract that omitted provisions may not be supplied by parol. *Steamboat Co.* v. *Brown*, 54 Pa. 77.

Records.— Contents of a judgment record cannot be proved by parol. *Walsh* v. *Watrous*, 2 Law T. (N. S.) 7.

A record cannot be contradicted by parol. *Hoffman* v. *Coster*, 2 Whart. 453; *Graham* v. *Smith*, 25 Pa. 323. But a record may be impeached for fraud. *Thorne* v. *Insurance Co.*, 80 Pa. 15.

Contract on its face incomplete.— Where a writing does not purport to represent all the terms of a contract, those not appearing may be proved by parol. *Schwab* v. *Ginkinger*, 181 Pa. 8; *Selig* v. *Rehfuss*, 195 Pa. 200; *Dickson* v. *Hartman Mfg. Co.*, 179 Pa. 343.

Condition precedent.— *Keener* v. *Crago*, 81 Pa. 166; *Cullmans* v. *Lindsay*, 114 Pa. 170.

Waiver.— A parol waiver of a written agreement may be proved. *Hyde* v. *Kiehl*, 183 Pa. 414.

Substituted and subsequent contracts.— A written contract may be rescinded by parol and a new one substituted for it. *Harrold* v. *McDonald*, 194 Pa. 359; *Beatty* v. *Larzelere*, 194 Pa. 605; *Machine Co.* v. *Coal Co.*, 204 Pa. 177.

A subsequent independent contract may be proved even though it vary or contradict a writing. *Whitney* v. *Shippen*, 89 Pa. 22; *Heilman* v. *Weinman*, 139 Pa. 143; *Holloway* v. *Frick*, 149 Pa. 178.

A subsequent parol agreement with different subject-matter may be proved. *Collins* v. *Barnes*, 83 Pa. 15.

The subsequent agreement requires a new consideration. *Malone* v. *Dougherty*, 79 Pa. 46.

Payment.— Payment may be proved by parol. *Fowler* v. *Smith*, 153 Pa. 639.

Date.— The real time when a deed was executed may be shown. *Geiss* v. *Odenheimer*, 4 Yeates, 278.

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;[21] 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.[22]

(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.[23]

(4) In order to ascertain the relation of the words of a refers, or may probably have been intended to refer,[24] or which identifies any person or thing mentioned in it.[25]

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* See Note XXXIII.

21 Illustrations (*a*) (*b*) (*c*).

22 Illustration (*a*).

23 Illustrations (*e*) and (*f*).

24 See all the Illustrations.

25 Illustration (*g*).

Such facts are hereinafter called the circumstances of the case.[26]

(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.[27]

(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.[28]

(7) If the document applies in part but not with accuracy or 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 equally well 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 as to his habitual use of language or names for particular persons or things.[29]

26 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*, 1876, 3 Ch. Div. 134, 142.

27 Illustration (*h*).

28 Illustration (*i*).

29 Illustrations (*k*) (*l*) (*m*).

(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.[30]

(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.[31]

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.[32]

(*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 weighting 2 cwt.[33]

(*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.[34]

(*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."[35]

(*e*) A leaves an estate to K, L, M, &c., by a will dated before 1838. Eight years afterwards A declares that by these letters he meant particular persons. Evidence of this declaration is not admissible. Proof

30 Illustrations (*n*) (*o*).

31 Illustration (*p*).

32 *Smith* v. *Wilson*, 1832, 3 B. & Ad. 728.

33 *Gorrissen* v. *Perrin*, 1857, 2 C. B. (N. S.) 681.

34 *Goblet* v. *Beechey*, 1831, 3 Sim. 24; 2 Russ. & Myl. 624.

35 *Blackett* v. *Royal Exchange Co.*, 1832, 2 C. & J. 244.

that A was in the habit of calling a particular person M would have been admissible.[36]

(*f*) A leaves a legacy to ——. Evidence to show how the blank was intended to be filled is not admissible.[37]

(*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.[38]

(*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.[39]

(*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.[40]

(*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, and the testatrix used to call them Bowden. Evidence of these facts was admitted.[41]

(*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.[42]

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[36] *Clayton* v. *Lord Nugent*, 1844, 13 M. & W. 200: see 207–8.

[37] *Baylis* v. *A. G.*, 1741, 2 Atk. 239. In *In re Bacon's Will, Camp* v. *Coe*, 1886, 31 Ch. Div. 460, blanks were left in a will, and parol evidence was admitted to rebut any presumption arising from them against the *primâ facie* claim of the executor to the residue undisposed of.

[38] *Shore* v. *Wilson*, 1842, 9 C. & F. 356. 365 *et seq.*

[39] Wig. Ext. Ev. pp. 18 and 19, and note of cases.

[40] *Miller* v. *Travers*, 1832, 8 Bing. 244.

[41] *Lee* v. *Pain*, 1845, 4 Hare, 251–3.

[42] *Doe* v. *Hiscocks*, 1839, 5 M. & W. 363. Cf. *In re Fish, Ingram* v. *Rayner*, [1894], 2 Ch. D. 83, where F devised property to his niece,

(*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.[43]

(*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.[44]

(*n*) A devises one house to George Gord the son of George Gord, another to George Gord the son of John Gord, and a third to George Gord the son of Gord. Evidence both of the circumstances and of the testator's statements of intention may be given to show which of the two George Gords he meant.[45]

(*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.[46]

(*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, but the legatee may show, either by proof of surrounding circumstances, or of declarations by the testator that they were.[47]

E W. He had no niece so named, but had two grand-nieces of that name, one legitimate, the other illegitimate; evidence of the surrounding circumstances tending to show that the illegitimate niece was meant was not admitted.

[43] *Ryall* v. *Hannam*, 1847, 10 Beav. 536.

[44] *Stringer* v. *Gardiner*, 1859, 27 Beav. 35; 4 De G. & J. 468.

[45] *Doe* v. *Needs*, 1836, 2 M. & W. 129.

[46] *In the goods of de Rosaz*, 1877, L. R. 2 P. D. 66.

[47] *Per* Leach, V.C. in *Hurst* v. *Leach*, 1821, 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*, 1841, 1 Dru. & War. 94, 111–133. See, too, *Jenner* v. *Hinch*, 1879, 5 Prob. Div. 106.

AMERICAN NOTE.

General.

Authorities.— 1 Greenleaf on Evidence (15th ed.), sec. 275 *et seq.;* 17 Am. & Eng. Encyclopædia of Law (2d ed.), p. 1 *et seq.;* 1st ed., vol. 17, p. 419 *et seq.*

Actual intention.— The actual intention cannot be shown by parol evidence. *Pingry* v. *Watkins,* 17 Vt. 379; *Kelley* v. *Kelley,* 25 Pa. St. 406; *Palmer* v. *Albee,* 50 Ia. 429; *Taylor* v. *Morris,* 90 N. C. 614; *Marshall* v. *Haney,* 4 Md. 498, 59 Am. Dec. 92; *Crooks* v. *Whitford,* 47 Mich. 283; *Adams* v. *Morgan,* 150 Mass. 143.

Identifying persons and things.—*Aldrich* v. *Gaskill,* 10 Cush. (Mass.) 55; *Melcher* v. *Chase,* 105 Mass. 125; *Cleverly* v. *Cleverly,* 124 Mass. 314; *Bergin* v. *Williams,* 138 Mass. 544; *Scanlon* v. *Wright,* 13 Pick. (Mass.) 523; *Peabody* v. *Brown,* 10 Gray (Mass.) 45; *Kingsford* v. *Hood,* 105 Mass. 495; *Simpson* v. *Dix,* 131 Mass. 179; *Watson* v. *New Milford,* 72 Conn. 565.

E W and E W, Junior, father and son, lived in the same town. The latter bought a piece of land, and received a deed of it, drawn to E W. Held, that he could show that it was intended to be made to himself — E W, Junior, both because the ambiguity, arising by parol, could be explained by parol, and because the deed would otherwise be inoperative for want of delivery. *Coit* v. *Starkweather,* 8 Conn. 294.

Under the rule which admits parol evidence in cases of ambiguity, to aid in the construction of a will, it is necessary that the words of the will should describe accurately the subject or object of the gift, and that the parol evidence should go only to show which of certain properly-described subjects or objects was intended. *Fairfield* v. *Lawson,* 50 Conn. 510.

Meaning of words, etc.— *McDonough* v. *Jolly,* 165 Pa. St. 542; *Converse* v. *Wead,* 142 Ill. 132; *Walrath* v. *Whittekind,* 26 Kan. 482; *Confederate Note Case,* 19 Wall. 548; *Sloops* v. *Smith,* 100 Mass. 63, 66, 1 Am. Rep. 857.

The meaning of a term in a certain business may be shown by parol evidence. *Parker* v. *Selden,* 69 Conn. 552; *Fuller* v. *Metropolitan Life Ins. Co.,* 70 Conn. 647.

The parties had entered into a written contract which provided that one of them should "work" a certain street, and the alleged breach of this agreement formed one of the claims submitted to the

arbitrators. Held, that parol evidence was admissible to show the special meaning of this term as understood by the parties at the time of making the contract; and that such evidence was not limited to expert testimony. *In re Curtis-Castle Arbitration,* 64 Conn. 514, 515.

A note payable "in cotton yarn, at the wholesale factory prices," may be explained by evidence that, by the usage of manufacturers and dealers in cotton yarn, the term "wholesale factory prices" means a different scale of prices from the actual market wholesale prices. *Avery* v. *Stewart,* 2 Conn. 73.

Surrounding circumstances.—*Reed* v. *Ins. Co.,* 95 U. S. 23; *Gilmor's Estate,* 154 Pa. St. 523; *Perry* v. *Bowman,* 151 Ill. 25; *Andrews* v. *Dyer,* 81 Me. 104: *Barry* v. *Bennett,* 7 Metc. (Mass.) 354; *Hurley* v. *Brown,* 98 Mass. 545; *Russell* v. *Lathrop,* 117 Mass. 424.

It is a familiar rule that a deed shall, if possible, be so construed as to effectuate the intention. In arriving at that intention it is always admissible to consider the situation of the parties and the circumstances, and every part of the writing should be considered with the help of that evidence. *Bartholomew* v. *Muzzy,* 61 Conn. 393.

The defendant offered evidence of a conversation between the agent of the plaintiffs and himself before a certain written agreement was made, as to the kind and nature of employment to be given him under the agreement. Held, that, so far as the evidence went to contradict, add to or vary the written agreement it was inadmissible, but that it was admissible so far as it tended to show the surrounding circumstances at the time the agreement was made. *Excelsior Needle Co.* v. *Smith,* 61 Conn. 59.

Indefiniteness as to object intended.— Where the grantor in a deed described the premises as the farm on which he then dwelt, held, that parol evidence was admissible to show that at that time a certain parcel of land subsequently claimed by the grantee, as parcel of the farm, was uncultivated and uninclosed, and divided from the farm by a highway, and that the grantor ever retained the exclusive possession of it. *Doolittle* v. *Blakesley,* 4 Day (Conn.), 272, 465. See *Bennett* v. *Pierce,* 28 Conn. 315.

More proper meaning of language.—*Appeal of Washington & Lee Univ.,* 111 Pa. St. 572; *Covert* v. *Sebern,* 73 Ia. 564; *Thornell* v. *Brockton,* 141 Mass. 157; *Hatch* v. *Douglas,* 48 Conn. 110, 40 Am. Rep. 154; *First Society* v. *Platt,* 12 Conn. 88; *Bulkley* v. *Chapman,*

9 Conn. 8; *Mullen* v. *Reed,* 64 Conn. 248; *Davies* v. *Davies,* 55 Conn. 319.

Ambiguities.— *Bradley* v. *Rees.* 113 Ill. 327; *Morgan* v. *Burrows,* 45 Wis. 211; *Goff* v. *Roberts,* 72 Mo. 570; *Pfeifer* v. *Nat. Ins. Co.,* 62 Minn. 536.

Parol evidence of intention is inadmissible to explain a contract ambiguous on its face. *Brown* v. *Slater,* 16 Conn. 196.

A latent ambiguity, that is, an ambiguity arising from extrinsic evidence, may be removed by extrinsic evidence. *Bristol* v. *Ontario Orphan Asylum,* 60 Conn. 477.

Practical construction.— The practical construction by the parties can be shown. *Dist. of Columbia* v. *Gallaher,* 124 U. S. 505; *Hosmer* v. *McDonald,* 80 Wis. 54; *Howard* v. *Fessenden,* 14 Allen (Mass.), 124; *Stevenson* v. *Erskine,* 99 Mass. 367; *Morris* v. *French,* 106 Mass. 326; *Lovejoy* v. *Lovett,* 124 Mass. 270; *Carney* v. *Hennessey,* 74 Conn. 107, 49 Atl. 910; *Hamilton* v. *Dennison,* 56 Conn. 368; *Bray* v. *Loomer,* 61 Conn. 464.

Technical terms, special significations, figures, marks, etc.— *Fowler* v. *Ætna Fire Insurance Co.,* 7 Wend. 270; *Dow* v. *Whetten,* 8 Wend. 160; *Collender* v. *Dinsmore,* 64 Barb. 457, 55 N. Y. 200; *Sturm* v. *Williams,* 6 J. & S. 325; *Coit* v. *Commercial Insurance Co.,* 7 Johns. 385; *Bend* v. *Georgia Insurance Co.,* 1 N. Y. Leg. Obs. 12; *Sleght* v. *Hartshorne,* 2 Johns. 531, reversing 1 Johns. 192; *Astor* v. *Union Insurance Co.,* 7 Cow. 202; *Dana* v. *Fiedler,* 12 N. Y. 40, 1 E. D. Smith, 463; *Collender* v. *Dinsmore,* 55 N. Y. 200, 64 Barb. 457; *Dickinson* v. *Water Commissioners,* 2 Hun, 615, 5 S. C. 185; *Nelson* v. *Sun Mutual Insurance Co.,* 71 N. Y. 453; *Storey* v. *Salomon,* 6 Daly, 531; *Silberman* v. *Clark,* 96 N. Y. 522; *Kennedy* v. *Porter,* 109 N. Y. 526; *Campbell Printing Press, etc., Co.* v. *Walker,* 1 N. Y. St. R. 200, 114 N. Y. 7, 22 N. Y. St. R. 173, affirming 9 N. Y. St. R. 722; *Newhall* v. *Appleton,* 114 N. Y. 140, 22 N. Y. St. R. 670; *Smith* v. *Clews,* 114 N. Y. 140, 22 N. Y. St. R. 670; *Atkinson* v. *Truesdell,* 127 N. Y. 230, 38 N. Y. St. R. 159, affirming 25 N. Y. St. R. 821, 6 N. Y. Supp. 509.

Abbreviations.— Abbreviations may be explained by parol. *Con. Ben. Assn.* v. *Loomis,* 142 Ill. 560; *Razor* v. *Razor,* 142 Ill. 375; *Converse* v. *Wead,* 142 Ill. 132.

The meaning of C O D may be shown by parol. *Adams Express Co.* v. *Lesem,* 39 Ill. 313.

The term "southeast 40" may be defined by parol evidence, where it is used in a deed. *Evans* v. *Gary,* 174 Ill. 595, 51 N. E. 615.

New Jersey.

Identity.— Identity may be proved by parol when there is a misnomer. *Youngs* v. *Sunderland*, 3 Green, 32.

Person or thing meant by a peculiar name. *Lanning* v. *Sisters*, 35 N. J. Eq. 392.

Parol evidence admissible to identify a note referred to in a writing. *Martin* v. *Bell*, 3 Harr. 167. Or to identify a legatee. *Evans* v. *Hays*, 3 N. J. Eq. 204. Or to identify the subject-matter. *Fitch* v. *Archibald*, 29 N. J. L. 160.

Parol evidence admitted to identify the demand which a mortgage was given to secure. *Tallman* v. *Wallack*, 54 N. J. Eq. 655.

Meaning of terms.— Business usage may be proved to give certain terms a special meaning. *Steward* v. *Scudder*, 4 Zab. 96; *Schenck* v. *Griffen*, 38 N. J. L. 463.

Oral evidence admissible to show that ordinary words are used in a special or technical sense. *Smith* v. *Lunger*, 64 N. J. L. 539.

Parol evidence admitted to explain the term "Domestic Missionary Society" in a will. *Van Nostrand* v. *Reformed Church*, 59 N. J. Eq. 19. And to identify the "Home Missionary Society." *Congregational Home Mis. Soc.* v. *Van Arsdale*, 58 N. J. Eq. 293.

Though a c ntract describes a sum of money as liquidated damages or as a penalty, the court is not bound by such description but will inquire as to the true facts of the case. *Whiteld* v. *Levy*, 35 N. J. L. 149; *Cheddick* v. *Marsh*, 1 Zab. 463; *Church* v. *Stockton*, 8 N. J. Eq. 520.

Doubtful meaning.— Parol evidence admissible to explain doubtful meaning. *Hartwell* v. *Camman*, 10 N. J. Eq. 128; *Suffern* v. *Butler*, 21 N. J. Eq. 410; *Wuesthoff* v. *Seymour*, 22 N. J. Eq. 66; *Leigh* v. *Savidge*, 14 N. J. Eq. 124.

Parol evidence admitted to show that time was of the essence, where the writing left the matter doubtful. *King* v. *Ruckman*, 20 N. J. Eq. 316, 21 N. J. Eq. 599.

Latent ambiguity.— Latent ambiguity defined. *Den.* v. *Cubberly*, 7 Hal. 308.

Latent ambiguity explainable by parol. *Den.* v. *Cubberly*, 7 Hal. 308; *Jackson* v. *Perrine*, 35 N. J. L. 137; *Axford* v. *Meeks*, 59 N. J. L. 502.

Patent ambiguity.— Parol evidence not admissible to explain a patent ambiguity. *Halsted* v. *Meeker*, 18 N. J. Eq. 136; *Carr* v. *Land Co.*, 22 N. J. Eq. 85; *S. C.*, 19 N. J. Eq. 424.

"Circumstances of the case."— To put the court in the position of the testator and enable it to understand the language of his will, the situation and circumstances of the testator may be shown by parol. *Barnard* v. *Barlow*, 50 N. J. Eq. 131; reversed, *Barlow* v. *Barnard*, 51 N. J. Eq. 620.

To arrive at the intention of the parties, the circumstances surrounding the execution of a contract may be proved. *Crane* v. *Bonnell*, 2 N. J. Eq. 264; *Morris Canal Co.* v. *Matthieson*, 3 N. J. Eq. 385; *Horner* v. *Leeds*, 25 N. J. L. 106; *Havens* v. *Thompson*, 26 N. J. Eq. 383.

The object for which a written instrument was made may be shown by parol; for example, that a bond and mortgage were given as mere collateral security and not to merge the prior account. *Van Vliet* v. *Jones*, 20 N. J. L. 340.

Parol evidence admissible to explain how an instrument was executed. *Willis* v. *Fernald*, 33 N. J. L. 207.

Illustration (e).— *Beatty* v. *Trustees*, 39 N. J. Eq. 452.

Paragraph 7.— *Griscom* v. *Evans*, 40 N. J. L. 402, 42 N. J. L. 579.

Paragraph 9.— *Van Houten* v. *Post*, 33 N. J. Eq. 344.

Partnership.— *Voorhees* v. *Jones*, 29 N. J. L. 270.

Maryland.

Surrounding circumstances.— The surrounding circumstances may be proved to throw light on the intention of the parties. *Bank* v. *Gerke*, 68 Md. 449.

A written acknowledgment of an indebtedness may be explained by proof of the nature of the transaction out of which it arose. *Barger* v. *Collins*, 7 H. & J. 213.

Independent and collateral facts may be shown by parol to aid in the interpretation of a writing. *Bladen* v. *Wells*, 30 Md. 577; *Stockham* v. *Stockham*, 32 Md. 196.

The method of making a contract may be proved to aid in its interpretation. *Phœnix Ins. Co.* v. *Ryland*, 69 Md. 437.

Identifying subject-matter.— Parol evidence not contradicting or varying a writing, but explaining obscurity and identifying subject-matter is admissible. *Criss* v. *Withers*, 26 Md. 553; *Fryer* v. *Patrick*, 42 Md. 51; *Warfield* v. *Boothe*, 33 Md. 63.

The subject-matter of a will may be identified by parol. *Chase* v. *Stockett*, 72 Md. 235.

Parol evidence is admissible to make certain the parties or the subject-matter. *Rice* v. *Forsyth*, 41 Md. 389; *Dorsey* v. *Eagle*, 7 G. & J. 321.

Practical construction by the parties.— Acts of one party showing his understanding of a contract are not admissible as against the other party. *Stockham* v. *Stockham*, 32 Md. 196.

Explanation of terms.— Where three "cargoes" of phosphate were sold, it may be shown by parol that a certain number of tons formed the average cargo in that trade. *Pinckney* v. *Dambman*, 72 Md. 173.

A word may be shown to have a special meaning in a certain trade. *Susquehanna Fer. Co.* v. *White*, 66 Md. 444.

Latent ambiguities.— An ambiguity which is latent may be explained by parol. *Stockham* v. *Stockham*, 32 Md. 196; *Rice* v. *Forsyth*, 41 Md. 389; *Dorsey* v. *Eagle*, 7 G. & J. 321; *Mitchell* v. *Mitchell's Lessee*, 6 Md. 224.

Latent ambiguity defined. *Marshall* v. *Haney*, 4 Md. 498.

The intention of a testator cannot be shown by parol except to explain a latent ambiguity. *Brome* v. *Pembroke*, 66 Md. 193; *Zimmerman* v. *Hafer*, 81 Md. 347.

Patent ambiguities.— A patent ambiguity is one apparent on the face of the instrument and generally cannot be explained by parol. *Marshall* v. *Haney*, 4 Md. 498; *Newcomer* v. *Kline*, 11 G. & J. 498; *Clarke* v. *Lancaster*, 36 Md. 196; *Castleman* v. *Du Val*, 89 Md. 657.

Actual intention.— The actual intention cannot be shown by parol evidence. *Marshall* v. *Haney*, 4 Md. 498, 59 Am. Dec. 92.

In construing a municipal resolution, parol evidence of the intention of the members of the council is not admissible. *Hagerstown* v. *Startzman*, 93 Md. 606.

A contract partly written and partly oral is for the jury. *Roberts* v. *Bonaparte*, 73 Md. 191.

Pennsylvania.

Actual intention.— Where the terms of the writing are clear and unambiguous, the intention of the parties must be drawn from the writing alone. *Heagy* v. *Umberger*, 10 S. & R. 339; *Patterson* v. *Forry*, 2 Pa. 456; *Hancock's Appeal*, 34 Pa. 155; *Kennedy* v. *Road Co.*, 25 Pa. 224; *Druckenmiller* v. *Young*, 27 Pa. 97; *Albert* v. *Ziegler*, 29 Pa. 50; *Fisher* v. *Deibert*, 54 Pa. 460; *Kirk* v. *Hartman*, 63 Pa. 97; *Kelley* v. *Kelley*, 25 Pa. 406.

Identity of persons and things.— Parol evidence is admissible to identify the subject-matter and apply the writing to it. *Appeal of Morris*, 88 Pa. 368; *Brownfield* v. *Brownfield*, 20 Pa. 55; *Peart* v. *Brice*, 152 Pa. 277; *Palmer* v. *Farrell*, 129 Pa. 162; *Jackson* v. *Litch*, 62 Pa. 451; *McDermott* v. *Hoffman*, 70 Pa. 31; *Barnhart* v. *Riddle*, 29 Pa. 92.

The locality and identity of the subject-matter may be shown by parol evidence. *Bertsch* v. *Lehigh C. & N. Co.*, 4 Rawle, 130; *Nixon* v. *McCallmont*, 6 W. & S. 159; *Gould* v. *Lee*, 55 Pa. 99; *Clarke* v. *Adams*, 83 Pa. 309.

Parol evidence admitted to show that testator in saying "Foreign Missionary Society" meant the one connected with a certain church. *Amberson's Estate*, 204 Pa. 397.

References made to extrinsic matters may be explained. *Monoc. Bridge Co.* v. *American Iron Bridge Mfg. Co.*, 83 Pa. 517.

An insurance policy covered a "barn including sheds and additions attached." This is explainable by parol. *Cummins* v. *Insurance Co.*, 197 Pa. 61.

Surrounding circumstances.— Parol testimony of the surrounding circumstances is admissible to aid in the interpretation. *Douthett* v. *Gas Co.*, 202 Pa. 416; *Gilmore's Appeal*, 154 Pa. 523.

Conversations and circumstances may be proved to explain ambiguities. *Miller* v. *Fichthorn*, 31 Pa. 252; *Foster* v. *McGraw*, 64 Pa. 464; *Caley* v. *Railway Co.*, 80 Pa. 363.

The purpose for which a writing was made may be shown. *Appeal of Sweetzer*, 71 Pa. 364.

Meaning of words, etc.— *McDonough* v. *Jolly*, 165 Pa. 542; *Conestoga Co.* v. *Finke*, 144 Pa. 159.

Parol evidence is admissible to explain the term "due diligence." *Bartley* v. *Phillips*, 165 Pa. 325.

The word "colliery" explained by parol. *Carey* v. *Bright*, 58 Pa. 70.

Expert testimony admitted as to the meaning of technical terms. *Miller* v. *Railway Co.*, 179 Pa. 350.

Abbreviations.— The abbreviations in a bank-book may be explained. *Wingate* v. *Bank*, 10 Pa. 104.

More proper meaning of language.— *Appeal of Washington & Lee Univ.*, 111 Pa. 572.

Paragraph (6).— *Best* v. *Hammond*, 55 Pa. 409.

Paragraph (9).— *Bank* v. *Fordyce*, 9 Pa. 275.

Agency.— One may show by parol that he contracted as agent for another. *Hubbert* v. *Borden*, 6 Whart. 79.

It may be shown by parol that one who signed a lease did not actually sign as landlord although the lease represents him to be such. *Swint* v. *Oil Co.*, 184 Pa. 202.

Ambiguity in general.— Parol evidence admissible. *Work* v. *Grier*, Add. 372; *Grier* v. *Huston*, 8 S. & R. 402; *Eckel* v. *Jones*, 8 Pa. 501; *Caley* v. *Railroad Co.*, 80 Pa. 363; *Shoemaker* v. *Ballard*, 15 Pa. 92.

Where a contract incorporates a bill of items and also certain plans and specifications, and the latter are in part contradictory to the former, it may be shown by parol which paper was intended to control. *Kendig* v. *Roberts*, 187 Pa. 339.

Patent ambiguities.— Patent ambiguity is not explainable by parol. *Wright* v. *Wright*, 2 Watts, 89. But see *Selden* v. *Williams*, 9 Watts, 9.

Latent ambiguities.— *Place* v. *Proctor*, 2 Penny. 264; *Mutual Ins. Co.* v. *Sailer*, 67 Pa. 108.

A latent ambiguity may be explained by parol. *Hetherington* v. *Clark*, 30 Pa. 393; *Mutual Ins. Co.* v. *Sailer*, 67 Pa. 108; *Coleman* v. *Eberly*, 76 Pa. 197.

For the jury.— Where an agreement is partly written and partly oral the construction of the whole is for the jury. *Philadelphia* v. *Stewart*, 201 Pa. 526. See also *Shafer* v. *Senseman*, 125 Pa. 310.

Written parts prevail over printed. *Haws* v. *Insurance Co.*, 130 Pa. 113.

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 is dependent upon the terms of a document in question. Any person other than a party to a document or his representative in interest

* See Note XXXIV.

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.

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.[48].

(*b*) The question is, whether A obtained money from B under false pretences. 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.[49]

AMERICAN NOTE.

General.

Authorities.— 1 Greenleaf on Evidence (15th ed.), sec. 279; 17 Am. & Eng. Encyclopædia of Law (1st ed.), p. 453 *et seq.*

Strangers to instrument.— *Bruce* v. *Roper Co.*, 87 Va. 381; *Needles* v. *Hanifan*, 11 Ill. App. 303; *Burns* v. *Thompson*, 91 Ind. 146; *Pfeifer* v. *Nat. Ins. Co.*, 62 Minn. 536, 538; *First Nat. Bank* v. *Dunn*, 55 N. J. L. 404; *Libby* v. *Mt. Monadnock, etc., Co.*, 47 N. H. 587, 32 Atl. 772; *Low* v. *Blodgett*, 21 N. H. 121; *Edgerly* v. *Emerson*, 23 N. H. 555, 55 Am. Dec. 207; *Furbush* v. *Goodwin*, 25 N. H. 425; *Woodman* v. *Eastman*, 10 N. H. 359; *Wilson* v. *Sullivan*, 58 N. H. 260; *Burnham* v. *Dorr*, 72 Me. 200. *Contra*, *McLellan* v. *Cumberland Bank*, 24 Me. 566; *Fonda* v. *Barton*, 63 Vt. 355, 22

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[48] *R.* v. *Cheadle*, 1832, 3 B. & Ad. 833.

[49] *R.* v. *Adamson*, 1843, 2 Moody, 286.

Atl. 594; *Shearer* v. *Babson*, 1 Allen (Mass.), 486; *Carpenter* v. *King*, 9 Metc. (Mass.), 511.

A stranger to a written instrument is not estopped by it from adducing parol testimony to prove a fraudulent operation of it upon his interests. *Reading* v. *Weston*, 8 Conn. 121.

The defendant offered to show an oral agreement between himself and the mortgagee, at the time the mortgage was given, that he, the defendant, should have the possession of the mortgaged premises until the mortgagee should demand possession. Held, that whatever force such agreement might have as between the immediate parties to it, the plaintiff, a stranger, could not be affected by it. *Downing* v. *Sullivan*, 64 Conn. 4.

The owner of a house, after having employed a broker to sell it, sold it himself to S, a person not sent by the broker. The broker, not being apprised of this, afterwards obtained an offer from B, of the same price for the property at which it had already been sold. This having been refused, and B having discovered the prior sale, he offered S $1,000 for his bargain, which was accepted, and the conveyance was made by the owner directly to B. In a suit by the broker for his commission,— Held, that the owner was not precluded, by the term of the deed, from showing by parol that B really purchased of S. *Hungerford* v. *Hicks*, 39 Conn. 264.

Collateral proceeding.— *Chapin* v. *Dobson*, 78 N. Y. 74; *Maddock* v. *Root*, 72 Hun, 98; affirmed in 150 N. Y. 561; *Bowen* v. *Bank of Newport*, 11 Hun, 226; *Engel* v. *Eastern Brewing Co.*, 19 Misc. Rep. 632, 44 N. Y. Supp. 391; *Sheely* v. *Cannon*, 17 Wkly. Dig. 159; *Adams* v. *Van Brunt*, 11 N. Y. St. R. 659; *Potter* v. *Weidman*, 20 Wkly. Dig. 110; *Lamphire* v. *Slaughter*, 61 How. Pr. 36.

New Jersey.

Strangers.— Rule applies only to parties and their privies. *Bank* v. *Dunn*, 55 N. J. L. 401.

Instrument only collaterally in issue.— Where the paper relates merely to some collateral fact and is not the subject of the action, parol evidence of its contents is admissible. *Gilbert* v. *Duncan*, 29 N. J. L. 133, 521; *West* v. *State*, 2 Zab. 212.

To show interest in a witness he may be asked on cross-examination as to the contents of a writing under which his interest arises. *Howell* v. *Ashmore*, 2 Zab. 261.

Parol evidence of interest in a witness is admissible, although written evidence exists. *Mayo* v. *Gray*, Pen. 837.

Maryland.

Third parties.— Strangers to an instrument may impeach it by parol. *Henderson* v. *Mayhew*, 2 Gill, 393.

Third parties may introduce oral evidence to prove the truth, though in variance with or in contradiction of a written instrument. *Grove* v. *Rentch*, 26 Md. 367.

One not a party to a written contract may prove a parol agreement between himself and one of the parties to such written contract in variance of its terms. *Fant* v. *Sprigg*, 50 Md. 551.

Instrument collateral to the issue.— The rule does not apply where an instrument is only collateral to the issue, and the parol evidence is not offered to impeach a title conferred by it or to alter or impair the rights existing under it. *Stewart* v. *State*, 2 H. & J. 114.

Pennsylvania.

The contents of a release not involved in the issue may be proved by parol. *Shoenberger* v. *Hackman*, 37 Pa. 87; *Scott* v. *Baker*, 37 Pa. 330.

A collateral fact recited in a contract may be proved by parol. *Gilmore* v. *Wilson*, 53 Pa. 194.

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]

AMERICAN NOTE.

(See also note to Article 95.)

General.

Authorities.— 5 Am. & Eng. Encyclopædia of Law (2d ed.), p. 23 *et seq.;* 1 Greenleaf on Evidence (15th ed.), sec. 74; *Clark* v. *Kingman,* 56 Ill. App. 360: *McCollister* v. *Yard,* 90 Ia. 621, 57 N. W. 447; *Com.* v. *Louisville & N. R. Co.,* 31 S. W. (Ky.) 473: *Wildey* v. *Crane,* 69 Mich. 17, 36 N. W. 734; *Mask* v. *Allen,* 17 South. (Miss.) 82:

The burden of proof is upon the party holding the affirmative of the issue. *Johnson* v. *Plowman,* 49 Barb. 472; *Swart-*

* See Note XXXV. † See Note XXXVI.

[1] 1 Ph. Ev. 552; Taylor, s. 364 (from Greenleaf); Best, ss. 265–6; Starkie, 585–6.

out v. *Ranier,* 143 N. Y. 499, 62 N. Y. St. R. 848, affirming 67 Hun, 241; *Colburn* v. *Marsh,* 68 Hun, 269, affirmed, on opinion below, in 144 N. Y. 657; *Grant* v. *Walsh,* 145 N. Y. 502, 65 N. Y. St. R. 370, reversing 81 Hun, 449; *Bryant* v. *Gay,* 88 Hun, 614, 68 N. Y. St. R. 687, affirmed in 153 N. Y. 655; *New York Security & Trust Co.* v. *Saratoga Gas & Electric Light Co.,* 88 Hun, 569, affirmed in 157 N. Y. 689. See 30 App. Div. 89, appeal dismissed in 156 N. Y. 645; *Caswell* v. *Hazard,* 47 N. Y. St. R. 356, 65 Hun, 620; *Dwyer* v. *Rorke,* 10 App. Div. 236, 41 N. Y. Supp. 721; *Continental National Bank* v. *Strauss,* 137 N. Y. 148, 50 N. Y. St. R. 208, affirming 43 N. Y. St. R. 68; *Hotopp* v. *Huber,* 16 App. Div. 327, affirming 18 Misc. Rep. 554, dismissal of appeal denied in 153 N. Y. 677; *Matter of Elmer,* 88 Hun, 290, 68 N. Y. St. R. 417; *Matter of Ryalls,* 74 Hun, 205, 56 N. Y. St. R. 291; *Matter of Ryalls,* 80 Hun, 459, 62 N. Y. St. R. 291; *Patterson Gas Governor Co.* v. *Glenby,* 4 Misc. Rep. 532, 54 N. Y. St. R. 119.

Burden on affirmative.—*Clark* v. *Kingman,* 56 Ill. App. 360; *Hinman* v. *Pope,* 1 Gilm. 131; *Martin* v. *Brewster,* 49 Ill. 306; *Union Nat. Bank* v. *Baldenwick,* 45 Ill. 375; *Watt* v. *Kirby,* 15 Ill. 200; *Ross* v. *Utter,* 15 Ill. 402; *Clark* v. *Kingman,* 56 Ill. App. 360; *Hanke* v. *Cobeskey,* 57 Ill. App. 267; *Harley* v. *Harley,* 67 Ill. App. 138; *Marshall* v. *Cunningham,* 13 Ill. 20; *Barnes* v. *People,* 18 Ill. 52; *Hudson* v. *Miller,* 97 Ill. App. 74 (trespass).

It is generally not necessary to prove a negative. *Graves* v. *Bruen,* 11 Ill. 431; *Indiana M. M. F. Ins. Co.* v. *People,* 65 Ill. App. 355.

But where one has conveyed his property to his wife, the burden of disproving fraud rests upon him. *Dillman* v. *Nadelhoffer,* 162 Ill. 625.

Where both parties have equal opportunity to prove a negative it must be established by the plaintiff. *G. W. R. R. Co.* v. *Bacon,* 30 Ill. 347.

One alleging undue influence must prove it. *Roe* v. *Taylor,* 45 Ill. 485.

The defendant may disprove what the plaintiff must prove. *Atkins* v. *Byrnes,* 71 Ill. 327; *Herrick* v. *Gary,* 83 Ill. 85.

One who charges a failure of duty must prove it. *C. & G. W. Ry. Co.* v. *Armstrong,* 62 Ill. App. 228.

The burden is upon the plaintiff to make out his case. *Kenyon* v. *Hampton,* 70 Ill. App. 80.

Intestacy is a fact to be proven. *Lyon* v. *Kain*, 36 Ill. 363.

The plaintiff must show want of probable cause in malicious prosecution. *Brown* v. *Smith*, 83 Ill. 291; *Angelo* v. *Fale*, 85 Ill. 106; *Anderson* v. *Friend*, 85 Ill. 135; *Comisky* v. *Breen*, 7 Brad. 369; *McFarland* v. *Washburn*, 14 Brad. 369; *Israel* v. *Brooks*, 23 Ill. 575; *Mitchinson* v. *Cross*, 58 Ill. 366; *Lawrence* v. *Hagerman*, 56 Ill. 68; *Lundmacher* v. *Block*, 39 Ill. App. 560.

In libel the plaintiff must prove malice. *Wharton* v. *Wright*, 30 Ill. App. 343, 348.

The burden of proof is on the one affirming the execution of the will. *Rigg* v. *Wilton*, 13 Ill. 15.

The ones who seek to establish a will must prove mental capacity. *Carpenter* v. *Calvert*, 83 Ill. 62; *Trish* v. *Newell*, 62 Ill. 196.

Where a joint liability is alleged, the burden is on the party alleging it to prove it. *Merchant* v. *Manion*, 97 Ill. App. 43.

Insanity must be proved by one alleging it. *Guild* v. *Hull*, 127 Ill. 533; *Perry* v. *Pearson*, 135 Ill. 218, 227; *Stevens* v. *Shannahan*, 160 Ill. 330.

In an action for personal injuries, the plaintiff must prove the negligence of the defendant. *Illinois Cent. R. R. Co.* v. *Hobbs*, 58 Ill. App. 130; *T. H. & I. R. R. Co.* v. *Eaggmann*, 58 Ill. App. 21.

One seeking to recover for an injury must prove that he used due care. *Werk* v. *Illinois S. Co.*, 54 Ill. App. 302.

The plaintiff in a contract action must prove defendant's promise. *Holmes* v. *Stummel*, 24 Ill. 370; *Wells* v. *Reynolds*, 3 Scam. 191; *Johnson* v. *Moulton*, 1 Scam. 532; *Roberts* v. *Garen*, 1 Scam. 396.

In a suit on a constable's bond, the plaintiff has the burden of proof. *Toborg* v. *Toborg*, 63 Ill. App. 426.

Where the defendant pleads contract, the burden of proof as to it is upon him. *Osgood* v. *Groseclose*, 159 Ill. 511.

One who seeks to establish a claim against an insolvent estate has the burden of proof. *Crandall* v. *Lumber Co.*, 164 Ill. 474.

Where one pleads license to land he has the burden of establishing it. *Chandler* v. *Smith*, 70 Ill. App. 658.

One who pleads in abatement has the burden of proof. *Schanzenbach* v. *Brough*, 58 Ill. App. 526.

Fraud is to be proved by the one who pleads it. *Muhlke* v. *Hegerness*, 56 Ill. App. 322; *Sawyer* v. *Nelson*, 59 Ill. App. 46; *Elgin, etc., Co.* v. *Elgin, etc., Co.*, 155 Ill. 127; *Hall* v. *Jarvis*, 65 Ill. 302; *Ross*

v. *Sutherland*, 81 Ill. 275; *Edey* v. *Fath*, 4 Brad. 275; *E. St. L. P. & P. Co.* v. *Hightower*, 9 Brad. 297.

A husband who conveys his property to his wife has the burden of showing that it was not fraudulent as to creditors. *Dillman* v. *Nadelhoffer*, 162 Ill. 625.

If fraud is set up as a defense it must be proved. *Lawrence* v. *Jarvis*, 32 Ill. 305; *Milk* v. *Moore*, 39 Ill. 584; *Stout* v. *Oliver*, 40 Ill. 245.

Decree of proof.— In order to obtain a judgment, the plaintiff must prove his case by a preponderance of evidence. *Dickenson* v. *Gray*, 72 Ill. App. 55; *M'Kensie* v. *Stretch*, 48 Ill. App. 410; *Mitchell* v. *Hindman*, 150 Ill. 538; *Shinn* v. *Mathney*, 48 Ill. App. 135; *Irwin* v. *Brown*, 145 Ill. 199; *C., P. & St. L. Ry. Co.* v. *Lewis*, 48 Ill. App. 274; *Smith* v. *Hays*, 23 Ill. App. 244; *P. & R. I. R. R. Co.* v. *Lane*, 83 Ill. 448; *Graves* v. *Coldwell*, 90 Ill. 612; *Herrick* v. *Gary*, 83 Ill. 85.

Unless the plaintiff has made out his case by a preponderance of evidence a judgment in his favor must be reversed. *Kenyon* v. *Hampton*, 70 Ill. App. 80.

The truth of the charge may be established in libel suits by a preponderance of evidence. Hurd's Rev. Stat., chap. 126, sec. 3, p. 1604.

A tort may be shown by a preponderance of evidence. *Hoener* v. *Koch*, 84 Ill. 408.

Fraud in inducing another to sign a note may be proved by a preponderance of evidence. *Kingman* v. *Reinemer*, 166 Ill. 208.

Preponderance does not depend necessarily upon the number of witnesses. *Gowen* v. *Kehoe*, 71 Ill. 66.

The word "preponderance" is defined in *N. C. St. Ry. Co.* v. *Louis*, 138 Ill. 9.

The plaintiff need not prove his case by a clear preponderance of evidence. *Taylor* v. *Felsing*, 164 Ill. 331.

The court need not instruct the jury in a civil case that the plaintiff must prove his case by a clear preponderance. *Gooch* v. *Tobias*, 29 Ill. App. 268; *Cartier* v. *Troy Lumber Co.*, 35 Ill. App. 449, 456. It is error to so charge. *Harnish* v. *Hicks*, 71 Ill. App. 551.

It is erroneous to charge the jury that the plaintiff must prove his own case by a preponderance of evidence, and must also disprove the issues presented by the defendant. *Schallman* v. *Royal Ins. Co.*, 94 Ill. App. 364.

As to degree of proof required in specific performance, see *Short* v. *Keiffer*, 142 Ill. 258.

Whether there is a preponderance of evidence is for the jury. *Weber Wag. Co.* v. *Kehl*, 40 Ill. App. 584, 587.

An instruction that a jury is to be satisfied is error. *Rolfe* v. *Rich*, 149 Ill. 436.

In a civil case, fraud may be proved by a preponderance of evidence. *Sherwood* v. *National Bank*, 17 Ill. App. 591, 593; *C., N. & St. P. Ry. Co.* v. *Kruger*, 124 Ill. 457; *Endsley* v. *Johns*, 120 Ill. 469, 475; *Brown* v. *Bierman*, 24 Ill. App. 574; *Orient Ins. Co.* v. *Weaver*, 22 Ill. App. 122.

Fraud must be proved clearly. *Coan* v. *Morrison*, 34 Ill. App. 352, 354; *Geneser* v. *Telgman*, 37 Ill. App. 374, 382; *Johnson* v. *Worthington*, 30 Ill. App. 617, 625; *Altmann* v. *Weir*, 34 Ill. App. 617.

The one alleging usury must prove it. *Telford* v. *Garrels*, 132 Ill. 550, 554.

The burden is upon the defendant in specific performance to show the subsequent change of contract. *Gray* v. *S. Car Mfg. Co.*, 127 Ill. 187, 199.

A gift *causa mortis* must be proved by clear evidence. *Woodburn* v. *Woodburn*, 23 Ill. App. 289.

The plaintiff in a civil action need not make out his case to the satisfaction of the jury. *Fernandes* v. *M'Ginnis*, 25 Ill. App. 165.

It is error to charge a jury that one must prove facts in a civil case to the satisfaction of the jury. *White* v. *Gale*, 14 Brad. 274; *Balohradsky* v. *Carlisle*, 14 Brad. 289; *Brent* v. *Brent*, 14 Brad. 256.

Proving a negative.— The burden of proof is sometimes upon the one holding the negative. *Boulden* v. *McIntire*, 119 Ind. 574; *Goodwin* v. *Smith*, 72 Ind. 173; *Carmel Natural Gas Co.* v. *Small*, 150 Ind. 427; *O'Kane* v. *Miller*, 3 Ind. App. 136; *Archibald* v. *Long*, 144 Ind. 451; *Castle* v. *Bell*, 145 Ind. 8; *City of New Albany* v. *Endres*, 143 Ind. 192; *Nash* v. *Hall*, 4 Ind. 444; *Hall* v. *Nash*, 11 Ind. 34.

When a right depends upon establishing a negative fact, the party asserting it must prove it. *O'Kane* v. *Miller*, 3 Ind. App. 136, 137; *New Albany* v. *Andres*, 143 Ind. 192; *Carmel Natural Gas Co.* v. *Small*, 150 Ind. 427; *Nash* v. *Hall*, 4 Ind. 444; *Hall* v. *Nash*, 11 Ind. 34; *Boulden* v. *McIntire*, 119 Ind. 574, 581.

Right to open and close.— The one who has the burden of proof has the right to open and close. *Ronyer* v. *Miller*, 16 Ind. App. 519; *Starnes* v. *Schofield*, 5 Ind. App. 4.

On plaintiff.— The plaintiff generally has the burden of proof. *Turner* v. *Cool*, 23 Ind. 56; *Zook* v. *Simonson*, 72 Ind. 83; *Toledo, etc., R. R. Co.* v. *Stithorn*, 16 Ind. 225; *Moore* v. *Allen*, 5 Ind. 521; *Hand* v. *Taylor*, 4 Ind. 409; *Levi* v. *Allen*, 15 Ind. App. 38; *Smith* v. *Downing*, 6 Ind. 374.

If the plaintiff must produce any proof he has the right to open and close. *Camp* v. *Brown*, 48 Ind. 575; *Fetters* v. *Muncie*, 34 Ind. 251; *Hyatt* v. *Clements*, 65 Ind. 12.

The right to open and close is not taken away from the plaintiff by filing an argumentative denial. *Rothrock* v. *Perkinson*, 61 Ind. 39.

If the plaintiff fail to prove some essential fact, and the defendant supplies the omission, it is sufficient. *Astley* v. *Carpon*, 89 Ind. 167, 175.

On defendant.— The defendant sometimes has the burden of proof. *Blackledge* v. *Pine*, 28 Ind. 466; *Cunningham* v. *Hoff*, 118 Ind. 263; *Hayes* v. *Fitch*, 47 Ind. 21; *Zook* v. *Simonson*, 72 Ind. 83.

The defendant has the burden of proving his affirmative defenses. *Baker* v. *Leathers*, 3 Ind. 558; *Peck* v. *Hunter*, 7 Ind. 295; *State* v. *Vincennes Univ.*, 5 Ind. 77; *Farbach* v. *State*, 24 Ind. 77; *Balke* v. *State*, 24 Ind. 85; *Tull* v. *David*, 17 Ind. 377; *Gaul* v. *Flemming*, 10 Ind. 253; *Smelser* v. *Wayne, etc., Co.*, 82 Ind. 417, 420. By a preponderance of the evidence. *Phenix Ins. Co.* v. *Pickel*, 119 Ind. 155, 163; *McLees* v. *Felt*, 11 Ind. 218.

An argumentative denial does not shift the burden of proof. *Bishop* v. *State ex rel.*, 83 Ind. 67, 74.

Under a general denial all the evidence need not be negative in character, but it must be negative in its effect. *Hess* v. *Union State Bank*, 156 Ind. 523.

When the plaintiff does not have to introduce any proof, the defendant has the burden of proof as to his affirmative defenses and may open and close. *Lindley* v. *Sullivan*, 133 Ind. 588; *Goodrich* v. *Friedersdorff*, 27 Ind. 308; *Indiana Board* v. *Gray*, 54 Ind. 91; *Judah* v. *Trustees*, 23 Ind. 272; *Shank* v. *Fleming*, 9 Ind. 189; *Hamlin* v. *Nesbit*, 37 Ind. 284; *Zehner* v. *Kepler*, 16 Ind. 290; *Donohoe* v. *Rich*, 2 Ind. App. 540. Compare *McCloskey* v. *Davis*, 8 Ind. App. 190.

The plaintiff has the burden of proving property in himself in replevin where he pleads that the goods are his property. *Noble* v. *Epperly*, 6 Ind. 414; *Turner* v. *Cool*, 23 Ind. 56.

The burden of proving payment is upon the defendant. *Clifford* v. *Smith*, 4 Ind. 377.

If the defendant pleads fraud or failure of consideration he has the burden of proof. *Towsey* v. *Shook*, 3 Blackf. 267; *Rogers* v. *Worth*, 4 Blackf. 186; *Thomas* v. *Quick*, 5 Blackf. 334; *Cook* v. *Cunningble*, 4 Ind. 221. Compare *Flack* v. *Cunningham*, 1 Blackf. 107; *Fisher* v. *Fisher*, 8 Ind. App. 665; *Tenbrook* v. *Brown*, 17 Ind. 410; *Stewart* v. *English*, 6 Ind. 176.

Or lack of capacity in a donor or testator. *Blough* v. *Parry*, 144 Ind. 463; *Teegarden* v. *Lewis*, 145 Ind. 98.

Or infancy. *Pitcher* v. *Laycock*, 7 Ind. 398.

The burden of proof is on the defendant in a cross-complaint. *Fitzgerald* v. *Goff*, 99 Ind. 28, 35.

On a counterclaim, the defendant has the right to open and close. *McCormick* v. *Gray*, 100 Ind. 285; *Schee* v. *McQuilken*, 59 Ind. 269.

In slander and libel, the defendant who justifies has the right to open and close. *Heilman* v. *Shanklin*, 60 Ind. 424.

Statutes.— Statutes which merely declare statutory presumptions affecting the burden of proof are valid. *Voght* v. *State*, 124 Ind. 358, 362.

As to burden of proof under section 2666, Burns, 1901, see *Archibald* v. *Long*, 144 Ind. 451.

Statutes changing the burden of proof are strictly construed. *White* v. *Flynn*, 23 Ind. 46.

New Jersey.

General authorities.— *Trenton Ins. Co.* v. *Johnson*, 4 Zab. 576; *American Ins. Co.* v. *Anderson*, 33 N. J. L. 151; *Kane* v. *Hibernia Ins. Co.*, 38 N. J. L. 441; *Winans* v. *Winans*, 19 N. J. Eq. 220; *Butts* v. *Hoboken*, 38 N. J. L. 391; *Feldman* v. *Gamble*, 26 N. J. Eq. 494; *Edwards* v. *Elliott*, 36 N. J. L. 449; *S. C.*, 21 Wall. 532; *Fischer* v. *Fischer*, 18 N. J. Eq. 300.

Burden of proving notice of an unrecorded deed is on the party alleging notice. *Coleman* v. *Barklew*, 27 N. J. L. 357; *Lewis* v. *Hall*, 7 N. J. Eq. 475; *Blair* v. *Ward*, 10 N. J. Eq. 119; *Holmes* v. *Stout*, 10 N. J. Eq. 419; *Vreeland* v. *Claflin*, 24 N. J. Eq. 313; *Buchanan* v. *Rowland*, 2 South. 732.

Burden of proving that the report of a master is erroneous is on the one excepting. *Bank* v. *Sprague*, 23 N. J. Eq. 81.

Burden of proving mental incapacity is on one alleging it. *Swayze* v. *Swayze*, 37 N. J. Eq. 180.

Burden may be on the defendant.— Burden of proving payment as a defense is on the defendant. *McKinney* v. *Slack*, 19 N. J. Eq. 164; *Smith* v. *Burnet*, 17 N. J. Eq. 40.

In trespass, if the defendant avers property in him the burden of proving it is on him. *Outcalt* v. *Durling*, 25 N. J. L. 443.

In suit by an assignee to foreclose a mortgage, the burden is on the defendant to prove that plaintiff was not a *bona fide* purchaser. *Danbury* v. *Robinson*, 14 N. J. Eq. 213.

Burden of proof in bastardy cases.— G. S. 1895, "Bastards," 19.

Maryland.

One alleging a contract sustains the burden of proving it by a preponderance of the evidence. *Ohlendorff* v. *Kaune*, 66 Md. 495.

Statutes.— Certificate of a judge made conclusive evidence of the sufficiency of articles of incorporation. P. G. L. 1888, art. 23, sec. 43.

Constable's receipt of a claim for collection made *prima facie* evidence against him in a suit on his bond. P. G. L. 1888, art. 20, sec. 20.

Protest of a bill or note made *prima facie* evidence. P. G. L. 1888, art. 13, sec. 6.

Pennsylvania.

Burden of proving a negative may be on the plaintiff. *Hunt* v. *Todd*, 18 Pa. 316.

One who alleges a breach of covenant must prove it affirmatively. *Chambers* v. *Jaynes*, 4 Pa. 39; *Hubbard* v. *Wheeler*, 17 Pa. 425; *Sartwell* v. *Wilcox*, 20 Pa. 117. Even though the party alleging it be the defendant. *Evans* v. *Fegely*, 67 Pa. 370.

The one alleging failure of consideration of a note must prove it. *Schneider* v. *Bechtold*, 3 Phila. 50.

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.

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.

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 loaded thereon by B without notice to A's captain. A must prove the absence of notice.[3]

(*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.[4]

AMERICAN NOTE.

General.

Authorities.— 2 Wharton on Evidence, sec. 1246; 2 Greenleaf on Evidence (15th ed.), secs. 408, note, 426, notes; *Childs* v. *Merrill,* 66 Vt. 302.

The presumption of innocence casts the burden of proving guilt

* See Note XXXVI.

[2] *Thurtell* v. *Beaumont*, 1823, 1 Bing. 339.

[3] *Williams* v. *East India Co.*, 1802, 3 Ea. 192, 198–9.

[4] *R.* v. *Twyning*, 1819, 2 B. & Ald. 386.

upon the State, but it does no more. While it calls for evidence from the State, it is not itself evidence for the accused. *State* v. *Smith*, 65 Conn. 283.

The court, where no requests were made by the prisoner, charged that it was incumbent upon the State to satisfy the jury beyond a reasonable doubt of the guilt of the accused, but omitted to say that the accused was presumed to be innocent until proven guilty, and omitted also to define "reasonable doubt." Held, that the defendant had no just ground for complaint. *State* v. *Smith*, 65 Conn. 283.

Where a husband is charged with cruelty or violence towards his wife, there is a legal presumption of his innocence, arising from their relation, and the mutual affection by which it is commonly accompanied. *State* v. *Green*, 35 Conn. 205.

Criminal cases.— *Miles* v. *U. S.*, 103 U. S. 304; *Nevling* v. *Com.*, 98 Pa. St. 322; *People* v. *Paulsell*, 115 Cal. 6; *Morgan* v. *State*, 48 O. St. 371; *Wade* v. *State*, 71 Ind. 535; *Jameson* v. *People*, 145 Ill. 357; *Porterfield* v. *Com.*, 91 Va. 801; *People* v. *Ezzo*, 104 Mich. 341; *Com.* v. *Goodwin*, 14 Gray (Mass.), 55; *Com.* v. *Kimball*, 24 Pick. (Mass.) 366; *Com.* v. *Hardiman*, 9 Gray (Mass.), 136; *Com.* v. *McKie*, 1 Gray (Mass.), 61; *State* v. *Schweitzer*, 57 Conn. 539; *Hoyt* v. *Danbury*, 69 Conn. 348.

Civil cases.— The rule in this country generally is that where crime is imputed in a civil case it is enough to prove it by preponderance of evidence. 2 Greenleaf on Evidence (15th ed.), secs. 408, note, 426, notes; *Baird* v. *Abbey*, 73 Mich. 347; *Smith* v. *Burns*, 106 Mo. 694; *Atlanta Journal* v. *Mayson*, 97 Ga. 640; *U. S. Express Co.* v. *Jenkins*, 73 Wis. 471; *Turner* v. *Hardin*, 80 Ia. 691; *Continental Ins. Co.* v. *Jachnichen*, 110 Ind. 59; *Lindley* v. *Lindley*, 68 Vt. 421; *Nelson* v. *Pierce*, 18 R. I. 539; *Mead* v. *Husted*, 52 Conn. 56; *Roberge* v. *Burnham*, 124 Mass. 277. *Contra* (following the general English rule), *Grimes* v. *Hilliary*, 150 Ill. 141; *Williams* v. *Dickenson*, 28 Fla. 90.

In an action brought on the statute to recover treble value for property feloniously taken, the court below held, that it was not enough for the plaintiff to produce evidence sufficient for a recovery in an ordinary civil action, but that he was bound to prove the felonious taking "beyond a reasonable doubt, in the same manner as in a criminal prosecution." Upon motion of the plaintiff, a new trial was granted. *Munson* v. *Atwood*, 30 Conn. 103–107.

Crime not in issue.—Last paragraph of text. *Colorado Coal Co.* v. *U. S.*, 123 U. S. 307; *Davis* v. *Davis*, 123 Mass. 590.

Presumption of innocence.— Such a presumption exists in all cases. *N. Y. & Brooklyn Ferry Co.* v. *Moore*, 18 Abb. N. C. 106, 102 N. Y. 667, 1 N. Y. St. R. 374, reversing 32 Hun, 29; *Green* v. *Crane*, 68 N. Y. Supp. 248, 57 App. Div. 9.

Preponderance defined.— Preponderance of evidence is the production of evidence by the plaintiff which when weighed with the opposing evidence has the greater convincing force and produces a greater probability in plaintiff's favor. *Hoffman* v. *Loud*, 111 Mich. 156. See also *Strand* v. *C. & W. M. Ry. Co.*, 67 Mich. 380, 34 N. W. 712.

New Jersey.

Authority.— *State* v. *Wilson*, Coxe, 439.

Criminal cases.— In criminal cases guilt must be proved beyond a reasonable doubt. *Gardner* v. *State*, 55 N. J. L. 17.

Reasonable doubt defined. *Donnelly* v. *State*, 26 N. J. L. 614.

In prosecutions for seduction the good repute of the prosecutrix for chastity must be established beyond a reasonable doubt. *State* v. *Brown*, 64 N. J. L. 414; *Zabriskie* v. *State*, 43 N. J. L. 646.

Insanity as a defense.— The State does not have the burden of proving sanity beyond a reasonable doubt. *Graves* v. *State*, 45 N. J. L. 203.

Burden of proving insanity is on the accused. The jury must be satisfied of the insanity beyond a reasonable doubt. *State* v. *Spencer*, 1 Zab. 197.

In civil cases.— The commission of a crime may be proved by a preponderance of the evidence. *Kane* v. *Hibernia Ins. Co.*, 39 N. J. L. 697; *Kentner* v. *Kline*, 41 N. J. Eq. 422.

Illustration (a).— Rule *contra*. *Kane* v. *Hibernia Ins. Co.*, 39 N. J. L. 697.

Civil case where more than mere preponderance required. *Cake* v. *Shull*, 45 N. J. Eq. 208. Reformation of a written instrument. *Green* v. *Stone*, 54 N. J. Eq. 387. Maintaining defense of usury. *Taylor* v. *Morris*, 22 N. J. Eq. 606. Said to require proof beyond a reasonable doubt. *Hupsch* v. *Resch*, 45 N. J. Eq. 657.

Proof of title by adverse possession required to be beyond a reasonable doubt. *Rowland* v. *Updyke*, 28 N. J. L. 101.

Divorce cases.— Adultery on the part of the defendant in divorce must be proved beyond a reasonable doubt. The court must be

satisfied. *Berckmans* v. *Berckmans*, 17 N. J. Eq. 453. The proof must be entitled to and command belief. *Clare* v. *Clare*, 19 N. J. Eq. 37.

Maryland.

Authorities.— *Corpus delicti* must be proved beyond a reasonable doubt. *Norwood* v. *State*, 45 Md. 68.

Criminality in criminal cases must be established to a moral certainty. *B. & O. R. Co.* v. *Shipley*, 39 Md. 251.

Civil cases.— Moral delinquency in civil cases must be proved by evidence admitting of practically no reasonable doubt. *Corner* v. *Pendleton*, 8 Md. 337.

Preponderance of the evidence is sufficient in civil cases. *McBee* v. *Fulton*, 47 Md. 403.

Proof required for reformation of a written instrument. *Insurance Co.* v. *Ryland*, 69 Md. 437.

Pennsylvania.

Criminal cases.— *Nevling* v. *Com.*, 98 Pa. 322.

Guilt must be proved beyond a reasonable doubt. *Com.* v. *Winnemore*, I Brewst. 356; *Com.* v. *Tack*, 1 Brewst. 511; *Com.* v. *Hanlon*, 8 Phila. 401; *Com.* v. *Irving*, 1 Leg. Chron. 69; *Com.* v. *Harman*, 4 Pa. 274; *Insurance Co.* v. *Usaw*, 112 Pa. 89; *McMeen* v. *Com.*, 114 Pa. 300; *Com.* v. *Cook*, 166 Pa. 193.

The *corpus delicti* need not be proved by "overwhelming proof," merely beyond a reasonable doubt. *Zell* v. *Com.*, 94 Pa. 258.

Defenses.— Burden of proving insanity by a fair preponderance of the evidence is on the accused. *Com.* v. *Wireback*, 190 Pa. 138; *Com.* v. *Bezek*, 168 Pa. 603; *Com.* v. *Heidler*, 191 Pa. 375; *Ortwein* v. *Com.*, 76 Pa. 414; *Lynch* v. *Com.*, 77 Pa. 205. But he need not prove it "beyond a reasonable doubt." *Meyers* v. *Com.*, 83 Pa. 131.

The same rule applies to an *alibi*. *Rudy* v. *Com.*, 128 Pa. 500.

Setting up an *alibi* as a defense does not change the burden of proof. *Fife* v. *Com.*, 29 Pa. 429; *Briceland* v. *Com.*, 74 Pa. 463.

In rape, the burden is on the defendant to show that the girl is not of good repute. *Com.* v. *Allen*, 135 Pa. 483.

Where defendant gives evidence showing self-defense, if he raises a reasonable doubt of guilt he should be acquitted. *Tiffany* v. *Com.*, 121 Pa. 165.

Proof of good character may raise a reasonable doubt of guilt. *Becker* v. *Com.*, 9 Atl. 510.

The doubt must be serious and substantial to justify acquittal. *Com.* v. *Harman*, 4 Pa. 274.

Definition of "reasonable doubt." *Com.* v. *Mudgett*, 174 Pa. 211.

In civil cases.— The commission of crime may be established by a mere preponderance of the evidence in civil cases. *Fire Ins. Co.* v. *Usaw*, 112 Pa. 80; *Braunschweiger* v. *Waits*, 179 Pa. 47.

Where a libelous article charges a crime, the presumption of innocence establishes *prima facie* the want of probable cause for publishing the charge. *Bryant* v. *Times*, 192 Pa. 585.

In action for alienation of a wife's affections, adultery need not be established beyond a reasonable doubt. *Sieber* v. *Pettit*, 200 Pa. 58.

Sometimes more than a mere preponderance of the evidence is required in civil cases; as in actions to reform a written instrument. *National Bank* v. *Hartman*, 147 Pa. 558. To set aside a written instrument for fraud. *Cummins* v. *Hurlbutt*, 92 Pa. 165. To attack the acknowledgment of a deed. *Lewars* v. *Weaver*, 121 Pa. 268.

To overcome presumption of payment raised by lapse of twenty years, the proof must be of a "satisfactory and convincing character." *Gregory* v. *Com.*, 121 Pa. 611.

Illustration (a).— Rule *contra*. *Somerset Co. Ins. Co.* v. *Usaw*, 112 Pa. 80.

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 favour.[5]

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[5] 1 Ph. Ev. 552; Taylor, ss. 365, 366; Starkie, 586–7 & 748; Best, s. 268; and see *Abrath* v. *N. E. Ry.*, 1883, 11 Q. B. D. 440, especially the judgment of Bowen, L.J., 455–462.

Where there are conflicting presumptions, the case is the same as if there were conflicting evidence.[6]

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.[7]

(*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 to the prosecutor.[8]

(*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.[9]

(*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.[10]

(*e*) It is shown that a hedge stands on A's land. The burden of proving that the ditch adjacent to it was not A's also is on the person who denies that the ditch belongs to A.[11]

(*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.[12]

(*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 into the socket is on B.[13]

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6 See Illustration (*i*).

7 *Mills* v. *Barber*, 1836, 1 M. & W. 425.

8 1 Russ. Cri. 146.

9 *R.* v. *Butler*, 1803, 1 R. & R. 61.

10 1 Story, Eq. Juris., s. 310, n. 1. Quoting *Hunter* v. *Atkins*, 1832, 3 M. & K. 113.

11 *Guy* v. *West*, 1808, Selw. N. P. 1244.

12 *Doe* v. *Coulthred*, 1837, 7 A. & E. 235.

13 *Armoury* v. *Delamirie*, 1721, 1 S. L. C. 353.

(*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 had been rumoured. The burden of proving that she has not foundered is on B.[14]

(*i*) Z in 1864 married A. In 1868 he was convicted of bigamy in having in 1868 married B during the life of A. In 1879 he married C. In 1880, C being alive, he married D, and was prosecuted for bigamy in marrying D in the lifetime of C. The prisoner on his second trial proved the first conviction, thereby proving that A was living in 1868. No further evidence was given. A's being alive in 1868 raises a presumption that she was living in 1879. Z's marriage to C in 1879 being presumably innocent, raises a presumption that A was then dead. The inference ought to have been left to the jury.[15]

AMERICAN NOTE.

(See also note to Article 93.)

General.

Authorities.— 1 Greenleaf on Evidence (15th ed.), sec. 74, and notes; 5 Am. & Eng. Encyclopædia of Law (2d ed.), p. 21 *et seq.*

The burden of proof does not shift; the weight of evidence does. *Scott* v. *Wood,* 81 Cal. 398; *Atkinson* v. *Goodrich Trans. Co.,* 69 Wis. 5; *Tiffany* v. *Com.,* 121 Pa. St. 165; *State* v. *Wingo,* 66 Mo. 181; *Agnew* v. *U. S.,* 165 U. S. 36; *Clark* v. *Hills,* 67 Tex. 141; *Tarbox* v. *Eastern Steamboat Co.,* 50 Me. 339; *Central Bridge* v. *Butler,* 2 Gray (Mass.), 130; *Phillips* v. *Ford,* 9 Pick. (Mass.) 39; *Powers* v. *Russell,* 13 Pick. (Mass.) 69; *Starratt* v. *Mullen,* 148 Mass. 570.

The term "burden of proof" is used in two senses, viz., to indicate the burden of going forward if the allegations of the pleader be met by a traverse, and to denote the duty to meet and rebut some pieces of evidence introduced by the adverse party by proof to overbear it in the mind of the trier. Taking the term in the former sense, the burden of proof never shifts. *Baxter* v. *Camp,* 71 Conn. 252; *Miles's Appeal,* 68 Conn. 242–244. See, also, *Pease* v. *Cole,* 53 Conn. 71.

In malicious prosecution the court charged that malice might be inferred from want of probable cause, but refused to charge that

[14] *Koster* v. *Reed,* 1826, 6 B. & C. 19.

[15] *R.* v. *Willshire,* 1881, 6 Q. B. D. 366.

the burden of proof shifted from the plaintiff to the defendant. Held, correct. *Thompson* v. *Beacon Valley Rubber Co.*, 56 Conn. 499.

Burden of proof does not shift.— The giving of *prima facie* evidence of a fact does not shift the burden of proof: it is still upon the party holding the affirmative, after all the evidence is in. *Heinemann* v. *Heard*, 62 N. Y. 448, reversing 2 Hun, 324, 4 S. C. 666; *Dederich* v. *McAllister*, 49 How. Pr. 351; *People* v. *Cassata*, 6 App. Div. 386, 39 N. Y. Supp. 641.

Instances.— The agreement as a necessary element in a common-law marriage may be proved by the same circumstances in a criminal as in a civil suit. *Swartz* v. *State*, 7 Circ. Dec. 43, 13 Ohio Circ. Ct. 63.

Degree of proof.— In civil cases a preponderance of evidence is enough. *Cunningham* v. *Hoff*, 118 Ind. 263.

An affirmative defense is to be established by a preponderance of evidence. *Shufflebarger* v. *Ollemman*, 25 Ind. App. 521; *Laird* v. *Davidson*, 124 Ind. 412, 414.

A preponderance of evidence does not involve a preponderance of the number of witnesses. *McLees* v. *Felt*, 11 Ind. 218; *Rudolph* v. *Lane*, 57 Ind. 115; *Wray* v. *Tindall*, 45 Ind. 517.

Preponderance enough.— In a suit for libel charging crime, justification is established by preponderance of evidence and does not need to be proved beyond a reasonable doubt. In a suit for slander, the words imputing the commission of a felony, a preponderance of evidence is all that is necessary to establish the plaintiff's case. *Owen* v. *Dewey*, 107 Mich. 67; *Finley* v. *Widner*, 112 Mich. 230.

Evidence that is not a preponderance, but which is clear and satisfactory, must justify the reformation of a written contract upon mistake in drafting. *Burns* v. *Coskey*, 100 Mich. 94; *Berrmersch* v. *Linn*, 101 Mich. 64; *Gumbert* v. *Trensch*, 103 Mich. 543.

New Jersey.

Presumptions.— Presumption of fact and presumption of law defined. *Gulick* v. *Loder*, 13 N. J. L. 68, 72; *Snediker* v. *Everingham*, 27 N. J. L. 150, 153.

Instances of proof sufficient to raise a presumption.— Conclusive presumption that debt is paid after a lapse of twenty years. *Blue* v. *Everett*, 55 N. J. Eq. 329.

Presumption is that a will found canceled was canceled intentionally, and this is not overcome by proof of a declaration of the

testator that his will was all right. *Smock* v. *Smock,* 11 N. J. Eq. 156; *Matter of White,* 25 N. J. Eq. 501.

When husband pays for land and has it conveyed to his wife, a gift is presumed. *Whitley* v. *Ogle,* 47 N. J. Eq. 67.

Claimant under a deed presumed to have taken without notice of prior unrecorded deeds. *Roll* v. *Rea,* 50 N. J. L. 265.

Possession of a negotiable instrument is *prima facie* evidence of ownership. *Halsted* v. *Colvin,* 51 N. J. Eq. 387, 52 N. J. Eq. 339.

Possession raises presumption of ownership and throws burden of proof on one asserting ownership in others. *Harris* v. *Kirkpatrick,* 36 N. J. L. 526; reversing *S. C.,* 35 N. J. L. 392; *Hopkins* v. *Chandler,* 2 Harr. 299.

Circumstances raising the presumption that a deed from husband to wife has been delivered. *Vought* v. *Vought,* 50 N. J. Eq. 177.

Burden of proving absence of fraud.— Where plaintiff proves that certain securities were obtained from him by fraud or felony the burden is cast upon the defendant to show that he was a *bona fide* holder for value. *Ward Sav. Bank* v. *First Nat. Bank,* 48 N. J. L. 513.

Proof that a creditor was such at the time of a conveyance for an inadequate consideration raises a conclusive presumption of fraud. *Gardner* v. *Kleinke,* 46 N. J. Eq. 90; *Bouquet* v. *Heyman,* 50 N. J. Eq. 114; *Manning* v. *Riley,* 52 N. J. Eq. 39.

Possession by the vendor raises a presumption of fraud and shifts the burden of proof from the creditor to the vendee. *Runyon* v. *Groshon,* 12 N. J. Eq. 86.

When it is shown that a negotiable note was given without consideration the holder must prove that he was a *bona fide* purchaser for value. *Gilbert* v. *Duncan,* 29 N. J. L. 521: reversing *S. C.,* 29 N. J. L. 133; *Bank* v. *Savings Institution,* 33 N. J. L. 170.

Degree of proof.— Evidence to show that ordinary words have been used in a peculiar or technical sense should be clear, accurate, and convincing. *Smith* v. *Lunger,* 64 N. J. L. 539.

Proof of adultery in divorce cases must be clear and direct and be such as to command belief. *Clare* v. *Clare,* 19 N. J. Eq. 37.

Doctrine of res ipsa loquitur.— Proof that electricity did escape from the rails is presumptive proof of negligence. *Res ipsa loquitur. Trenton R. Co.* v. *Cooper,* 60 N. J. L. 219.

Circumstances under which a presumption of negligence arises from mere proof of the injury. *Res ipsa loquitur. Excelsior Elec. Co.* v. *Sweet,* 59 N. J. L. 441; reversing *S. C.,* 57 N. J. L. 224.

Explosion; reasonable inference of negligence. *Bahr* v. *Lombard, Ayres & Co.*, 53 N. J. L. 233.

Fall of an electric street lamp; presumption of negligence. *Excelsior Elec. Co.* v. *Sweet*, 57 N. J. L. 224.

Injury from falling brick. *Sheridan* v. *Foley*, 58 N. J. L. 230.

Burden of proving insanity.— The defendant setting up insanity as a defense must establish it by a preponderance of the evidence. The State has not the burden of proving sanity beyond a reasonable doubt. *Graves* v. *State*, 45 N. J. L. 203.

An existing state presumed to continue.— A partnership having existed, it is presumed to continue. *Princeton Co.* v. *Gulick*, 1 Harr. 161. See *Farmers' Bank* v. *Green*, 30 N. J. L. 316.

It is presumed that one who enters as a tenant continues a tenant, and clear proof is required to overcome the presumption. *Cole* v. *Potts*, 10 N. J. Eq. 67.

Possession once shown is presumed to continue. *Watson* v. *Kelty*, 1 Harr. 517.

Lucid interval.— Insanity at one time having been proved, the burden of proving a lucid interval is on the one claiming by virtue of the insane person's act. *Den.* v. *Moore*, 2 South. 470; *Whitenack* v. *Stryker*, 2 N. J. Eq. 8; *Goble* v. *Grant*, 3 N. J. Eq. 629; *Turner* v. *Cheesman*, 15 N. J. Eq. 243; *State* v. *Spencer*, 1 Zab. 196.

Maryland.

Authorities.— Presumption that an indorsee is a *bona fide* purchaser for value. *McCorker* v. *Banks*, 84 Md. 292.

Proof of execution of a will plus the presumption of sanity make out a *prima facie* case. *Higgins* v. *Carlton*, 28 Md. 115.

In an action for damages the burden is on the plaintiff to show that the defendant's act was *prima facie* wrongful, and then on the defendant to show justification or excuse. *Tucker* v. *State*, 89 Md. 471.

The presumption is that an existing state of affairs continues. *Hammond's Lessee* v. *Inloes*, 4 Md. 138.

If an act may be either rightful or wrongful according to the circumstances, the presumption is that it was rightful. *Brewer* v. *Bowersox*, 92 Md. 567.

Degree of proof.— The proof of the contents of a lost will must be conclusive and satisfactory. *Rhodes* v. *Vinson*, 9 Gill. 169.

To show a gift *mortis causa*, proof of delivery must be clear and decisive. *Whalen* v. *Milholland*, 89 Md. 199.

The usual rule in civil cases is that a fact need be proved only by a preponderance of the evidence. *Myers* v. *King*, 42 Md. 65; *B. & O. R. Co.* v. *Shipley*, 39 Md. 251.

Where the fact to be proved involves moral delinquency the evidence should be so strong as to overcome any presumption of innocence. *Corner* v. *Pendleton*, 8 Md. 337.

Res ipsa loquitur.— Proof of an injury caused by the falling of cross ties from a moving train raises a presumption of negligence. *Howser* v. *Railroad Co.*, 80 Md. 146.

The falling of a roof of a building under construction is *prima facie* proof of negligence. *Hearn* v. *Quillen*, 94 Md. 39.

Proof of the breaking of an axle of a car raises a presumption of negligence and throws the burden of proof on the defendant. *Western Md. R. Co.* v. *Shirk*, 95 Md. 637.

No presumption of negligence arises from the mere breaking of machinery. *South Baltimore Car Works* v. *Shaefer*, 96 Md. 88.

Pennsylvania.

Presumptions.— When a presumption of negligence has arisen, it remains until overthrown by the opposite party. *Kane* v. *Philadelphia*, 196 Pa. 502.

Laws of another State are presumed to be the same as the *lex fori*. *Musser* v. *Stauffer*, 178 Pa. 99.

When a husband buys property and takes title in his own name, the legal presumption is that he furnished the money. *Martin's Estate*, 181 Pa. 378.

No presumption that one who died under twenty-one left no issue. *Clark* v. *Trinity Church*, 5 W. & S. 266.

Payment.— Presumption that a bond has been paid arises after a lapse of twenty years. *White* v. *White*, 200 Pa. 565; *Devereux's Estate*, 184 Pa. 429.

No matter how solemnly a debt may be evidenced the presumption of payment arises after twenty years. *Hummel* v. *Lilly*, 188 Pa. 463.

Presumption of payment arising from lapse of time is a rule of evidence, and applies against the State. *Ash's Estate*, 202 Pa. 422.

A receipt in full raises a presumption of payment and throws

the burden of overcoming it on the one alleging that a sum is due. *Rhoads' Estate*, 189 Pa. 460; *MacDonald* v. *Piper*, 193 Pa. 312.

The burden of proving payment is on the party alleging it, and does not shift merely because he produces certain receipts. If these are alleged to be forgeries, the presumption of innocence does not avail to put upon the opposite party the burden of proof. *Shrader* v. *Glass Co.*, 179 Pa. 623.

Illustration (a).— Indorsee of a bill or note is presumed to be a *bona fide* purchaser for value. *Gray* v. *Bank*, 29 Pa. 365; *Lerch Hardware Co.* v. *Bank*, 109 Pa. 240.

Where evidence has been given indicating that a conveyance was fraudulent, the burden is thrown on the grantee to show that he was a *bona fide* purchaser for value. *Rogers* v. *Hall*, 4 Watts, 359; *Clark* v. *Depew*, 25 Pa. 509.

Illustration (d).— Attorney and client. *Cuthbertson's Appeal*, 97 Pa. 163.

Proof of a fiduciary relation may throw the burden of proving absence of undue influence on the proponent of a will. *Miller's Estate*, 179 Pa. 645.

Illustration (g).— *McCown* v. *Quigley*, 147 Pa. 307.

Proof required to make a prima facie case.— Proof of the execution of a will plus the presumption of sanity make out a *prima facie* case. *Grubbs* v. *McDonald*, 91 Pa. 236.

The owner of goods lost by a carrier makes out a *prima facie* case by merely showing the fact of loss of the goods. *Buck* v. *Railroad Co.*, 150 Pa. 170.

Res ipsa loquitur.— A presumption of negligence may arise from mere proof that an accident occurred. *Shafer* v. *Lacock*, 168 Pa. 497 (house set on fire); *Madara* v. *Electric Ry. Co.*, 192 Pa. 542 (collision of cars); *Campbell* v. *Traction Co.*, 201 Pa. 167.

Leaving a live wire on the street raises presumption of negligence. *Devlin* v. *Light Co.*, 192 Pa. 188.

A presumption of negligence may arise from the mere fact of the explosion of a boiler. *Baran* v. *Reading Iron Co.*, 202 Pa. 274.

Instances where no such presumption arose. *Mixter* v. *Imp. Coal Co.*, 152 Pa. 395; *Huey* v. *Gahlenbeck*, 121 Pa. 238; *Earle* v. *Arbogast*, 180 Pa. 409 (explosion); *Bamford* v. *Traction Co.*, 194 Pa. 17 (fall of a pole).

Shifting burden of proof.— The burden of proof does not shift; the weight of evidence does. *Tiffany* v. *Com.*, 121 Pa. 165.

Burden said to shift when one makes out a *prima facie* case. *Aiken* v. *Miller*, 7 Pitts. L. J. 140.

Proof that a criminal process was made use of to collect a debt raises a presumption of want of probable cause and malice and shifts the burden of proof. *Wenger* v. *Phillips*, 195 Pa. 214.

If an assignment is under seal a consideration will be presumed, but evidence of *mala fides* shifts the burden. *Hancock's Appeal*, 34 Pa. 155.

Degree of proof.—To establish a parol trust the evidence must be clear and convincing. *Fowler* v. *Webster*, 180 Pa. 610; *Braun* v. *Church*, 198 Pa. 447; *Van Storch* v. *Van Storch*, 196 Pa. 545.

Evidence to establish a resulting trust must satify the mind and conscience of the court sitting as a chancellor. *Fidelity Co.* v. *Moore*, 194 Pa. 617.

"Very clear proof" required before equity will grant relief on the ground of mistake. *Ridgway's Account*, 206 Pa. 587; *Williamson* v. *Carpenter*, 205 Pa. 164; *Ahlborn* v. *Wolff*, 118 Pa. 242; *Bank* v. *Hartman*, 147 Pa. 558.

Degree of proof required to alter the terms of a written contract. *Ott* v. *Oyer's Exr.*, 106 Pa. 6; *Thomas* v. *Loose*, 114 Pa. 35; *Jones* v. *Backus*, 114 Pa. 120; *North* v. *Williams*, 120 Pa. 109; *Ferguson* v. *Rafferty*, 128 Pa. 337; *Claybaugh* v. *Goodchild*, 135 Pa. 421.

Testimony to alter or set aside a written contract must be clear, precise, and indubitable. *Axle Co.* v. *Leyda*, 188 Pa. 322; *Harrold* v. *McDonald*, 194 Pa. 359; *Streator* v. *Paxton*, 201 Pa. 135; *Sutch's Estate*, 201 Pa. 305.

Evidence to reform a written contract must be clear, precise, and indubitable. *Schotte* v. *Meredith*, 197 Pa. 496.

Evidence to alter or contradict a written contract must be equivalent to the testimony of two credible witnesses. *Beckett* v. *Allison*, 188 Pa. 279.

It is error to allow slight evidence of fraud to overturn a writing. The evidence must be clear, precise, and indubitable. *De Douglas* v. *Traction Co.*, 198 Pa. 430.

Evidence that a lost deed existed and that it was delivered, must be clear and satisfactory. *In re Nicholls*, 190 Pa. 308.

A wife must prove by evidence not admitting of doubt that property seized on execution while in the apparent possession of her husband is really her property. *Eavenson* v. *Pownall*, 182 Pa. 587.

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 the fact shall lie on any particular person;[16] 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.

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.

(*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.[17]

(*c*) In an action for malicious prosecution the plaintiff must prove (1) his innocence; (2) want of reasonable and probable cause for the prosecution; (3) malice or indirect motive; and he must prove all that is necessary to establish each proposition sufficiently to throw the burden of disproving that proposition on the other side.[18]

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[16] For instances of such provisions, see Taylor, s. 372, n. 2.

[17] *Elkin* v. *Janson*, 1845, 13 M. & W. 655. See, especially, the judgment of Aldersen, B., 663–6.

[18] *Abrath* v. *North Eastern Railway*, 1883, 11 Q. B. D. 440.

(*d*) 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.[19]

AMERICAN NOTE.

(As to the shifting of the burden of proof, see note to Articles 93 and 95.)

General.

Authorities.— 1 Greenleaf on Evidence (15th ed.), secs. 78, 79 *et seq.;* 5 Am. & Eng. Encyclopædia of Law (2d ed.), p. 21; *Phœnix Ins. Co.* v. *Pickel,* 119 Ind. 155; *Ætna Life Ins. Co.* v. *Ward,* 140 U. S. 76; *State* v. *Hathaway,* 115 Mo. 36; *Robinson* v. *Robinson,* 51 Ill. App. 317; *State* v. *Ahern,* 54 Minn. 195; *State* v. *Emery,* 98 N. C. 668; *State* v. *Higgins,* 13 R. I. 330; *Mulcahy* v. *Fenwick,* 161 Mass. 164; *Barton* v. *Kirk,* 157 Mass. 303; *Parker* v. *Floyd,* 12 Cush. (Mass.) 230; *Lothrop* v. *Otis,* 7 Allen (Mass.), 435.

First paragraph of text. *Stiles* v. *Haner,* 21 Conn. 512; *Fox* v. *Glastenbury,* 29 Conn. 209; *Ryan* v. *Bristol,* 63 Conn. 31, 37; *Thompson* v. *Beacon Falls Rubber Co.,* 56 Conn. 499.

In an action to recover an overpayment upon a contract of sale, the burden of proof is upon the plaintiff. *Doyle* v. *Unglish,* 143 N. Y. 556, 62 N. Y. St. R. 801, affirming 50 N. Y. St. R. 244.

In an action to foreclose a mechanic's lien, the burden of proof is upon the plaintiff to show a substantial performance or waiver. *Cahill* v. *Heuser,* 2 App. Div. 292, 73 N. Y. St. R. 450.

Where a general denial is interposed by the answer to the whole complaint, the plaintiff is bound to establish every material fact therein alleged. *Farmers' Loan & Trust Co.* v. *Siefke,* 144 N. Y. 354, 63 N. Y. St. R. 662.

The burden is upon those who allege unsoundness of mind in attacking a deed to prove that fact. *Baldwin* v. *Golde,* 88 Hun, 115, 68 N. Y. St. R. 273.

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[19] 1 Ph. Ev. 556, and cases there quoted: but now see 42 & 43 Vict. c. 49, s. 39. The illustration is founded more particularly on *R.* v. *Jarvis*, in a note to *R.* v. *Stone*, 1757, 1 Ea. 639, where Lord Mansfield's language appears to imply what is stated above.

Where exceptions are filed to the reports of executors and administrators they have the burden of proof. *Taylor* v. *Burk*, 91 Ind. 252, 255.

On appeal from proceedings to establish a highway or drain the remonstrant has the burden of proof. *Peed* v. *Brenneman*, 89 Ind. 252, 254; *Conwell* v. *Tate*, 107 Ind. 171, 172.

The burden of proving insanity is on the party who alleges it. *Fay* v. *Burditt*, 81 Ind. 433, 443; *Olvey* v. *Jackson*, 106 Ind. 286, 290; *Hull* v. *Louth*, 109 Ind. 315, 323.

New Jersey.

Mental capacity.— Presumption is that testator had capacity to make a will. *McCoon* v. *Allen*, 45 N. J. Eq. 708; *Lee's Case*, 46 N. J. Eq. 193; *Smith* v. *Smith*, 48 N. J. Eq. 566; *Swayze* v. *Swayze*, 37 N. J. Eq. 180.

Presumption is in favor of testamentary capacity. Burden on contestants to show insanity or drunkenness. *Elkinton* v. *Brick*, 44 N. J. Eq. 154; *Dumont* v. *Dumont*, 46 N. J. Eq. 223; *Sloan* v. *Mansfield*, 3 N. J. Eq. 563; *Trumbull* v. *Gibbons*, 2 Zab. 117; *Andress* v. *Weller*, 3 N. J. Eq. 604.

Presumption is that a man is conscious and sane, and burden is on one alleging the contrary. *State* v. *Hill*, 65 N. J. L. 627; *Turner* v. *Cheesman*, 15 N. J. Eq. 243; *Matter of Collins*, 18 N. J. Eq. 253.

Defense of insanity regarded with jealousy and must be established by a preponderance of the evidence. *Graves* v. *State*, 45 N. J. L. 347. See *State* v. *Spencer*, 1 Zab. 197.

Presumption is against total incapacity to contract because of intoxication. *Burroughs* v. *Richman*, 13 N. J. L. 233.

Health.— Presumption is that every citizen enjoys normal condition of mind and body. *Board of Health* v. *Lederer*, 52 N. J. Eq. 675.

Undue influence.— *Waddington* v. *Buzby*, 43 N. J. Eq. 154; reversed, 45 N. J. Eq. 173.

Contributory negligence.— *New Jersey Exp. Co.* v. *Nichols*, 33 N. J. L. 434.

Contributory negligence must be averred and proved by defendant. *Durant* v. *Palmer*, 29 N. J. L. 544.

Authority — Fraud. — *Hagerman* v *Buchanan*, 45 N. J. Eq. 292; *Zinn* v. *Brinkerhoff*, 48 N. J. Eq. 513.

When a presumption of fraud arises. *Phillips* v. *Pullen,* 45 N. J. Eq. 830.

Opportunities of knowledge.— *Greeley* v. *Passaic,* 42 N. J. L. 87.

Burden on the defendant.— Burden of proving that one is within an exception to a general law forbidding the selling of liquors without a license is on the defendant. *Plainfield* v. *Watson,* 57 N. J. L. 525.

Usury as a defense, burden on defendant. *Berdan* v. *Trustees,* 47 N. J. Eq. 8, 48 N. J. Eq. 309.

Burden of proving a libelous publication privileged is on the defendant. *King* v. *Patterson,* 49 N. J. L. 417; *Fahr* v. *Hayes,* 50 N. J. L. 275.

Instances.— The reasonableness of an ordinance is presumed. *Trenton H. R. Co.* v. *Trenton,* 53 N. J. L. 132.

Presumption is that a woman is unmarried. *Gaunt* v. *State,* 50 N. J. L. 490.

One alleging a deed absolute on its face to be a mortgage must prove it. *Winters* v. *Earl,* 52 N. J. Eq. 52, 588.

When an officer acts without objection it will be presumed that he is the one appointed. *State, Kingsland* v. *Union,* 37 N. J. L. 268.

Good repute for chastity must be proved affirmatively by the State in a prosecution for seduction. It is not presumed. *Zabriskie* v. *State,* 43 N. J. L. 646.

Maryland.

Instances.— There is no presumption that a dead man left no heirs: it must be proved. *Sprigg* v. *Moale,* 28 Md. 497; *Hammond's Lessee* v. *Inloes,* 4 Md. 138; *Shriver* v. *State,* 65 Md. 278.

Mental capacity of a testator is presumed. *Brown* v. *Ward,* 53 Md. 376; *Taylor* v. *Creswell,* 45 Md. 422; *Higgins* v. *Carlton,* 28 Md. 111.

There is no presumption that the law of another State is the same as the law of this when the common law has been changed by statute. *Dickey* v. *Bank,* 89 Md. 280; *State* v. *Railroad Co.,* 45 Md. 41.

Burden on the defendant.— In an action to vacate a conveyance as being in fraud of creditors, if the defendant alleges that the grantor had other property sufficient to pay creditors, he must sustain the burden of proving such allegation. *Dawson* v. *Waltemeyer,* 91 Md. 328.

The burden of proving that the insured committed suicide is on the defendant company. *Royal Arcanum* v. *Brashears*, 89 Md. 624.

The burden is on an insurance company to show that representations of the insured were false and material to the risk. *Maryland Casualty Co.* v. *Gehrmann*, 96 Md. 634.

In an action for false arrest, the burden of proof is on the defendant to show reasonable ground to suspect that the plaintiff was guilty. *Edger* v. *Burke*, 96 Md. 715.

Negligence.— The burden is on the party alleging it. *Railroad Co.* v. *Stebbing*, 62 Md. 504; *Commissioners of Harford* v. *Wise*, 75 Md. 38; *Railroad Co.* v. *State*, 73 Md. 74; *Benedick* v. *Potts*, 88 Md. 52.

In some cases, mere proof of the occurrence of an accident raises the presumption of negligence. *Res ipsa loquitur. Howser* v. *Railroad Co.*, 80 Md. 146; *Benedick* v. *Potts*, 88 Md. 52; *Railroad Co.* v. *Kaskell*, 78 Md. 517; *Drug Co.* v. *Colladay*, 88 Md. 78.

Contributory negligence.— In a damage suit, the burden of proving contributory negligence is on the defendant. *State* v. *Railroad Co.*, 58 Md. 482; *Frech* v. *Railroad Co.*, 39 Md. 574.

Pennsylvania.

Particular facts.—Burden is on the one asserting: That a deed is antedated. *Geiss* v. *Odenheimer*, 4 Yeates, 278. That one having legal title holds in trust. *Moore* v. *Small*, 19 Pa. 461; *Todd* v. *Campbell*, 32 Pa. 250. That there is a trust and that the bar of the statute has been removed, as against an absolute deed thirty years old. *Lingenfelter* v. *Richey*, 62 Pa. 123. That a boundary is other than the monuments show. *Dawson* v. *Mills*, 32 Pa. 302. That a garnishee holds assets. *Caldwell* v. *Coates*, 78 Pa. 312. That a condition precedent to liability on an instrument has occurred. *Patterson* v. *Bank*, 4 W. & S. 42. That a contracting party was incompetent. *McClure* v. *Mansell*, 4 Brewst. 119.

Burden of proving marriage is upon woman claiming to be widow of decedent. *Davis' Estate*, 204 Pa. 602.

Burden is on the insurance company to show that insured committed suicide. *Fisher* v. *Life Assn.*, 188 Pa. 1.

In action on a lost note given for a loan, the burden of proving the loan, the note, and its loss is on the plaintiff. *Bollinger* v. *Cowan*, 193 Pa. 319.

Illustration (c).— *McClafferty* v. *Philp,* 151 Pa. 86.

Mental capacity.— Testamentary capacity and absence of undue influence are presumed. *Messner* v. *Elliott,* 184 Pa. 41; *Grubbs* v. *McDonald,* 91 Pa. 236; *McClure* v. *Mansell,* 4 Brewst. 119.

Negligence.— *Sopherstein* v. *Bertels,* 178 Pa. 401; *Madara* v. *Electric Ry. Co.,* 192 Pa. 542; *Earle* v. *Arbogast,* 180 Pa. 409.

Evidence that a passenger was injured through a defect in the track raises a presumption of negligence. *McCafferty* v. *Railroad Co.,* 193 Pa. 339.

No presumption of negligence arises from the mere fact that one is found by a railroad track in a dying condition. *Welsh* v. *Railroad Co.,* 181 Pa. 461.

Burden of proving negligence where an infant was injured is on the plaintiff; where it is not sustained there should be an instruction for the defendant. *Kline* v. *Traction Co.,* 181 Pa. 276; *Moss* v. *Traction Co.,* 180 Pa. 389.

A presumption of negligence is warranted by proof that squabs were in good condition when put in a cold storage warehouse and were mouldy and rotten when removed therefrom. *Leidy* v. *Warehouse Co.,* 180 Pa. 323.

Contributory negligence.—It is presumed that the deceased " stopped, looked, and listened." *Connerton* v. *Canal Co.,* 169 Pa. 339.

Burden on the defendant.— Burden of proving a set-off for breach of warranty is on defendant. *Ore Roaster Co.* v. *Rogers,* 191 Pa. 229.

In action to recover the purchase price of a mill, the burden of proving that the mill was not as guaranteed is on the defendant. *Sprout, Waldron & Co.* v. *Eagal,* 193 Pa. 389.

Burden of proving payment of a debt is on one alleging it. *Burk's Estate,* 205 Pa. 332; *Building Assn.* v. *Wall,* 7 Phila. 240.

Burden of proving insanity as a defense is on the accused and is never shifted. It must be established by a fair preponderance of the evidence. *Com.* v. *Heidler,* 191 Pa. 375; *Com.* v. *Bezek,* 168 Pa. 603; *Com.* v. *Gerade,* 145 Pa. 289; *Com.* v. *Woodley,* 166 Pa. 463; *Ortwein* v. *Com.,* 76 Pa. 414; *Com.* v. *Kilpatrick,* 204 Pa. 218.

In an action for selling goods without a license, the burden is on the defendant to show that he had one. *Com.* v. *Brownbridge,* 1 Brewst. 399; *S. C.,* 6 Phila. 318; *Com.* v. *Dilbo,* 29 Leg. Int. 150.

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.

(*b*) A wishes to prove, by secondary evidence, the contents of a lost document.

A must prove that the document has been lost.

AMERICAN NOTE.

General.

Authorities.— *Grimes* v. *Hilliary*, 150 Ill. 141; *Hansen* v. *Amer. Ins. Co.*, 57 Ia. 741; *State* v. *Thibeau*, 30 Vt. 100; *State* v. *Swift*, 57 Conn. 505, 506; *Com.* v. *Brown*, 14 Gray (Mass.), 419; *Com.* v. *Waterman*, 122 Mass. 43; *Same* v. *Ratcliffe*, 130 Mass. 36.

Evidence already in may be rendered competent by subsequent evidence. *Burns* v. *Harris*, 66 Ind. 536; *Rowell* v. *Klein*, 44 Ind. 290.

Evidence may be admitted conditionally upon an agreement to bring forth other evidence. *Railway Co.* v. *Conway*, 57 Ind. 52.

New Jersey.

Burden of proving that an instrument is lost.— *Johnson* v. *Arnwine*, 42 N. J. L. 451.

Lost contract — burden on one claiming under it. *Swaine* v. *Maryott*, 28 N. J. Eq. 589.

Burden of proving that an instrument is lost is on the one offering secondary evidence. *Wyckoff* v. *Wyckoff*, 16 N. J. Eq. 401; *Clark* v. *Hornbeck*, 17 N. J. Eq. 430; *Wills* v. *McDole*, 2 South. 502; *Sterling* v. *Potts*, 2 South. 773; *Smith* v. *Axtell*, 1 N. J. Eq. 494; *Sussex Ins. Co.* v. *Woodruff*, 26 N. J. L. 541.

A subsequent admission that an instrument is lost is as good as preliminary proof. *Culver* v. *Culver*, 31 N. J. Eq. 448.

Confessions.— Before the State may introduce a confession, it must prove affirmatively that the confession was voluntary. *State* v. *Young*, 67 N. J. L. 223; *Roesel* v. *State*, 62 N. J. L. 216.

Maryland.

Whether the loss of a document is established sufficiently to let in secondary evidence is a question for the court. *Banking Co.* v. *Gittings*, 45 Md. 181.

Pennsylvania.

Whether the loss of a document has been proved so as to let in secondary evidence is a question for the court. *Flinn* v. *McGonigle*, 9 W. & S. 75; *Graff* v. *Railroad Co.*, 31 Pa. 489; *Gorgas* v. *Hertz*, 150 Pa. 538.

Burden of proving that an instrument is lost. *Emig* v. *Diehl*, 76 Pa. 359; *Burr* v. *Kase*, 168 Pa. 81; *Insurance Co.* v. *Mardorf*, 152 Pa. 22.

ARTICLE 97A.

BURDEN OF PROOF WHEN PARTIES STAND IN A FIDUCIARY RELATION.

When persons stand in a relation to each other of such a nature that the one reposes confidence in the other, or is placed by circumstances under his authority, control or influence, when the question is as to the validity of any transaction between them from which the person in whom confidence is reposed or in whom authority or influence is vested derives advantage, the burden of proving that the confidence, authority or influence was not abused, and that the transaction was in good faith and valid, is on the person in whom such confidence or authority or influence is vested, and the nature and amount of the evidence required for this purpose depends upon the nature of the confidence or authority, and on the character of the transaction.[20]

[20] See Story's 'Equity,' para. 307 and following. Also Taylor, s. 151 and following. The illustrations of the principle are innumerable, and very various.

AMERICAN NOTE.

General.

Authorities.— 27 Am. & Eng. Encyclopædia of Law (1st ed.), p. 452 *et seq.;* Pomeroy's Equity Jurisprudence, secs. 943–963; *Darlington's Estate,* 147 Pa. St. 624; *Roby* v. *Colehour,* 135 Ill. 300; *Porter* v. *Bergen,* 54 N. J. Eq. 405; *Lauere* v. *Reynolds,* 35 Minn. 476; *McConkey* v. *Cockey,* 69 Md. 286; *Bogie* v. *Nolan,* 96 Md. 86; *Gates* v. *Cornett,* 72 Mich. 420; *Stepp* v. *Frampton,* 179 Pa. St. 284; *Burnham* v. *Heselton,* 82 Me. 495; *Whipple* v. *Barton,* 63 N. H. 613; *St. Leger's Appeal,* 34 Conn. 450; *Livingston's Appeal,* 63 Conn. 78; *Richmond's Appeal,* 59 Conn. 247.

Where a person stands in a relation of special confidence towards another and has with him some transaction from which he derives benefit, such transaction will not be sustained in equity unless it was fair in itself and its nature and effect fully understood. *Nichols* v. *McCarthy,* 53 Conn. 318.

And the burden of proof is on the person claiming the benefit of the transaction to show these facts. *Nichols* v. *McCarthy,* 53 Conn. 323.

One partner cannot take any unlawful advantage of his copartners, but the burden is not upon him to show affirmatively that his purchase of the interest of his copartner was fair. *Nirdlinger* v. *Bernheimer,* 90 Hun, 290; affirmed. on opinion below, in 153 N. Y. 652. See 133 N. Y. 45, reversing 33 N. Y. St. R. 1019.

Attorney and client.—*Petrie* v. *Williams,* 68 Hun, 589, 52 N. Y. St. R. 587. See same case, 88 Hun, 292, 153 N. Y. 671; *Matter of Cohen,* 84 Hun, 586, 66 N. Y. St. R. 325; *Findley* v. *Leary,* 87 Hun, 8, 67 N. Y. St. R. 488; *Marden* v. *Dorthy,* 12 App. Div. 176, 42 N. Y. Supp. 834. See same case, 12 App. Div. 188, 42 N. Y. Supp. 827.

Fiduciary relations.—In case of confidential relationship, the burden is upon the one claiming benefit from the transaction. *Smith* v. *Cuddy,* 96 Mich. 562, 56 N. W. 89; *Brennan* v. *Zehner,* 97 Mich. 98; *Gates* v. *Cornett,* 72 Mich. 420.

Where a director makes a contract with a corporation, the burden is upon him to show good faith. *Miner* v. *Belle Isle Ice Co.,* 93 Mich. 97.

Evidence that parties had lived together in adulterous intercourse is pertinent as a fact tending to prove the existence of undue influence in procuring a deed. *Wallace* v. *Harris*, 32 Mich. 380.

New Jersey.

General rule.— *Farmer* v. *Farmer*, 39 N. J. Eq. 211; *Dunn* v. *Dunn*, 42 N. J. Eq. 431; *Traphagen* v. *Voorhees*, 44 N. J. Eq. 21; *Mott* v. *Mott*, 49 N. J. Eq. 192; *Porter* v. *Bergen*, 54 N. J. Eq. 405.

Attorney and client.— The burden of proving that a transaction between an attorney and a client was a fair one is on the attorney. *Condit* v. *Blackwell*, 22 N. J. Eq. 481; *Porter* v. *Bergen*, 54 N. J. Eq. 405; *Brown* v. *Bulkley*, 13 N. J. Eq. 451.

Spiritual adviser.— The relationship of priest and parishioner raises no presumption of undue influence where the spiritual adviser is made residuary legatee. Distinguishing gifts *inter vivos*. *Sparks' Case*, 63 N. J. Eq. 242.

Conveyance by parishioner to priest, burden of proof on the latter. *Corrigan* v. *Pironi*, 48 N. J. Eq. 607.

Guardians and trustees.— For a guardian to obtain a discharge, he must satisfy the court as to any disputed items. *Pyatt* v. *Pyatt*, 44 N. J. Eq. 491; reversed, 46 N. J. Eq. 285.

Burden of proof on an accounting trustee. *McCulloch* v. *Tompkins*, 62 N. J. Eq. 262.

The burden of proving that an item in a guardian's account is false is on the ward only when the guardian has complied with the law. *Burnham* v. *Dalling*, 16 N. J. Eq. 144.

Principal and agent.— The rule applies where an agent takes title to property of which he is in charge, though the agent be the child of the principal. *Le Gendre* v. *Byrnes*, 44 N. J. Eq. 372.

Husband and wife.— The rule applies when a husband procures his wife to execute a deed of trust by which he secures an advantage. *Hall* v. *Otterson*, 52 N. J. Eq. 522, 53 N. J. Eq. 695.

When property is transferred by a wife to a husband for the latter's benefit, the burden of proving undue influence is on the wife. *Curtis* v. *Crossley*, 59 N. J. Eq. 358.

Confidential relation.— Burden of proof may shift from one impeaching his deed to the one upholding it, in case the former proves

that he is illiterate and that the deed was read to him by the grantee only. *Suffern* v. *Butler*, 19 N. J. Eq. 202.

Confidential companion and business adviser was sole beneficiary under a will; burden of proving undue influence was on contestants. *Wheeler* v. *Whipple*, 44 N. J. Eq. 141, 45 N. J. Eq. 367.

Burden of proof is upon a beneficiary who had the testator under his control. *Carroll* v. *Hause*, 48 N. J. Eq. 269; *Boisaubin* v. *Boisaubin*, 51 N. J. Eq. 252.

Maryland.

The doctrine applied to transactions between persons occupying confidential relations does not apply to gifts by will. *Tyson* v. *Tyson*, 37 Md. 567; *Griffith* v. *Diffenderffer*, 50 Md. 466.

Proof that a conveyance for an inadequate consideration was made by an illiterate old man in his last illness to his business agent and adviser raises a presumption of undue influence. *Zimmerman* v. *Bitner*, 79 Md. 115.

Guardian and ward.— *McConkey* v. *Cockey*, 69 Md. 286.

Parent and child.— The burden of proving good faith is not upon a child who is the donee in a voluntary conveyance from his parent. *Bauer* v. *Bauer*, 82 Md. 241.

Principal and agent.— As to transactions between principal and agent, the burden of proving good faith is on the agent. *Brown* v. *Trust Co.*, 87 Md. 377. But this rule does not apply when the transaction in question was not related to the subject of the agency. *Id.*

Pennsylvania.

Confidential relation.— Where a testator's son, who is largely preferred, was the confidential agent of his father, the burden of proof is on him to show no undue influence. *Miller* v. *Miller*, 187 Pa. 572.

Where circumstances show that the parties did not deal on equal terms, but that one had overmastering influence while the other was old, infirm, and dependent, the burden of proving the transaction to be fair is on the former. *Stepp* v. *Frampton*, 179 Pa. 284.

A beneficiary who has procured a will to be written for his benefit by one whose faculties are impaired must sustain the burden of proof. *Caven* v. *Agnew*, 186 Pa. 314.

The donee of a large voluntary gift must show that the donor knew and understood what he was doing. *Neal* v. *Black*, 177 Pa. 83; *Clark* v. *Clark*, 174 Pa. 309.

Parent and child.— Burden of proof is not on a child to show that a voluntary deed from his parent was fair and conscionable. *Carney* v. *Carney*, 196 Pa. 34; *Clark* v. *Clark*, 174 Pa. 309.

"Business dealings between parents and children and other near relatives are not *per se* fraudulent; they must be treated just as are the transactions between ordinary debtors and creditors, and where the *bona fides* of their transactions is attacked, the fraud must be clearly proved." *Reehling* v. *Byers*, 94 Pa. 316; *Coleman's Estate*, 193 Pa. 605 (reviewing many cases).

Husband and wife.— No presumption that a deed from husband to wife without any valuable consideration was obtained through undue influence. *Ford* v. *Ford*, 193 Pa. 530.

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.

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 (unless the proceedings in the course of which the question arises are proceedings instituted in consequence of adultery[1]), nor are any declarations by them upon that subject deemed to be relevant facts when the legitimacy of the woman's child is in question,

* See Note XXXV.

[1] 32 & 33 Vict. c. 68, s. 3.

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.[2] Letters written by the mother may, as part of the *res gestæ,* be admissible evidence to show illegitimacy, though the mother could not be called as a witness to prove the statements contained in such letters.[3]

AMERICAN NOTE.

General.

Authorities.— 1 Greenleaf on Evidence (15th ed.), secs. 28, 344; vol. 2, secs. 150–153; 13 Am. & Eng. Encyclopædia of Law (1st ed.), p. 225; 3 Am. & Eng. Encyclopædia of Law (2d ed.), p. 873; *Grant* v. *Mitchell,* 83 Me. 23; *Pittsford* v. *Chittenden,* 58 Vt. 69; *Sullivan* v. *Kelly,* 3 Allen (Mass.), 148, 150; *Phillips* v. *Allen,* 2 Allen (Mass.), 453; *Abington* v. *Dunbury,* 105 Mass. 287; *Bowers* v. *Wood,* 143 Mass. 182; *Patterson* v. *Gaines,* 6 How. (U. S.) 550; *State* v. *Lavin,* 80 Ia. 555; *Bullock* v. *Knox,* 96 Ala. 195; *Watts* v. *Owens,* 62 Wis.

[2] *R.* v. *Luffe,* 1807, 8 Ea. 190, at p. 207; *Cope* v. *Cope,* 1833, 1 Mo. & Ro. 269 and at p. 273; *Legge* v. *Edmonds,* 1856, 25 L. J. Eq. 125, see p. 135; *R.* v. *Mansfield,* 1841, 1 Q. B. 444; *Morris* v. *Davies,* 1825, 3 C. & P. 215. See, as an illustration of these principles, *Hawes* v. *Draeger,* 1883, 23 Ch. Div. 173. 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 husband. 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.

[3] *Aylesford Peerage Case,* 1885, 11 App. Ca. 1, in which the general rule stated above is considered and affirmed.

512; *Egbert* v. *Greenwalt*, 44 Mich. 245; *Scanlon* v. *Walshe*, 81 Md. 118; *Goss* v. *Froman*, 89 Ky. 318; *Scott* v. *Hillenberg*, 85 Va. 245.

The presumption holds even if the parties are, while still married, living apart by consent. *Hemingway* v. *Touner*, 1 Allen (Mass.), 29.

If the husband has access his impotency must be clearly proved in order to rebut the presumption stated in the text. *Com.* v. *Wenz*, 1 Ashm. (Pa.) 269; *State* v. *Goode*, 10 Ir. L. (N. C.) 49; *State* v. *Broadway*, 69 N. C. 411.

Non-access.— Sustaining text. *Wright* v. *Hicks*, 12 Ga. 155, 56 Am. Dec. 451; *Com.* v. *Shepherd*, 6 Binn. (Pa.) 283, 6 Am. Dec. 449; *Dean* v. *State*, 24 Ind. 483.

Proof of non-access.— The non-access may be proved by circumstantial evidence, not alone by witnesses who could testify that the husband was constantly at a distance from the wife. *Pittsford* v. *Chittenden*, 58 Vt. 49; *State* v. *Pettaway*, 3 Hawks. (N. C.) 623.

Evidence of husband or wife.—Sustaining text. *Dennison* v. *Paige*, 29 Pa. St. 420; *Com.* v. *Shepherd*, 6 Binn. (Pa.) 273; *Parker* v. *Way*, 15 N. H. 45; *Stegall* v. *Stegall*, 2 Brock. (U. S.) 256; *Kleinhart* v. *Ehlers*, 38 Pa. St. 439; *Clapp* v. *Clapp*, 97 Mass. 531; *Wright* v. *Hicks*, 15 Ga. 160; *State* v. *Herman*, 13 Ired. (N. C.) 502; *Hemmingway* v. *Touner*, 1 Allen (Mass.), 209.

"Non-access cannot be proved by either the husband or the wife, whether the proceeding is one of settlement, or bastardy, or to recover property claimed as heir-at-law." *Dennison* v. *Paige*, 29 Pa. St. 420, 72 Am. Dec. 644. See also *Cranford* v. *Blackburn*, 17 Md. 49, 77 Am. Dec. 323; *Easley* v. *Com.* (Pa.), 11 Atl. 220; *Com.* v. *Stricker*, 1 Browne (Pa.), xlvii, appendix; *Com.* v. *Shepherd*, 6 Binn. (Pa.), 283, 6 Am. Dec. 449; *Corson* v. *Corson*, 44 N. H. 587; *Boykin* v. *Boykin*, 70 N. C. 262, 16 Am. Rep. 776; *Egbert* v. *Greenwalt*, 44 Mich. 246, 38 Am. Rep. 260; *Tioga Co.* v. *So. Creek Tp.*, 75 Pa. St. 436 (stating the reason of the rule); *Mink* v. *State*, 60 Wis. 583, 50 Am. Rep. 386.

Evidence.— *Matter of Taylor*, 9 Paige, 611.

Declaration of parties.— Sustaining text. *Matter of Taylor*, 9 Paige, 611.

The marriage of parents, since deceased, may be shown by declarations made *ante litem motam*. *Canjolle* v. *Ferrie*, 23 N. Y. 90.

Presumption of legitimacy.— *Haworth* v. *Gill*, 30 Ohio St. 627; *Sutphin* v. *Cox*, 1 Weekly Law Mag. 346; *Schaffer* v. *Mueller*, 9

Weekly Law Bulletin, 287; *Roth* v. *Jacobs*, 21 Ohio St. 646; *Miller* v. *Anderson*, 43 Ohio St. 473; *Ives* v. *McNicoll*, 59 Ohio St. 402.

Evidence of non-intercourse for more than a year, continuing to within five months of the birth of a child, rebuts the presumption of legitimacy. *Dean* v. *State ex rel. Marrical*, 29 Ind. 483.

The testimony of a wife is inadmissible to show the illegitimacy of her child. *Egbert* v. *Greenwalt*, 44 Mich. 245.

Where husband and wife live together, there is a presumption of legitimacy. *Egbert* v. *Greenwalt*, 44 Mich. 245.

"Non-access cannot be proved by either the husband or the wife, whether the proceeding is one of settlement or bastardy, or to recover property claimed as heir-at-law." *Egbert* v. *Greenwalt*, 44 Mich. 246, 38 Am. Rep. 260.

Testimony against legitimacy.— A party cannot testify to anything which would tend to rebut the presumption of the legitimacy of children born in lawful wedlock and which public policy requires to be preserved, in an action for seduction, but may testify to intercourse with the defendant, since conception is not an essential element to the cause of action. *Rabike* v. *Baer*, 115 Mich. 328.

New Jersey.

A bastardy warrant may issue even in case the woman is married, but the nonaccess of her husband must be affirmatively shown. *State* v. *Overseer*, 4 Zab. 533.

Maryland.

A child born in lawful wedlock is presumed to be legitimate. Nonaccess of the husband may be proved, but not by testimony of the mother or an adulterer. *Scanlon* v. *Walshe*, 81 Md. 118.

Nonaccess cannot be proved by either the husband or the wife, whether the proceeding is one of settlement, or bastardy, or to recover property claimed as heir-at-law. See *Crauford* v. *Blackburn*, 17 Md. 49, 77 Am. Dec. 323.

Pennsylvania.

Presumption of legitimacy.—After the lapse of ninety years it requires very strong evidence to overcome the presumption. *Pickens' Estate*, 163 Pa. 14.

"Nonaccess cannot be proved by either the husband or the wife, whether the proceeding is one of settlement, or bastardy, or to re-

cover property claimed as heir-at-law." *Dennison* v. *Paige*, 29 Pa. 420, 72 Am. Dec. 644; *Com.* v. *Shepherd*, 6 Binn. 273; *Kleinhart* v. *Ehlers*, 38 Pa. 439; *Easley* v. *Com.*, 11 Atl. 220; *Com.* v. *Stricker*, 1 Browne, xlvii, appendix; *Tioga Co.* v. *South Creek Tp.*, 75 Pa. 436 (stating the reason of the rule).

If the husband has access his impotency must be clearly proved in order to rebut the presumption stated in the text. *Com.* v. *Wenz*, I Ashm. 269.

Husband and wife competent to prove such facts in action between third parties. *Janes' Estate*, 147 Pa. 527.

There is no presumption that one who marries the mother of a bastard child is the father of it. *Janes' Estate*, 147 Pa. 527.

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.[4]

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

[4] *McMahon* v. *McElroy*, 1869, 5 Ir. Rep. Eq. 1; *Hopewell* v. *De Pinna*, 1809, 2 Camp. 113; *Nepean* v. *Doe*, 1837, 2 S. L. C. 542, 632; *Nepean* v. *Knight*, 2 M. & W. 1837, 894, 912; *R.* v. *Lumley*, 1869, 1 C. C. R. 196; and see the caution of Lord Denman in *R.* v. *Harborne*, 1835, 2 A. & E. at p. 544. All the cases are collected and considered in *In re Phene's Trust*, 1869, 5 Ch. App. 139. The doctrine is also much discussed in *Prudential Assurance Company* v. *Edmonds*, 1877, 2 App. Cas. 487. The principle is stated to the same effect as in the text in *Re Corbishley's Trusts*, 1880, 14 Ch. Div. 846.

to the order in which two or more persons died who are shown to have died in the same accident, shipwreck, or battle.[5]

AMERICAN NOTE.

General.

Authorities.— 1 Greenleaf on Evidence (15th ed.), secs. 30, 41; McKelvey on Evidence, p. 67; *Johnson* v. *Merithew*, 80 Me. 111; *Winship* v. *Conner*, 42 N. H. 341.

First paragraph of text. *Stockbridge's Case*, 145 Mass. 517; *Davie* v. *Briggs*, 97 U. S. 628; *Hoyt* v. *Newbold*, 45 N. J. L. 219; *Cooper* v. *Cooper*, 86 Ind. 75; *State* v. *Henke*, 58 Ia. 457; *University* v. *Harrison*, 90 N. C. 385; *Shriver* v. *State*, 65 Md. 278; *Flood* v. *Growney*, 126 Mo. 262.

Absence alone does not raise the presumption. There must be other circumstances, such as the failure of friends to hear from the absent one. *Sensendefer* v. *Pacific, etc., Ins. Co.*, 19 Fed. Rep. 68.

The courts should exercise caution in applying the rule of the text. *Shown* v. *Mackin*, 9 Lea (Tenn.), 601.

Time of death.— Sustaining text as to the rule that there is no presumption as to time of death. 1 Am. & Eng. Encyclopædia of Law (1st ed.), p. 39, and cases cited.

Bigamy.— As to effect of presumption in bigamy prosecution, see *Com.* v. *Mash*, 7 Metc. 472.

Same calamity.— Sustaining last paragraph of text. *Coy* v. *Leach*, 8 Metc. (Mass.) 371, 372, 41 Am. Dec. 518; *Fuller* v. *Linzee*, 135 Mass. 468; *Russell* v. *Hallett*, 23 Kan. 276; *Paden* v. *Briscoe*, 81 Tex. 563. See *Ehlis* v. *Will*, 73 Wis. 445; *Johnson* v. *Merthew*, 80 Me. 111.

Loss of vessel.— A presumption that a vessel has been lost arises after a reasonable time has passed without news of her. *Clifford* v. *Thomaston Mutual Ins. Co*, 50 Me. 209, 79 Am. Dec. 606.

Presumption of death from absence.— *Rice* v. *Lumley*, 10 Ohio St. 596; *Stover* v. *Bounds*, 1 Ohio St. 107, 52 Ohio St. 362; *Rosenthal* v. *Mayhugh*, 33 Ohio St. 155; *Brent* v. *First*, 41 Ohio St. 436; *Youngs* v. *Heffner*, 36 Ohio St. 232; *Mayhugh* v. *Rosenthal*, 1 Cinc. Super. Ct. Rep. 492; *Whalen* v. *State*, 5 Circ. Dec. 488, 12 Ohio Circ. Ct. 586.

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[5] *Wing* v. *Angrave*, 1860, 8 H. L. C. 183, 198; and see authorities in last note.

The wife of one who has been absent within the rule of the text may marry again. The fact that she has sued him for divorce is not an admission that he was not dead. *Supreme Commandery* v. *Everding,* 20 Ohio Circ. Ct. 689, 11 Circ. Dec. 419.

Presumption rebuttable.— The presumption is rebuttable. *Youngs* v. *Heffner,* 36 Ohio St. 232; *Mayhugh* v. *Rosenthal,* 1 Cinc. Super. Ct. Rep. 492.

Persons not heard from for seven years presumed to be dead. *Whiting* v. *Nicholl,* 46 Ill. 230; *Reedy* v. *Camfield,* 159 Ill. 254; *Reedy* v. *Millizen,* 155 Ill. 626, 636.

If a person has been heard from within seven years the presumption of death does not exist. *Sinsheimer* v. *Skinner Mfg. Co.,* 165 Ill. 116, reversing 54 Ill. App. 151.

In civil cases, death may be proved by circumstantial evidence. *John Hancock, etc., Co.* v. *Moore,* 34 Mich. 41.

Presumption of life as to a person of whom no account is given at the end of seven years. *Bailey* v. *Bailey,* 36 Mich. 181. See, also, *People* v. *Eaton,* 59 Mich. 559.

New Jersey.

Authorities.— *Osborn* v. *Allen,* 26 N. J. L. 388; *Den* v. *Brown,* 2 Hal. 307.

First paragraph of text. *Hoyt* v. *Newbold,* 45 N. J. L. 219.

Where plaintiffs alleged that J. B. S. had been absent from the State for more than seven years without having been heard from, and the defendants admitted the absence but alleged on information and belief that he had been heard from, the burden of proving that J. B. S. is alive is on the defendants. *Smith* v. *Smith,* 5 N. J. Eq. 484.

The New Jersey statute was designed to furnish a presumption as to the *time* of death as well as of the *fact* of death after seven years. *Ex'rs of Clarke* v. *Canfield,* 15 N. J. Eq. 119; *Wambaugh* v. *Schenck,* Pen. 229.

Presumption is that the absent person lived through the seven years. *Ex'rs of Clarke* v. *Canfield,* 15 N. J. Eq. 119.

Maryland.

Authorities.— Presumption of death arises after seven years' absence unheard from. *Tilly* v. *Tilly,* 2 Bland. 436. See *Lee* v. *Hoye,* 1 Gill, 188.

The presumption of death arises after seven years' absence unheard from, but there is no presumption that the person died without issue. *Chew* v. *Tome,* 93 Md. 244; *Sprigg* v. *Moale,* 28 Md. 497.

Mere lapse of time is not enough to raise a presumption of death; it must be shown that the person has not been heard from. *Shriver* v. *State,* 65 Md. 278.

One is presumed to be dead if he would be over ninety were he living. *Stevenson* v. *Howard,* 3 H. & J. 554.

Death in common disaster.— Where several die in the same disaster, there is no presumption whatever as to the order of their death or that they died at the same time. Survivorship must be proved by one asserting it. *Cowman* v. *Rogers,* 73 Md. 403.

Time of death.— The presumption is that the person lived through the seven years. *Schaub* v. *Griffin,* 84 Md. 557.

Presumption of death arises after absence for seven years unheard from, but there is no presumption as to the time such death occurred, and one alleging a certain time must prove it. *Schaub* v. *Griffin,* 84 Md. 557.

Pennsylvania.

Presumption of death arises only after the expiration of the seven years, in the absence of any evidence of some specific peril encountered by the party before that time. Insurance premiums should be paid through the seven years. *Mutual Benefit Co.'s Petition,* 174 Pa. 1.

ARTICLE 100.

* PRESUMPTION OF LOST GRANT.

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 pre-

* The subject of the doctrine of lost grants is much considered in *Angus* v. *Dalton*, 3 Q. B. D. 84, 1881, 6 App. Cas. 740.

sumption that such right had a lawful origin and that it was created by a proper instrument which has been lost.

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.[6]

(*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.[7]

(*c*) A borough corporation proved a prescriptive right to a several oyster fishery in a navigable tidal river. The free inhabitants of ancient tenements in the borough proved that from time immemorial and claiming as of right they had dredged for oysters, within the limits of the fishery, from Feb. 2 to Easter Eve in each year. The Court presumed a grant from the Crown to the corporation before legal memory of a several fishery, with a condition in it that the free inhabitants of ancient tenements in the borough should enjoy such a right.[8]

(*d*) 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.[9]

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[6] *Goodtitle* v. *Baldwin*, 1809, 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.

[7] *Leconfield* v. *Lonsdale*, 1870, L. R. 5 C. P. 657.

[8] *Goodman* v. *Mayor of Saltash*, 1882, 7 App. Ch. 633 (see especially 650). Lord Blackburn dissented on the ground that such a grant would not have been legal (pp. 651–62). See same case in 1881, 7 Q. B. D. 106, and 1880, 5 C. P. D. 431, both of which were reversed.

[9] *Webb* v. *Bird*, 1863, 13 C. B. (N. S.) 841.

(*e*) No length of enjoyment 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.[10]

AMERICAN NOTE.

General.

Authorities.— 1 Greenleaf on Evidence (15th ed.), secs. 45–47; 2 Wharton on Evidence, sec. 348 *et seq.; Sumner* v. *Child,* 2 Conn. 628; *Hart* v. *Chalker,* 5 Conn. 315; *Charles River Bridge* v. *Warren Bridge,* 7 Pick. (Mass.) 344, 448, 449; *Gayetty* v. *Bethune,* 14 Mass. 49; *Coolidge* v. *Learned,* 8 Pick. (Mass.) 504; *Fletcher* v. *Fuller,* 120 U. S. 534; *Carter* v. *Fishing Co.,* 77 Pa. 310; *Tex. Mex. Ry. Co.* v. *Uribe,* 85 Tex. 386; *Frazier* v. *Brown,* 12 O. St. 294; *Chatfield* v. *Wilson,* 28 Vt. 49; *Lehigh R. R. Co.* v. *McFarland,* 43 N. J. L. 605; *Ricard* v. *Williams,* 7 Wheat. (U. S.) 59, 109; *Casey's Lessee* v. *Inloes,* 1 Gill (Md.), 430, 39 Am. Dec. 658; *Trowbridge* v. *Spinning* (Wash.), 54 L. R. A. 205.

Title to corporeal property cannot arise from the doctrine of implied grant. *Sumner* v. *Child,* 2 Conn. 628; *Price* v. *Lyon,* 14 Conn. 291.

Presumption of grant.—*C. & I. R. R. Co.* v. *Zinn,* 18 Ohio St. 417 (existence of road over canal company's land); *Knoblock* v. *Hollinger,* 9 Ohio Circ. Ct. 288, 6 Circ. Dec. 427; *Bierce* v. *Pierce,* 15 Ohio, 529; *Harmon* v. *Kelley,* 14 Ohio, 502, 7 Am. Law Rec. 411; *Fitzpatrick* v. *Forsyth,* 7 Am. Law. Rec. 411 (conveyance of fee), *Schulte* v. *Beincke,* 4 Nisi Prius, 207, 4 Low. Dec. 250; *Morris* v. *Balkins,* 8 Am. Law Rec. 577; *Lessees of Blake* v. *Davis,* 20 Ohio, 230; *Viers, Herring* v. *McDowell's Petition,* Tappan, 89; *Frazier* v. *Brown,* 12 Ohio St. 294.

The presumption arises after a time equal to that prescribed in the Statute of Limitations. *Morrison* v. *Balkins,* 8 Am. Law Rec. 577.

If the existence of a defective grant is proved, no grant can be presumed in order to cure the defect. *Roads* v. *Symmes,* 1 Ohio, 281, 316.

A patent from the Federal government for lands will not be presumed. *Wallace's Lessees* v. *Minor,* 7 Ohio (pt. 1), 249.

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[10] *Chasemore* v. *Richards,* 1859, 7 H. L. C. 349.

A deed will not be presumed from possession for less than the statutory period. *Rosa* v. *Corwin,* 3 Ohio, 407.

Unless unaccompanied by other circumstances. *Coarcier & Revises* v. *Graham,* 1 Ohio, 349.

Presumption rebuttable.— The presumption is rebuttable. *Wallace's Lessees* v. *Minor,* 6 Ohio, 366, 7 Ohio (pt. 1), 249.

Underground waters.— The doctrine of the text does not apply to underground waters eventually issuing as a spring. *Frazier* v. *Brown,* 12 Ohio St. 294.

New Jersey.

Authorities.— *Lehigh R. R. Co.* v. *McFarland,* 43 N. J. L. 605.

Title by adverse possession arises out of a presumption of a lost grant. *Railroad Co.* v. *McFarland,* 30 N. J. Eq. 180, 31 N. J. Eq. 706.

A presumption of the existence of a deed may be raised by recitals in later ones. *Fuller ads. Den.,* 20 N. J. L. 61.

As to the circumstances sufficient to induce the jury to presume the existence of a deed, see *Den.* v. *Johnson,* 2 Hal. 6.

Maryland.

Authority.— *Casey's Lessee* v. *Inloes,* 1 Gill, 430, 39 Am. Dec. 658.

A conveyance may be presumed from great length of possession and the payment of taxes. *Cheney* v. *Watkins,* 1 H. & J. 527. See *Cockey* v. *Smith,* 3 H. & J. 20.

Pennsylvania.

Authority.— *Carter* v. *Fishing Co.,* 77 Pa. 310.

Illustration (e).— Percolating waters. *Wheatly* v. *Baugh,* 25 Pa. 528.

There is no presumption that an order of court was made authorizing a certain conveyance because it would be a matter of record and its loss must be proved. *Baskin* v. *Seechrist,* 6 Pa. 154.

Presumption of a grant of a right of way from long use and other circumstances. *Lewis* v. *Carstairs,* 6 Whart. 193.

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.

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.[11]

AMERICAN NOTE.

General.

Authorities.— 1 Greenleaf on Evidence (15th ed.), secs. 20, 38, *n.*, 40, *n.;* Perry on Trusts (4th ed.), sec. 349.

Regularity.— *State* v. *Potter,* 52 Vt. 33; *State* v. *Main,* 69 Conn. 140, 144; *Brownell* v. *Palmer,* 22 Conn. 107, 119; *Ward* v. *Metropolitan Life Ins. Co.,* 66 Conn. 239; *Gregory* v. *Brooks,* 37 Conn. 372; *Perry* v. *Reynolds,* 53 Conn. 535; *Booth* v. *Booth,* 7 Conn. 367; *Coggill* v. *Botsford,* 29 Conn. 447; *Platt* v. *Grover,* 136 Mass. 115; *Murray's Heirs* v. *Erie,* 59 Pa. 223; *Nofire* v. *U. S.,* 164 U. S. 657; *Schell's Excrs.* v. *Fauche,* 138 U. S. 562; *Hogue* v. *Corbett,* 156 Ill. 540; *State* v. *Williams,* 99 Mo. 291; *Sinclair* v. *Learned,* 51 Mich. 335.

First proposition of text.— *Rumsey* v. *N. Y. & N. E. R. R. Co.,* 130 N. Y. 88; *Wood* v. *Morehouse,* 45 N. Y. 368; *Swarthout* v. *Ranier,* 143 N. Y. 499, 504; *Kent* v. *Quicksilver Mining Co.,* 78

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* See Note XXXVII., and *Macdougall* v. *Purrier,* 1830, 2 Dow. & Cl. 135, 433. *R.* v. *Cresswell,* 1876, 1 Q. B. D. (C. C. R.) 446, is a modern illustration of the effect of this presumption.

[11] *Doe* d. *Hammond* v. *Cooke,* 1829, 6 Bing. 174, 179.

N. Y. 159, 183; *Hilton* v. *Bender*, 69 N. Y. 75; *Jackson* v. *Shaffer*, 11 Johns. 513; *Wood* v. *Chapin*, 13 N. Y. 509–516, 67 Am. Dec. 62.

Until the contrary appears it will be assumed that public officers have obeyed the law. *People* v. *Dalton*, 61 N. Y. Supp. 263, 46 App. Div. 264.

If a public officer has no recollection of the circumstances of a particular case, he may testify as to the routine of business in his office. *People* v. *Oyer and Terminer of New York*, 83 N. Y. 436.

Instances.— An officer selling property under an execution is presumed after a long period of time to have complied with the requirements of the statute. *Leland* v. *Cameron*, 31 N. Y. 115.

In the absence of proof to the contrary, a public officer is presumed to have done that, the omission of which would constitute a neglect of duty. Hence, it is presumed that a sheriff properly posted notices of a sale on execution. *Wood* v. *Morehouse*, 45 N. Y. 368, affirming 1 Lans. 405.

Regularity of official acts.—*Ballance* v. *Underhill*, 3 Scam. 453; *Todemier* v. *Aspinwall*, 43 Ill. 401; *Shattuck* v. *People*, 4 Scam. 478; *Governor* v. *Ridgway*, 12 Ill. 14; *Glancy* v. *Elliott*, 14 Ill. 456; *Buckmaster* v. *Job*, 15 Ill. 328; *Dyer* v. *Flint*, 21 Ill. 80; *Hogue* v. *Corbit*, 156 Ill. 540; *Doyle* v. *Wiley*, 15 Ill. 576 (in laying out land); *Chicago* v. *Johnson*, 53 Ill. 91 (laying of pavement); *Dempster* v. *West*, 69 Ill. 613 (mortgage sales); *Harris* v. *Lester*, 80 Ill. 307 (proceedings of courts); *Graves* v. *Coldwell*, 90 Ill. 612 (proceedings of courts); *Anthony* v. *International Bank*, 93 Ill. 225 (seal upon copies); *Duncan* v. *Fletcher*, Breese, 252 (administering oath to referee); *Lattin* v. *Smith*, Breese, 284 (acts of magistrate); *Vanlandingham* v. *Lowery*, 1 Scam. 241 (proceedings by referee); *Waldo* v. *Averett*, 1 Scam. 487 (appeal bonds); *Archer* v. *Spillman*, 1 Scam. 553.

As to this presumption with reference to legal proceedings, see *Mulford* v. *Shepard*, 1 Scam. 583; *Wilcox* v. *Woods*, 3 Scam. 51; *Ballance* v. *Samuel*, 3 Scam. 381; *Singleton* v. *Wafford*, 3 Scam. 577; *Russell* v. *Whiteside*, 4 Scam. 7; *Burgwin* v. *Babcock*, 11 Ill. 28; *Holmes* v. *People*, 5 Gilm. 478; *Eaton* v. *Graham*, 11 Ill. 619; *Cody* v. *Hough*, 20 Ill. 43; *Cook* v. *Skelton*, 20 Ill. 107; *Cook* v. *Renick*, 19 Ill. 598; *White* v. *People*, 81 Ill. 323; *City of Virginia* v. *Hall*, 96 Ill. 278; *Allen* v. *People*, 77 Ill. 484; *Maxcy* v. *Williamson County*, 72 Ill. 207.

The presumption of regularity extends to the action of jury commissioners. *Regent* v. *People,* 96 Ill. App. 189.

There is a presumption that legal proceedings are regular. *Austin* v. *Austin,* 43 Ill. App. 488.

Proceedings with reference to highways are presumed to be regular. *Shields* v. *Roos,* 158 Ill. 214.

Recitals in sheriff's deeds are *prima facie* correct. *Gardner* v. *Eberhart,* 82 Ill. 316.

It is presumed that a referee was sworn according to law. *Story* v. *Demarne,* 77 Ill. App. 74.

A sheriff's certificate of sale without a judgment is no evidence of title. *Curtis* v. *Swearingen,* Breese, 160.

The presumption that officials do their duty does not extend to officials of corporations. *T. C. Gas Works* v. *People,* 156 Ill. 387.

That one was an officer is to be presumed from his habitually acting in that capacity. *Morrell* v. *People,* 32 Ill. 499.

Other presumptions.—Facts from which presumptions arise must be proven by direct evidence. *Morris* v. *I. & St. L. R. R. Co.,* 10 Brad. 389.

As to charging the jury concerning presumptions, see *Illinois Cent. R. R. Co.* v. *Cragin,* 71 Ill. 177.

Possession.—Possession of land is *prima facie* evidence of ownership. *Frank* v. *Palmer,* 65 Ill. App. 124.

The ownership of a railroad may be presumed from its use. *Illinois Cent. R. R. Co.* v. *Mills,* 42 Ill. 407; *P., C. & St. L. R. R. Co.* v. *Kunston,* 69 Ill. 103; *T., P. & W. Ry. Co.* v. *Arnold,* 49 Ill. 178.

The possession of personal property is *prima facie* evidence of ownership. *Roberts* v. *Haskall,* 20 Ill. 59.

Where one is in possession of an article of personal property and mortgages it, it will be presumed that he was the owner of it. *Downey* v. *Arnold,* 97 Ill. App. 91.

The fact that a note is in one's possession is some evidence of ownership. *Henderson* v. *Davisson,* 157 Ill. 379.

A deed found in the grantee's possession is presumed to have been delivered. *Harshberger* v. *Carroll,* 163 Ill. 636.

Title may be presumed from possession. *Keith* v. *Keith,* 104 Ill. 397; *Doty* v. *Burdick,* 83 Ill. 473; *Herbert* v. *Herbert,* Breese, 278; *Brooks* v. *Bruyn,* 18 Ill. 539; *Burnap* v. *Cook,* 32 Ill. 168; *Farwell* v. *Meyer,* 35 Ill. 40.

The ownership of corporation securities is presumed from possession. *Higgins* v. *Lansingh,* 154 Ill. 301.

Presumption of guilt from possession of stolen goods. *Conkright* v. *People,* 35 Ill. 204.

As to presumption under the bucket shop act, see Hurd's Rev. Stat., chap. 38, sec. 137*c*, p. 592.

Possession of stolen property evidence of theft. *Jupitz* v. *People,* 34 Ill. 516; *Conkright* v. *People,* 35 Ill. 204; *Andrews* v. *People,* 60 Ill. 354; *Comfort* v. *People,* 54 Ill. 404.

As to evidence.— The failure to call a natural witness is an unfavorable circumstance. *Lebanon Coal & Machine Assn.* v. *Zerwick,* 77 Ill. App. 486.

Presumption for nonproduction of evidence (letters). *Law* v. *Woodruff,* 48 Ill. 399.

Presumption from the destruction or fabrication of evidence. *Winchell* v. *Edwards,* 57 Ill. 41; *Downing* v. *Plate,* 90 Ill. 268; *C. C. R. R. Co.* v. *McMahon,* 103 Ill. 485.

There is a presumption that papers destroyed were against the spoliator. *Tartar* v. *Keller,* 167 Ill. 129.

Matters of law.— The presumption is that the common law prevails in another State as interpreted by the courts of this State. *Sealing* v. *Knollin,* 94 Ill. App. 443.

Effect of statute upon common law. *Cadwallader* v. *Harris,* 76 Ill. 370.

Presumption as to foreign laws. *Crouch* v. *Hall,* 15 Ill. 263; *Tatman* v. *Strader,* 23 Ill. 493, 495.

It is presumed that the common law is in force in another State. *Van Ingen* v. *Brabrock,* 27 Ill. App. 401.

A common-law assignment in another State will be presumed to be regular. *Thompson Co.* v. *Whitehead,* 185 Ill. 454, 56 N. E. 1106, affirming 86 Ill. App. 76.

It will not be presumed that a chattel mortgage, fraudulent at the place of trial, is valid by the law of the State where it was made. *Shannon* v. *Wolf,* 173 Ill. 253, 50 N. E. 682, reversing 68 Ill. App. 580.

Payment.— Payment is presumed after twenty-seven years. *Langworthy* v. *Baker,* 23 Ill. 484; *McCormick* v. *Evans,* 33 Ill. 327.

A receipt in full is *prima facie* evidence of payment. *Walrath* v. *Norton,* 5 Gilm. 437; *Marston* v. *Wilcox,* 1 Scam. 271. Compare *Bartholomew* v. *Bartholomew,* 24 Ill. 199; *Fitzsimmons* v. *Allen,* 39 Ill. 440.

Identity.— As to identity. *Lee* v. *Mendel*, 40 Ill. 359; *Heacock* v. *Lubukee*, 108 Ill. 641; *Brown* v. *Metz*, 33 Ill. 339; *Wickersham* v. *People*, 1 Scam. 128.

Where father and son bear the same name, the presumption is that the father is intended. *Doty* v. *Doty*, 159 Ill. 46.

Honesty.— There is a presumption that men are honest until the contrary is proved. *Diefenthaler* v. *Hall*, 96 Ill. App. 639.

Continuity.— The relation of common carrier, once proved, is presumed to exist. *P. & P. Union Ry. Co.* v. *U. S. Roll. S. Co.*, 136 Ill. 643, 654.

Sanity.— There is a presumption of sanity. *Stevens* v. *Shannahan*, 160 Ill. 330; *Fisher* v. *People*, 23 Ill. 283; *Hopps* v. *People*, 31 Ill. 385, 394; *Lilly* v. *Waggoner*, 27 Ill. 395; *Titcomb* v. *Vantyle*, 84 Ill. 371; *Snow* v. *Benton*, 28 Ill. 306.

The condition of mind long before a will was made is irrelevant. *Dickie* v. *Carter*, 42 Ill. 376.

Every one free.— That every one is free. *Rodney* v. *Illinois Cent. R. R. Co.*, 19 Ill. 42; *Bailey* v. *Cromwell*, 3 Scam. 71; *Kinney* v. *Cook*, 3 Scam. 232.

Conveyance to wife.— There is presumption that a conveyance by husband to wife is by way of gift. *Pool* v. *Phillips*, 167 Ill. 432.

Other presumptions.—*Jackson* v. *Cummings*, 15 Ill. 449; *Korah* v. *Ottawa*, 32 Ill. 121; *People* v. *Hatch*, 33 Ill. 9; *R., R. I. & St. L. R. R. Co.* v. *Lewis*, 58 Ill. 49; *Illinois Cent. R. R. Co.* v. *Houck*, 72 Ill. 285; *C., B. & Q. R. R. Co.* v. *Van Patten*, 74 Ill. 91.

That one intends the natural results of his acts.— *People* v. *Sweeney*, 55 Mich. 586; *Allison* v. *Chandler*, 11 Mich. 542; *People* v. *Potter*, 5 Mich. 1; *People* v. *Scott*, 6 Mich. 287; *People* v. *Getchell*, 6 Mich. 497; *Schaible* v. *Ardner*, 98 Mich. 70; *People* v. *Resh*, 107 Mich. 251.

New Jersey.

Presumption of regularity.— *Railroad Co.* v. *Little*, 41 N. J. Eq. 519.

Regularity of taking a deposition. *New Jersey Exp. Co.* v. *Nichols*, 32 N. J. L. 166, 33 N. J. L. 434.

Presumed that an oath was administered regularly. *Coxe* v. *Field*, 1 Green, 215; *Williamson* v. *Carroll*, 1 Harr. 217.

Judicial proceedings.— Judicial proceeding of another State presumed to be valid and regular. *Royal Arcanum* v. *Carley*, 52 N. J. Eq. 642.

Presumption is that a judgment was entered at the earliest hour of the day in which it could be entered in due course. *Hunt* v. *Swayze*, 55 N. J. L. 33.

In rendering a decree the court is presumed to have proceeded according to law, and the burden of proof is on the impeaching party. *Eldridge* v. *Lippincott*, Coxe, 397; *Hyer* v. *Morehouse*, Spen. 125.

Presumption that an attorney has authority to appear. *Norris* v. *Douglass*, 2 South. 817; *Railroad Co.* v. *Greenwich*, 25 N. J. Eq. 565; *Ward* v. *Price*, 25 N. J. L. 225.

Every reasonable presumption is in favor of the validity of an award. *Thomas* v. *W. Jersey R. Co.*, 24 N. J. Eq. 568.

Regularity of the proceedings of a court with jurisdiction is presumed. *Maxwell* v. *Pittenger*, 3 N. J. Eq. 156; *Van Kleek* v. *O'Hanlon*, 21 N. J. L. 582; *Reeves* v. *Townsend*, 22 N. J. L. 396.

Presumption that what ought to be done has been done does not apply in case of persons and tribunals having limited or merely statutory jurisdiction. *Snediker* v. *Quick*, 13 N. J. L. 306.

Presumptions arising from lapse of time.— Presumed that surveyors acted with ordinary skill and care when oral evidence has become impossible by lapse of time. *Scott* v. *Yard*, 46 N. J. Eq. 79.

Surveys which have stood upon the records of the proprietors for nearly 200 years are conclusively presumed to have been approved by the proprietors. *Jennings* v. *Burnham*, 56 N. J. L. 289.

After a highway has been used for a long time the presumption is that those who surveyed it acted properly. *Taintor* v. *Morristown*, 33 N. J. L. 57; *Taintor* v. *Morristown*, 19 N. J. Eq. 46; *Ward* v. *Folly*, 2 South. 482; *Bodine* v. *Trenton*, 36 N. J. L. 198; *State* v. *Lewis*, 2 Zab. 564.

Presumption that title is extinguished when no entry is made in twenty years does not exist in favor of one who never himself exercised any dominion over the property. *Roll* v. *Rea*, 57 N. J. L. 647.

Mortgage presumed to be paid after a lapse of twenty years. *Magee* v. *Bradley*, 54 N. J. Eq. 326; *Stimis* v. *Stimis*, 54 N. J. Eq. 17.

Presumption after twenty years that a legacy has been paid. *Magee* v. *Bradley*, 54 N. J. Eq. 326.

Presumption is that tax has been paid after a lapse of twenty years. *In re Commissioners of Trenton*, 17 N. J. L. J. 23.

Maryland.

The proceedings of a court of general jurisdiction are presumed to be regular. *Schultze* v. *State,* 43 Md. 295; *Hayes* v. *Brotzman,* 46 Md. 519.

The presumption is that a trustee has faithfully performed the trust. *Shilknecht* v. *Eastburn,* 2 G. & J. 115.

Pennsylvania.

Regularity.— *Murray's Heirs* v. *Erie,* 59 Pa. 223.

If a court has jurisdiction the regularity of its proceedings is presumed. *Ohio* v. *Hinchman,* 27 Pa. 479; *Iddings* v. *Cairns,* 2 Grant, 88.

Presumed that an order staying an execution was properly granted. *Cake* v. *Cake,* 192 Pa. 550.

It is presumed that officers act in accordance with duty and within the scope of their authority only when they act as such officers. *Murphy* v. *Chase,* 103 Pa. 260.

Presumption of payment when note has come into hands of the maker. *Connelly* v. *McKean,* 64 Pa. 113.

The report of public officers appointed to appraise and survey lands is *prima facie* evidence of the regularity of their proceedings, even though the report is not as complete as it should be. *Allegheny* v. *Nelson,* 25 Pa. 332.

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

* See Note XXXVIII.

between himself and such person or his representative in interest, to deny the truth of that thing.

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 he acted in the manner in which the other person was led by such fraud to believe him to act.

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.[12]

(*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.[13]

(*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. B may show that he had only a copy and not the original.[14]

(*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

[12] *Pickard* v. *Sears*, 1837, 6 A. & E. 469, 474.

[13] (Per Parke, B.) *Freeman* v. *Cooke*, 1848, 2 Ex. 663.

[14] *Howard* v. *Hudson*, 1853, 2 E. & B. 1.

for C on the ground that, for want of specific appropriation, no property passed to B.[15]

(*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 cashed. He wrote 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.[16]

(*f*) A railway company negligently issues two delivery orders for the same wheat to A, who fraudulently raises money from B as upon two consignments of different lots of wheat. The Railway is liable to B for the amount which A fraudulently obtained by the company's negligence.[17]

(*g*) 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.[18]

AMERICAN NOTE.

General.

Authorities.— Bigelow on Estoppel, sec. 453 *et seq.;* 11 Am. & Eng. Encyclopædia of Law (2d ed.), p. 420 *et seq.*

Estoppel.— First paragraph of text. *Dickerson* v. *Colgrove,* 100 U. S. 578; *Mutual Life Ins. Co.* v. *Norris,* 31 N. J. Eq. 583; *Slocumb* v. *Railroad Co.,* 57 Ia. 675; *Stevens* v. *Ludlum,* 46 Minn. 168; *Bates* v. *Swiger,* 40 W. Va. 421; *Putnam* v. *Tyler,* 117 Pa. 570; *Fletcher* v. *Pullen,* 70 Md. 205; *Backus* v. *Taylor,* 84 Ind. 503; *Drew* v. *Kimball,* 43 N. H. 282, 80 Am. Dec. 163; *Horn* v. *Cole,* 51 N. H. 287; *Forsyth* v. *Day,* 46 Me. 176; *Wetherell* v. *Mar. Ins. Co.,* 49 Me. 200; *Allen* v. *Shaw,* 61 N. H. 95; *Canfield* v. *Gregory,* 66 Conn. 9, 17; *Chase's Appeal,* 57 Conn. 236; *Roe* v. *Jerome,* 18 Conn. 153; *Taylor*

[15] *Knights* v. *Wiffen,* 1870, L. R. 5 Q. B. 660.

[16] *Young* v. *Groate,* 1827, 4 Bing. 253.

[17] *Coventry* v. *G. E. R.,* 1883, 11 Q. B. D. 776.

[18] Per Blackburn, J., in *Swan* v. *N. B. Australasian Co.,* 1863, 2 H. & C. 181. See *Baxendale* v. *Bennett,* 1878, 3 Q. B. D. 525. The earlier cases on the subject are much discussed in *Jorden* v. *Money,* 1854, 5 H. L. Ca. 209–16, 249–257.

v. *Ely*, 25 Conn. 258; *Mitchell* v. *Leavitt*, 30 Conn. 590; *Carroll* v. *M. R. R. Co.*, 111 Mass. 1; *Zuchtman* v. *Roberts*, 109 Mass. 53, 54, 12 Am. Rep. 663; *Jackson* v. *Allen*, 120 Mass. 64; *Fall River Bank* v. *Buffinton*, 97 Mass. 500.

Fraud.— Last paragraph of text. *Ruddell* v. *Fhalor*, 72 Ind. 533; *Ross* v. *Doland*, 29 O. St. 473; *Shirts* v. *Overjohn*, 60 Mo. 305. *Compare Leather Mfrs. Bank* v. *Holley*, 117 U. S. 96; *O'Mulcahy* v. *Holley*, 21 Minn. 31; *Putnam* v. *Sullivan*, 4 Mass. 45, 53, 3 Am. Dec. 206.

Last paragraph of text.— *Ross* v. *Doland*, 29 Ohio St. 473.

New Jersey.

Estoppel.— First paragraph of text. *Mutual Life Ins. Co.* v. *Norris*, 31 N. J. Eq. 583.

One erected a house on land of another who stood by and was silent. No estoppel if the silence was due to mistake. *McKelway* v. *Armour*, 10 N. J. Eq. 115.

Instances.— *Bank* v. *Fulmer*, 31 N. J. L. 52; *Den.* v. *Baldwin*, 1 Zab. 395; *Dewees* v. *Insurance Co.*, 35 N. J. L. 366; *Erie R. Co.* v. *D., L. & W. R. Co.*, 21 N. J. Eq. 283; *Atty.-Gen.* v. *Railroad Co.*, 24 N. J. Eq. 50.

Estoppel in pais defined.— *Church* v. *Iron Works*, 45 N. J. L. 133.

Maryland.

Authorities in general.— *Harly* v. *Bank*, 51 Md. 562; *Homer* v. *Grosholz*, 38 Md. 520; *Bramble* v. *State*, 41 Md. 435; *McClellan* v. *Kennedy*, 8 Md. 230; *Hambleton* v. *Railroad Co.*, 44 Md. 551; *Browne* v. *Church*, 37 Md. 108; *Andrews* v. *Clark*, 72 Md. 396; *Fletcher* v. *Pullen*, 70 Md. 205.

Facts constituting an estoppel *in pais* are admissible without being specially pleaded. *Babylon* v. *Duttera*, 89 Md. 444.

Estoppel, what is. *Alexander* v. *Walker*, 8 Gill, 239.

When the law raises a conclusive presumption as to one's intention from the acts themselves, no evidence as to such intention is admissible. *Lineweaver* v. *Slagle*, 64 Md. 465.

Estoppels must be mutual. *Groshon* v. *Thomas*, 20 Md. 234.

Illustration (e).— Rule *contra*. *Burrows* v. *Klunk*, 70 Md. 451.

Pennsylvania.

Estoppel by conduct.— Illustrations. *Sargent* v. *Johns,* 206 Pa. 386; *Putnam* v. *Tyler,* 117 Pa. 570.

Receipt in full as an estoppel. *Ebert* v. *Johns,* 206 Pa. 395.

A receipt may operate as an estoppel as against third parties acting in reliance upon such receipt to their injury. *Atkins* v. *Payne,* 190 Pa. 5.

No estoppel from failure to proclaim a forgery immediately on discovery. *Zell's Appeal,* 103 Pa. 344.

Illustration (e).— Question of negligence left to the jury. *Leas* v. *Walls,* 101 Pa. 57.

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;[19] and no person who came upon any land by the licence 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 licence was given.[20]

AMERICAN NOTE.

General.

Authorities.— 18 Am. & Eng. Encyclopædia of Law (2d ed.), p. 411 *et seq.;* vol. 11, p. 440 *et seq.;* 1 Washburn on Real Property (5th ed.), pp. 588–601.

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[19] *Doe* v. *Barton,* 1840, 11 A. & E. 307; *Doe* v. *Smyth,* 1815, 4 M. & S. 347; *Doe* v. *Pegg,* 1785, 1 T. R. 760 (note).

[20] *Doe* v. *Baytup,* 1835, 3 A. & E. 188.

Tenant.— *Scott* v. *Rutherford,* 92 U. S. 107; *Sexton* v. *Carley,* 147 Ill. 269. But see *Corrigan* v. *Chicago,* 144 Ill. 537; *Derrick* v. *Luddy,* 64 Vt. 462; *Camp* v. *Camp,* 5 Conn. 300; *Magill* v. *Hinsdale,* 6 Conn. 469; *Holmes* v. *Kennedy,* 1 Root (Conn.), 77; *Streeter* v. *Ilsley,* 147 Mass. 141; *Cobb* v. *Arnold,* 8 Metc. (Mass.) 398; *Bailey* v. *Kilburn,* 10 Metc. (Mass.) 176; *Oakes* v. *Munroe,* 8 Cush. (Mass.) 282; *Miller* v. *Lang,* 99 Mass. 13; *Hames* v. *Shaw,* 100 Mass. 187; *Coburn* v. *Palmer,* 8 Cush. (Mass.) 124; *Blake* v. *Sanderson,* 1 Gray (Mass.), 332; *Patten* v. *Deshon,* 1 Gray (Mass.), 325; *Dunshee* v. *Grundy,* 15 Gray (Mass.), 314; *Granger* v. *Parker,* 137 Mass. 228.

A tenant may dispute his lessor's title, if he has yielded the possession in good faith, though without process of law, to one who had actu lly entered under a paramount title, coupled with a present right of entry. *Camp* v. *Scott,* 47 Conn. 369.

A lessee, who holds over after the end of the term, is estopped from setting up against the lessor that the title is in a stranger. *Holmes* v. *Kennedy,* 1 Root, 77.

Licensee.— *Hamilton, etc., R. Co.* v. *R. R. Co.,* 29 O. St. 341; *Hoen* v. *Simmons,* 1 Cal. 719, 52 Am. Dec. 290; *Glynn* v. *George,* 20 N. H. 114.

The estoppel may be claimed by any person deriving title from the landlord. *People* v. *Angel,* 61 How. Pr. 159; *Goodnow* v. *Pope,* 31 Misc. Rep. 475.

New Jersey.

Estoppel of tenant to deny landlord's title. *Horner* v. *Leeds,* 25 N. J. L. 106.

Maryland.

A tenant is estopped from denying his landlord's title. *Goodsell* v. *Lawson,* 42 Md. 348; *Cook* v. *Cresswell,* 44 Md. 581; *Isaac* v. *Clarke,* 2 Gill, 1.

If plaintiff claims title under the same person as the defendant does, he need not show that person's title as the defendant is estopped to dispute it. *Elwood* v. *Lannon,* 27 Md. 200.

But a tenant may show that the landlord's estate has been sold for taxes. *Keys* v. *Forrest,* 90 Md. 132.

A tenant may show that his landlord's title has expired since the lease. *Presstman* v. *Silljacks,* 52 Md. 647.

Pennsylvania.

Authority: *Kunkle* v. *Gas Co.*, 165 Pa. 133.

A tenant may show that one of the persons who signed the lease as landlord is not actually the landlord and did not sign as such. *Swint* v. *Oil Co.*, 184 Pa. 202.

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;[21] 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,[22] though he may deny his authority to endorse it.[23] If the bill is accepted in blank, the acceptor may not deny the fact that the drawer endorsed it.[24]

AMERICAN NOTE.

Authorities.— 2 Greenleaf on Evidence (2d ed.), secs. 164, 165; 4 Am. & Eng. Encyclopædia of Law (2d ed.), p. 65 *et seq.; Hoffman* v. *Bank of Milwaukee*, 12 Wall. 181; *U. S. Bank* v. *Bank of Georgia*, 10 Wheat. 333. 353; *National Bank* v. *Bangs*, 106 Mass. 441; *Marine Nat. Bank* v. *Nat. City Bank*, 59 N. Y. 67: *Nat. Park Bank* v. *Ninth Nat. Bank*. 46 N. Y. 77, 70 Am. Rep. 310; Crawford's Negotiable Instruments Law, sec. 112, p. 52.

21 *Garland* v. *Jacomb*, 1873, L. R. 8 Ex. 216.

22 *Sanderson* v. *Collman*, 1842, 4 M. & G. 209.

23 *Robinson* v. *Yarrow*, 1817, 7 Tau. 455.

24 *L. & S. W. Bank* v. *Wentworth*, 1880, 5 Ex. D. 96.

New Jersey.

The acceptor cannot deny that due diligence was used in presenting it. *Middlesex* v. *Thomas*, 20 N. J. Eq. 39.

Maryland.

The acceptor conclusively admits the signature of the drawer, but not the indorsement of the payee, even though the bill be to the drawer's own order. *Williams* v. *Drexel*, 14 Md. 566.

The acceptor is estopped to deny, as against the payee, that he has funds of the drawer in his hands. *Laflin* v. *Sinsheimer*, 48 Md. 411.

Pennsylvania.

The indorser of a negotiable instrument cannot be a witness to invalidate it. *John's Admr.* v. *Pardee*, 109 Pa. 545.

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.

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, obtained the goods from a third person who has claimed them from such bailee, agent, or licensee.[25]

[25] *Dixon* v. *Hammond*, 1819, 2 B. & A. 310; *Crossley* v. *Dixon*, 1863, 10 H. L. C. 293; *Gosling* v. *Birnie*, 1831, 7 Bing. 339; *Hardman* v. *Wilcock*, 1832 (?), 9 Bing. 382 (n.); *Biddle* v. *Bond*, 1865, 34 L. J. Q. B. 137; *Wilson* v. *Anderton*, 1830, 1 B. & Ad. 450. As to carriers, see *Sheridan* v. *New Quay*, 1858, 4 C. B. (N. S.) 618.

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 some 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.[26]

AMERICAN NOTE.

Authorities.— 4 Am. & Eng. Encyclopædia of Law (2d ed.), p. 531 *et seq.;* vol. 3, p. 758 *et seq.;* vol. 1, p. 1091 *et seq.*

Bailee, etc.— First paragraph of text. *Bricker* v. *Stroud*, 56 Mo. App. 183; *The Idaho*, 93 U. S. 575; *King* v. *Richards*, 6 Whart. 418; *Pulliam* v. *Burlingame*, 81 Mo. 111, 51 Am. Rep. 229; *Roberts* v. *Noyes*, 76 Me. 590; *Singer Mfg. Co.* v. *King*, 14 R. I. 511; *Burton* v. *Wilkinson*, 18 Vt. 186, 46 Am. Dec. 145; *Staples* v. *Fillmore*, 43 Conn. 510; *Osgood* v. *Nichols*, 5 Gray (Mass.), 420; *Bursley* v. *Hamilton*, 15 Pick. (Mass.) 40, 25 Am. Dec. 423.

Bill of lading.—Last paragraph of text. *Relyea* v. *New Haven Rolling Mill Co.*, 75 Fed. Rep. 420; *Brooke* v. *N. Y., etc., R. Co.*, 108 Pa. 529; *Sioux City, etc., R. Co.* v. *First Nat. Bank*, 10 Neb. 556; *Sears* v. *Wingate*, 3 Allen (Mass.), 103. But see *Pollard* v. *Vinton*, 105 U. S. 7; *Balt. & O. R. Co.* v. *Wilkens*, 44 Md. 11; *Dean* v. *King*, 22 O. St. 118; *Nat. Bank of Commerce* v. *Chicago, etc., R. Co.*, 44 Minn. 224.

[26] 18 & 19 Vict. c. 111, s. 3.

New Jersey.

Bill of lading.— The receipt of a common carrier is not conclusive proof of quantity or condition of the goods in favor of either consignor or consignee. *Ayres* v. *Railroad Co.*, 29 N. J. L. 397.

Maryland.

Bill of lading.— Last paragraph of text. See *B. & O. R. Co.* v. *Wilkens*, 44 Md. 11.

Pennsylvania.

Shipowner is estopped if the master acts within apparent authority. *Brooke* v. *Railroad Co.*, 108 Pa. 529.

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.

AMERICAN NOTE.

General.

Competency is presumed. *Campbell* v. *Campbell*, 130 Ill. 466, 473.

The statute on evidence does not render incompetent any person before competent. *M'Kay* v. *Riley*, 135 Ill. 589.

Credible witnesses to a will are competent witnesses. *In re Noble's Estate*, 22 Ill. App. 535; *In re Will, etc.*, 124 Ill. 269.

All witnesses are competent unless rendered incompetent by statute, under section 504, Rev. Stat., 1894. *Jordon* v. *State*, 142 Ind. 422.

A person of sufficient age is presumed to be a competent witness. *Duncan* v. *Welty*, 20 Ind. 44.

Presumed competent.— A witness is presumed to be competent until the contrary is shown. *Norris* v. *Hurd*, Wright, 102.

ARTICLE 107.†

WHAT WITNESSES ARE INCOMPETENT.

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 understand-

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* See Note XXXIX.

† See Note XL. A witness under sentence of death was said to be incompetent in *R.* v. *Webb*, 1867, 11 Cox, 133, *sed quære*.

ing the questions put to him, from giving rational answers to those questions, or from knowing that he ought to speak the truth.

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 must be written and such signs made in open Court. Evidence so given is deemed to be oral evidence.

AMERICAN NOTE.

General.

Authorities.— 1 Wharton on Evidence, secs. 398–403, 406, 407; 1 Greenleaf on Evidence (15th ed.), secs. 365–370.

Youth, etc.— First paragraph of text. *State* v. *Whittier,* 21 Me. 341, 347, 38 Am. Dec. 272; *Day* v. *Day,* 56 N. H. 316; *Com.* v. *Hutchinson,* 10 Mass. 225; *Com.* v. *Robinson,* 165 Mass. 426; *State* v. *Levy,* 23 Minn. 104; *State* v. *Doyle,* 107 Mo. 36; *State* v. *Douglas,* 53 Kan. 669; *McGuff* v. *State,* 88 Ala. 147.

A child of five may be allowed to testify. *Com.* v. *Robinson,* 165 Mass. 426. See also *Wheeler* v. *U. S.,* 159 U. S. 523; *State* v. *Juneau,* 88 Wis. 180; *McGuire* v. *People,* 44 Mich. 286 (child of six).

Unsound mind.— *Kendall* v. *May,* 10 Allen (Mass.), 59; *Com.* v. *Lynes,* 142 Mass. 577; *Lewis* v. *Eagle Ins. Co.,* 10 Gray (Mass.), 508.

The question whether a person offered as a witness is insane goes to his competency, and is a preliminary question to be decided by the court. *Holcomb* v. *Holcomb,* 28 Conn. 179.

Persons of unsound mind may testify if, in fact, their understanding is sufficient to enable them to understand the oath and the questions. *Pease* v. *Burrowes,* 86 Me. 153, 176; *Dist. of Columbia* v. *Annes,* 107 U. S. 519; *Tucker* v. *Shaw,* 158 Ill. 326; *Bowdle* v. *Railway Co.,* 103 Mich. 272; *Cannaday* v. *Lynch,* 27 Minn. 435; *Worthington* v. *Mencer,* 96 Ala. 310.

Interest.— The common-law disqualification because of interest is now removed, so far as the United States courts are concerned. U. S. Stat. at Large, vol. 20, p. 30; U. S. Rev. Stats., sec. 858.

In the various States, the common-law disqualification because of interest is generally removed by statute, but the fact of interest may be shown (*e. g.*, Conn. Gen. Stats., sec. 1098).

Atheist.— At common law, one who does not believe in God is an incompetent witness. *Free* v. *Buckingham*, 59 N. H. 219; *Arnd* v. *Amling*, 53 Md. 192; *Clinton* v. *State*, 33 O. St. 27; *Hunscom* v. *Hunscom*, 15 Mass. 184.

The opinions of one offered as a witness, as to the existence of a God and future accountability, must be derived from other witnesses, and he cannot himself be questioned upon them. *Atwood* v. *Welton*, 7 Conn. 73.

They may be proved from his declarations out of court. *Curtiss* v. *Strong*, 4 Day (Conn.), 56; *Bow* v. *Parsons*, 1 Root (Conn.), 481.

An atheist is now, by statute generally, a competent witness, but the fact may be shown (*e. g.*, Conn. Gen. Stats., sec. 1098; Mass. Pub. Stats., chap. 169, sec. 17). See *Hronek* v. *People*, 134 Ill. 139; *People* v. *Copsey*, 71 Cal. 548; *Bush* v. *Com.*, 80 Ky. 244.

Deaf and dumb witness.— *Quinn* v. *Halbert*, 57 Vt. 178; *State* v. *De Wolf*, 8 Conn. 93, 97.

Conviction of crime.— Conviction of crime does not render a person incompetent as a witness, although it may be shown to affect credibility. Code Civ. Pro., sec. 832. *Sims* v. *Sims*, 75 N. Y. 466; *People* v. *O'Neil*, 109 N. Y. 251. And this even though the crime is not an infamous one. *People* v. *Burns*, 33 Hun, 296.

Accomplice.— An accomplice may testify against a prisoner. *Love* v. *People*, 160 Ill. 501.

Detectives.— The testimony of a private detective is to be regarded with suspicion. *Blake* v. *Blake*, 70 Ill. 618. Compare *DeLong* v. *Giles*, 11 Brad. 33.

Bias.— It is competent to prove a witness's bias and sympathy. *Elgin* v. *Eaton*, 2 Brad. 90.

No party to any civil action, suit, or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein of his own motion, or in his own behalf, by virtue of the foregoing section, (removing disqualification because of interest) when any adverse party sues or defends as the trustee or conservator of any idiot, habitual drunkard, lunatic, or distracted person, or as the executor, administrator, heir, legatee or devisee of any deceased person, or as guardian or trustee of any such heir, legatee or

devisee, unless when called as a witness by such adverse party so suing or defending, and also except in the following cases, namely:

First. In any action, suit or proceeding, a party or interested person may testify to facts occurring after the death of such deceased person, or after the ward, heir, legatee or devisee shall have attained his or her majority.

Second. When, in such action, suit or proceeding, any agent of any deceased person shall, in behalf of any person or persons suing or being sued, in either of the capacities above named, testify to any conversation or transaction between such agent and the opposite party or party in interest, such opposite party or party in interest may testify concerning the same conversation or transaction.

Third. Where, in any such action, suit or proceeding, any such party suing or defending, as aforesaid, or any persons having a direct interest in the event of such action, suit or proceeding, shall testify in behalf of such party so suing or defending, to any conversation or transaction with the opposite party or party in interest, then such opposite party or party in interest, shall also be permitted to testify as to the same conversation or transaction.

Fourth. Where, in any such action, suit or proceeding, any witness, not a party to the record, or not a party in interest, or not an agent of such deceased person, shall, in behalf of any party to such action, suit or proceeding, testify to any conversation or admission by any adverse party or party in interest, occurring before the death and in the absence of such deceased person, such adverse party or party in interest may also testify as to the same admission or conversation.

Fifth. When, in any such action, suit or proceeding, the deposition of such deceased person shall be read in evidence at the trial, any adverse party or party in interest may testify as to all matters and things testified to in such deposition by such deceased person, and not excluded for irrelevancy or incompetency. Hurds' Rev. Stat., chap. 51, sec. 2, p. 858.

As to section 2 of the evidence act, regarding competency, see *Laurence* v. *Laurence*, 164 Ill. 367.

Under certain circumstances, the defendant may be called as a witness by the plaintiff under a bill of discovery. *Hair Co.* v. *Daily*, 161 Ill. 379.

In any action, suit or proceeding by or against any surviving partner or partners, joint contractor or joint contractors, no adverse party or person adversely interested in the event thereof, shall,

by virtue of section 1 of this act (removing disqualifications because of interest) be rendered a competent witness to testify to any admission or conversation by any deceased partner or joint contractor, unless some one or more of the surviving partners or joint contractors were also present at the time of such admission or conversation; and in every action, suit or proceeding a party to the same who has contracted with an agent of the adverse party — the agent having since died — shall not be a competent witness as to any admission or conversation between himself and such agent, unless such admission or conversation with the said deceased agent was had or made in the presence of a surviving agent or agents of such adverse party, and then only except where the conditions are such that under the provisions of sections 2 and 3 of this act he would have been permitted to testify if the deceased person had been a principal and not an agent. Hurd's Rev. Stat., chap. 51, sec. 4, p. 859.

The parties to bastardy proceedings may testify in Illinois. See Hurd's Rev. Stat., chap. 17, sec. 6, p. 204.

The adverse party may be compelled to testify in the same State. Hurd's Rev. Stat., chap. 51, sec. 6, p. 860.

If a party desires the testimony of the adverse party, he must subpœna him. *Vennum* v. *Vennum*, 56 Ill. 430.

A party in interest may be compelled to testify against himself. *Brooks* v. *McKinney*, 4 Scam. 309.

One named as a party defendant is not necessarily an adverse party to the plaintiff. 197 Ill. 298, 301, 64 N. E. 324.

Party as witness in will contest. 197 Ill. 298, 301, 64 N. E. 324.

The habits of a party are admissible on questions of negligence. *Swift* v. *Zerwick*, 88 Ill. App. 558.

One cannot testify in his own behalf when the adverse party defends as executor. *Johnson* v. *Cunningham*, 56 Ill. App. 593.

The common-law disqualification still exists as to the defense in suits brought by administrators. *Thompson* v. *Wilson*, 56 Ill. App. 159.

Husband and wife.— At common law, the husband or wife was not a competent witness for or against the other. *Keep* v. *Griggs*, 12 Brad. 511; *Waddams* v. *Humphrey*, 22 Ill. 661; *Rea* v. *Tucker*, 51 Ill. 110.

The wife may be a witness when her husband may. *Illinois Cent. R. R. Co.* v. *Taylor*, 24 Ill. 323.

A husband or wife cannot testify where the adverse party is an executor. *Harriman* v. *Sampson,* 23 Ill. App. 159; *Treleaven* v. *Dixon,* 119 Ill. 548, 550.

A husband is not a competent witness for his wife who has sued an executor. *Mann* v. *Forcin,* 166 Ill. 446.

A husband cannot testify for or against his wife upon her trial for adultery. *Miner* v. *People,* 58 Ill. 59.

In malicious prosecution, the wife of the plaintiff is incompetent. *Mitchinson* v. *Cross,* 58 Ill. 366.

A wife cannot testify in behalf of her husband in a suit to cancel a deed on the ground of duress. *Rendleman* v. *Rendleman,* 156 Ill. 568.

The wife of the defendant is not a competent witness for him in a slander suit. *Hanover* v. *Hanover,* 78 Ill. 412.

In a suit by an executor, the widow cannot testify for the plaintiff in reference to a conversation between the defendant and the deceased. *Reeves* v. *Herr,* 59 Ill. 81.

In litigation respecting the separate estate of the wife, the husband is a competent witness for her. *Waggoneller* v. *Rexford,* 2 Brad. 455; *Frank* v. *Eggleston,* 92 Ill. 515; *Wing* v. *Goodman,* 75 Ill. 159; *Flynn* v. *Gardner,* 3 Ill. App. 253; *Mueller* v. *Rebham,* 94 Ill. 142; *Johnson* v. *McGregor,* 157 Ill. 350; *Pfissing* v. *Heiter,* 91 Ill. App. 407; *Toler* v. *Bishop,* 84 Ill. App. 278; *Best* v. *Jenks,* 123 Ill. 447, 453; *Stout* v. *Ellison,* 15 Ill. App. 222.

Under section 5 of the act relating to evidence, the husband and wife may be witnesses in behalf of or against each other, except as therein otherwise provided. *Mueller* v. *Rebham,* 94 Ill. 142; *Cordery* v. *Hughes,* 6 Brad. 401; *Smith* v. *Long,* 106 Ill. 485; *Keep* v. *Griggs,* 12 Brad. 511; *Eads* v. *Thompson,* 109 Ill. 87.

In a suit by a wife for money lost by her husband at gaming, the husband is a competent witness. *Johnson* v. *McGregor,* 55 Ill. App. 530.

As to corroboration of the husband's testimony by the wife in a suit in which he was not interested, see *L. A. & N. C. Gravel Road* v. *Madans,* 102 Ill. 417.

A wife is a competent witness to prove the consideration of a deed made to her by the husband. *Payne* v. *Miller,* 103 Ill. 442.

A wife is not competent as a witness for her husband in arbitration proceedings under Rev. Stat., chap. 10, secs. 16 and 18. *Seaton* v. *Kendall,* 174 Ill. 410, 49 N. E. 561.

Where the adverse party sues the defendant as the representative of a deceased person, a husband and wife cannot testify for or against each other. *Mann* v. *Forein*, 69 Ill. App. 318.

A wife may testify for or against her husband as to any matter as to which she acts as his agent. *Illinois Cent. R. R. Co.* v. *Messnard*, 15 Ill. App. 213; *Mitchell* v. *Hughs*, 24 Ill. App. 308.

The wife cannot testify in a suit of trespass brought against her husband, when offered as a witness in his behalf. *Wolf* v. *Vanhousen*, 55 Ill. App. 295.

A wife, who is a party, is a competent witness for herself. *Kelly* v. *Hale*, 59 Ill. App. 568.

If a husband is interested, a wife is not competent. *McGrath* v. *Miller*, 61 Ill. App. 497.

Divorced wife is incompetent to testify as to the impotency of her former husband. *Griffith* v. *Griffith*, 162 Ill. 368, reversing 55 Ill. App. 474.

In a suit to partition land of a deceased husband, the widow is competent as to facts occurring after his death. *Gillespie* v. *Gillespie*, 159 Ill. 84.

As to the testimony of husband and wife under the statute, see *Wilcoxon* v. *Read*, 95 Ill. App. 33.

As to the testimony of husband and wife in actions against them, see *Vercler* v. *Jansen*, 96 Ill. App. 328.

As to divorced wife as witness, see *Maher* v. *Title Guarantee & Trust Co.*, 95 Ill. App. 365.

Adverse party as witness.— The adverse party may be examined as a witness. *Smith* v. *Rosenbaum*, 19 Ind. 256.

If the adverse party fails to attend as a witness, judgment may be entered against him. *Belton* v. *Smith*, 45 Ind. 291; *Nelson* v. *Neely*, 63 Ind. 194.

Or may be punished for contempt. *Chaffin* v. *Brownfield*, 88 Ind. 305.

The adverse party may be cross-examined in his own behalf. *Mosier* v. *Stoll*, 119 Ind. 244.

In partition suits between heirs, the party is not competent unless he is required by the court to testify, or has been called by the other party. *Dille* v. *Webb*, 61 Ind. 85.

As to executors as witnesses, see *Shirts* v. *Rooker*, 21 Ind. App. 420.

Objection for incompetency.— The ground of objection to the competency of a witness must be pointed out to the court, or the overruling of the objection cannot be assigned for error. *Whitewater Valley Canal Co.* v. *Dow,* 1 Ind. 141.

If the objection goes to the competency of a witness himself, it is not necessary to state what counsel expects to prove by him. *State* v. *Thomas,* 111 Ind. 515.

New Jersey.

Disqualification for interest abolished.— G. S. 1895, "Evidence," 3.

Parties to an action are competent when called by the adverse party. G. S. 1895, "Evidence," 2, 6.

Crime.— Conviction of crime no longer disqualifies. G. S. 1895, "Evidence," 1.

Youth.—Whether a boy of twelve years is competent to testify is largely in the discretion of the trial court; boy held competent in this case. *State* v. *Cracker,* 65 N. J. L. 410.

Atheists.—*Percey* v. *Powers,* 51 N. J. L. 432; *Van Pelt* v. *Van Pelt,* Pen. 657; *Smith* v. *Drake,* 23 N. J. Eq. 302.

Witness not incompetent because he is not an orthodox believer. *Miller* v. *Miller,* 1 Green, 139.

Attorneys.— The attorney conducting the case is not an incompetent witness. *Roston* v. *Morris,* 25 N. J. L. 173.

Judge.— A justice cannot be a witness in his own court. *Corlies* v. *Vannote,* 1 Hal. 324; *Outcalt* v. *Rankin,* 2 Green, 33; *Paterson* v. *Schenck,* 3 Green, 434; *McCormick* v. *Brookfield,* 1 South. 69.

Lack of mental capacity.— *Den.* v. *Van Cleve,* 2 South. 589, 653; *Donnelly* v. *State,* 26 N. J. L. 601, 620; *Van Pelt* v. *Van Pelt,* Pen. 657; *James* v. *Stonebanks,* Coxe, 227.

Husband and wife.— Husband and wife now competent and compellable witnesses in any civil action to which either is a party. *Foley* v. *Loughran,* 60 N. J. L. 464; *Lippincott* v. *Wikoff,* 54 N. J. Eq. 107.

Objections because of incompetency.— Objection to a witness on ground of incompetency ought to be made when he is sworn. *Den.* v. *Ashmore,* 2 Zab. 261; *Chambers* v. *Hunt,* 2 Zab. 552; *Coil* v. *Wallace,* 4 Zab. 291; *Den.* v. *Geiger,* 4 Hal. 225; *Graham* v. *Berryman,* 19 N. J. Eq. 29, 21 N. J. Eq. 370; *Price* v. *Ward,* 2 Hal. 127.

Cross-examining a witness does not waive an objection to him on the ground of incompetency. *Meeker* v. *Boylan,* 28 N. J. L. 274; *Ogden* v. *Robertson,* 3 Green, 124.

Objection to the competency of a witness may be waived. *Boone* v. *Ridgway*, 29 N. J. Eq. 543. And it is regarded as waived unless made promptly. *Monfort* v. *Rowland*, 38 N. J. Eq. 181, 40 N. J. Eq. 281; *Fennimore* v. *Childs*, 1 Hal. 318.

A court should sometimes of its own motion disregard incompetent evidence. *Sherman* v. *Lanier*, 39 N. J. Eq. 249.

Transactions with one deceased.— Under the revision of 1900 parties to a suit are competent witnesses notwithstanding their interest, but if either sues as the representative of a deceased person the other cannot testify as to transactions had with such deceased, until such deceased's representative testifies to some transaction with his deceased. This rule applies even where both parties are acting in such representative capacity. *Lodge* v. *Hulings*, 64 N. J. Eq. 761. See *Haines* v. *Watts*, 55 N. J. L. 149; *Bell* v. *Samuels*, 60 N. J. L. 370; *Thompson* v. *West*, 56 N. J. Eq. 660.

General rule where one party is acting in a representative capacity. *Montgomery* v. *Simpson*, 31 N. J. Eq. 1; *Larison* v. *Polhemus*, 36 N. J. Eq. 506; *Baker* v. *Galpin*, 39 N. J. Eq. 491; *Woolverton* v. *Van Syckel*, 57 N. J. L. 393; *Dickerson* v. *Payne*, 66 N. J. L. 351; *Greenwood* v. *Henry*, 52 N. J. Eq. 447; *McCartin* v. *McCartin*, 45 N. J. Eq. 265; *Christopher* v. *Wilkins*, 64 N. J. Eq. 354.

Heirs-at-law are representatives within the meaning of the statute. *Colfax* v. *Colfax*, 32 N. J. Eq. 206; *Joss* v. *Mohn*, 55 N. J. L. 407.

Where defendant dies during the pendency of an action the plaintiff thereupon becomes an incompetent witness as to transactions with the defendant. *Osborne* v. *O'Reilly*, 43 N. J. Eq. 647; reversing *S. C.*, 42 N. J. Eq. 467; *Beckhaus* v. *Ladner*, 48 N. J. Eq. 152, 50 N. J. Eq. 487.

If after one party has testified in an action the opposite party dies, the evidence so given remains competent. *Marlatt* v. *Warwick*, 18 N. J. Eq. 108, 19 N. J. Eq. 439.

Having proved a contract with deceased, the plaintiff is thereafter a competent witness to show his performance thereof not in the presence of deceased. *Provost* v. *Robinson*, 58 N. J. L. 222.

When a party sues or is sued in a representative capacity, such party's husband or wife is a competent witness to transactions between such party and the deceased. *Foley* v. *Loughran*, 60 N. J. L. 464; *Rairdon* v. *Sampson*, 67 N. J. L. 346.

When the suit is by a corporation against the representative of a deceased person, the officers of the corporation are competent witnesses as to transactions with deceased. *New Jersey Trust Co.* v. *Camden Safe D. Co.*, 58 N. J. L. 196.

In an action against the estate of a deceased person by the assignee of certain contract rights, the assignor is a competent witness as to his transactions with the deceased. *Cullen* v. *Woolverton*, 65 N. J. L. 279.

Statute.— Disqualification of a party when the opposite party is acting in a representative capacity. G. S. 1895, "Evidence," 3, 4, 12, 53.

Maryland.

Interest and crime.— Disqualification because of interest or crime is now removed. P. G. L. 1888, art. 35, sec. 1. But such interest or crime may be proved to affect the credibility of the witness. P. G. L. 1888, art. 35, sec. 5.

Conviction for perjury still disqualifies. P. G. L. 1888, art. 35, sec. 1.

Youth.— It is for the trial court to determine whether a young child is a competent witness. *Freeny* v. *Freeny*, 80 Md. 406.

Atheist.— At common law, one who does not believe in God is an incompetent witness. *Arnd* v. *Amling*, 53 Md. 192.

Husband and wife.— A wife is a competent witness in an action by her to set aside a marriage contract as a forgery. *Classen* v. *Classen*, 57 Md. 510.

Husband and wife are competent witnesses in a suit to declare the marriage void. *Le Brun* v. *Le Brun*, 55 Md. 496.

One claiming to be the widow of the deceased is not competent as to the fact of marriage. *Redgrave* v. *Redgrave*, 38 Md. 93.

Interest.— Authorities as to disqualification on the ground of interest. *Highberger* v. *Stiffler*, 21 Md. 350; *Insurance Co.* v. *Crane*, 16 Md. 260; *Turnpike Co.* v. *State*, 19 Md. 239.

Legatees under a will are competent witnesses in regard to it. *Harris* v. *Pue*, 39 Md. 535. And so are heirs-at-law petitioning for a share in the distribution of an estate. *Jones* v. *Jones*, 36 Md. 447.

When one party to a transaction is dead or insane.— See Code, art. 35, sec. 2.

The surviving party is incompetent to testify as to such transaction. *Wright* v. *Gilbert*, 51 Md. 146; *Robertson* v. *Morell*, 66 Md.

530; *Webster* v. *Le Compte,* 74 Md. 249; *Gunther* v. *Bennett,* 72 Md. 384; *Standford* v. *Horwitz,* 49 Md. 525; *Johnson* v. *Heald,* 33 Md. 352; *Wienecke* v. *Arbin,* 88 Md. 182.

A stockholder in a corporation is not incompetent in regard to a contract of the corporation, even though the other party thereto be dead. *Downes* v. *Railroad Co.,* 37 Md. 100.

When a corporation contracts with a person, the agent of the corporation who negotiated the contract is a competent witness even though the other party is dead or insane. *Flach* v. *Gottschalk Co.,* 88 Md. 368.

The death of the agent of a corporation or firm who acted for it in making a contract does not render the other party incompetent. *South Balto., etc., Co.* v. *Muhlbach,* 69 Md. 395; *Spencer* v. *Trafford,* 42 Md. 1.

The surviving party is incompetent only as to a contract or cause of action in issue and on trial. *Wright* v. *Gilbert,* 51 Md. 146; *Leiter* v. *Grimes,* 35 Md. 434; *Smith* v. *Wood,* 31 Md. 293.

Devisees under a will do not have such an adverse interest as to be incompetent to testify against an executor on his claim for services. *Bantz* v. *Bantz,* 52 Md. 686.

A witness is not incompetent in case any of the several parties with whom he made a contract is living. *Simmons* v. *Haas,* 56 Md. 153.

The death of one partner does not disqualify the other partners as witnesses concerning contracts of the firm. *Hardy* v. *Ches. Bank,* 51 Md. 562.

But they are disqualified in a suit for an accounting brought by a representative of the deceased partner. *Sangston* v. *Hack,* 52 Md. 173. See *McKaig* v. *Hebb,* 42 Md. 227.

The death of one party after the testimony of the other is taken does not render such testimony incompetent. *Armitage* v. *Snowden,* 41 Md. 119.

On the question of which of two mortgages is prior one mortgagee is not incompetent by reason of the death of the other. *Swartz* v. *Chickering,* 58 Md. 290.

An assignee of a life insurance policy is competent to testify as to the consideration for such assignment from the deceased as against another assignee. *Diffenbach* v. *Vogeler,* 61 Md. 370.

But the surviving party to a written contract is competent to prove its loss. *Ahl* v. *Ahl,* 71 Md. 555.

In an action for specific performance of a contract, made by one now dead, to convey a house, the plaintiff is not a competent witness. *Polk* v. *Clark*, 92 Md. 372.

One is not rendered incompetent to testify as to a contract by reason of the death of the other party to it, in case the negotiations were with an agent of such deceased party and the agent is living and competent. *Warth* v. *Brafman*, 85 Md. 674.

Surviving party.— Disqualification on the ground that the other party to the suit or contract is dead or insane. P. G. L. 1888, art. 35, sec. 2, and chap. 495, Laws of 1902.

Time for objecting.— An objection to a witness on the ground of incompetency is in time if made after he was sworn but before examination. *Ward* v. *Leitch*, 30 Md. 326.

Pennsylvania.

Disqualification for interest removed.— Pepper & Lewis' Digest of Laws, "Witnesses," sec. 8.

Every witness is presumed to be competent. *Pringle* v. *Pringle*, 59 Pa. 281; *McClelland* v. *West*, 70 Pa. 183.

The testimony of a witness who is competent at the time he testifies is not rendered inadmissible by his subsequently becoming incompetent. *Wells* v. *Insurance Co.*, 187 Pa. 166.

Youth.—A boy of thirteen is old enough to be instructed as to the nature of an oath, if he does not already know it. *Com.* v. *Wilson*, 186 Pa. 1.

A child is competent if he believes in a state of rewards and punishments, and knows that punishment will follow falsehood. *Com.* v. *Ellenger*, 1 Brewst. 352; *Com.* v. *Carcy*, 2 Brewst. 404.

Atheist not competent.— *Michenor* v. *Taggart*, 7 Haz. Leg. Reg. 112. But it is not necessary that the witness should believe in the everlasting punishment, if he believes in God. *Cubbison* v. *McCreary*, 2 W. & S. 262; *Blair* v. *Searer*, 26 Pa. 274.

Infamous crime.— One convicted of an infamous crime becomes competent again on being pardoned. *Hoffman* v. *Coster*, 2 Whart. 453; *Com.* v. *Railroad Co.*, 1 Grant. 329; *Howser* v. *Com.*, 51 Pa. 332.

Perjury.— Conviction of perjury is still a disqualification. Pepper & Lewis' Digest of Laws, "Witnesses," sec. 9; "Criminal Procedure," sec. 80.

One convicted of perjury and afterward pardoned is a competent witness. *Diehl* v. *Rodgers*, 169 Pa. 316.

The conviction of a crime less than infamous does not disqualify. *Com.* v. *Murphy*, 3 Clark, 290 (receiving stolen goods); *Bickel* v. *Fasig*, 33 Pa. 463 (conspiracy to defraud); *Schuylkill Co.* v. *Copley*, 67 Pa. 386 (embezzlement).

In trial for murder a witness who is under sentence of death is a competent witness for the State. *Com.* v. *Clemmer*, 190 Pa. 202.

Drunken person.— *Gould* v. *Crawford*, 2 Pa. 89.

Attorneys.— An attorney who conducts the case is competent as a witness. *Follansbee* v. *Walker*, 72 Pa. 228; *Frear* v. *Drinker*, 8 Pa. 520; *Newman* v. *Bradley*, 1 Dall. 240.

Question for the court.— The competency of a witness, on questions of both fact and law, is to be determined by the court. *Semple* v. *Callery*, 184 Pa. 95.

Time for objecting.— Objections to competency of a witness, if known, are waived if not made before he is examined. *Patterson* v. *Wallace*, 44 Pa. 88.

Incompetency as to a transaction with one now dead.— See act of 1887, P. L. 158; *Darragh* v. *Stevenson*, 183 Pa. 397; *Stauffer* v. *Insurance Assn.*, 164 Pa. 205; *Thomas* v. *Miller*, 165 Pa. 216; *Acklin* v. *McCalmont Co.*, 201 Pa. 257.

One who has had a transaction with a person now dead is not competent to testify in regard to it until some competent witness adverse to the surviving party has testified to such transaction. *Robbins* v. *Farwell*, 193 Pa. 37; *Shroyer* v. *Smith*, 204 Pa. 310; *Kauss* v. *Rohner*, 172 Pa. 481.

Witness incompetent as to a transaction with one now deceased as against the administrator. *Flanagan* v. *Nash*, 185 Pa. 41.

The survivor is not competent as to a contract made by him with a deceased member of a partnership. *Jack* v. *Moyer*, 187 Pa. 87.

A son is not a competent witness against his father's estate as to an agreement with his father. *Schwab* v. *Ginkinger*, 181 Pa. 8.

An heir-at-law cannot testify against the title conveyed by deceased. *Baldwin* v. *Stier*, 191 Pa. 432.

The plaintiff and his wife are both incompetent to testify as to an oral lease from one now dead. *Myers* v. *Litts*, 195 Pa. 595; *Arrott Mills Co.* v. *Way Mfg. Co.*, 143 Pa. 435; *Crothers* v. *Crothers*, 149 Pa. 201; *Baldwin* v. *Stier*, 191 Pa. 432; *Bitner* v. *Boone*, 128 Pa. 567; *Sutherland* v. *Ross*, 140 Pa. 379.

Instances where the rule did not apply.— The survivor is not disqualified unless his testimony is adverse to the interests of the decedent. *Rine* v. *Hall*, 187 Pa. 264; *Horne* v. *Petty*, 192 Pa. 32; *Trymby, Hunt & Co.* v. *Endress*, 175 Pa. 6.

A widow is a competent witness in ejectment as against purchasers at a sheriff's sale under a judgment against her deceased husband. *Poundstone* v. *Jones*, 187 Pa. 289.

An agent who transacted business for his principal with one since deceased is a competent witness as to the transaction. *Sargeant* v. *Insurance Co.*, 189 Pa. 341.

Disqualification removed.— A witness becomes competent as to transactions with one now deceased when he releases all interest adverse to such decedent's estate. *Walls* v. *Walls*, 182 Pa. 226.

A witness who is incompetent as to matters occurring with a person now deceased becomes competent as to all such matters if called by the adverse party to testify as to any of them. *Danley* v. *Danley*, 179 Pa. 170; *Watkins* v. *Hughes*, 206 Pa. 526.

Surviving party.— Disqualification of a surviving party as a witness in case of death, lunacy, etc. Pepper & Lewis' Digest of Laws. "Witnesses," secs. 14–16, 18, 19.

Husband and wife as witnesses against each other.— Pepper & Lewis' Digest of Laws, "Witnesses," secs. 11, 12; "Criminal Procedure," sec. 81; Laws of 1899, page 41; Laws of 1903, page 27.

ARTICLE 108.*[1]

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, and tried at the

* See Note XLI.

[1] The Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), by sect. 6, applies "to all criminal proceedings notwithstanding any enactment in force at the commencement of this Act," except proceedings for non-repair of highways, etc. (see *post*), and Court Martials, unless it is applied to them by general orders under the Naval Discipline Act. 1866 (29 & 30 Vict. c. 109), s. 65, or rules under the Army Act, 1882 (44

same time,[2] is incompetent to testify;[3] except as hereinafter mentioned.

Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, is a competent witness for the defence at every stage of the

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& 45 Vict. c. 58), s. 70. By sect. 7 it does not extend to Ireland. The enactments referred to in sect. 6 are contained in a number of Statutes, which, before 1898, made accused persons and their wives or husbands competent witnesses to different extents, in different specified cases. It seems probable that subsequent Statute Law Revision Acts will repeal these enactments. Those now in force, and subject to this section, are The Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), s. 34 (4); The Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 51 (4); The Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 21; The Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), s. 11; The Threshing Machines Accidents Prevention Act, 1878 (41 & 42 Vict. c. 12), s. 3; The Army Act, 1882 (44 & 45 Vict. c. 58), s. 156 (3); The Explosives Act, 1883 (46 & 47 Vict. c. 3), s. 4 (2); The Married Women's Property Act, 1884 (47 & 48 Vict. c. 14), s. 1, as to which see *post* in the above article; The Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 20; The Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), s. 10 (1); The Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 62 (2); The Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), s. 9; The Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41), s. 12; The Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 24; The Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 57 (3); The Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 694; The Law of Distress Amendment Act, 1895 (58 & 59 Vict. c. 24), s. 5; The False Alarms of Fire Act, 1895 (58 & 59 Vict. c. 28), s. 2; The Factory and Workshop Act, 1895 (58 & 59 Vict. c. 37), s. 49; The Corrupt and Illegal Practices Prevention Act, 1895 (58 & 59 Vict. c. 40), s. 2; The Chaff-cutting Machines (Accidents) Act, 1897 (60 & 61 Vict. c. 60, s. 5.

[2] Not if they are tried separately; *Windsor* v. *R.*, 1866, L. R. 1 Q. B. 390; *Re Bradlaugh*, 15 Cox, 257.

[3] *R.* v. *Payne*, 1872, 1 C. C. R. 349; and *R.* v. *Thompson*, 1872, *Ib.* 377.

proceedings,[4] whether the person so charged is charged solely or jointly with any other person; provided—

a person so charged shall not be called as a witness except upon his own application; and

the wife or husband of a person so charged cannot be called as a witness except upon the application of the person so charged.[5]

But the wife or husband of a person charged may be called as a witness either for the prosecution or defence, and without the consent of the person charged, if he is charged with—

(*a*) an offence under any enactment mentioned in the footnote hereto;[6] or

(*b*) an offence as to which the wife or husband of the person charged may by common law be called as a witness without his or her consent, *i. e.* an offence consisting of any

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[4] This does not include proceedings before a Grand Jury; *R.* v. *Rhodes*, [1899], 1 Q. B. 77.

[5] 61 & 62 Vict. c. 36, s. 1.

[6] *Ib.* ss. 1 (c.), 4. The enactments referred to are set out in the Schedule to the Act, being The Vagrancy Act, 1824 (5 Geo. IV, c. 83), the enactment punishing a man for neglecting to maintain or deserting his wife or any of his family; The Poor Law (Scotland) Act, 1845 (8 & 9 Vict. c. 83), s. 80, relating to the like or neglect to maintain an illegitimate child; The Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), ss. 48–55, relating to rape, indecent assault on a female, abduction; The Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), ss. 12 and 16, relating to offences by a married man or woman against his wife's or her husband's property, as to which see *supra;* The Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69); and The Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41).

bodily injury or violence inflicted on his or her wife or husband.[7]

In any such criminal proceeding against a husband or a wife, as is authorised by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75, ss. 12 and 16), the husband and wife respectively are competent and admissible witnesses, and except when defendant compellable to give evidence.[8]

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, river, or bridge;[9]

Proceedings instituted for the purpose of trying civil rights only;[9]

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[7] 61 & 62 Vict. c. 36, ss. 1 (c.), 4; and as to the common law, see *R.* v. *Wakefield*, 1877, 2 Lew. 287; and *Reeve* v. *Wood*, 1864, 5 B. & S. 364. The common law has also been supposed to apply to treason, Taylor's Ev. s. 1372.

[8] 47 Vict. c. 14, which must be read as subject to 61 & 62 Vict. c. 36, *ante;* and see the case of *R.* v. *Brittleton*, 1884, 12 Q. B. D. 266, which turns on the wording of the Act of 1882, and occasioned this enactment. The following doubt arises on the effect of this enactment. Does it mean (*a*) only that the wife is competent as against the husband, and the husband as against the wife, notwithstanding their marriage, or (*b*) that in such cases not only the prosecutor, though married to the prisoner, but the prisoner, though prisoner and though married, is to be competent, though the prisoner is not to be compellable? It is observable that the first "husband and wife" does not become "wife or husband" before the word "respectively," as would have been natural. It is also remarkable that in the Act of 1882 a criminal proceeding is described as "a remedy"—a very peculiar phrase.

[9] 40 & 41 Vict. c. 14. The provisions of this Act are not affected by The Criminal Evidence Act, 1898, 61 & 62 Vict. c. 36, s. 6; see *ante*, p. 414, note 1.

Proceedings on the Revenue side of the Exchequer Division of the High Court of Justice.[10]

AMERICAN NOTE.

General.

Authorities.— 1 Greenleaf on Evidence (15th ed.), secs. 330, 334–336, 362, 363; 1 Wharton's Criminal Evidence, sec. 421 *et seq.;* 29 Am. & Eng. Encyclopædia of Law, p. 552; Rapalje on Witnesses, sec. 146 *et seq.; Hiler* v. *People,* 156 Ill. 511; *Holley* v. *State,* 105 Ala. 100; *State* v. *Pain,* 48 La. Ann. 311; *Holman* v. *State,* 72 Miss. 108.

By statute now a witness may generally testify if he so wishes, but his failure to take the stand may not be commented upon, nor does it give rise to any presumption against him. *Wilson* v. *U. S.,* 149 U. S. 60; *Com.* v. *Scott,* 123 Mass. 239; *Watt* v. *People,* 126 Ill. 9; *Yarbrough* v. *State,* 70 Miss. 593; *Showalter* v. *State,* 84 Ind. 562; *Conway* v. *State,* 118 Ind. 482; *State* v. *Smith,* 86 N. C. 705; *Kidwell* v. *Com.,* 97 Ky. 538.

The jury may consider his interest in weighing his testimony. *Reagan* v. *U. S.,* 157 U. S. 301; *State* v. *Pratt,* 121 U. S. 566; *Doyle* v. *People,* 147 Ill. 394.

Persons jointly indicted.— Those jointly indicted may, now, generally, by statute, be witnesses for or against each other. *Com.* v. *Brown,* 130 Mass. 279; *Wilson* v. *U. S.,* 149 U. S. 60; *Watt* v. *People,* 126 Ill. 9; *People* v. *Sansome,* 98 Cal. 235; *Showalter* v. *State,* 84 Ind. 562; *Yarbrough* v. *State,* 70 Miss. 593.

People jointly indicted may be competent witnesses. *State* v. *Smith,* 86 N. C. 705; *Kidwell* v. *Com.,* 97 Ky. 538; *Conway* v. *State,* 118 Ind. 482; *Com.* v. *Brown,* 130 Mass. 279.

If a *nolle* has been entered in the case of the one jointly indicted, or if he has been acquitted, he becomes competent. *State* v. *Walker,* 98 Mo. 95; *Love* v. *People,* 160 Ill. 501. So, if he has been convicted. *Brown* v. *Com.,* 86 Va. 935; *State* v. *Minor,* 117 Mo. 302; *State* v. *Jones,* 51 Me. 125. *Contra, Kehoe* v. *Com.,* 85 Pa. St. 127. So, if he is to have a separate trial. *Benson* v. *U. S.,* 146 U. S. 325; *Allen* v.

[10] 28 & 29 Vict. c. 104, s. 34.

State, 10 O. St. 287; *Smith* v. *Com.*, 90 Va. 759; *Noyes* v. *State*, 41 N. J. L. 418. *Contra*, *Staup* v. *Com.*, 74 Pa. St. 458.

Husband or wife.— *Lucas* v. *State*, 23 Conn. 19, 20; *State* v. *Gardner*, 1 Root (Conn.), 485. See Conn. Gen. Stats., sec. 1623. See also *Com.* v. *Sapp*, 90 Ky. 580; *State* v. *Pennington*, 124 Mo. 388; *State* v. *Guest*, 100 N. C. 410; *State* v. *Chambers*, 187 Ia. 1; *Bassett* v. *U. S.*, 137 U. S. 496; *People* v. *Quanstrom*, 93 Mich. 259; *Love* v. *People*, 160 Ill. 507.

Now, generally, by statute, the husband or wife of the accused may testify as to everything except confidential communications (*e. g.*, Maine Rev. Stats., chap. 134, sec. 19; Mass. Pub. Stats., chap. 169, sec. 18, par. 3). See *Com.* v. *Moore*, 162 Mass. 441.

A husband or wife may be a competent witness to a bodily assault committed upon the witness by the other party to the relation. *Johnson* v. *State*, 94 Ala. 53; *State* v. *Pennington*, 124 Mo. 388.

In some States husbands and wives may testify against each other in prosecutions for bigamy, incest or adultery. *Lord* v. *State*, 17 Neb. 526; *State* v. *Chambers*, 87 Ia. 1. *Contra*, *Bassett* v. *U. S.*, 137 U. S. 496; *McLean* v. *State*, 32 Tex. App. 521; *People* v. *Quanstrom*, 93 Mich. 254.

In the Federal courts, accused persons and their wives and husbands are competent witnesses, but cannot be compelled to testify. Act of Congress, March 19, 1878, chap. 37, Rev. Stats. of U. S., sec. 858a.

A wife cannot ordinarily testify against her husband in a criminal case. *Wilke* v. *People*, 53 N. Y. 525.

New Jersey.

Defendant.— Person indicted is competent in his own behalf. G. S. 1895, "Evidence," 8.

Joint defendants.— Joint defendants in larceny are incompetent on behalf of each other. *State* v. *Carr*, Coxe, 1. See *State* v. *Brien*, 32 N. J. L. 414.

The court may order an accomplice acquitted or a *nolle prosequi* may be entered for the purpose of rendering a witness competent. *State* v. *Graham*, 41 N. J. L. 15.

A coconspirator who has pleaded guilty is a competent witness for the State. *U. S.* v. *Sacia*, 2 Fed. Rep. 754.

One jointly indicted with the defendant is a competent witness for the State in a separate trial. *Noyes* v. *State*, 31 N. J. L. 418.

Rule as to husband and wife.— G. S. 1895, "Evidence," 5, 51, 54, 57, 73; "Disorderly Persons," 18.

Wife competent against the husband in prosecutions for desertion and nonsupport. Laws of 1903, chap. 216.

Where two parties have been jointly indicted and a severance has been had, the wife of one of the defendants is a competent witness against the other. *Munyon* v. *State*, 62 N. J. L. 1.

Forgery.— Person whose name has been forged is competent on trial of an indictment for the forgery. G. S. 1895, "Evidence," 7.

Maryland.

Defendant.— The defendant in a criminal prosecution is a competent but not a compellable witness. P. G. L. 1888, art. 35, sec. 3.

Accessory.— One indicted as an accessory before the fact is not competent on behalf of the accused, his principal. *Davis* v. *State*, 38 Md. 15.

Husband and wife.— A husband and a wife are not competent as against each other. *Turpin* v. *State*, 55 Md. 462; *Hanon* v. *State*, 63 Md. 123.

Husband or wife of the accused is competent. P. G. L. 1888, art. 35, sec. 3.

In actions in which a husband and wife are not directly interested, each is a competent witness, although the testimony tends to incriminate the other. *Funk* v. *Kincaid*, 5 Md. 404.

In prosecution for wife-beating, the wife is a competent witness against her husband. *Hanon* v. *State*, 63 Md. 123.

How a former conviction may be proved. P. G. L. 1888, art. 35, sec. 5.

Pennsylvania.

Statute.— All persons made competent witnesses, except those convicted of perjury and in certain cases husband and wife. Pepper & Lewis' Digest of Laws, "Criminal Procedure," secs. 79–81; "Witnesses," secs. 1–3; Laws of 1899, page 41; Laws of 1903, page 27.

Husband and wife.— By statute, a wife is a competent witness for her husband but not against him. *Yeager* v. *Weaver*, 64 Pa. 425; *Cawley* v. *Wilson*, 7 Phila. 676; *Craig* v. *Brendel*, 69 Pa. 153; *Ballentine* v. *White*, 77 Pa. 20.

A wife is incompetent to testify against her husband in a criminal case. *Com.* v. *Paynter*, 8 Phila. 609; *Com.* v. *McEwen*, 1 Clark, 140.

Where two are jointly indicted but separately tried, the wife of the one not on trial is competent to testify for the other. *Com.* v. *Manson*, 2 Ash. 31. And also for the State against the other, though she may refuse to answer questions incriminating her husband. *Com.* v. *Reid*, 8 Phila. 385.

Persons jointly indicted.— Three burglars jointly indicted for murder. On a separate trial one may testify as to the criminal concert of the three prior to the crime. *Com.* v. *Biddle*, 200 Pa. 640.

One jointly indicted is not competent as a witness for the other on the latter's separate trial, so long as such witness has not been acquitted or convicted himself. *Shay* v. *Com.*, 36 Pa. 305; *Staup* v. *Com.*, 74 Pa. 458.

If one jointly indicted with others has been convicted, he does not become a competent witness against the others. *Kehoe* v. *Com.*, 85 Pa. 127.

ARTICLE 109.

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.[11]

[11] 32 & 33 Vict. c. 68, s. 3. The word "such" seems to have been omitted accidentally.

AMERICAN NOTE.

General.

Authority.— *Howard* v. *Brower*, 37 Ohio St. 402.

Adultery.— The evidence of the *particeps criminis* in adultery is to be received with caution. *Wahle* v. *Wahle*, 71 Ill. 511.

New Jersey.

See statute.— G. S. 1895, "Evidence," 5, 73.

Pennsylvania.

Testimony of husband and wife. *Bitner* v. *Boone*, 128 Pa. 567.

Wife's testimony not admissible against a codefendant of her husband. *Cornelius* v. *Hambay*, 150 Pa. 364.

See statute.— Pepper & Lewis' Digest of Laws, "Criminal Procedure," sec. 81.

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.[12]

AMERICAN NOTE.

General.

Authorities.— 1 Greenleaf on Evidence (15th ed.), sec. 254; McKelvey on Evidence, p. 288; *Campbell* v. *Chace*, 12 R. I. 333.

Sustaining text.— *Seitz* v. *Seitz*, 170 Pa. St. 71; *Smied* v. *Frank*, 86 Ind. 250; *People* v. *Mullings*, 83 Cal. 138; *Com.* v. *Sapp*, 90 Ky.

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12 16 & 17 Vict. c. 83, s. 3, and 61 & 62 Vict. c. 36, s. 1, subs. (*d*). 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.

580; *Hitchcock* v. *Moore*, 70 Mich. 112; *Hopkins* v. *Grimshaw*, 165 U. S. 342; *Goelz* v. *Goelz*, 157 Ill. 33; *Litchfield* v. *Merritt*, 102 Mass. 520; *Dickerman* v. *Graves*, 6 Cush. (Mass.) 308, 53 Am. Dec. 41; *Brown* v. *Wood*, 121 Mass. 137; *Drew* v. *Tarbell*, 117 Mass. 90; *Com.* v. *Hayes*, 145 Mass. 289; *Com.* v. *Caponi*, 155 Mass. 534.

A husband or wife may not testify to conversations which are overheard by another. *Campbell* v. *Chace*, 12 R. I. 333. *Contra*, *Lyon* v. *Prouty*, 154 Mass. 488; *Sessions* v. *Trevitt*, 39 O. St. 259.

A wife may testify to private conversations, when the question arises upon the hearing of a claim in her favor against her husband's insolvent estate. *Spitz's Appeal*, 56 Conn. 187.

One who overhears conversations between husband and wife may testify. *Gannon* v. *People*, 127 Ill. 507; *State* v. *Gray*, 55 Kan. 135; *Com.* v. *Griffin*, 110 Mass. 181; *Lyon* v. *Prouty*, 154 Mass. 488; *State* v. *Hoyt*, 47 Conn. 518.

A wife cannot testify as to declarations of her husband. *Enos* v. *Hunter*, 4 Gilm. 211.

A wife is competent to testify as to a transaction as to which she was the agent of her husband. *Schneider* v. *Kabsch*, 91 Ill. App. 386.

Impotency.— A divorced wife is incompetent to testify as to the impotency of her former husband. *Griffith* v. *Griffith*, 162 Ill. 368, reversing 55 Ill. App. 474.

Communications between husband and wife privileged.— *Dye* v. *Davis*, 65 Ind. 474; *Jack* v. *Russey*, 8 Ind. 180; *Perry* v. *Randall*, 83 Ind. 143; *Stanley* v. *Montgomery*, 102 Ind. 102; *Smied* v. *Frank*, 86 Ind. 250.

Communications include not only statements but actions as well. *Perry* v. *Randall*, 83 Ind. 143.

Where a husband is prosecuted for a crime committed upon the person of his wife, their conversations connected with the crime are not privileged. *Doolittle* v. *State*, 93 Ind. 272.

In a suit against husband and wife to set aside a conveyance as being fraudulent, the negotiations between them are not privileged. *Beitman* v. *Hopkins*, 109 Ind. 177.

Where the wife is the agent of the husband she may testify as to what was said between them with reference to such agency. *Schmeid* v. *Frank*, 86 Ind. 250.

Neither party to the marriage relation can disclose communications made during the relation and this bar exists after the relation is terminated. *Dye* v. *Davis*, 65 Ind. 474; *Jack* v. *Russey*, 8 Ind.

180; *Perry* v. *Randall,* 83 Ind. 143; *Stanley* v. *Montgomery,* 102 Ind. 102.

A husband is not a competent witness after the death of his wife, on the question of whether or not he abandoned her. *Dye* v. *Davis,* 65 Ind. 474.

Communications between husband and wife are privileged even after the death of the husband. *Stanley* v. *Montgomery,* 102 Ind. 102; *Turner* v. *Cook,* 36 Ind. 129.

A husband or wife may testify as to facts learned by them through the marital relation. *Polson* v. *State,* 137 Ind. 519.

As to the evidence of husband and wife in forgery, see *Beyerline* v. *State,* 147 Ind. 125.

A wife may testify concerning misrepresentations and acts of undue influence. *De Ruiter* v. *De Ruiter,* 28 Ind. App. 9, 62 N. E. 100.

In presence of stranger.— Conversations between husband and wife in the presence of others are not privileged. *Reynolds* v. *State,* 147 Ind. 3.

In an action of criminal conversation, the husband may testify as to statements by the wife in the presence of the defendant. *Mainard* v. *Reider,* 2 Ind. App. 115.

Privileged communications.— In a suit by the husband for the alienating of his wife's affections he cannot testify as to conversations that took place between his wife and himself in the absence of the defendant without the consent of his wife, such communications being privileged. *McKenzie* v. *Lautenschlager,* 113 Mich. 171.

After death of others.— A husband cannot testify to confidential communications, even after the death of the wife. *Maynard* v. *Vinton,* 59 Mich. 139.

Consent.— A husband or wife may testify to confidential communications with the consent of the other. *Jenne* v. *Marble,* 37 Mich. 319; *Hunt* v. *Eaton,* 55 Mich. 362.

New Jersey.

Sustaining text.— *Clawson* v. *Riley,* 34 N. J. Eq. 348; *Rusling* v. *Bray,* 38 N. J. Eq. 398; *Gray* v. *Gray,* 39 N. J. Eq. 512.

When husband and wife are joint trustees, their communications in relation to the trust property are not privileged. *Wood* v. *Chetwood,* 27 N. J. Eq. 311.

Statutory rule.— G. S. 1895, "Evidence," 5.

Maryland.

But a wife is competent in a suit to set aside a marriage contract with her husband on the ground of forgery. *Classen* v. *Classen*, 57 Md. 510.

Statute.— P. G. L. 1888, art. 35, sec. 3.

Pennsylvania.

Sustaining text.— *Seitz* v. *Seitz*, 170 Pa. 71.

Confidential communications not admissible, but conversations as to business affairs in which third parties take part are admissible. *Robb's Appeal*, 98 Pa. 501.

After the husband's death the wife is incompetent as to confidential matters. *Hitner's Appeal*, 54 Pa. 110.

A widow is competent in a suit between her husband's executor and a stranger as to all matters not learned in consequence of the marriage relation. *Cornell* v. *Vanartsdalen*, 4 Pa. 364.

Widow is allowed to testify as to a verbal agreement with her husband. not confidential. *Peiffer* v. *Lytle*, 58 Pa. 386.

A wife may testify in a divorce proceeding as to statements and admissions by her husband that he had committed adultery. *Seitz* v. *Seitz*, 170 Pa. 71.

See statutory rule.— Pepper & Lewis' Digest of Laws, "Criminal Procedure," sec 82; "Witnesses," sec. 10.

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.[13] It seems that a barrister cannot be compelled to testify as to what he said in court in his character of a barrister.[14]

* See Note XLII.

13 *R.* v. *Gazard*, 1838, 8 C. & P. 595.

14 *Curry* v. *Walter*, 1796, 1 Esp. 456.

AMERICAN NOTE.

General.

Authorities.— 1 Wharton on Evidence, sec. 600; 17 Am. & Eng. Encyclopædia of Law (2d ed.), p. 724 *et seq.;* Weeks on Attorneys (2d ed.), secs. 124, 125.

Judges.— *Spalding* v. *Lowe*, 56 Mich. 366; *Zitske* v. *Goldberg*, 38 Wis. 216; *State* v. *Waterman*, 87 Ia. 255; *Highberger* v. *Stiffler*, 21 Md. 338; *Baker* v. *Thompson*, 89 Ga. 486; *Wright* v. *McCampbell*, 75 Tex. 644; *Barrett* v. *James*, 30 S. C. 329; *Allen's Appeal*, 69 Conn. 709.

Whether to prove the points decided, the judge is a competent witness, *quære*. *Supples* v. *Cannon*, 44 Conn. 430, and reporter's note.

Justices of the peace may testify on appeal as to what took place before them. *State* v. *Van Winkle*, 80 Ia. 15; *State* v. *Duffy*, 57 Conn. 525.

Where, on appeal, the question of the interest of the judge arises, he is a competent witness on that issue. *Sigourney* v. *Sibley*, 21 Pick. (Mass.) 101, 32 Am. Dec. 248.

Auditors, arbitrators, etc.— *Packard* v. *Reynolds*, 100 Mass. 153; *Schmidt* v. *Glade*, 126 Ill. 485; *Calvert* v. *Friebus*, 48 Md. 44; *Robinson* v. *Shanks*, 118 Ind. 125.

Attorney.— *French* v. *Hall*, 119 U. S. 152; *Freeman* v. *Fogg*, 82 Me. 408; *Follansbee* v. *Walker*, 72 Pa. St. 228; *Branson* v. *Caruthers*, 49 Cal. 374; *Connolly* v. *Straw*, 53 Wis. 645; *Carrington* v. *Holabird*, 17 Conn. 530.

Generally now attorneys are competent witnesses. Weeks on Attorneys (2d ed.), secs. 124, 125.

The fact that one is counsel in a case and engaged for a contingent fee does not render him incompetent as a witness. *Thon* v. *Rochester R. R. Co.*, 83 Hun, 443.

Arbitrator.— Arbitrators are competent witnesses. *Spurck* v. *Crook*, 19 Ill. 415; *Stone* v. *Atwood*, 28 Ill. 30; *Claycomb* v. *Butler*, 36 Ill. 100; *Schmidt* v. *Glade*, 126 Ill. 485.

New Jersey.

A justice may testify as to proceedings before him. *Brown* v. *Elliott*, 17 N. J. Eq. 353; *Dilts* v. *Parke*, 1 South. 219.

Maryland.

Judges.— *Highberger* v. *Stiffler,* 21 Md. 338.

Auditors, arbitrators, etc.— *Calvert* v. *Friebus,* 48 Md. 44.

Pennsylvania.

Judges.— *Hibbs* v. *Blair,* 14 Pa. 413; *Graham* v. *Graham,* 9 Pa. 254; *Converse* v. *Colton,* 49 Pa. 346.

Notes taken by a judge during a trial as evidence. *Schall* v. *Miller,* 5 Whart. 156.

Attorney.— *Follansbee* v. *Walker,* 72 Pa. 228.

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, unless the officer at the head of the department concerned permits him to do so,[15] 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.[16]

AMERICAN NOTE.

General.

Authorities.— 1 Greenleaf on Evidence (15th ed.), secs. 250, 251; McKelvey on Evidence, p. 301; *Oliver* v. *Pate,* 41 Ind. 132, 141; *U. S.* v. *Moses,* 4 Wash. C. C. 726; *Worthington* v. *Scribner,* 109 Mass. 487, 488, 12 Am. Rep. 736; *Appeal* of *Hartranft,* 85 Pa. St. 433; *Thompson* v. *German., etc., R. Co.,* 22 N. J. Eq. 171. See also *Totten* v. *U. S.,* 92 U. S. 105; *U. S.* v. *Trumbull,* 48 Fed. Rep. 194.

New Jersey.

Authority.— *Thompson* v. *German, etc., R. Co.,* 22 N. J. Eq. 171.

Pennsylvania.

Authority.— *Appeal of Hartranft,* 85 Pa. 433.

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15 *Beatson* v. *Skene,* 1860, 5 H. & N. 838.

16 *Chubb* v. *Salomons,* 1852, 3 Car. & Kir. 77; *Plunkett* v. *Cobbett,* 1804, 5 Esp. 136.

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.

A criminal prosecution by the Director of Public Prosecutions is a public prosecution, and the Director of Public Prosecutions cannot be required to say from whom he acquired information or what it was.[17]

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.[18]

AMERICAN NOTE.

General.

Authorities.— 1 Greenleaf on Evidence (15th ed.), sec. 250; McKelvey on Evidence, p. 301; *Vogel* v. *Gruaz*, 110 U. S. 311; *People* v. *Laird*, 102 Mich. 135; *State* v. *Loper*, 16 Me. 293; *U. S.* v. *Moses*, 4 Wash. C. C. (U. S.) 726; *Worthington* v. *Scribner*, 109 Mass. 487, 488, 12 Am. Rep. 736.

All communications in regard to the commission of offenses made to public officers, with a view to the prosecution or detention of suspected offenders, are privileged, and neither the communications themselves, nor the name of the person who made them, may be divulged without the consent of said person. *Oliver* v. *Pate*, 41 Ind. 132, 141. See also *State* v. *Van Buskirk*, 59 Ind. 384.

New Jersey.

Authority.— *Patton* v. *Freeman*, Coxe, 113.

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17 *Marks* v. *Beyfus*, [1890], 25 Q. B. D. 494.

18 *R.* v. *Hardy*, 1794, 24 S. T. 811: *A. G.* v. *Bryant*, 1846, 15 M. & W. 169; *R.* v. *Richardson*, 1863, 3 F. & F. 693.

ARTICLE 114.

COMPETENCY OF JURORS.

A petty juror may not [19] and it is doubtful whether a grand juror may [20] give evidence as to what passed between the jurymen 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.

AMERICAN NOTE.

General.

Authorities.— 1 Wharton on Evidence, sec. 901 *et seq.;* 1 Greenleaf on Evidence (15th ed.), secs. 252, 252a.

Petty jurors.— *State* v. *Harrison,* 36 W. Va. 729; *Follansbee* v. *Walker,* 74 Pa. St. 306; *Swails* v. *Cissna,* 61 Ia. 693; *White* v. *State,* 73 Miss. 50; *State* v. *Vari,* 35 S. C. 175; *Studley* v. *Hall,* 22 Me. 198, 201; *State* v. *Pike,* 65 Me. 111; *Hannum* v. *Belchertown,* 19 Pick. (Mass.) 311, 313; *Com.* v. *White,* 147 Mass. 76; *Woodward* v. *Leavitt,* 107 Mass. 453; *Rowe* v. *Carney,* 139 Mass. 41. See *Mattox* v. *U. S.,* 146 U. S. 140.

The testimony of jurors is not admissible to impeach their verdict as by showing their misconduct. *Taylor* v. *Garnett,* 110 Ind. 166; *Sanitary Dist.* v. *Cullerton,* 147 Ill. 385; *People* v. *Stimer,* 82 Mich. 17; *State* v. *Wood,* 124 Mo. 212; *People* v. *Kloss,* 115 Cal. 567; *Shepherd* v. *Camden,* 82 Me. 535; *Mead* v. *Smith,* 16 Conn. 346; *Bridgewater* v. *Plymouth,* 97 Mass. 382. But it is competent to prove the misconduct of parties with reference to them. *Johnson* v. *Witt,* 138 Mass. 79; *Peck* v. *Brewer,* 48 Ill. 54; *People* v. *Hunt,* 59 Cal. 430; *Clement* v. *Spear,* 56 Vt. 401; *State* v. *Rush,* 95 Mo. 199; *Chicago, etc., R. Co.* v. *McDaniel,* 34 Ind. 166; *Heffron* v. *Gallupe,* 55 Me. 565.

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[19] *Vaise* v. *Delaval,* 1785, 1 T. R. 11; *Burgess* v. *Langley,* 1843, 5 M. & G. 722.

[20] 1 Ph. Ev. 140; Taylor, s. 943.

Grand jurors.— Grand jurors may testify as to what particular witnesses said. *State* v. *Benner*, 64 Me. 267, 283; *State* v. *Coffee*, 56 Conn. 399.

It may be shown by the testimony of grand jurors that twelve did not concur in finding the indictment. *Low's Case*, 4 Me. 439, 444. *Contra, State* v. *Fassett*, 16 Conn. 457, 466. See also on grand jurors. *U. S.* v. *Farrington*, 5 Fed. Rep. 343; *Gitchell* v. *People*, 146 Ill. 175; *Com.* v. *Scowden*, 92 Ky. 120; *Loveland* v. *Cooley*, 59 Minn. 259; *State* v. *Johnson*, 115 Mo. 480.

When an effort is made to impeach a witness by showing that he told a different story before the grand jury, the grand jurors are competent witnesses. *State* v. *Benner*, 64 Me. 267; *State* v. *Wood*, 53 N. H. 484; *Gordon* v. *Com.*, 92 Pa. St. 216; *Burdick* v. *Hunt*, 43 Ind. 381; *Bressler* v. *People*, 117 Ill. 422; *State* v. *Thomas*, 99 Mo. 235; *Pellum* v. *State*, 89 Ala. 28.

In an action for malicious prosecution, one who was present may testify as to the evidence adduced before the grand jury. *Hunter* v. *Randall*, 69 Me. 183. *Contra, Kennedy* v. *Holladay*, 105 Mo. 24.

Grand jurors may testify as to whether or not one appeared before them as a witness. *Com.* v. *Hill*, 11 Cush. (Mass.) 137; *People* v. *Northey*, 77 Cal. 619.

On motion for a new trial, the testimony of a juror is not admissible to impeach the verdict. *Williams* v. *Montgomery*, 60 N. Y. 648; *Dalrymple* v. *Williams*, 63 N. Y. 361.

New Jersey.

Authorities.— *State* v. *Powell*, 2 Hal. 244; *Wallace* v. *Coil*, 4 Zab. 600.

Petty jurors— *Hutchinson* v. *Coal Co.*, 36 N. J. L. 24; *Kennedy* v. *Kennedy*, 18 N. J. L. 450 (to show verdict incorrectly returned); *Peters* v. *Fogarty*, 55 N. J. L. 386.

Petty juror incompetent to testify as to what was said in the jury-room or while viewing premises. *State* v. *Vansciver*, 7 N. J. L. J. 268.

Testimony of jurors is admissible to show that the foreman misstated their verdict. *Peters* v. *Fogarty*, 55 N. J. L. 386.

Grand jurors.— *Wilson* v. *Hill*, 13 N. J. Eq. 143.

Grand juror not competent to prove that a witness testified otherwise before the grand jury. *Imlay* v. *Rogers*, 2 Hal. 347.

Maryland.

Grand jurors.— Grand jurors cannot testify as to their reasons for the action they took. *Owens* v. *Owens*, 81 Md. 518.

A grand juror is not permitted to testify as to the individual action of any member of the jury in regard to a matter before them. *Elbin* v. *Wilson*, 33 Md. 135.

A grand juror may testify that a certain witness' testimony before the petty jury is different from that he gave before the grand jury. *Kirk* v. *Garrett*, 84 Md. 383.

Testimony of grand jurors is competent to prove perjury before them. *Izer* v. *State*, 77 Md. 110.

Petty jurors.— A juror is not a competent witness to impeach the verdict, whether as to misbehavior or mistake. *Bosley* v. *Ches. Ins. Co.*, 3 G. & J. 450; *Browne* v. *Browne*, 22 Md. 103.

A petty juror is not a competent witness as to the motives upon which a verdict was reached. *Ford* v. *State*, 12 Md. 514.

Pennsylvania.

Petty jurors.— *Follansbee* v. *Walker*, 74 Pa. 306.

A juror is a competent witness in a criminal case, but one who may become a witness ought not be put on the jury. *Howser* v. *Com.*, 51 Pa. 332.

Grand jurors.— When an effort is made to impeach a witness by showing that he told a different story before the grand jury, the grand jurors are competent witnesses. *Gordon* v. *Com.*, 92 Pa. 216.

In malicious prosecution, a member of the grand jury is competent to prove who was the prosecutor. *Huidekoper* v. *Cotton*, 3 Watts, 56.

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

* See Note XLIII.

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.

This article does not extend to—

(1) Any such communication as aforesaid made in furtherance of any criminal purpose; whether such purpose was at the time of the communication known to the professional adviser or not;[21]

(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;

(3) Any fact with which such legal adviser became acquainted otherwise than in his character as such.

The expression "legal adviser" includes barristers and solicitors,[22] their clerks,[23] and interpreters between them

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21 *R.* v. *Cox & Railton*, 1884, 14 Q. B. D. 153. The judgment in this case is that of ten judges in the Court for Crown Cases Reserved, and examines minutely all the cases on the subject. 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 knowingly 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.

22 *Wilson* v. *Rastall*, 1792, 4 T. R. 753. As to interpreters, *Ib.* 756.

23 *Taylor* v. *Foster*, 1825, 2 C. & P. 195; *Foote* v. *Hayne*, 1824, 1 C. & P. 545. *Quœre*, whether licensed conveyancers are within the

and their clients. It does not include officers of a corporation through whom the corporation has elected to make statements.[24]

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 by A against the prosecutor in the original case for malicious prosecution.[25]

(*b*) If a legal adviser witnesses a deed, he must give evidence as to what happened at the time of its execution.[26]

(*c*) 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.[27]

AMERICAN NOTE.

General.

Authorities.— 1 Greenleaf on Evidence (15th ed.), secs. 237–246, 261; 1 Wharton on Evidence, secs. 576–594; Weeks on Attorneys-at-Law (2d ed.), chap. 8; *Com. Life Ins. Co.* v. *Schaefer*, 94 U. S. 457: *People* v. *Barker*, 56 Ill. 299; *Sweet* v. *Owens*, 109 Mo. 1; *McLellan* v. *Longfellow*, 32 Me. 494, 54 Am. Dec. 599; *Snow* v. *Gould*,

rule? Parke, B., in *Turquand* v. *Knight*, 1836, 2 M. & W. at p. 100, thought not. Special pleaders would seem to be on the same footing.

[24] *Mayor of Swansea* v. *Quirk*, 1879, 5 C. P. D. 106. Nor pursuivants of the Herald's College; *Slade* v. *Tucker*, 1880, 14 Ch. Div. 824.

[25] *Brown* v. *Foster*, 1857, 1 H. & N. 736.

[26] *Crawcour* v. *Salter*, 1881, 18 Ch. Div. pp. 35–6.

[27] *Annesley* v. *Anglesea*, 1743, 17 S. T. 1223–44.

74 Me. 540, 43 Am. Rep. 604; *Thorne* v. *Kilborne*, 28 Vt. 750, 67 Am. Dec. 742; *Earle* v. *Grant*, 46 Vt. 113; *Wade* v. *Ridley*, 87 Me. 368; *Brown* v. *Butler*, 71 Conn. 583; *Higbee* v. *Dresser*, 103 Mass. 523; *Blount* v. *Kimpton*, 155 Mass. 378; *Anonymous*, 8 Mass. 370; *Foster* v. *Hall*, 12 Pick. (Mass.) 89; *Hatton* v. *Robinson*, 14 Pick. (Mass.) 416; *Barnes* v. *Harris*, 7 Cush. (Mass.) 576.

A lawyer acting as a mere scrivener is not within the rule. *Hanlon* v. *Doherty*, 109 Ind. 37; *Smith* v. *Long*, 106 Ill. 485; *Stallings* v. *Hullum*, 79 Tex. 421; *Childs* v. *Merrill*, 66 Vt. 302; *Todd* v. *Munson*, 53 Conn. 579. See *Carter* v. *West*, 93 Ky. 211.

He must be acting as an attorney. *Coon* v. *Swan*, 30 Vt. 6.

Law students who are not clerks are not within the rule. *Schubkagel* v. *Dierstein*, 31 Pa. St. 46; *Holman* v. *Kimball*, 22 Vt. 555; *Barnes* v. *Harris*, 7 Cush. (Mass.) 576. Nor those supposed to be lawyers, who in fact are not. *Barnes* v. *Harris*, 7 Cush. (Mass.) 576; *Hawes* v. *State*, 88 Ala. 37.

The rule does not apply to suits involving the construction of the client's will. *Doherty* v. *O'Callaghan*, 157 Mass. 90.

The rule does not exclude the testimony as to a public fact, although it would not have been learned but for the employment. *Com.* v. *Bacon*, 135 Mass. 521.

The fact that the client takes the stand does not constitute consent to the attorney to testify. *Montgomery* v. *Pickering*, 116 Mass. 227.

Where a client requests an attorney to obtain information as to facts, with reference to an estate in settlement, the communication is not privileged. *Turner's Appeal*, 72 Conn. 319. See also *Allen* v. *Hartford Life Ins. Co.*, 72 Conn. 696; *Goddard* v. *Gardner*, 28 Conn. 175.

Waiver.— The client may waive his right and allow the attorney to testify. *Hunt* v. *Blackburn*, 128 U. S. 464; *Passmore* v. *Passmore's Estate*, 50 Mich. 626; *Sleeper* v. *Abbott*, 60 N. H. 162.

Learned from outside sources.— *Daniel* v. *Daniel*, 39 Pa. St. 191; *Swaim* v. *Humphreys*, 42 Ill. App. 370; *Jennings* v. *Sturdevant*, 140 Ind. 641; *Theisen* v. *Dayton*, 82 Ia. 74; *State* v. *Fitzgerald*, 68 Vt. 125; *Brady* v. *State*, 39 Neb. 529. See *Carroll* v. *Sprague*, 59 Cal. 655; *Turner's Estate*, 167 Pa. St. 609; *Hughes* v. *Boone*, 102 N. C. 137.

Criminal purpose.— Whether an attorney to whom a criminal project has been confided by his client may divulge it, *quære*.

People v. *Van Alstine*, 57 Mich. 69; *Orman* v. *State*, 22 Tex. App. 604; *State* v. *Kidd*, 89 Ia. 54; *Hamil* v. *England*, 50 Mo. App. 338; *State* v. *Barrows*, 52 Conn. 325.

Witnesses.- A person who overhears may testify. *People* v. *Buchanan*, 145 N. Y. 1.

The communication must relate to his professional employment. *Mowell* v. *Van Buren*, 77 Hun, 569; *Rosseau* v. *Blean*, 131 N. Y. 177.

An attorney may testify that he acted as such. *Hampton* v. *Boylan*, 46 Hun, 151. And for whom. *Mulford* v. *Muller*, 3 Abb. Dec. 330.

A communication in the presence of the adverse party is not within the rule. *Hurlbut* v. *Hurlbut*, 128 N. Y. 420.

Clerks, etc.— Communications to lawyers' employees are within the rule. *Jackson* v. *French*, 3 Wend. 337; *Sibley* v. *Waffle*, 16 N. Y. 180.

Testimony as to existence of relation.— An attorney may testify as to the existence of the relation of attorney and client. *Leindecker* v. *Waldron*, 52 Ill. 283.

Who is an attorney.— Communications to be privileged must be made to an attorney as an attorney. *Borum* v. *Fouts*, 15 Ind. 50.

A lawyer acting as a mere scrivener is not within the rule. *Hanlon* v. *Doherty*, 109 Ind. 37; *Borum* v. *Fouts*, 15 Ind. 50; *Thomas* v. *Griffen*, 1 Ind. App. 457.

A fee is not necessary to the privilege of an attorney. *Reed* v. *Smith*, 2 Ind. 160.

Communications to a prosecuting attorney with reference to crimes are privileged. *Oliver* v. *Pate*, 43 Ind. 132; *State* v. *Van Buskirk*, 59 Ind. 384.

Communications made to an attorney before his employment are not protected. *Jennings* v. *Sturdevant*, 140 Ind. 641.

Communications to a notary are not privileged. *Lukin* v. *Halderson*, 24 Ind. App. 645.

By testator.— Communications by a testator to his attorney, with reference to his will, are not protected after the former's death. *Kern* v. *Kern*, 154 Ind. 29, modifying *Gurley* v. *Park*, 135 Ind. 440; *McDonald* v. *McDonald*, 142 Ind. 55.

In will contests, the attorney may testify as to the communications of his client, the testator. *Pence* v. *Waugh*, 135 Ind. 143.

In presence of adverse party.— Where a communication to an attorney is in the presence of the adverse party it is not privileged. *Hanlon* v. *Doherty,* 109 Ind. 37.

New Jersey.

Waiver.— Client may waive the privilege. *Sayre* v. *Sayre,* 2 Green, 487.

Communications to attorney not privileged when he is in the employ of both parties as to the matter communicated. *Gulick* v. *Gulick,* 39 N. J. Eq. 516.

Fraud and crime.— An attorney is a competent witness as to matters confided to him by his client when the latter consults him with a criminal or fraudulent object in view, whether the attorney is a *particeps criminis* or not. *Matthews* v. *Hoagland,* 48 N. J. Eq. 455.

Presence of third person.— Communications between a client and a third person in the presence of the attorney are not privileged. *Carr* v. *Weld,* 19 N. J. Eq. 319; *Roper* v. *State,* 58 N. J. L. 420.

Maryland.

Authorities.— *Salmon* v. *Clagett,* 3 Bland, 125.

The rule applies even though the client is not a party to the suit in question. *Hodges* v. *Mullikin,* 1 Bland, 503.

A letter from the client to the attorney with reference to bringing suit is a privileged communication. *Hunter* v. *Van Bomhorst,* 1 Md. 504.

Communications in regard to office business must be no more divulged by the attorney than if made in relation to a pending suit. *Crane* v. *Barkdoll,* 59 Md. 534 (drawing deeds); *Chew* v. *Bank,* 2 Md. Ch. 231 (drawing will).

A lawyer's testimony that he brought a suit, recovered judgment, collected the amount and paid it to one to whom his client had assigned it is not within the privilege. *Fulton* v. *Maccracken,* 18 Md. 528.

Waiver of privilege.— The privilege is the client's and he may waive it and make the attorney a competent witness. *Chase's Case,* 1 Bland, 206.

Pennsylvania.

See statute.— Pepper & Lewis' Digest of Laws, "Criminal Procedure," sec. 83; "Witnesses," sec. 13.

An attorney is not competent to testify to confidential communications between himself and his client. *Heister* v. *Davis*, 3 Yeates, 4; *Beltzhoover* v. *Blackstock*, 3 Watts, 20; *Hill's Estate*, 9 Phila. 355; *Paxton* v. *Steckel*, 2 Pa. 93; *Moore* v. *Bray*, 10 Pa. 519; *Miller* v. *Weeks*, 22 Pa. 89.

Presence of third party.— Communications in the presence of a third party are not privileged. *Hummell* v. *Kistner*, 182 Pa. 216.

Communications made in the presence of the opposite party. *Goodwin Co.'s Appeal*, 117 Pa. 514.

An attorney may testify as to an agreement made in open court by the parties and their counsel, as it is not confidential. *Kramer* v. *Kister*, 187 Pa. 227; *Levers* v. *Van Buskirk*, 4 Pa. 309.

Matters not privileged.— Privilege of an attorney extends only to confidential communications. The mere fact of his employment as attorney is not privileged. *Sargent* v. *Johns*, 206 Pa. 386.

An attorney may testify as to communications of his client not made by virtue of their relationship as attorney and client. *Heaton* v. *Findlay*, 12 Pa. 304; *Beeson* v. *Beeson*, 9 Pa. 279.

An attorney is competent to testify as to his client's mental capacity on an issue *devisavit vel non.* *Daniel* v. *Daniel*, 39 Pa. 191.

When the attorney is interested jointly with the client in the matter communicated, such communication is not privileged. *Jeanes* v. *Fridenburgh*, 5 Penn. L. J. 65.

Where several employ an attorney concerning the same business, communications to him by them are not privileged *inter sese*. *Seip's Estate*, 163 Pa. 423.

Learned from outside sources.— *Daniel* v. *Daniel*, 39 Pa. St. 191; See *Turner's Estate*, 167 Pa. 609.

Others than lawyers.— Law students who are not clerks are not within the rule. *Schubkagel* v. *Dierstein*, 131 Pa. 46.

A conveyancer is not privileged. *Matthews' Estate*, 1 Phila. 292; *S. C.*, 5 Clark, 149.

Question for the court.— The attorney is not the judge as to whether a communication is privileged; that is for the trial court. *Jeanes* v. *Fridenberg*, 3 Clark, 199.

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;[28] but communications between a third party and a legal adviser are not protected unless the third party is acting as the agent of the person seeking advice, or the communications are made in contemplation of litigation, or for the purpose of giving advice or obtaining evidence with reference to it.[29]

AMERICAN NOTE.

General.

Authorities.— 1 Greenleaf on Evidence (15th ed.), secs. 240, 240a; Weeks on Attorneys-at-Law (2d ed.), sec. 162.

First paragraph of text. *Barker* v. *Kuhn,* 38 Ia. 392; *Swenk* v. *People,* 20 Ill. App. 111; *Verdelli* v. *Gray's Harbor Co.*, 115 Cal. 517; *Duttenhofer* v. *State,* 34 O. St. 91; *Hemenway* v. *Smith,* 28 Vt. 701, 706.

If the party takes the stand he can be compelled to testify on cross-examination to communications with his counsel. *Inhabitants of Woburn* v. *Henshaw,* 101 Mass. 193, 200, 3 Am. Rep. 333.

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28 *Minet* v. *Morgan,* 1873, 8 Ch. App. 361, reviewing all the cases, and adopting the explanation given in *Pearse* v. *Pearse,* 1846, 1 De G. & S. 18–31, of *Radcliffe* v. *Fursman,* 1730, 2 Br. P. C. 514. An illustration will be found in *Mayor of Bristol* v. *Cox,* 1884, 26 Ch. Div. 678.

29 *Wheeler* v. *Le Marchant,* 1881, 17 Ch. D. 675. See, too, *Calcraft Guest,* [1898], 1 Q. B. 759.

Statements made to an attorney, with a view to employing him, have been held within the rule, although he was never in fact employed. *State* v. *Lally,* 102 Ala. 25; *Denver Tramway Co.* v. *Owens,* 20 Col. 107; *Sargent* v. *Hampden,* 38 Me. 581.

One who overhears the conversation between attorney and client may testify. *Hoy* v. *Morris,* 13 Gray (Mass.), 519; *Tyler* v. *Hall,* 106 Mo. 313; *Goddard* v. *Gardner,* 28 Conn. 172.

A bill of particulars prepared by a layman, by direction of the client, and handed by him to the attorney, who did not make use of it, is not a privileged communication. *Pulford's Appeal,* 48 Conn. 249.

First paragraph of text.—*Duttenhofer* v. *State,* 34 Ohio St. 91, 95.

When relation exists.— To entitle communications to be considered as confidential and privileged, the relation of client and attorney must exist. *Granger* v. *Warrington,* 3 Gilm. 299; *De Wolf* v. *Strader,* 26 Ill. 225; *C., F., R. & B. Co.* v. *Jameson,* 48 Ill. 281; *Staley* v. *Dodge,* 50 Ill. 43; *People* v. *Barker,* 56 Ill. 299.

Communications to one not a licensed attorney are not privileged. *McLaughlin* v. *Gilmore,* 1 Brad. 563.

In order that the privilege exist, one must be consulted as an attorney, not as a mere friend. *Smith* v. *Long,* 106 Ill. 485; *Goltra* v. *Wolcott,* 14 Ill. 89.

Communications between friends are not privileged. *Goltra* v. *Wolcott,* 14 Ill. 89.

There is no objection to having the plaintiff's attorney swear as to calculation of interest. *Stratton* v. *Henderson,* 26 Ill. 69.

Waiver.— If one voluntarily testifies as to communications with his attorney, he may be cross-examined fully. *Swenk* v. *People,* 20 Ill. App. 111.

Letters.— Letters from attorneys to their clients are not admissible. *Ingleheart* v. *Jernegan,* 16 Ill. 513.

Bill sworn to.— A bill sworn to but never filed is a privileged communication. *Burnham* v. *Roberts,* 70 Ill. 19.

ARTICLE 117.*

CLERGYMEN AND MEDICAL MEN.

Medical men [30] and [probably] clergymen may be compelled to disclose communications made to them in professional confidence.

AMERICAN NOTE.

General.

Authorities.— 1 Greenleaf on Evidence (15th ed.), secs. 247, 248; McKelvey on Evidence, p. 295. But a different rule has been established by statute in many States.

Physicians.—*Thompson* v. *Ish*, 99 Mo. 160, 17 Am. St. Rep. 552, *n.*; *Heuston* v. *Simpson*, 115 Ind. 62; *Gartside* v. *Com. Life Ins. Co.*, 76 Mo. 446; *People* v. *West*, 106 Cal. 89; *Conn. Life Ins. Co.* v. *Union Trust Co.*, 117 U. S. 250; *Gurley* v. *Park*, 135 Ind. 440; *Kansas City, etc., R. Co.* v. *Murray*, 55 Kan. 336.

Clergymen.— *Gillooley* v. *State*, 58 Ind. 182; *Com.* v. *Drake*, 15 Mass. 161.

The burden of showing disqualification is upon the person objecting. *People* v. *Koerner*, 154 N. Y. 355.

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,[31] or any document the production of which might tend to criminate

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* See Note XLIV.

[30] *Duchess of Kingston's Case*, 1776, 20 S. T. 572–3. As to clergymen, see Note XLIV.

[31] *Pickering* v. *Noyes*, 1823, 1 B. & C. 263; *Adams* v. *Lloyd*, 1858, 3 H. & N. 351.

him, or expose him to any penalty or forfeiture;[32] 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,[33] or because he has lien upon it.[34]

No bank is compellable to produce the books of such bank, except in the case provided for in Article 37.[35]

AMERICAN NOTE.

General.

Authorities.— 1 Wharton on Evidence, secs. 377, 537; 1 Greenleaf on Evidence (15th ed.), secs. 246, 451, 453; *Machine Co.* v. *Batchelder*, 68 Vt. 431; *Thompson* v. *Engle*, 4 N. J. Eq. 271; *Cullison* v. *Bossom*, 1 Md. Ch. 95; *First Nat. Bank* v. *Hughes*, 6 Fed. Rep. 741; *Bull* v. *Loveland*, 10 Pick. (Mass.) 9, 14; *Burnham* v. *Morissey*, 14 Gray (Mass.), 226; *Adams* v. *Porter*, 1 Cush. (Mass.) 170. See *Lester* v. *People*, 150 Ill. 408, 41 Am. St. Rep. 375, 388, *n.*

See *Davenbagh* v. *M'Kennie*, 5 Cow. 27; *Bonesteel* v. *Lynde*, 8 How. Pr. 226, 352; *Lane* v. *Cole*, 12 Barb. 680.

New Jersey.

Authority.— *Thompson* v. *Engle*, 4 N. J. Eq. 271.

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32 *Whitaker* v. *Izod*, 1809, 2 Tau. 115.

33 *Doe* v. *Date*, 1842, 3 Q. B. 609, 618.

34 *Hope* v. *Liddell*, 1855, 7 De G. M. & G. 331; *Hunter* v. *Leathley*, 1830, 10 B. & C. 858; *Brassington* v. *Brassington*, 1823, 1 Si. & 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*, 1842, 2 Mo. & Ro. 437; but it seems to be opposed to *Hunter* v. *Leathley*, 1830, 10 B. & C. 858, 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*, 1848 (per Parke, B.), 1 Ex. 801.

35 42 & 43 Vict. c. 11.

Maryland.

Authority.— *Cullison* v. *Bossom,* 1 Md. Ch. 95.

Pennsylvania.

Criminating documents.— *Boyle* v. *Smithman,* 146 Pa. 255.

Exposure to penalty.— A bank cannot be compelled to produce its books in a suit to recover a penalty for usury. *Union Glass Co.* v. *Bank,* 10 Pa. Co. Ct. 574.

ARTICLE 119.

PRODUCTION OF DOCUMENTS WHICH ANOTHER PERSON, HAVING POSSESSION, COULD REFUSE TO PRODUCE.

No solicitor,[36] 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.[37]

AMERICAN NOTE.

General.

Authorities.— 1 Greenleaf on Evidence (15th ed.), secs. 241, 246; Weeks on Attorney-at-Law (2d ed.), sec. 163; *Wertheim* v. *Continental R. Co.,* 15 Fed. Rep. 716; *Harrisburg Car Co.* v. *Sloan,* 120 Ind. 156; *Steed* v. *Cruise,* 70 Ga. 168. See *Pulford's Appeal,* 48 Conn. 247.

He can be compelled to testify as to the existence of the paper. *Lease of Rhoades* v. *Selin,* 4 Wash. C. C. 715; *Stokoe* v. *St. Paul,*

36 *Volant* v. *Soyer,* 1853, 13 C. B. 231; *Phelps* v. *Prew,* 1854, 3 E. & B. 431.

37 *Davies* v. *Waters,* 1842, 9 M. & W. 608; *Few* v. *Guppy,* 1834, 13 Beav. 457.

etc., R. Co., 40 Minn. 545; *Westcott* v. *Atlantic Co.*, 3 Metc. (Mass.) 282; *Durkee* v. *Leland*, 4 Vt. 612.

He may be compelled to testify as to the existence of the papers. *Coveney* v. *Tannahill*, 1 Hill, 33, 37 Am. Dec. 287.

Pennsylvania.

A report prepared by defendant's agent for use by counsel in the trial of the case need not be produced. *Davenport Co.* v. *Railroad Co.*, 166 Pa. 480.

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 [or the wife or husband of the witness] to any criminal charge, or to any penalty or forfeiture which the judge regards as reasonably likely to be preferred or sued for;[38] 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 other-

[38] *R.* v. *Boyes*, 1861, 1 B. & S. 330; followed and approved in *Ex parte Reynolds*, 1882, by the Court of Appeal; see 20 Ch. Div. 298. As to husbands and wives, see 1 Hale, P. C. 301; *R.* v. *Cliviger*, 1788, 2 T. R. 263; *Cartwright* v. *Green*, 1803, 8 Ve. 405; *R.* v. *Bathwick*. 1831, 2 B. & Ad. 639; *R.* v. *All Saints, Worcester*, 1817, 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 incriminate her husband. *R.* v. *Cliviger* assumes that she was, and was to that extent overruled. As to the later law, see *R.* v. *Halliday*, 1860, 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.

wise liable to any civil suit, either at the instance of the Crown or of any other person.[39]

A person charged with an offence and being a witness in pursuance of the Criminal Evidence Act, 1898, may be asked any question in cross-examination, notwithstanding that it would tend to criminate him as to the offence charged.[40]

AMERICAN NOTE.

General.

Authorities.—1 Greenleaf on Evidence (15th ed.), secs. 451–453; Wharton on Evidence, secs. 533–541.

Exemption.— First paragraph of text. *Eckstein's Petition,* 148 Pa. St. 509; *Temple* v. *Com.,* 75 Va. 892; *State* v. *Simmons Co.,* 109 Mo. 118; *Stevens* v. *State,* 50 Kan. 712; *Winters* v. *People,* 139 Ill. 363; *State* v. *Haden,* 43 Minn. 253; *Ex parte Boscowitz,* 84 Ala. 463; *Coburn* v. *Odell,* 30 N. H. 540; *Janvrin* v. *Scamaron,* 29 N. H. 280; *Chamberlain* v. *Wilson,* 12 Vt. 491; *Emery's Case,* 107 Mass. 172; *Com.* v. *Trider,* 143 Mass. 180.

A witness cannot be compelled to disclose facts which would subject him to a criminal prosecution. *Grannis* v. *Branden,* 5 Day (Conn.), 272; *Barnes* v. *State,* 19 Conn. 404.

On a prosecution for selling liquor to a common drunkard, the person claimed to be such was a witness for the State to prove the sale, and was asked, upon cross-examination, if he was a common drunkard. Held, that he was not bound to answer, as an answer might criminate him. *Barnes* v. *State,* 19 Conn. 404.

The rule does not apply if the criminal prosecution is barred by lapse of time. *Lamson* v. *Boyden,* 160 Ill. 613; *Mahanke* v. *Cleland,* 76 Ia. 401; *Childs* v. *Merrill,* 66 Vt. 302. Or statute granting an exemption to such witness. *Brown* v. *Walker,* 161 U. S. 591; *Ex parte Cohen,* 104 Cal. 524; *State* v. *Nowell,* 58 N. H. 314.

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[39] 46 Geo. III. c. 37. See *R.* v. *Scott,* 1856, 25 L. J. M. C. 128, and subsequent cases as to bankrupts, and *Ex parte Scholfield,* 1877, 6 Ch. Div. 230. *Quære,* Is he bound to produce a document incriminating himself? See *Webb* v. *East,* 1880, 5 Ex. D. 23 & 108.

[40] 61 & 62 Vict. c. 36, s. 1 (*e*).

The court may, but need not, advise the witness of his right to refuse to answer. *Com.* v. *Howe*, 13 Gray (Mass.), 26; *Com.* v. *Shaw*, 4 Cush. (Mass.) 594; *Mayo* v. *Mayo*, 119 Mass. 292.

Penalty.— A witness cannot be compelled to give testimony which may expose him to a penalty. Nor, it seems, to give testimony which may subject him to a debt, although called as a witness in a suit between third parties. *Benjamin* v. *Hathaway*, 3 Conn. 532.

Husband or wife.—*Cornelius* v. *Hambay*, 150 Pa. St. 359; *Keep* v. *Griggs*, 12 Ill. App. 511; *People* v. *Langtree*, 64 Cal. 256; *Woods* v. *State*, 76 Ala. 35; *Com.* v. *Sparks*, 7 Allen (Mass.), 534; *State* v. *Bridgman*, 49 Vt. 202; *State* v. *Briggs*, 9 R. I. 361.

Waiver.— The privilege may be waived. *State* v. *Wentworth*, 65 Me. 234; *Samuel* v. *People*, 164 Ill. 379; *State* v. *Van Winkle*, 80 Ia. 15; *State* v. *Foster*, 23 N. H. 348; *Foster* v. *Pierce*, 11 Cush. (Mass.) 437, 59 Am. Dec. 152; *Com.* v. *Nichols*, 114 Mass. 285, 19 Am. Rep. 346; *Com.* v. *Morgan*, 107 Mass. 199.

By testifying as to part, the witness waives his protection and can be compelled to testify as to the whole. *People* v. *Freshour*, 55 Cal. 375; *State* v. *Fay*, 43 Ia. 561; *State* v. *Nichols*, 29 Minn. 357; *Coburn* v. *Odell*, 30 N. H. 540; *State* v. *Witham*, 72 Me. 531; *Com.* v. *Pratt*, 126 Mass. 462; *Com.* v. *Nichols*, 114 Mass. 285; *Com.* v. *Smith*, 163 Mass. 431. See *Samuel* v. *People*, 164 Ill. 379.

The witness, by taking the stand, waives his protection. *Disque* v. *State*, 49 N. J. L. 249; *Thomas* v. *State*, 103 Ind. 419; *Thomas* v. *State*, 100 Ala. 53; *State* v. *Thomas*, 98 N. C. 599; *People* v. *Wong Ah Leorg*, 99 Cal. 440; *State* v. *Witham*, 72 Me. 531; *State* v. *Griswold*, 67 Conn. 307.

Where a witness voluntarily testifies in chief on a particular subject, he may be cross-examined on the same subject, although his answers may criminate or disgrace him. *Norfolk* v. *Gaylord*, 28 Conn. 312.

Civil liability.— Sustaining text. *Bull* v. *Loveland*, 10 Pick. (Mass.) 9, 12; *Lees* v. *U. S.*, 150 U. S. 476; *Gadsden* v. *Woodward*, 103 N. Y. 242; *Lowney* v. *Perham*, 20 Me. 235.

Exposure to penalty.— Sustaining text. *Livingston* v. *Tompkins*, 4 Johns. Ch. 432; *Livingston* v. *Harris*, 3 Paige, 533, 11 Wend. 329; *Matter of Kip*, 1 Paige, 601; *People* v. *Rector*, 19 Wend. 569; *Matter of Dickinson*, 58 How. Pr. 260.

Exemption.— First paragraph of text. *Winters* v. *People*, 139 Ill. 363.

A defendant may not give testimony which will criminate him, nor need he produce documents which would have that effect. *Lampson* v. *Boyden*, 160 Ill. 613.

Caution.—The court may caution a witness that he need not incriminate himself. *Eggers* v. *Fox*, 177 Ill. 185, 52 N. E. 269.

Prosecution barred.— One cannot refuse to answer on the ground that the evidence would incriminate himself if the prosecution would be barred by lapse of time. *Prussing* v. *Jackson*, 85 Ill. App. 324; *Lamson* v. *Boyden*, 160 Ill. 613.

Testimony tending to disgrace.— A witness cannot refuse to answer on the ground that his testimony would disgrace him. *Weldon* v. *Burch*, 12 Ill. 374.

Questions may be asked on cross-examination which tend to disgrace a witness. *City* v. *Hardy*, 98 Ind. 577.

New Jersey.

Statute.— Witnesses need not answer questions exposing them to criminal prosecution, penalty, or forfeiture of estate. G. S. 1895, "Evidence," 10.

Waiver.— The witness, by taking the stand, waives his protection. *Disque* v. *State*, 49 N. J. L. 249.

Husband and wife.— *State* v. *Wilson*, 31 N. J. L. 77.

Legislative investigations.—No privilege in investigations before legislative committees. G. S. 1895, "Evidence," 75.

Privilege denied in cases of fraud.— G. S. 1895, "Crimes," 158.

Maryland.

General rule.— *Taney* v. *Kemp*, 4 H. & J. 349.

A party indicted for fraud cannot be compelled to produce his books of account as evidence against himself. *Blum* v. *State*, 94 Md. 375.

It is for the court to say whether or not the answer to a question is likely to incriminate him. *Chesapeake Club* v. *State*, 63 Md. 446.

Gambling cases.— This privilege taken away in gambling cases. P. G. L. 1888, art. 27, sec. 131.

Exposure to civil suit.— A witness may be compelled to answer, though it may tend to render him liable in a civil action to some

penalty or loss. *Hays* v. *Richardson*, 1 G. & J. 366; *Naylor* v. *Semmes*, 4 G. & J. 274; *Taney* v. *Kemp*, 4 H. & J. 349.

A witness is not excused merely because his answer would be against his interest. *Stoddart* v. *Manning*, 2 H. & J. 147.

Personal privilege of witness.— A witness may refuse to answer a question that tends to incriminate him; but this is his personal privilege, not that of the party calling him as a witness. *Chesapeake Club* v. *State*, 63 Md. 446.

Waiver.— When the accused in a criminal case takes the stand, he waives his right to refuse to answer questions tending to expose him to penal liability. *Guy* v. *State*, 90 Md. 29.

When a party plaintiff takes the stand he is held to have waived his privilege as to criminating questions. *Roddy* v. *Finnegan*, 43 Md. 490.

Pennsylvania.

Const. of Pa., art. I, sec. 9.

Exemption.— First paragraph of text. *Eckstein's Petition*, 148 Pa. 509; *Ex parte Doran*, 2 Pars. 467.

When a witness refuses to answer a question on the ground that it may criminate him, no inference can properly be drawn from such refusal. *Phelin* v. *Kenderdine*, 20 Pa. 354.

A court will compel the production of the books of a corporation even though the entries made therein by one of the parties to the suit may tend to criminate him. *McElree* v. *Darlington*, 187 Pa. 593.

Husband or wife.— *Cornelius* v. *Hambay*, 150 Pa. 359.

A wife need not answer questions incriminating her husband. *Com.* v. *Reid*, 8 Phila. 385.

When a statute permits a wife to testify for her husband, she may be compelled in cross-examination to testify against him. *Balentine* v. *White*, 77 Pa. 20.

Election contests.— The rule does not apply in contested election cases. Const. of Pa., art. VIII, sec. 10; Pepper & Lewis' Digest of Laws, "Contested Elections," sec. 41.

A witness can be compelled to answer incriminating questions in contested election cases, because he is protected by the Bill of Rights. *Kelly's Contested Election*, 200 Pa. 430.

Question for the court.— The criminating tendency of a question is for the trial judge. He may compel witness to answer, but in

such case the answer cannot ever be used against the witness. *Com.* v. *Bell*, 145 Pa. 374.

Testimony wrongfully obtained from the witness by the court cannot be used against him. *Horstman* v. *Kaufman*, 97 Pa. 147.

ARTICLE 121.

CORROBORATION WHEN REQUIRED.*

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.[41] The fact that the defendant did not answer letters affirming that he had promised to marry the plaintiff is not such corroboration.[42]

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 of the said justices or Court respectively.[43]

No person can be convicted of an offence against sect. 4 of the Criminal Law Amendment Act, 1885, or an offence against the Prevention of Cruelty to Children Act, 1894, or an offence mentioned in the Schedule to that Act (as to which see p. 347, note 11, upon the unsworn evidence of a child of tender years, unless such unsworn evidence is

* See Article 122.

41 32 & 33 Vict. c. 68, s. 2.

42 *Wiedemann* v. *Walpole*, [1891], 2 Q. B. 534.

43 8 & 9 Vict. c. 10, s. 6; 35 & 36 Vict. c. 6, s. 4.

corroborated by material evidence implicating the accused.[44]

When the only proof against a person charged with a criminal offence is the evidence of an accomplice, uncorroborated 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.[45]

AMERICAN NOTE.

General.

Authorities.— 1 Wharton on Evidence, sec. 414; 1 Greenleaf on Evidence (15th ed.), secs. 379–382; 1 Am. & Eng. Encyclopædia of Law (2d ed.), p. 399.

The jury may convict on uncorroborated testimony. *Cox* v. *Com.*, 125 Pa. St. 24; *Hoyt* v. *People*, 140 Ill. 588; *Ayers* v. *State*, 88 Ind. 275; *People* v. *Gallagher*, 75 Mich. 512; *Campbell* v. *People*, 159 Ill. 9; *Lamb* v. *State*, 40 Neb. 312; *State* v. *Maney*, 54 Conn. 178; *State* v. *Wolcott*, 21 Conn. 272; *State* v. *Stebbins*, 29 Conn. 463, 79 Am. Dec. 223; *State* v. *Williamson*, 42 Conn. 261; *State* v. *Potter*, 42 Vt. 495; *State* v. *Dana*, 59 Vt. 614; *State* v. *Litchfield*, 58 Me. 270; *State* v. *Cunningham*, 31 Me. 355; *State* v. *Kibling*, 63 Vt. 636; *Com.* v. *Bosworth*, 22 Pick. (Mass.) 397; *Com.* v. *Larrabee*, 99 Mass. 413; *Com.* v. *Scott*, 123 Mass. 237, 25 Am. Rep. 81; *Com.* v. *Holmes*, 127 Mass. 424, 34 Am. Rep. 391.

In some States it is the practice to warn the jury. *Collins* v. *State*, 98 Ill. 584; *Cheathem* v. *State*, 67 Miss. 335; *State* v. *Barber*, 113 N. C. 711; *Ingalls* v. *State*, 48 Wis. 647; *Com.* v. *Price*, 10 Gray (Mass.), 472, 71 Am. Dec. 668; *Com.* v. *Brooks*, 9 Gray (Mass.), 299; *Com.* v. *Larrabee*, 99 Mass. 413; *State* v. *Kibling*, 63 Vt. 636.

It is held in some States that it is not error to omit the caution. *State* v. *Potter*, 42 Vt. 495; *State* v. *Kibling*, 63 Vt. 636; *Com.* v.

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[44] 48 & 49 Vict. c. 69, s. 4; 57 & 58 Vict. c. 41, s. 15. See Article 123A.

[45] 1 Ph. Ev. 93–101; Taylor, ss. 967–971; 3 Russ. Cri. 642–653. See *In re Meunier*, [1894], 2 Q. B. 415.

Holmes, 127 Mass. 424, 34 Am. Rep. 391; *Com.* v. *Scott*, 123 Mass. 237, 25 Am. Rep. 81; *Com.* v. *Wilson*, 152 Mass. 12; *Com.* v. *Bishop*, 165 Mass. 148. But see *State* v. *Williamson*, 42 Conn. 261; *State* v. *Maney*, 54 Conn. 178.

Detectives and others who act with the criminals, in order to bring them to justice, are not accomplices. *State* v. *McKean*, 36 Ia. 343; *People* v. *Bolanger*, 71 Cal. 17; *Com.* v. *Hollister*, 157 Pa. St. 13; *State* v. *Hoxsie*, 15 R. I. 1.

Any evidence is corroborative which tends to connect the defendant with the crime. *State* v. *Donnelly*, 130 Mo. 642; *Hester* v. *Com.*, 85 Pa. St. 139; *State* v. *Maney*, 54 Conn. 178. See *U. S.* v. *Howell*, 56 Fed. Rep. 20; *Com.* v. *Holmes*, 127 Mass. 424.

One accomplice cannot corroborate another, unless, perhaps, they have had no opportunity to be together before the trial. *State* v. *Williamson*, 42 Conn. 265, 266.

Generally divorces will not be granted upon the testimony of parties alone. *Robbins* v. *Robbins*, 100 Mass. 150; *Cooper* v. *Cooper*, 88 Cal. 45; *Lewis* v. *Lewis*, 75 Pa. 200; *Rie* v. *Rie*, 34 Ark. 37. *Contra*, *Flattery* v. *Flattery*, 88 Pa. St. 27; *Sylvis* v. *Sylvis*, 11 Col. 319.

Breach of promise.— Modifying rule of text. *Homan* v. *Earle*, 53 N. Y. 267.

Seduction.— Corroboration is required in a prosecution for seduction. *People* v. *Kearney*, 110 N. Y. 188.

Accomplice.— Conviction may be had upon the uncorroborated testimony of an accomplice. *Cross* v. *People*, 47 Ill. 152; *Friedberg* v. *People*, 102 Ill. 160.

An accomplice is a competent witness. *Earll* v. *People*, 73 Ill. 330; *Collins* v. *People*, 98 Ill. 584.

An uncorroborated accomplice is a competent witness. *Gray* v. *People*, 26 Ill. 344; *Friedberg* v. *People*, 102 Ill. 160.

Bastardy.— In a prosecution for bastardy, the testimony of the complainant must be corroborated. *People* v. *Chrisman*, 66 Ill. 162; *McCoy* v. *People*, 65 Ill. 439.

New Jersey.

What are corroborating circumstances.— *State* v. *Guild*, 10 N. J. L. 163.

Seduction.— Corroborative evidence required to prove seduction. *Zabriskie* v. *State*, 43 N. J. L. 640.

In prosecution for seduction the subsequent conduct and conversa-

tions of the defendant are admissible to corroborate the testimony of prosecutrix. *State* v. *Brown*, 64 N. J. L. 414.

Marriage.— An admission of a marriage in an answer is sufficient to prove it when corroborated. *Dare* v. *Dare*, 52 N. J. Eq. 195.

Accomplices.— Corroboration of the testimony of an accomplice is advisable but not necessary. *State* v. *Hyer*, 39 N. J. L. 598.

Woman taking a potion to cause an abortion is not an accomplice. *State* v. *Hyer*, 39 N. J. L. 598.

Confessions in criminal cases.— A confession is sufficient for conviction without corroboration if there be other evidence of the *corpus delicti*. *State* v. *Guild*, 10 N. J. L. 163.

Divorce.— Corroborative evidence required in divorce cases. *McShane* v. *McShane*, 45 N. J. Eq. 341; *Summerbell* v. *Summerbell*, 37 N. J. Eq. 603; *McGrail* v. *McGrail*, 48 N. J. Eq. 532.

Divorce not to be granted on uncorroborated testimony of complainant. *Woodworth* v. *Woodworth*, 21 N. J. Eq. 251; *Palmer* v. *Palmer*, 22 N. J. Eq. 88; *Tate* v. *Tate*, 26 N. J. Eq. 55; *Belton* v. *Belton*, 26 N. J. Eq. 449; *Cummins* v. *Cummins*, 15 N. J. Eq. 138; *Mount* v. *Mount*, 15 N. J. Eq. 162. So also adultery charged by the defendant must be sustained by other proof than that of the defendant alone. *Reid* v. *Reid*, 21 N. J. Eq. 251.

Confessions in divorce cases are to be taken with great caution and should be held insufficient unless corroborated. *Clutch* v. *Clutch*, 1 N. J. Eq. 474; *Miller* v. *Miller*, 2 N. J. Eq. 139; *Jones* v. *Jones*, 17 N. J. Eq. 351; *Derby* v. *Derby*, 21 N. J. Eq. 36.

In divorce, corroboration of the petitioner is necessary to prove desertion. *Pullen* v. *Pullen*, 29 N. J. Eq. 541; *Sandford* v. *Sandford*, 32 N. J. Eq. 420.

Maryland.

Proof of one's own declarations is not admissible to corroborate. P. G. L. 1888, art. 35, sec. 2.

Divorce, etc.— Testimony of plaintiff must be corroborated in actions for adultery, divorce, and breach of promise of marriage. P. G. L. 1888, art. 35, sec. 3.

Pennsylvania.

In equity.— A written instrument will not be reformed on the uncorroborated testimony of one witness. *Sutch's Estate (No. 1)*, 201 Pa. 305.

Accomplices.— Evidence corroborating an accomplice must tend to connect the accused with the crime. *Watson* v. *Com.*, 95 Pa. 418; *Cox* v. *Com.*, 125 Pa. 94.

An accomplice need not be corroborated in every detail. *Ettinger* v. *Com.*, 98 Pa. 338.

Detectives and others who act with the criminals, in order to bring them to justice, are not accomplices. *Com.* v. *Hollister*, 157 Pa. 13; *Campbell* v. *Com.*, 84 Pa. 187.

Rape, seduction, etc.— In rape, corroborative evidence should be required, if possible. *Com.* v. *Childs*, 2 Pitts. 391.

Corroborative evidence required to prove seduction. *Rice* v. *Com.*, 100 Pa. 28.

Corpus delicti.— A confession is not sufficient for conviction without other proof of the *corpus delicti*. *Com.* v. *Hanlon*, 8 Phila. 401; *Gray* v. *Com.*, 101 Pa. 380.

The jury may convict on uncorroborated testimony. *Cox* v. *Com.*, 125 Pa. 24.

Any evidence is corroborative which tends to connect the defendant with the crime. *Hester* v. *Com.*, 85 Pa. 139.

Divorce.— Instance of a divorce granted upon uncorroborated testimony of a party. *Flattery* v. *Flattery*, 88 Pa. 27.

ARTICLE 121A.

CLAIM ON ESTATE OF DECEASED PERSON.

Claims upon the estates of deceased persons, whether founded upon an allegation of debt or of gift, ought not to be maintained upon the uncorroborated testimony of the claimant, unless circumstances appear or are proved which make the claim antecedently probable, or throw the burden of disproving it on the representatives of the deceased.

Illustrations.

(*a*) A, a widow, swore that her deceased husband gave her plate, &c., in his house, but no circumstances corroborated her allegation. Her claim was rejected.[46]

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[46] *Finch* v. *Finch*, 1883, 23 Ch. Div. 267.

(*b*) A, a widow, claimed the rectification of a settlement drawn by her husband the night before their marriage, and giving him advantages which, as she swore, she did not mean to give him, and were not explained to her by him. The settlement was not one which, in the absence of agreement between the parties, would have been sanctioned by the Court. Her claim was admitted though uncorroborated.[47]

AMERICAN NOTE.

General.

See *Hatch* v. *Atkinson*, 56 Me. 324; *Dilts* v. *Stevenson*, 17 N. J. Eq. 407; *Farmer's Exr.* v. *Farmer*, 39 N. J. Eq. 211.

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. 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.[48]

This provision does not apply to cases of high treason in compassing or imagining the Queen's death, in which the

[47] *Livesey* v. *Smith*, 1880. 15 Ch. Div. 655. *In re Garnett, Gandy* v. *Macaulay*, 1885, 31 Ch. Div. 1, is a similar case. In *In re Hodgson, Beckett* v. *Ramsdale*, 1885, 31 Ch. Div. p. 183, the language of Hannen. J., in words somewhat relaxes the rule, but not, I think, in substance.

[48] 7 & 8 Will. III. c. 3, ss. 2, 4.

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,[49] or to misprision of such treason.

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 which corroborate such witness, the defendant is entitled to be acquitted.[50]

AMERICAN NOTE.

General.

Authorities.— 1 Greenleaf on Evidence (15th ed.), secs. 255–259; 1 Wharton on Evidence, sec. 414.

Treason against the United States. Art. 3, sec. 3, of the U. S. Constitution.

Perjury.— *Com.* v. *Parker*, 2 Cush. (Mass.) 212.

In perjury, one witness, with corroborating circumstances, is sufficient. *Com.* v. *Parker*, 2 Cush. (Mass.) 212; *Com.* v. *Butland*, 119 Mass. 317, 324; *Com.* v. *Pollard*, 12 Metc. (Mass.) 225; *Williams* v. *Com.*, 91 Pa. St. 493; *People* v. *Wells*, 103 Cal. 631; *State* v. *Hawkins*, 115 N. C. 712; *U. S.* v. *Hall*, 44 Fed. Rep. 864; *State* v. *Jean*, 42 La. Ann. 946; *State* v. *Head*, 57 Mo. 252.

New Jersey.

Rule in chancery.— When one witness in support of allegations of bill is not sufficient. *Morris* v. *White*, 36 N. J. Eq. 324.

Pennsylvania.

A single uncorroborated witness is sufficient to prove murder. *McLain* v. *Com.*, 99 Pa. 86.

To prove that a written contract has been changed by parol, testimony equal in weight to that of two witnesses must be produced.

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[49] 39 & 40 Geo. III. c. 93.

[50] 1 Russ. on Crimes, 368.

Pennsylvania Iron Co. v. *Diller*, 1 Atl. 924; *Thomas* v. *Loose*, 114 Pa. 35; *Jones* v. *Backus*, 114 Pa. 120; *Day* v. *Osborn*, 9 Atl. 643; *Beckett* v. *Allison*, 188 Pa. 279.

Usage.— Business usage may be proved by one witness. *Adams* v. *Insurance Co.*, 95 Pa. 348.

Rule in chancery.— When one witness in support of allegations of the bill is not sufficient. *Smith* v. *Ewing*, 151 Pa. 256.

Perjury, supporting text.— *Williams* v. *Com.*, 91 Pa. 493.

Treason.— *Respublica* v. *McCarty*, 2 Dall. 86.

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, except as is stated in this and the following article.

Every person objecting to being sworn, and stating, as the ground of such objection, either that he has no religious belief, or that the taking of an oath is contrary to his religious belief, may make his solemn affirmation, which is of the same force and effect as if he had taken the oath, and if, having made such affirmation, he wilfully and corruptly gives false evidence, he is liable to be punished as for perjury.

Such affirmation must be as follows:—

"I, A. B., do solemnly, sincerely, and truly declare and affirm,"

and then proceed with the words of the oath prescribed by law, omitting any words of imprecation or calling to witness.[1]

Where an oath has been duly administered and taken, the fact that the person to whom the same was adminis-

[1] 51 & 52 Vict. c. 46, the Oaths Act, 1888, which repeals the previous enactments on the subject.

tered had, at the time of taking such oath, no religious belief, does not for any purpose affect the validity of such oath.[2]

AMERICAN NOTE.

General.

Authority.— 1 Greenleaf on Evidence (15th ed.), sec. 371.

Atheists.— See article 107 of this book.

It is enough to show that an oath was administered by one who habitually did it, in the absence of proof that he was not properly appointed an officer. *Morrell* v. *People,* 32 Ill. 499.

New Jersey.

Affirmation is not sufficient if the witness does not object to being sworn. *Williamson* v. *Carroll,* 1 Harr. 217. When the record is silent it is presumed that a witness was sworn. *Doughty* v. *Read,* Pen. 901.

Witness competent though he does not believe God will punish perjury. *Percy* v. *Powers,* 51 N. J. L. 432.

Maryland.

After judgment a party cannot object that certain evidence not taken on oath was admitted. *Nesbitt* v. *Dallam,* 7 G. & J. 494.

Pennsylvania.

Statute.— Pepper & Lewis' Digest of Laws, "Oaths and Affirmations."

ARTICLE 123A.

UNSWORN EVIDENCE OF YOUNG CHILD.

Where upon the hearing of a charge under sect. 4 of the Criminal Law Amendment Act, 1885, a child of tender years who is tendered as a witness does not, in the opinion of the Court, understand the nature of an oath, the evidence of such child may be received, though not given upon oath, if, in the opinion of the Court, such child is possessed

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[2] 51 & 52 Vict. c. 46, s. 3.

of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth;[3]

Provided that no person can be convicted in such a case unless such unsworn evidence is corroborated by other material evidence implicating the accused.[3]

Any witness whose evidence, not upon oath, has been admitted as mentioned in this article is liable to indictment and punishment for perjury in all respects as if he or she had been sworn.[3]

If evidence not upon oath is given under the provisions stated in this article, and the charge is one of felony, the prisoner may be convicted under sect. 9 of the Criminal Law Amendment Act, 1885, of an offence[4] in respect of which such unsworn evidence might not have been given.[5] If the charge is one of misdemeanour, the prisoner cannot be convicted of another misdemeanour, in respect of which such unsworn evidence might not have been given, if such other misdemeanour was charged in another count of the indictment.[6]

Where, in any proceeding against any person for an offence under the Prevention of Cruelty to Children Act, 1894, or for any of the offences mentioned in the Schedule to that Act,[7] the child in respect of whom the offence is

[3] 48 & 49 Vict. c. 69, s. 4. The offences under this section are, unlawfully and carnally knowing, and attempting unlawfully and carnally to know any girl under thirteen.

[4] These offences are, any offence under ss. 3, 4, 5 of the Criminal Law Amendment Act, 1885, and indecent assault.

[5] *R.* *Wealand,* 1888, 20 Q. B. D. 827. See Note XLIVA.

[6] *R.* v. *Paul,* [1890], 25 Q. B. D. 202. See note XLIVA.

[7] See p. 347, note 11.

charged to have been committed, or any other child of tender years who is tendered as a witness, does not, in the opinion of the Court, understand the nature of an oath, the evidence of such child may be received, though not given upon oath, if, in the opinion of the Court, such child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.

And the evidence of such child, though not given on oath, but otherwise taken and reduced into writing, in accordance with the provisions of sect. 17 of the Indictable Offences Act, 1848,[8] or sect. 13 of the Prevention of Cruelty to Children Act, 1894,[9] shall be deemed to be a deposition within the meaning of those sections respectively.

Provided that—

(*a*) a person shall not be liable to be convicted of the offence unless the testimony admitted by virtue of this section and given on behalf of the prosecution is corroborated by some other material evidence in support thereof implicating the accused; and

(*b*) any child whose evidence is received as aforesaid and who shall wilfully give false evidence shall be liable to be indicted and tried for such offence, and on conviction thereof may be adjudged such punishment as is provided for by section 11 of the Summary Jurisdiction Act, 1879, in the case of juvenile offenders.[10]

[8] See Article 140. [9] See Article 141B.

[10] 57 & 58 Vict. c. 41, s. 15.

ARTICLE 123B.

UNSWORN EVIDENCE OF A BARRISTER.

A barrister giving evidence in Court, in proceedings where evidence is usually given by affidavit, as to his action in his professional capacity in previous proceedings makes a statement from his seat in Court without an oath having been administered to him.[11]

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.[12]

Any person to whom an oath is administered, who so desires, may be sworn with uplifted hand in the form and manner usual in Scotland.[13]

Every person now or hereafter having power by law or by consent of parties to hear, receive, and examine evi-

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11 *Hickman* v. *Berens*, [1895], 2 Ch. p. 638, following the previous unreported case of *Kempshall* v. *Holland* (but see 98 L. T. p. 489, Leading Article), decided in the Court of Appeal. In the former case the original proceedings took place before an official referee; in both the barrister's statement was in substitution for an affidavit. See Article 111, and Note XLII.

12 1 & 2 Vict. c. 105. For the old law, see *Omichund* v. *Barber*, 1745, 1 S. L. C., 7th Ed., 445.

13 51 & 52 Vict. c. 46, s. 5.

dence, is empowered to administer an oath to all such witnesses as are lawfully called before him.[14]

AMERICAN NOTE.

General.

Authorities.— 1 Greenleaf on Evidence (15th ed.), sec. 371; 1 Wharton on Evidence, sec. 387.

On the swearing of Mohammedans, Brahmins, Chinese, etc.— *State* v. *Chiagk*, 92 Mo. 395; *Bow* v. *People*, 160 Ill. 438; *Newman* v. *Newman*, 7 N. J. Eq. 26; *Com.* v. *Jarboe*, 89 Ky. 143.

New Jersey.

Form of oath.— Oath substantially in form prescribed. *State* v. *Dayton*, 23 N. J. L. 49.

Jewish oath.— *Newman* v. *Newman*, 7 N. J. Eq. 26.

Pennsylvania.

The oath may be administered to a witness by the interpreter. *Com.* v. *Jongrass*, 181 Pa. 172.

ARTICLE 125.

HOW ORAL EVIDENCE MAY BE TAKEN.

Oral evidence may be taken[15] (according to the law relating to civil and criminal procedure)—

In open court upon a final or preliminary hearing;

Or out of court for future use in court—

(*a*) upon affidavit,

(*b*) under a commission,[16]

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[14] 14 & 15 Vict. c. 99, s. 16.

[15] As to civil procedure, see Order XXXVII. to Judicature Act of 1875. As to criminal procedure, see 11 & 12 Vict. c. 42, for preliminary procedure, and the rest of this chapter for final hearings.

[16] The law as to commissions to take evidence is as follows: The root of it is 13 Geo. III. c. 53. Sect. 40 of this Act provides for the

(*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., Rule 5.

Oral evidence taken upon a preliminary hearing may, in the cases specified in Articles 140–142, be recorded in the form of a deposition, which deposition may be used as a documentary evidence of the matter stated therein in the cases and on the conditions specified in Chapter XVII.

Oral evidence taken in open court must be taken according to the rules contained in this chapter relating to the examination of witnesses.

[17]Oral evidence taken under a commission must be taken in the manner prescribed by the terms of the commission.

[18] Oral evidence taken under a commission 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 va-

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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 misdemeanour brought against Governors, &c., in India in the Court of Queen's Bench. Sect. 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 they relate to civil proceedings to the world at large. 3 & 4 Vict. c. 105, gives a similar power to the Courts at Dublin. See as to cases in which commissions will not be granted, *In re Boyce, Crofton* v. *Crofton*, 1882, 20 Ch. Div. 760: and *Berdan* v. *Greenwood*, 1880, ibid., in note, 764; also *Langen* v. *Tate*, 1883, 24 Ch. Div. 322; *Lawson* v. *Vacuum Brake Co.*, 1884; 27 Ch. Div. 137.

[17] Taylor, s. 513.

[18] *Id.* s. 512.

lidity of objections taken to particular questions, but must record the questions, the fact that they were objected to, and the answers given.

[19] If secondary evidence of the contents of any document is not objected to on the taking of a commission it cannot be objected to afterwards.

[20] 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. The costs 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.

[21] 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 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.

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[19] *Robinson* v. *Davies*, 1879, 5 Q. B. D. 26.

[20] R. S. C., Order XXXVIII., 3.

[21] Taylor, s. 548. *Hutchinson* v. *Bernard*, 1836, 2 Moo. & Rob. 1.

AMERICAN NOTE.

General.

An answer is not evidence if the oath is waived. *Bickerdike* v. *Allen*, 157 Ill. 95.

Unverified pleas are not evidence. *Shepard* v. *Wells*, 70 Ill. App. 72.

A sworn answer in chancery has no weight as evidence. *Deimel* v. *Brown*, 136 Ill. App. 586, 593.

Affidavits.— As to affidavits generally, see Hurd's Rev. Stat., chap. 110.

Affidavits are *prima facie* evidence of book accounts on default. Hurd's Rev. Stat., chap. 110, sec. 38, p. 1289.

Ex parte affidavits are admissible only by consent. *Bressler* v. *McCune*, 56 Ill. 475.

An affidavit in support of an application for change of venue is not admissible. *Ohio, etc., Ry. Co.* v. *Levy*, 134 Ind. 343.

New Jersey.

Depositions.— G. S. 1895, "Evidence," 25–46, 63, 64, 66, 67.

Commissions out of courts of other States. G. S. 1895, "Evidence," 49, 50.

Commissions to take testimony as to the execution of a will. G. S. 1895, "Orphans' Courts," 253.

Depositions in contested election cases. G. S. 1895, "Elections," 118–121.

In divorce, defendant not appearing. Laws of 1902, chap. 135.

Depositions.— The execution, return, and use of depositions. *Perry* v. *Thompson*, 1 Harr. 72; *Lawrence* v. *Finch*, 17 N. J. Eq. 234; *Saltar* v. *Applegate*, 3 Zab. 115; *Ludlam* v. *Broderick*, 3 Green, 269; *Moran* v. *Green*, 1 Zab. 562.

A deposition taken in a former action between the same parties is not of itself admissible. *Trimmer* v. *Larrison*, 3 Hal. 56.

Depositions taken when no suit is pending excluded. *Lummis* v. *Stratton*, Pen. 245; *Layton* v. *Cooper*, Pen. 65; *Bickman* v. *Pissant*, Coxe, 220; *Camden & Amboy R. Co.* v. *Stewart*, 19 N. J. Eq. 343, 21 N. J. Eq. 484.

Copies of a church parish register admissible in evidence as part of a deposition. *Hancock* v. *Catholic Benev. Legion*, 67 N. J. L. 614.

For any part of a deposition to be admissible the whole must be before the court. *Lanahan* v. *Lawton*, 50 N. J. Eq. 276, 796.

Testimony de bene esse.— G. S. 1895, "Evidence," 59, 64; Laws of 1902, chap. 143; Laws of 1903, chap. 135.

Testimony of a party to the suit may be taken by commission or *de bene esse*. G. S. 1895, "Evidence," 11.

Reasons for taking a deposition *de bene esse*, and the notice, must appear in the commissioner's certificate. Oral testimony not admissible. *Case* v. *Garretson*, 54 N. J. L. 42.

Maryland.

Depositions in general.— *Jackson* v. *Jackson*, 80 Md. 176; *Cover* v. *Smith*, 82 Md. 586.

Commissions.— Commissions to take testimony in the State. P. G. L. 1888, art. 35, secs. 17–29.

Commissions to take testimony out of the State. P. G. L. 1888, art. 35, secs. 15, 16.

Commissions to take evidence from other States. P. G. L. 1888, art. 35, sec. 34.

Boundaries.— Commissions to perpetuate boundaries of lands. P. G. L. 1888, art. 35, secs. 30–33.

Seamen.— Evidence of seamen taken *de bene esse*. P. G. L. 1888, art. 84, sec. 9.

Notice of the issuance of a commission.— *B. & O. R. Co.* v. *State*, 60 Md. 449; *Waters* v. *Waters*, 35 Md. 531; *Cherry* v. *Baker*, 17 Md. 75; *Law* v. *Scott*, 5 H. & J. 438; *Hatton* v. *McClish*, 6 Md. 407; *Young* v. *Mackall*, 4 Md. 362.

Execution of the commission.— *Ecker* v. *McAllister*, 45 Md. 290; *Insurance Co.* v. *Bossiere*, 9 G. & J. 121; *Purner* v. *Piercy*, 40 Md. 212; *Matthews* v. *Dare*, 20 Md. 248; *Walkup* v. *Pratt*, 5 H. & J. 51.

Foreign commissions.— *Little* v. *Edwards*, 69 Md. 499; *Goodman* v. *Wineland*, 61 Md. 449; *Sewell* v. *Gardner*, 48 Md. 178; *Crichton* v. *Smith*, 34 Md. 42.

Depositions de bene esse.— *Quynn* v. *Carroll*, 22 Md. 288; *Williams* v. *Banks*, 5 Md. 198; *Matthews* v. *Dare*, 20 Md. 248; *Collins* v. *Elliott*, 1 H. & J. 1; *Bryden* v. *Taylor*, 2 H. & J. 396; *Lingan* v. *Henderson*, 1 Bland, 236 (aged and infirm witness).

Pennsylvania.

Depositions.— Pepper & Lewis' Digest of Laws, "Evidence," secs. 1–5; "Justices of the Peace," secs. 86–96; "Witnesses," sec. 19.

Depositions.— *Brown* v. *Com.*, 73 Pa. 321.

Deposition of a dying man is not admissible if there was no opportunity for cross-examination. *Pringle* v. *Pringle*, 59 Pa. 281.

Deposition admissible after the party's death. *Evans* v. *Reed*, 78 Pa. 415; *Speyerer* v. *Bennett*, 79 Pa. 445.

The deposition of one who has lost his memory from old age is admissible. *Emig* v. *Diehl*, 76 Pa. 359.

A deposition taken at the instance of one party may be given in evidence by the other. *O'Connor* v. *Iron Mt. Co.*, 56 Pa. 234; *Smith* v. *Austin*, 4 Brewst. 89.

When objections to a deposition must be made. *Hill* v. *Canfield*, 63 Pa. 77.

Evidence of a witness before a coroner taken down by a bystander not admissible. *McLain* v. *Com.*, 99 Pa. 86.

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.

Whenever any witness has been examined in chief, or has been [22] intentionally sworn, or has made a promise and declaration as hereinbefore mentioned for the purpose of giving evidence, the opposite party has a right to cross-examine him; 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. 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 fur-

* See Note XLV.

22 See Cases in Taylor, s. 1429.

ther cross-examination, and if it does so, the parties have the right of further cross-examination and further re-examination respectively.

If a witness dies, or becomes incapable of being further examined at any stage of his examination, the evidence given before he became incapable is good.[23]

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.[24]

AMERICAN NOTE.

General.

Authorities.— 1 Greenleaf on Evidence (15th ed.), sec. 431 *et seq.*; 8 Encyclopædia of Pleading and Practice, p. 70 *et seq.*

Witness to produce document.—*Aiken* v. *Martin*, 11 Pai. 499; *Calderon* v. *O'Donahue*, 47 Fed. Rep. 39; *Stiles* v. *Allen*, 5 Allen (Mass.), 320.

Order of proof discretionary.— The order of testimony is discretionary with the judge. *Bruce* v. *Kelly*, 7 J. & S. 27. See *Foster* v. *Newbrough*, 58 N. Y. 481, reversing 66 Barb. 645; *Levy* v. *People*, 80 N. Y. 327; *Neil* v. *Thorne*, 88 N. Y. 270; *Smith* v. *McGowan*, 3 Barb. 404; *Staring* v. *Bowen*, 6 Barb. 109; *Bedell* v. *Powell*, 13 Barb. 183; *People* v. *Ruloff*, 11 Abb. Pr. (N. S.) 245; *Stock* v. *Le Boutiller*, 19 Misc. Rep. 112, 43 N. Y. Supp. 248, affirming 18 Misc. Rep. 349; *Matter of Beck*, 6 App. Div. 211; affirmed, on opinion below, in 154 N. Y. 750; *Decker* v. *Gaylord*, 35 Hun, 584.

The examination of witnesses is largely within the discretion of the court. *Griffin* v. *Domas*, 22 Ill. App. 203; *Smith* v. *Hays*, 23 Ill. App. 244.

Where a witness is excluded from the courtroom and enters con-

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23 *R.* v. *Doolin*, 1832, 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.

24 *R.* v. *Whitehead*, 1866, 1 C. C. R. 33.

trary to the order of the court, he may be admitted as a witness in the discretion of the court. *Bow* v. *People,* 160 Ill. 439.

Evidence may be admitted for one purpose only and not for all. *C., R. I. & P. R. R. Co.* v. *Clark,* 108 Ill. 113.

It is the duty of the court to exclude improper testimony. *Barr* v. *W. C. M. & M. Co.,* 5 Brad. 442.

Evidence offered but excluded is not to be considered. *Hersey* v. *Westover,* 11 Brad. 197.

The court need not allow the repetition of questions. *Blackington* v. *Tebbals,* 17 Ill. App. 456; *Buck* v. *Maddock,* 167 Ill. 219, 67 Ill. App. 466; *Thomas* v. *Chicago,* 152 Ill. 292.

One has not the right to have evidence repeated. *Buck* v. *Maddocks,* 67 Ill. App. 466.

If there is evidence tending to establish the cause of action the case should go to the jury. *C., M. & St. P. Ry. Co.* v. *Walsh,* 157 Ill. 672.

In order to fix the date, the whole of an ordinance need not be introduced. *Chicago* v. *W. & L. Co.,* 14 Brad. 219.

The court decides whether there is any evidence; the jury as to the weight of evidence. *Luxen* v. *C. & G. T. Ry. Co.,* 69 Ill. App. 648.

Re-examination.— *Morton* v. *Zwierzykowski,* 192 Ill. 328, 61 N. E. 413, affirming 91 Ill. App. 462; *Ackerstadt* v. *Chicago City Ry. Co.,* 194 Ill. 616, 62 N. E. 884, affirming 94 Ill. App. 130.

Recalling witness.— Recalling witnesses is discretionary with the court. *Russel* v. *Martin,* 2 Scam. 493.

The court may refuse to allow the witness to be recalled for the purpose of further cross-examination. *C. & A. Ry. Co.* v. *Eaton,* 62 N. E. 784, affirming 96 Ill. App. 570.

As to form of questions, see *C. & A. Ry. Co.* v. *Eaton,* 62 N. E. 784, affirming 96 Ill. App. 570; *Illinois Steel Co.* v. *Ostrowski,* 194 Ill. 376, 62 N. E. 822, affirming 93 Ill. App. 57.

A question cannot assume the existence of facts not proved. *Erie & P. D.* v. *Cecil,* 112 Ill. 180, 186; *Mida* v. *Geissman,* 17 Ill. App. 207, 211; *Myer* v. *Krohn,* 114 Ill. 581.

The court should not ordinarily interfere in the examination of a witness. The examination is not generally the province of the court. *Miland* v. *Meiswinkel,* 82 Ill. App. 522.

The court may ask questions and allow cross-examination based upon them. *Cooper* v. *Randall,* 59 Ill. 317; *Foreman* v. *Baldwin,* 24 Ill. 298, 306.

Demurrer to evidence.— *Rothchild* v. *Brusche*, 131 Ill. 265.

Offering evidence.— Evidence must be offered specifically. *Russell* v. *Lake*, 68 Ill. App. 440.

As to the effect of withholding evidence, see *Bornhofen* v. *Greenebaum*, 68 Ill. App. 645.

Objections.— Objections to evidence must be made at the trial. *Wilkinson* v. *Ward*, 42 Ill. App. 541; *McCartney* v. *Loomis*, 61 Ill. App. 364.

Objections to evidence not made are waived. *Allen* v. *Mason*, 17 Ill. App. 318, 320.

Objections to be available on appeal must be specific. *Huntington* v. *Aurand*, 70 Ill. App. 28; *P. S. P. Co.* v. *Sharp*, 67 Ill. App. 477; *C. & A. Ry. Co.* v. *Logue*, 58 Ill. App. 142.

Motion to strike out.— If a question be proper, irrelevant portions of the answer are to be stricken out on motion. *A. M. U. Ex. Co.* v. *Gilbert*, 57 Ill. 468.

Objections to be specific.— *Bank* v. *Colter*, 61 Ind. 153; *City* v. *Lowery*, 74 Ind. 520; *Farnam* v. *Lauman*, 73 Ind. 568; *Railway Co.* v. *Parker*, 97 Ind. 91; *Underwood* v. *Linton*, 54 Ind. 468. Those on the ground that the evidence is improper, immaterial, or incompetent, are too indefinite. *Noftsger* v. *Smith*, 6 Ind. App. 54; *McCloskey* v. *Davis*, 8 Ind. App. 190; *Litten* v. *Wright School Tp.*, 127 Ind. 81; *Evansville, etc., R. R. Co.* v. *Fettig*, 130 Ind. 61; *Miller* v. *Dill*, 149 Ind. 326; *Mortgage Trust Co.* v. *Moore*, 150 Ind. 465; *Swaim* v. *Swaim*, 134 Ind. 596; *Bass* v. *State*, 136 Ind. 165; *Keesling* v. *Doyle*, 8 Ind. App. 43; *Baldwin* v. *Runyan*, 8 Ind. App. 344; *State ex rel.* v. *Hughes*, 19 Ind. App. 266; *Rhea* v. *Crunk*, 12 Ind. App. 23; *Board, etc.* v. *O'Connor*, 137 Ind. 622; *Indiana, etc., Co.* v. *Wagner*, 138 Ind. 658; *Voss* v. *State ex rel.*, 9 Ind. App. 294; *Diether* v. *Ferguson, etc., Co.*, 9 Ind. App. 173; *Wabash, etc., Union* v. *James*, 8 Ind. App. 449; *Lankford* v. *State*, 144 Ind. 428; *Stratton* v. *Lockhart*, 1 Ind. App. 380; *Pennsylvania Co.* v. *Horton*, 132 Ind. 189; *Ohio, etc., Ry. Co.* v. *Wrape*, 4 Ind. App. 108; *Chicago, etc., R. R. Co.* v. *Champion*, 9 Ind. App. 510; *Crabs* v. *Mickle*, 5 Ind. 145.

Admission of evidence conditionally.— Where the competency of evidence depends upon proof of other facts, it may be admitted on condition that such proof shall be supplied. *Shepard* v. *Goben*, 142 Ind. 318.

Slang in question.— A question should not include an obscure slang phrase. *Whitney* v. *State*, 154 Ind. 573.

Irresponsive answers.— Irresponsive answers are to be stricken out. *Skelley* v. *Bail*, 27 Ind. App. 87.

Separating witnesses.— Witnesses may be separated. *Xenia Real Estate Co.* v. *Macy*, 147 Ind. 568.

As to separating witnesses, see *State* v. *David*, 25 Ind. App. 296.

Bill of exceptions.— As to setting out evidence in a bill of exceptions, see *Bank* v. *Colter*, 61 Ind. 153; *Nudd* v. *Holloway*, 43 Ind. 366; *Watt* v. *De Haven*, 55 Ind. 128.

As to bills of exceptions, see *Anderson* v. *Lane*, 32 Ind. 102; *Burdick* v. *Hunt*, 43 Ind. 381; *Lee* v. *State*, 88 Ind. 256; *Citizens' Co.* v. *Harris*, 108 Ind. 392; *Railway Co.* v. *Quick*, 109 Ind. 295.

Practice.— A person may choose his own way in introducing evidence. *Burns* v. *Harris*, 66 Ind. 536; *Clawson* v. *Lowry*, 7 Blackf. 140; *Ginn* v. *Collins*, 43 Ind. 271.

The mode of testifying is subject to the discretion of the court. *Snyder* v. *Nations*, 5 Blackf. 295.

If evidence is competent as to some parties and incompetent as to others, the court should be requested that it should be considered as against the former one. *Smith* v. *Weiser*, 11 Ind. App. 468; *Thistleweight* v. *Thistleweight*, 132 Ind. 355; *Benjamin* v. *McElwaine Co.*, 10 Ind. App. 76.

Written evidence does not go to the jury-room. *Nichols* v. *State*, 65 Ind. 512.

Contracts sued on may, if the court so rules, be taken to the jury-room. *Snyder* v. *Braden*, 58 Ind. 143.

As to fees of witnesses, see *Schlicht* v. *State*, 56 Ind. 173; *Goodwin* v. *Smith*, 68 Ind. 301; *Railroad Co.* v. *Johnson*, 108 Ind. 126.

The jury pass upon the weight of evidence. *Durham* v. *Smith*, 120 Ind. 463.

Anticipating defense.— Evidence anticipating the defense is no part of the plaintiff's original case and is properly excluded when offered as such. *Barnett* v. *Farmers' Mut. Fire Ins. Co.*, 115 Mich. 247.

Examination by court.— The court may, in taking up a witness to examine him in an improper manner, commit error. *Darrow* v. *Pierce*, 91 Mich. 63, 51 N. W. 813.

Attendance of witnesses.— The attempt to prevent the attendance of one as a witness who has not yet been subpœnaed is a contempt of court. *Montgomery* v. *Muskegon Circuit Judge*, 100 Mich. 436.

The court has power to detain witnesses in a criminal trial upon a proper showing, but the witnesses have a right to be heard before committed. *Lewellen's Case*, 104 Mich. 318.

Reopening case.— The court at its discretion may reopen the case and permit the plaintiff to introduce more direct testimony after the defendant has rested. This practice is not approved. *Minkley* v. *Springswells Tp.*, 113 Mich. 347.

Failure to produce evidence.— Failure to produce evidence within the control of a party, and which would naturally be produced, may be commented upon before the jury. *Battersbee* v. *Calkins*, 8 Det. L. N. 778, 87 N. W. 760.

New Jersey.

Recalling witnesses.— With permission of the court, a witness may be recalled for re-examination on new matter. *Osborne* v. *O'Reilly*, 34 N. J. Eq. 60.

Order of proof.— Order of proof in discretion of the trial court. *Donnelly* v. *State*, 26 N. J. L. 601; *Bodee* v. *State*, 57 N. J. L. 140.

Objecting to evidence.— Time objection must be made. An objection made after the incompetent question is answered comes too late. *Cunningham* v. *State*, 61 N. J. L. 67.

A verdict will not be set aside on the ground that improper evidence was received when no objection was made to its admission. *Den.* v. *Geiger*, 4 Hal. 225; *Den.* v. *Downam*, 1 Green, 135; *Coil* v. *Wallace*, 4 Zab. 291; *Mecker* v. *Boylan*, 28 N. J. L. 274; *Dare* v. *Moore*, Coxe. 94.

An objection to evidence without stating ground therefor is disregarded. *Mooney* v. *Peck*, 49 N. J. L. 232.

When offered evidence has been excluded, the exception must state the grounds upon which the offer was made. *Dale* v. *See*, 51 N. J. L. 378.

On error a party cannot contend that evidence was not admissible for reasons not set up at the trial. *Hustis* v. *Banister Co.*, 64 N. J. L. 279.

Unresponsive answers.— Unresponsive answers may be stricken out on motion of the party asking the questions. *Guild* v. *Aller*, 2 Harr. 310.

An answer irrelevant in part only will be stricken out only in part. *Delaney* v. *State*, 51 N. J. L. 37.

Last paragraph of text.— *Monfort* v. *Rowland*, 38 N. J. Eq. 181.

Examination of witnesses in chancery.— G. S. 1895, "Chancery," 43–46, 132.

Maryland.

Order of proof.— A party may introduce his evidence in the order he chooses, and cannot be compelled to state in advance what his subsequent evidence will be. *Patterson* v. *Crowther*, 70 Md. 124; *Life Ins. Co.* v. *Dempsey*, 72 Md. 288; *Jerry* v. *Townshend*, 9 Md. 145; *Plank Road Co.* v. *Bruce*, 6 Md. 457.

Usually the plaintiff may complete his evidence before the defendant has a right to introduce any, but in libel the defendant may introduce evidence to show that the communication was privileged before the plaintiff has concluded. *Maurice* v. *Worden*, 54 Md. 233.

The trial court has discretion to allow evidence to be introduced at a later stage than that at which it should have been. *Railroad Co.* v. *Slack*, 45 Md. 161.

No appeal lies from the orders of the trial court on matters of the order of proof. *Bannon* v. *Warfield*, 42 Md. 22; *Lurssen* v. *Lloyd*, 76 Md. 360.

Recalling a witness.— The court has discretion to recall a witness to state what his testimony was. *Green* v. *Ford*, 35 Md. 82.

The court has discretion to allow a witness to be recalled for examination on matters concerning which he has already testified. *Trustees* v. *Heise*, 44 Md. 453; *Girault* v. *Adams*, 61 Md. 1; *Young* v. *Omohundro*, 69 Md. 424; *Swartz* v. *Chickering*, 58 Md. 290; *Barnum* v. *Barnum*, 42 Md. 251.

Witnesses may be recalled to the stand within the discretion of the trial court. *Brown* v. *State*, 72 Md. 468; *Waters* v. *Waters*, 35 Md. 531; *Schwartze* v. *Yearly*, 31 Md. 270.

Reopening case.— A refusal of the trial court to allow further evidence to be presented after the case has been closed is no ground for reversal. *Ricketts* v. *Pendleton*, 14 Md. 320; *Sellers* v. *Zimmermann*, 18 Md. 255; *Williams* v. *Brailsford*, 25 Md. 126.

The trial court has discretion to allow a party to introduce further testimony after he has closed his case. *Berry* v. *Derwart*, 55 Md. 66. Even though a motion has been made based upon the insufficiency of the evidence. *Ohlendorff* v. *Kanne*, 66 Md. 495.

Death of witness during examination.— A deposition is admissible although the witness died before cross-examination. *Scott* v. *McCann*, 76 Md. 47.

Mode of examining witness.— Appeal does not lie from the action of the trial court in allowing further examination-in-chief after cross-examination. *New York, etc., R. Co.* v. *Jones,* 94 Md. 24.

The same question may be asked a witness more than once, in the discretion of the trial court. *Brown* v. *State,* 72 Md. 477.

A witness' attention may be called to a portion of his testimony which he left doubtful in order to make it clear. *Frisby* v. *Parkhurst,* 29 Md. 58.

Excluding witnesses from courtroom.— Witnesses may be excluded from the courtroom, but a witness' disobedience of the court's order affects the weight of his testimony and not its competency, unless such disobedience was by the fault of the party calling the witness. *Parker* v. *State,* 67 Md. 329.

Offers of evidence.— The court is under no duty of passing on an offer of evidence when there are no witnesses to sustain it. *Eschbach* v. *Hurtt,* 47 Md. 61.

An objection to evidence on the ground that it is offered at an improper time is within the discretion of the trial court. *Crenshaw* v. *Slye,* 52 Md. 140.

Objections to evidence en masse.— A general objection to a mass of evidence should be overruled if any part of it is admissible. *Burgoon* v. *Bixler,* 55 Md. 384; *Everett* v. *Neff,* 28 Md. 176; *Morrison* v. *Whiteside,* 17 Md. 452; *Budd* v. *Brooke,* 3 Gill, 198; *Curtis* v. *Moore,* 20 Md. 93; *Levy* v. *Taylor,* 24 Md. 282; *Oelrichs* v. *Ford,* 21 Md. 489; *Wheeler* v. *Harrison,* 94 Md. 147; *Scarlett* v. *Academy of Music,* 46 Md. 132.

A general exception to the competency of a witness will be overruled if he is competent for any purpose. *Brewer* v. *Bowersox,* 92 Md. 567.

If offered evidence be admissible for any one of several purposes mentioned, a general objection to it will be overruled. *Nutwell* v. *Tongue,* 22 Md. 419.

Time for objecting.— Objections to evidence must be made when it is offered or within a reasonable time thereafter; they come too late after argument to the jury has begun. *Lamb* v. *Taylor,* 67 Md. 85; *Bull* v. *Schuberth,* 2 Md. 38; *Dent* v. *Hancock,* 5 Gill, 120.

When evidence has been introduced and prayers based upon it, an objection to its admissibility is too late. *Davis* v. *Patton,* 19 Md. 120; *Cecil Bank* v. *Heald,* 25 Md. 562.

The right may be reserved to object to evidence after the evidence has been closed. *Burton Coal Co.* v. *Cox,* 39 Md. 1.

When a question is improper, objection should be made before the question is answered; but if an answer is improper, it may be stricken out on motion. *B. & O. R. Co.* v. *Shipley*, 39 Md. 251.

Evidence not objected to.— When evidence has been admitted without objection it ought to be given as much weight as if it were admissible according to the rules of evidence. *Bank* v. *Duvall*, 7 G. & J. 78; *Slingluff* v. *Builders' Supply Co.*, 89 Md. 557.

Evidence which has not been objected to at the trial will be treated on appeal as admissible. *Atwell* v. *Grant*, 11 Md. 101.

Admitting evidence subject to exception.—When evidence has been admitted subject to objection, such objection must be made either before or at the end of the testimony. *Roberts* v. *Bonaparte*, 73 Md. 191.

Assurance of counsel that evidence is relevant.— Evidence seemingly irrelevant may be admitted on the assurance of counsel that his subsequent evidence will show its relevancy. *Davis* v. *Calvert*, 5 G. & J. 269.

If counsel's assurance is not made good, the evidence will be excluded on proper motion. *Herrick* v. *Swomley*, 56 Md. 439.

Evidence admitted by agreement.— The affidavit of a witness may be admitted in place of having him orally examined, by agreement of the parties. *Scaggs* v. *B. & W. R. Co.*, 10 Md. 269.

Motion to strike.— When a question is proper but the answer is irrelevant it will be stricken out on motion. *Brashears* v. *Orme*, 93 Md. 442.

A motion, made after the close of the testimony, to exclude evidence given without objection comes too late. *North Bros.* v. *Mallory*, 94 Md. 305.

A motion to strike out a mass of testimony will be denied if any of it was proper. *Walker* v. *Schindel*, 58 Md. 360.

Irresponsive answers.— Answers that are not responsive to the question may be stricken out on motion. *Mayfield* v. *Kilgour*, 31 Md. 240; *Wise* v. *Ackerman*, 76 Md. 375.

Withdrawing evidence.— Where evidence has been admitted over objection, the party introducing it may before the case is argued withdraw it from the consideration of the jury. *Life Ins. Co.* v. *Martins*, 32 Md. 310; *Littig* v. *Birkestack*, 38 Md. 158.

Rebuttal.— Evidence which could have been introduced in chief is not admissible in rebuttal. *Cumb. & Pa. R. Co.* v. *Slack*, 45 Md. 161; *Bannon* v. *Warfield*, 42 Md. 22; *Donohue* v. *Shedrick*, 46 Md. 226; *Davis* v. *Hamblin*, 51 Md. 525.

If a plaintiff offers evidence in rebuttal of an anticipated defense he must complete his evidence on the subject then. *Herrick* v. *Swomley*, 56 Md. 439; *Dugan* v. *Anderson*, 36 Md. 567.

Testimony in rebuttal is not inadmissible merely because it is inconsistent with the evidence in chief. *Whitridge* v. *Rider*, 22 Md. 548.

The court has discretion to allow evidence in rebuttal that would have been more properly introduced at first, if it has been omitted inadvertently. *Stirling* v. *Stirling*, 64 Md. 138.

Evidence that is merely cumulative is not proper in rebuttal. *Brown* v. *Ward*, 53 Md. 376.

The taking of testimony in chancery.— P. G. L. 1888, art. 16, secs. 216–233.

Election contests.— How evidence is taken in contested election cases. P. G. L. 1888, art. 33, secs. 95–106.

Pennsylvania.

Order of proof.— The order of evidence is in the discretion of the trial judge. *Collins* v. *Freas*, 77 Pa. 493; *Smith* v. *Myler*, 22 Pa. 36; *Lauchner* v. *Rex*, 20 Pa. 464; *Garrigues* v. *Harris*, 17 Pa. 344; *Helfrich* v. *Stem*, 17 Pa. 143; *Harden* v. *Hays*, 14 Pa. 91; *Young* v. *Edwards*, 72 Pa. 257.

The court may permit rebuttal testimony to be given in anticipation. *Carey* v. *Bright*, 58 Pa. 70; *Bowers* v. *Still*, 49 Pa. 65; *Levers* v. *Van Buskirk*, 4 Pa. 309; *Schnable* v. *Doughty*, 3 Pa. 392; *Eisenhart* v. *Slaymaker*, 14 S. & R. 153.

Evidence is generally not allowed in rebuttal which might have been given in chief. *Stetson* v. *Croskey*, 52 Pa. 230; *Young* v. *Edwards*, 72 Pa. 257; *Acklin* v. *McCalmont Co.*, 201 Pa. 267. But the court has discretion. *Gaines* v. *Com.*, 50 Pa. 319; *Boyle* v. *McKinley*, 6 Phila. 172.

The accused was allowed to be called for cross-examination during the time the State was introducing its testimony in rebuttal. *Com.* v. *Eisenhower*, 181 Pa. 470.

The court may permit witnesses to be called out of order and after a party has rested his case. *Com.* v. *Wilson*, 186 Pa. 1.

In divorce the respondent may call the libellant as for cross-examination. *Costello* v. *Costello*, 191 Pa. 379.

It is in the discretion of the court to permit repetition of a former statement by a witness. *Aiken* v. *Stewart*, 63 Pa. 30.

Recalling witness.— The court may permit a witness to be recalled to give further testimony. *Browne* v. *Molliston*, 3 Whart. 129; *Covanhovan* v. *Hart*, 21 Pa. 495; *Insurance Co.* v. *Delpeuch*, 82 Pa. 225.

Reopening case.— Court may allow a party to reopen his case and put in new testimony. *Duncan* v. *McCullough*, 4 S. & R. 480; *Moloney* v. *Davis*, 48 Pa. 512; *Frederick* v. *Gray*, 10 S. & R. 182; *Hake* v. *Fink*, 9 Watts, 336; *Barnhart* v. *Pettit*, 22 Pa. 135.

Striking out testimony.— Incompetent testimony must be stricken out at or before the close of the testimony, or the error is not cured. *D. & H. Canal Co.* v. *Barnes*, 31 Pa. 193; *Railroad Co.* v. *Butler*, 57 Pa. 335; *Yeager* v. *Weaver*, 64 Pa. 425.

An instruction in the charge to the jury to disregard such testimony is too late. *R. R. & Coal Co.* v. *Decker*, 82 Pa. 119.

When a witness is shown to be incompetent by subsequent evidence, the only remedy is an instruction to the jury to disregard his testimony. *Rees* v. *Livingston*, 41 Pa. 113; *The Dictator*, 56 Pa. 290; *Simons* v. *Oil Co.*, 61 Pa. 202; *Lester* v. *McDowell*, 18 Pa. 91.

Striking out incompetent answers to questions. *Hamilton* v. *Railroad Co.*, 194 Pa. 1.

Unresponsive answers.— If an unresponsive answer is allowed to remain without objection, it cannot be objected to on appeal. *Hannum* v. *Pownall*, 187 Pa. 292.

Testimony of a witness unfinished.— If witness dies before cross-examination his testimony in chief is not admissible at common law. *Pringle* v. *Pringle*, 59 Pa. 281.

Evidence of a party who dies before examination is complete is good so far as it has been given. *Pratt* v. *Patterson* (Sup. Ct.), 3 L. & Eq. Rep. 45.

Cross-examination of a witness lost by death of a party. *Hay's Appeal*, 91 Pa. 265.

Presumption from failure to call a witness. *Com.* v. *Weber*, 167 Pa. 153; *Rice* v. *Com.*, 102 Pa. 408.

Offers of evidence.— When an offer of evidence as a whole is made, the court may admit it in part and reject the rest, though it is no error to reject it all. *Mundis* v. *Emig*, 171 Pa. 417.

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.

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.

AMERICAN NOTE.

General.

Authorities.— 1 Wharton on Evidence, sec. 529; 1 Greenleaf on Evidence (15th ed.), secs. 445–447, 467.

Cross-examination.— The cross-examination in some States must be limited to the matters covered by the direct examination. *Houghton* v. *Jones*, 1 Wall. 702; *Carey* v. *Hart*, 63 Vt. 424; *Sullivan* v. *Railroad Co.*, 175 Pa. 361; *Rigdon* v. *Conley*, 141 Ill. 565; *Richards* v. *State*, 82 Wis. 172; *Donnelly* v. *State*, 26 N. J. L. 463, 601; *People* v. *Van Ewan*, 111 Cal. 144; *State* v. *Wright*, 40 La. Ann. 589; *Williams* v. *State*, 32 Fla. 315; *Martin* v. *Exp. Ins. Co.*, 85 Ia. 643; *State* v. *Smith*, 49 Conn. 376; *Chapman* v. *Loomis*, 36 Conn. 460; *Burns* v. *Fredericks*, 37 Conn. 91; *Ashborn* v. *Waterbury*, 69 Conn. 217; *State* v. *Green*, 35 Conn. 208. *Contra*, *Blackington* v. *Johnson*, 126 Mass. 21; *Beal* v. *Nichols*, 2 Gray (Mass.), 262; *Moody* v. *Rowell*, 17 Pick. (Mass.) 490, 498; *Merrill* v. *Berkshire*, 11 Pick. (Mass.) 269; *Webster* v. *Lee*, 5 Mass. 334; *Gerrish* v. *Cummings*, 4 Cush. (Mass.) 391; *Stiles* v. *Allen*, 5 Allen (Mass.), 320.

Where it is so limited the court has a discretionary power as to how far to permit cross-examination to extend to matters not strictly

germane to the direct examination, and no error can be predicated upon the exercise of such discretion. *Steene* v. *Aylesworth*, 18 Conn. 254; *Chapman* v. *Loomis*, 36 Conn. 466; *State* v. *Bradley*, 48 Conn. 535; *Tompkins* v. *West*, 56 Conn. 484; *Dale's Appeal*, 57 Conn. 142; *State* v. *Duffy*, 57 Conn. 528, 529; *Tyler* v. *Waddingham*, 58 Conn. 396, 397; *Osborne* v. *Troup*, 60 Conn. 498; *State* v. *McGowan*, 66 Conn. 392; *Spiro* v. *Nitkin*, 72 Conn. 202.

Re-examination.— *Oakland Ice Co.* v. *Marcy*, 74 Me. 294, 301; *U. S.* v. 18 *Barrels, etc.*, 8 Blatchf. 475; *McElheny* v. *Pittsburgh, etc., R. Co.*, 147 Pa. 1; *Stoner* v. *Devilbiss*, 70 Md. 144; *Somerville, etc., R. Co.* v. *Dougherty*, 22 N. J. L. 495; *Plow Co.* v. *Hawthorn*, 71 Wis. 529; *Farrell* v. *Boston*, 161 Mass. 106; *Dole* v. *Wooldredge*, 142 Mass. 161.

Scope of cross-examination.— The scope of the cross-examination is largely in the discretion of the court. It is generally limited to matters covered by the direct. *Neil* v. *Thorn*, 88 N. Y. 270; *Hartness* v. *Boyd*, 5 Wend. 563; *Kerker* v. *Earter*, 1 Hill, 101; *Bedell* v. *Powell*, 13 Barb. 183; *Allen* v. *Bodine*, 6 Barb. 383; *Fry* v. *Bennett*, 3 Bosw. 200; *Mayer* v. *People*, 80 N. Y. 364; *People* v. *Oyer and Terminer Ct.*, 83 N. Y. 436; *Knight* v. *Cunnington*, 6 Hun. 100; *Hardy* v. *Norton*, 66 Barb. 527. See *Langley* v. *Wadsworth*, 99 N. Y. 61; *Hare* v. *Mahoney*, 36 N. Y. St. R. 658.

Must be germane.— Cross-examination is to be confined to matters covered by the direct. *Wheeler & Wilson Mfg. Co.* v. *Barren*, 172 Ill. 610, 50 N. E. 325, affirming 71 Ill. App. 222; *East Dubuque* v. *Burhyte*, 173 Ill. 553, 50 N. E. 1077, affirming 74 Ill. App. 99; *Rigdon* v. *Conley*, 141 Ill. 565; *Stevens* v. *Brown*, 12 Brad. 619; *Hurlbut* v. *Meeker*, 104 Ill. 541; *Entwistle* v. *Merkle*, 180 Ill. 9, 54 N. E. 217; *Stafford* v. *Fargo*, 35 Ill. 481; *Waller* v. *Carter*, 8 Brad. 511; *Adams Express Co.* v. *Haggard*, 37 Ill. 465; *P., P. & J. R. R. Co.* v. *Laurie*, 63 Ill. 264; *Lloyd* v. *Thompson*, 5 Brad. 90; *Peru Coal Co.* v. *Merrick*, 79 Ill. 112; *Drohn* v. *Brewer*, 77 Ill. 280; *C. & A. Ry. Co.* v. *Thompson*, 19 Ill. 578; *Hayward* v. *People*, 96 Ill. 492.

The cross-examination of a witness who is an officer of the corporation party cross-examining must be confined to matter covered by his direct. *East Dubuque* v. *Burhyte*, 74 Ill. App. 99.

A lengthy cross-examination upon matters not covered by the examination in chief is ground for reversal. *Bell* v. *Preitt*, 62 Ill. 361.

Need not be germane.— The cross-examination is not limited to matters covered by the direct. *Hemminger* v. *Western Assur. Co.*, 95 Mich. 355, 54 N. W. 949; *Ireland* v. *C., W. & M. Ry. Co.*, 79 Mich. 163, 44 N. W. 426; *Hay* v. *Reid*, 85 Mich. 296; *Child* v. *Detroit Mfg. Co.*, 72 Mich. 623. Compare *Fox* v. *Barrett's Estate*, 117 Mich. 162.

Rebutting testimony.— Where a railroad company was sued for injuries caused by a defective handle-bar on a hand car and introduced testimony that the car was found to be safe, for it was examined every morning, it is not error to allow testimony in rebuttal to contradict such testimony of the railroad. *Greenfield* v. *Lake Sh. & M. S. R. R. Co.*, 117 Mich. 307.

New Jersey.

Cross-examination.— The cross-examination of an accused must be limited to the matters brought out on his examination in chief. *State* v. *Sprague*, 64 N. J. L. 419; *Donnelly* v. *State*, 26 N. J. L. 463, 601.

A party is not allowed to establish his case substantively by cross-examining his opponent's witnesses. *Donnelly* v *State*. 26 N. J. L. 464, 601; *Dennis* v. *Van Voy*, 31 N. J. L. 39.

Re-examination.— Re-examination limited to explanation of matters brought out on cross-examination. *State* v. *Gedicke*, 43 N. J. L. 86.

If a witness is asked on cross-examination whether or not he had a certain conversation, he may be asked on re-examination what that conversation was. *Railroad Co.* v. *Doughty*. 2 Zab. 495.

Maryland.

Cross-examination.— Cross-examination is limited to matters brought out on examination in chief. *Griffith* v. *Diffenderffer*, 50 Md. 466; *Lewis* v. *Clark*, 86 Md. 327.

When a witness has testified as to a certain act, he may be cross-examined as to the surrounding circumstances. *Duttera* v. *Babylon*, 83 Md. 536.

The defendant in a criminal case may be cross-examined on all relevant matters, irrespective of the extent of the direct examination. *Guy* v. *State*, 90 Md. 29.

Collateral matters.— The cross-examination may extend to matters collateral to the examination in chief if they are connected with

and relevant to the matter concerning which he testified. *Black* v. *Bank*, 96 Md. 399.

Re-examination.— On re-examination the witness may be reminded of what he said on cross-examination in order to explain it. *Stoner* v. *Devilbiss*, 70 Md. 144.

A witness may be given the chance on re-examination to explain ambiguous answers given on cross-examination. *Schwartze* v. *Yearly*, 31 Md. 270.

The court has discretion to allow forgotten or omitted questions to be asked on re-examination, though usually the testimony is then confined to explanation of the cross-examination. *Blake* v. *Stump*, 73 Md. 160.

Pennsylvania.

Cross-examination.— Cross-examination must be confined to those matters brought out on the examination in chief. *Floyd* v. *Bovard*, 6 W. & S. 75; *Mitchell* v. *Welch*, 17 Pa. 339; *Thompson* v. *Ewing*, 1 Brewst. 67; *Smith* v. *Philadelphia Trac. Co.*, 202 Pa. 54; *Sutch's Estate*, 201 Pa. 305; *Bohan* v. *Avoca*, 154 Pa. 404; *Sullivan* v. *Railroad Co.*, 175 Pa. 361; *Denniston* v. *Philadelphia Co.*, 161 Pa. 41.

One cannot establish his case substantively by cross-examining his opponent's witnesses. *Breinig* v. *Meitzler*, 23 Pa. 156; *Helser* v. *McGrath*, 52 Pa. 531; *Ellmaker* v. *Buckley*, 16 S. & R. 72; *Jackson* v. *Litch*, 62 Pa. 451; *Bank* v. *Strohecker*, 9 Watts, 237.

This rule applies even where the witness under examination is a party to the suit, though such party may be examined in chief as on cross-examination. *Malone* v. *Dougherty*, 79 Pa. 46; *Boyd* v. *Con. Mills*, 149 Pa. 363.

"It is well settled in this State that the cross-examination of a witness should be confined to matters in regard to which he has been interrogated in chief, or to such questions as may tend to show his bias, interest, or relation to the party calling him, or test his knowledge, integrity, and accuracy of statement. A party should not be permitted to establish his claim or to prove his defense by a cross-examination of the witnesses of his opponent. Such is not the purpose for which a witness is cross-examined. While this is the rule, yet the range of a cross-examination must, to a very great extent, be left to the sound discretion of the trial judge." *Glenn* v. *Traction Co.*, 206 Pa. 137.

One cannot cross-examine a witness as to collateral matters merely

for the purpose of discrediting him afterward by contradicting him. *Hildeburn* v. *Curran*, 65 Pa. 59.

Conversation proved in part on direct examination may be brought out entire on cross-examination. *Coal Co.* v. *Schultz*, 71 Pa. 180.

Rule when adverse party is called as for cross-examination. Pepper & Lewis' Digest of Laws, "Witnesses," sec. 21.

Discretion of the court.— *Bohan* v. *Avoca*, 154 Pa. 404.

Re-examination.— *McElheny* v. *Railroad Co.*, 147 Pa. 1. The rest of a conversation only partly brought out on direct or cross-examination may be inquired of by opposite party. *Walsh* v. *Porterfield*, 87 Pa. 376.

One has the right to re-examine his witnesses in rebuttal on matters that require explanation. *Acklin* v. *McCalmont Co.*, 201 Pa. 257.

A witness may not, on re-examination, testify as to irrelevant matter brought out on cross-examination. *Smith* v. *Dreer*, 3 Whart. 154.

The court may permit new matter to be inquired into on re-examination. *Curren* v. *Connery*, 5 Binn. 488.

The trial court has discretion to allow questions on re-examination the purpose of which is to secure a repetition of the evidence given in chief. *Stern* v. *Stanton*, 184 Pa. 468.

Court has discretion to allow a variance from the usual order of giving evidence. *Young* v. *Edwards*, 72 Pa. 257.

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 examination in chief, or in re-examination, except with the permission of the Court, but such questions may be asked in cross-examination.

AMERICAN NOTE.

General.

Authorities.— 1 Greenleaf on Evidence (15th ed.), secs. 434, 435, 445; 1 Wharton on Evidence, secs. 499–504.

Leading questions.— *Moody* v. *Rowell,* 17 Pick. (Mass.) 498, 28 Am. Dec. 317; *Coogler* v. *Rhodes,* 38 Fla. 240; *Harvey* v. *Osborn,* 55 Ind. 535; *People* v. *Mather,* 4 Wend. 229.

It is discretionary with the court in both civil and criminal cases to allow leading questions on the direct-examination. *Northern Pac. R. Co.* v. *Urlin,* 158 U. S. 271; *Badder* v. *Keefer,* 91 Mich. 611; *Goudy* v. *Werbe,* 117 Ind. 154; *Crean* v. *Hourigan,* 158 Ill. 301; *Green* v. *Gould,* 3 Allen (Mass.), 465; *Com.* v. *Thrasher,* 11 Gray (Mass.), 57; *Moody* v. *Rowell,* 17 Pick. (Mass.) 490, 498.

The judge may himself ask leading questions of a witness. *Com.* v. *Galavan,* 9 Allen (Mass.), 271. See *Brubaker* v. *Taylor,* 76 Pa. St. 83; *Chandler* v. *Fleeman,* 50 Mo. 239; *Gabbett* v. *Sparks,* 60 Ga. 582.

Cross-examination.— *Stratford* v. *Sanford,* 9 Conn. 284; *Helfrich* v. *Stein,* 17 Pa. 143; *U. S.* v. *Dickinson,* 2 McLean, 325.

Numerous items.— Where the examination relates to items too numerous to be thought of by the witness, leading questions may be employed. *Huckins* v. *People's Ins. Co.,* 31 N. H. 238; *Graves* v. *Merchants' Ins. Co.,* 82 Ia. 637.

Hostile witness.— In case of a hostile witness, the court may allow leading questions on the direct-examination. *State* v. *Benner,* 64 Me. 267; *Whitman* v. *Morey,* 63 N. H. 448; *McBride* v. *Wallace,* 62 Mich. 451; *Bradshaw* v. *Combs,* 102 Ill. 428; *St. Clair* v. *U. S.,* 154 U. S. 150; *Stratford* v. *Sanford,* 9 Conn. 284; *State* v. *Stevens,* 65 Conn. 93.

A leading question, when improper, may be replaced by a proper question. *Allen* v. *Hartford Life Ins. Co.,* 72 Conn. 697.

Largely discretionary.— Leading questions are largely within the discretion of the court. *Funk* v. *Babbitt,* 55 Ill. App. 124; *Crean* v. *Hourigan,* 158 Ill. 301; *C. & A. Ry. Co.* v. *Eaton,* 62 N. E. 784, affirming 96 Ill. App. 570; *Day* v. *Porter,* 161 Ill. 235.

Unless the court has greatly abused its discretion with reference to leading questions, a judgment will not be reversed. *Gibson Co.* v. *Glizozinshi,* 76 Ill. App. 400.

As to the effect of leading questions on appeal, see *Crean* v. *Hourigan*, 158 Ill. 301.

One cannot complain of a leading question which has not injured him. *Bulson* v. *People*, 31 Ill. 409.

Objection.— A general objection to a question does not raise the point that it is leading. *First Nat. Bank* v. *Dunbar*, 118 Ill. 625.

Youthful witness.— Leading questions may be refused in the case of youthful witnesses. *Coon* v. *People*, 99 Ill. 368.

Instances.— A question "Did you go in voluntarily, or did he pull you in," is leading. *Kramer* v. *Riss*, 77 Ill. App. 623.

A question, "What was said, if anything, by the plaintiff, at the time, about his interest?" is not leading. *Swartwout* v. *Evans*, 41 Ill. 376.

Leading questions defined.—*Harvey* v. *Osborn*, 55 Ind. 535; *Jackson* v. *Todd*, 56 Ind. 406; *De Haven* v. *De Haven*, 77 Ind. 236.

Leading questions are those which either suggest the answer or which embody a material fact and can be answered by an affirmative or negative. *Harvey* v. *Osborn*, 55 Ind. 535; *De Haven* v. *De Haven*, 77 Ind. 236.

Leading questions are proper as to introductory matters. *Sohn* v. *Jervis*, 101 Ind. 578.

The following question was not excluded as suggestive: "After you saw the elevator at the carriage works, what did Kaiser say about it, if anything." *Sievers* v. *Peters Box, etc., Co.*, 151 Ind. 642.

Error.— In order to be reversible error, a ruling as to leading questions must be injurious. *City* v. *Witman*, 122 Ind. 538; *Hunsinger* v. *Hofer*, 110 Ind. 390; *Snyder* v. *Snyder*, 50 Ind. 492.

New Jersey.

Example of leading questions.— *State* v. *Mairs*, Coxe, 453.

Leading questions may be permitted on the examination in chief, largely within the discretion of the court. *Chambers* v. *Hunt*, 2 Zab. 552; *State* v. *Fox*, 25 N. J. L. 566; *Mershon* v. *Hobensack*, 2 Zab. 372, 3 Zab. 580.

Maryland.

Leading questions.— A question is leading when it embodies a material fact and allows of the answer yes or no. *Lee* v. *Tinges*, 7 Md. 216.

Introductory leading questions merely directing the witness' atten-

tion to the subject-matter of the examination are not objectionable on direct examination. *Bushman* v. *Morling*, 30 Md. 384.

The court may in its discretion permit leading questions to be asked. *Frownfelter* v. *State*, 66 Md. 80; *Stoner* v. *Devilbiss*, 70 Md. 144.

Time for objecting.— An objection to a question on the ground that it is leading, made after the question is answered, comes too late. *Washington F. I. Co.* v. *Davison*, 30 Md. 91; *Jones* v. *Jones*, 36 Md. 447.

Objection on the ground that a question is leading must be made at the time it is propounded, so that if need be the form can be changed. *Smith* v. *Cooke*, 31 Md. 174; *Kerby* v. *Kerby*, 57 Md. 345; *Brown* v. *Hardcastle*, 63 Md. 484.

Pennsylvania.

Leading questions.— A leading question is one so framed as to indicate the answer desired. *Snyder* v. *Snyder*, 6 Binn. 483; *Selin* v. *Snyder*, 7 S. & R. 166; *Summers* v. *Wallace*, 9 Watts, 161; *Railroad Co.* v. *Quick*, 61 Pa. 328.

The rule not ironclad. *Farmers' Ins. Co.* v. *Bair*, 87 Pa. 124.

A leading question must be specifically objected to on that ground. *Kemmerer* v. *Edelman*, 23 Pa. 143.

Leading questions are permissible on cross-examination, but must be confined to the matters brought out on the examination in chief. *Helfrich* v. *Stein*, 17 Pa. 143; *Turner* v. *Reynolds*, 23 Pa. 199.

Hostile witness.— The opposite party, if called as a witness, may be examined as if on cross-examination. *Malone* v. *Dougherty*, 79 Pa. 46.

Where a corporation is the defendant, its officers cannot be called adversely for cross-examination; but if they come under the class of necessary, unwilling, or adverse witnesses, leading questions are proper. *Gantt* v. *Cox*, 199 Pa. 208.

In an action for damages against a street railway company, the motorman of the car causing the injury cannot be called by the plaintiff as for cross-examination. *Callary* v. *Transit Co.*, 185 Pa. 176.

The court has discretion to permit leading questions on direct examination in the interest of justice. *Gantt* v. *Cox*, 199 Pa. 208.

Calling adverse party as for cross-examination.— Pepper & Lewis' Digest of Laws, "Witnesses," sec. 21.

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,

Provided that a person charged with a criminal offence and being a witness under the Criminal Evidence Act, 1898, may be cross-examined to the effect, and under the circumstances, described in Article 56.

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.

In the case provided for in Article 120, a witness cannot be compelled to answer such a question.

Illustration.

(*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

* See Note XLVI.

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.[25]

AMERICAN NOTE.

General.

Authorities.— 1 Greenleaf on Evidence (15th ed.), secs. 445, 446, 451–460; 1 Wharton on Evidence, secs. 527–548.

A witness may be compelled to answer questions tending to disgrace him. The extent to which they may be asked is discretionary with the court. *Heuncker* v. *Merkey*, 102 Pa. 462; *Storm* v. *U. S.*, 94 U. S. 76; *Smith* v. *State*, 64 Md. 25; *State* v. *Hack*, 118 Mo. 92; *Helwig* v. *Lascowski*, 82 Mich. 619; *Shelby* v. *Clagett*, 46 O. St. 549; *South Bend* v. *Hardy*, 98 Ind. 577; *Gutterson* v. *Morse*, 58 N. H. 165.

To test accuracy, etc.— *Tudor Iron Works* v. *Weber*, 129 Ill. 535; *Wallace* v. *Wallace*, 62 Ia. 651; *McFadden* v. *Santa Anna, etc., R. Co.*, 87 Cal. 464; *Uniacke* v. *Chicago, etc., R. Co.*, 67 Wis. 108; *State* v. *Duffy*, 57 Conn. 525.

Bias, etc.— Questions to show bias, etc., are allowed. *Fitzpatrick* v. *Riley*, 163 Pa. 65; *County Comrs.* v. *Minderlein*, 67 Md. 567; *Hinchcliffe* v. *Koontz*, 121 Ind. 422; *People* v. *Thomson*, 92 Cal. 506; *Wallace* v. *Taunton St. R. R. Co.*, 119 Mass. 91.

Collateral matters to affect credibility are not admissible. This is largely a question of discretion. *Com.* v. *Schaffner*, 146 Mass. 512; *Sullivan* v. *O'Leary*, 146 Mass. 322; *Barkley* v. *Copeland*, 86 Cal. 483.

The witness may be asked if he has had a lawsuit with one of the parties. *Spiro* v. *Nitkin*, 72 Conn. 205.

Questions may be asked on cross-examination to show the interest of the witness in the result of the suit. *Dore* v. *Babcock*, 72 Conn. 409.

Questions to test the moral sense of the witness are not allowable. *Com.* v. *Shaw*, 4 Cush. (Mass.) 593.

A witness may be asked if he has been in prison. *Com.* v. *Bonner*, 97 Mass. 587.

In a suit by a physician to recover for services rendered by a substitute, the substitute having testified that the charges are

[25] *R.* v. *Orton*, 1874. See summing-up of Cockburn, C.J., vol. ii. p. 719, &c.

reasonable, may be asked on cross-examination what his own fees would have been. *Sayles* v. *Fitz Gerald*, 72 Conn. 395.

A question intimating that another witness has testified differently from the one under examination is not proper on cross-examination. *Turner's Appeal*, 72 Conn. 314.

A witness may be compelled to answer questions tending to disgrace him. The extent to which they may be asked is discretionary with the court. *Shelly* v. *Claggett*, 46 Ohio St. 549.

Motive and interest.—*Kent* v. *State*, 42 Ohio St. 426; *Turner* v. *State*, 5 Ohio Circ. Ct. 537; *Boyle* v. *State*, 6 Ohio Circ. Ct. 163; *Valley Ry. Co.* v. *Roos*, 9 Ohio Circ. Ct. 201.

To show interest.— Questions tending to show the interest of a witness may be asked on cross-examination. *Travers* v. *Snyder*, 38 Ill. App. 379, 386; *Ancals* v. *People*, 134 Ill. 401, 414.

Conviction.— The fact that one has been in a reform school cannot be brought out on cross-examination in order to affect credibility; conviction for an infamous crime may, however, be shown. *Daxanbeklan* v. *People*, 93 Ill. App. 533.

To test credibility, etc.—Cross-examination may be directed to matters affecting the credibility of the witness. *City* v. *Hardy*, 98 Ind. 577.

On cross-examination, the knowledge, judgment or memory of a witness may be tested. *Frenzel* v. *Miller*, 37 Ind. 1; *Gilman* v. *Gard*, 29 Ind. 291.

A witness may be compelled to answer questions tending to disgrace him. The extent to which they may be asked is discretionary with the court. *Helwig* v. *Lascowski*, 82 Mich. 619.

New Jersey.

Court's discretion.— Extent of cross-examination largely within discretion of the trial court. *Derrickson* v. *Quimby*, 43 N. J. L. 376.

The manner of cross-examining largely in the discretion of the trial court. *West* v. *State*, 2 Zab. 212; *Jones* v. *Insurance Co.*, 36 N. J. L. 30.

Impairing credibility: discretion of court. *Fries* v. *Brugler*, 12 N. J. L. 79.

Former conviction.—The defendant in a criminal case may be asked on cross-examination whether he has ever been convicted of a crime,

for the purpose of attacking his credibility; also whether he pleaded *nolo contendere*. *State* v. *Henson*, 66 N. J. L. 601.

Interest and bias.— Witness may be asked concerning a contract whereby he is to share in the result of the suit. *Railroad Co.* v. *Dailey*, 37 N. J. L. 526.

Questions to bring out bias or interest in the result of the suit are permissible on cross-examination to discredit the witness. *Haver* v. *Railroad Co.*, 64 N. J. L. 312.

Statute.— Interest may be proved to affect credit. G. S. 1895, "Evidence," 3.

Disgracing questions.— *Rusling* v. *Bray*, 37 N. J. Eq. 174.

A witness cannot be compelled to answer questions that tend to disgrace him, though he may waive his privilege. *Vaughn* v. *Perrine*, Pen. 728; *State* v. *Fox*, 25 N. J. L. 566, 599; *State* v. *Bailly*, Pen. 415; *Fries* v. *Brugler*, 7 Hal. 79; *Schenck* v. *Schenck*, Spen. 208.

Maryland.

Authorities.— Questions to explain or break down the testimony in chief are admissible. *Howard* v. *Oppenheimer*, 25 Md. 350.

The court has discretion to refuse to allow cross-examination on matters too remote. *Gambrill* v. *Schooley*, 95 Md. 260.

Inadmissible testimony cannot be brought in under the guise of cross-examination, unless warranted by the examination in chief. *Crawford* v. *Beall*, 21 Md. 208.

Bias.— Relationship to a party to the suit, interest, or bias may be shown. *Blessing* v. *Hape*, 8 Md. 31.

On a second trial of a damage suit a witness may be asked if he had not said that he had helped to get a big verdict for the plaintiff at the first trial. *Wise* v. *Ackerman*, 76 Md. 375.

The bias of a witness may be shown, either against a party to the suit or against one who would be liable over in case judgment goes against such party. *Commissioners of Somerset* v. *Minderlein*, 67 Md. 567.

Accuracy.— Questions tending to test the correctness of an opinion given in chief are proper. *Keyser* v. *State*, 95 Md. 96.

Questions may be asked testing the witness' accuracy of recollection. *Ohlendorff* v. *Kaunne*, 66 Md. 495.

Disgracing questions.— A witness will not be compelled to answer questions tending to degrade or disgrace him. *Merluzzi* v. *Gleeson*, 59 Md. 214.

A witness may be asked whether he has ever been in jail and why. *McLaughlin* v. *Mencke,* 80 Md. 83; *Smith* v. *State,* 64 Md. 25 (*quære* whether he can be compelled to answer).

Pennsylvania.

Illustrative cases: *Markley* v. *Swartzlander,* 8 W. & S. 172; *Bank* v. *Fordyce,* 9 Pa. 275; *Jackson* v. *Litch,* 62 Pa. 451; *Hughes* v. *Coal Co.,* 104 Pa. 207; *Beck* v. *Hood,* 185 Pa. 32; *Guckavan* v. *Traction Co.,* 203 Pa. 521.

Where a witness testified that an accident was caused by the removal of sand-boxes from the cars, it is proper on cross-examination to ask him concerning substitutes for the sand-boxes used by the company. *Smith* v. *Philadelphia Trac. Co.,* 202 Pa. 54.

When a party is sworn merely to introduce a book of original entries, the cross-examination must be restricted to the book. *Shaw* v. *Levy,* 17 S. & R. 99.

A conversation testified to in chief may be brought out entire on cross-examination. *Over* v. *Blackstone,* 8 W. & S. 71; *Bank* v. *Donaldson,* 6 Pa. 179; *Gordon* v. *Preston,* 1 Watts, 385; *Stevenson* v. *Hoy,* 43 Pa. 191; *Jackson* v. *Litch,* 62 Pa. 451.

Cross-examination may cover the entire examination in chief and things closely connected therewith. *Hoffman* v. *Strohecker,* 9 Watts, 183; *Jackson* v. *Litch,* 62 Pa. 451; *Henderson* v. *Hydraulic Works,* 9 Phila. 100.

The judge has discretion to exclude unimportant questions. *Bank* v. *Roessler,* 186 Pa. 431.

Bias and interest.— Questions to show bias and interest are permissible on cross-examination. *Hopkinson* v. *Leeds,* 78 Pa. 396; *Ott* v. *Houghton,* 30 Pa. 451; *Glenn* v. *Traction Co.,* 206 Pa. 137; *Fitzpatrick* v. *Riley,* 163 Pa. 65.

Cross-examination on collateral matters may be limited by the court, but questions directed to the interest or bias of a witness may be asked of right. *Beck* v. *Hood,* 185 Pa. 32.

Detectives may be cross-examined as to their contract of employment to show interest and feeling in the cause. *Com.* v. *Farrell,* 187 Pa. 408.

Credibility and accuracy.— Questions bearing on credibility are admissible in the court's discretion. *Com.* v. *Eaton,* 8 Phila. 428; *Cameron* v. *Montgomery,* 13 S. & R. 128; *Batdorff* v. *Bank,* 61 Pa. 179; *McKinney* v. *Reader,* 6 Watts, 34; *Krider* v. *Philadelphia,* 180

Pa. 78; *Glenn* v. *Traction Co.*, 206 Pa. 137; *Huoncker* v. *Merkey*, 102 Pa. 462; *Philadelphia* v. *Reeder*, 173 Pa. 281; *Dampman* v. *Railroad Co.*, 166 Pa. 520.

Cross-examination as to the details of a map made by the witness to test his accuracy of knowledge and observation. *Dirk* v. *Railway Co.*, 164 Pa. 243.

Irrelevant questions are permissible in the discretion of the court for testing accuracy. *Clark* v. *Church*, 5 W. & S. 266.

Questions to show capacity and intelligence of the witness are proper. *Yeager* v. *Weaver*, 1 Leg. Gaz. 156.

A plaintiff may be asked on cross-examination as to his attempts to corrupt the jury on a previous trial of the case. *Beck* v. *Hood*, 185 Pa. 32.

ARTICLE 129A.

JUDGE'S DISCRETION AS TO CROSS-EXAMINATION TO CREDIT.

The judge may in all cases disallow any questions put in cross-examination of any party or other witness which may appear to him [*i.e.* the judge] to be vexatious and not relevant to any matter proper to be inquired into in the cause or matter.[26]

AMERICAN NOTE.

See note under Article 129.

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

[26] R. S. C., Order XXXVI., rule 38. I leave Article 129 as it originally stood; because this Order is after all only an exception to the rule. "Him" must refer to the judge, as it would otherwise refer to the "party or other witness," which would be absurd.

injuring his character, no evidence can be given to contradict him except in the following cases:—[27]

(1) If a witness is asked whether he has been previously convicted of any felony or misdemeanour, and denies or does not admit it, or refuses to answer, evidence may be given of his previous conviction thereof.[28]

(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.[29]

AMERICAN NOTE.

General.

Authorities.— 1 Wharton on Evidence, sec. 559; 1 Greenleaf on Evidence (15th ed.), sec. 449.

First paragraph of text. *Coombs* v. *Winchester*, 39 N. H. 13, 75 Am. Dec. 203; *Davis* v. *Roby*, 64 Me. 427; *Pullen* v. *Pullen*, 43 N. J. Eq. 136; *Robbins* v. *Spencer*, 121 Ind. 594; *Buckley* v. *Silverberg*, 113 Cal. 673; *Hester* v. *Com.*, 85 Pa. 139; *Moore* v. *People*, 108 Ill. 484; *Sloan* v. *Edwards*, 61 Md. 89.

The witness cannot be contradicted as to collateral matters. *State* v. *Benner*, 64 Me. 267; *Alexander* v. *Kaiser*, 149 Mass. 321; *McGuire* v. *McDonald*, 99 Mass. 49; *Com.* v. *Lyden*, 113 Mass. 452.

A witness cannot be cross-examined as to irrelevant matters for the mere purpose of contradicting him. *Tyler* v. *Todd*, 36 Conn. 224.

A party who puts an irrelevant question, on cross-examination, cannot afterwards offer evidence to contradict the answer given. *Winton* v. *Meeker*, 25 Conn. 464.

Conviction.— *Com.* v. *Bonner*, 97 Mass. 587; *Com.* v. *Gorham*, 99 Mass. 420.

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27 *A. G.* v. *Hitchcock*, 1847, 1 Ex. 91, 99–105. See, too, *Palmer* v. *Trower*, 1852, 8 Ex. 247.

28 28 & 29 Vict. c. 18, s. 6; re-enacting 17 & 18 Vict. c. 125, s. 25, now repealed.

29 *A. G.* v. *Hitchcock*, 1847, 1 Ex. 91, pp. 100, 105.

The conviction may be proved by the record or by the answers of the witness on cross-examination. *State* v. *Elwood*, 17 R. I. 763; *State* v. *McGuire*, 15 R. I. 23; *State* v. *O'Brien*, 81 Ia. 93; *State* v. *Sauer*, 42 Minn. 258; *People* v. *Crowley*, 100 Cal. 478; *Burdett* v. *Com.*, 93 Ky. 76; *Simons* v. *People*, 150 Ill. 66 (record, criminal cases).

Bias.— In a *qui tam* action for taking usury, the party who had paid it, having testified to that effect, was asked on cross-examination, whether he had not had a controversy with the defendant, and threatened to be revenged on him for collecting the note alleged to be usurious. Held, that the questions were admissible, and that his answers in the negative might be contradicted by other testimony. *Atwood* v. *Welton*, 7 Conn. 70.

Collateral matters.— A witness cannot be contradicted as to his testimony on a collateral point, on cross-examination. *C., R. I. & St. P. R. R. Co.* v. *Bell*, 70 Ill. 102; *Flansburg* v. *Basin*, 3 Brad. 531; *C., B. & Q. R. R. Co.* v. *Lee*, 60 Ill. 501; *East Dubuque* v. *Burhyte*, 173 Ill. 553, 50 N. E. 1077, 74 Ill. App. 99; *Ancals* v. *People*, 134 Ill. 401, 414.

One is bound by the answers of a witness on cross-examination as to collateral matters. *Stalcup* v. *State*, 146 Ind. 270. Compare *State ex rel.* v. *Taylor*, 4 Ind. App. 296; *Reynolds* v. *State*, 147 Ind. 3; *Hinkle* v. *State*, 151 Ind. 237, 61 N. E. 196.

Interest.— *Tolbert* v. *Burke*, 89 Mich. 132.

The bias or interest of a witness may be shown on cross-examination. *Swift Electric Light Co.* v. *Grant*, 90 Mich. 469, 51 N. W. 539.

Where a witness testifies on cross-examination that he has not been active in procuring testimony, the fact that he has been active may be proved. *Hamilton* v. *People*, 29 Mich. 173.

If a witness answers questions concerning interest, conviction or relationship to the party, on cross-examination, his answers may be contradicted. *Helwig* v. *Lascowski*, 82 Mich. 619.

One who has denied on cross-examination that he has ever been convicted may be impeached by proving the record. *Helwig* v. *Lascowski*, 82 Mich. 619.

Cross-examining counsel are bound by the answers of witnesses, upon collateral matters. *Hitchcock* v. *Burgett*, 38 Mich. 501.

New Jersey.

Statutory rule similar.— G. S. 1895, "Evidence," 9.

Authority.— *Pullen* v. *Pullen*, 43 N. J. Eq. 136.

The State cannot contradict the answers of the accused to irrelevant and immaterial questions asked him on cross-examination. *Bullock* v. *State*, 65 N. J. L. 557; *State* v. *Sprague*, 64 N. J. L. 419.

When a witness is asked on cross-examination for purposes of impeaching him whether he had not been guilty of larceny, the answer cannot be contradicted. *Pullen* v. *Pullen*, 43 N. J. Eq. 136.

Maryland.

Authority.— *Sloan* v. *Edwards*, 61 Md. 89.

If the prosecuting witness in a criminal case denies that he offered money to a witness for the defense to induce him to stay away, he may be contradicted. *Richardson* v. *State*, 90 Md. 109.

Pennsylvania.

Authorities.— *Elliott* v. *Boyles*, 31 Pa. 65; *Hester* v. *Com.*, 85 Pa. 139.

Answers on cross-examination may be contradicted if they were in regard to matters brought out on direct examination. *Blauvelt* v. *Railroad Co.*, 206 Pa. 141.

One who cross-examines a witness as to collateral matters is bound by his answers. *Griffith* v. *Eshelman*, 4 Watts, 51; *Wright* v. *Cumpsty*, 41 Pa. 102.

If a witness denies on cross-examination that he had previously committed perjury, his answer cannot be contradicted. *Elliott* v. *Boyles*, 31 Pa. 65.

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 proceeding and inconsistent with his present testimony, the

* See Note XLVII.

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.

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.

It seems that the discretion of the judge cannot be reviewed afterwards.[30]

AMERICAN NOTE.

General.

Authorities.— 10 Encyclopædia of Pleading and Practice, p. 279 *et seq.;* 1 Greenleaf on Evidence (15th ed.), sec. 462; *Sanderson* v. *Nashua,* 44 N. H. 492; *Martin* v. *Towle,* 59 N. H. 31.

First paragraph of text. *Ayers* v. *Watson,* 132 U. S. 394; *Atchison, etc., R. Co.* v. *Feehan,* 149 Ill. 202; *Rice* v. *Rice,* 104 Mich. 371; *Welch* v. *Abbott,* 72 Wis. 512; *Birch* v. *Hall,* 99 Cal. 299; *Brown* v. *State,* 72 Md. 468; *State* v. *Jones,* 44 La. Ann. 960; *Spohn* v. *Mo. Pac. R. Co.,* 122 Mo. 1; *Haley* v. *State,* 63 Ala. 83; *Stratford* v. *Fairfield,* 3 Conn. 591; *Burns* v. *Fredericks,* 37 Conn. 92; *Beardsley* v. *Wildman,* 41 Conn. 516; *Harrison's Appeal,* 48 Conn. 206.

If the statement is of some irrelevant matter, the answer of the witness is binding. *Com.* v. *Mooney,* 110 Mass. 99, 101.

Where a party has offered an account-book in evidence, evidence that upon the trial of another case he had testified that he had no such book is admissible. *Sayles* v. *Fitz Gerald,* 72 Conn. 391.

The contradictory statements may be proved independently, without first asking the witness if he made them. *Ware* v. *Ware,* 8 Greenl. (Me.) 42, 53; *Wilkins* v. *Bobbershall,* 32 Me. 184; *Cook* v. *Brown,* 34 N. H. 460; *Robinson* v. *Hutchinson,* 31 Vt. 443, 449; *Holbrook* v. *Holbrook,* 30 Vt. 433; *Tucker* v. *Welsh,* 17 Mass. 160, 166, 9 Am. Dec. 137; *Day* v. *Stickney,* 14 Allen (Mass.), 255, 260;

[30] *Rice* v. *Howard,* 1886, 16 Q. B. D. 681.

Gould v. *Norfolk Lead Co.*, 9 Cush. (Mass.), 338. *Compare Cogswell* v. *Newburyport Sav. Inst.*, 165 Mass. 524; *Com.* v. *Smith,* 163 Mass. 411; *Hedge* v. *Clapp*, 22 Conn. 262, 265, 9 Am. Dec. 137; *Tomlinson* v. *Derby*, 43 Conn. 562; *Butler* v. *Cornwall Iron Co.*, 22 Conn. 357. But see *Rothroek* v. *Gallaher*, 91 Pa. 108.

Some courts hold that a party cannot impeach his own witness, by proving inconsistent statements. *Cox* v. *Eayres*, 55 Vt. 24. But see Stats. of Vermont, sec. 1247; *Hildreth* v. *Aldrich*, 15 R. I. 163; *Brewer* v. *Porch*, 17 N. J. L. 377; *State* v. *Burks*, 132 Mo. 363; *Wheeler* v. *Thomas*, 67 Conn. 577; *Dixon* v. *State*, 86 Ga. 754; *Adams* v. *Wheeler*, 97 Mass. 67; *Stearns* v. *Merchants' Bank*, 53 Pa. St. 490; *Hall* v. *Chicago, etc., R. Co.*, 84 Ia. 311; *Tarsney* v. *Turney*, 48 Fed. Rep. 818; *Rindskopf* v. *Kuder*, 145 Ill. 607; *Chester* v. *Wilhelm,* 111 N. C. 314. But see *Brubaker* v. *Taylor*, 76 Pa. St. 83; *Cox* v. *Eayres,* 55 Vt. 24, 45 Am. Rep. 583.

This does not apply to a witness whom one is obliged to call (*e. g.*, attesting witnesses). *Thornton* v. *Thornton*, 39 Vt. 122; *Shorey* v. *Hussey*, 32 Me. 579; *Whitman* v. *Morey*, 63 N. H. 448; *State* v. *Slack*, 69 Vt. 486; *Hildreth* v. *Aldrich*, 15 R. I. 163. See *People* v. *Case*, 105 Mich. 92. Nor to an adverse witness. *Hurlburt* v. *Bellows,* 50 N. H. 102; *Putnam* v. *U. S.*, 162 U. S. 697–707; *McNerney* v. *Reading*, 150 Pa. St. 611; *White* v. *State*, 87 Ala. 24; *Selover* v. *Bryant,* 54 Minn. 434; *Smith* v. *Briscoe*, 65 Md. 561; *Nat. Syrup Co.* v. *Carlson*, 42 Ill. App. 178.

Evidence of statements contradictory to those made on the stand may be introduced. *Ward* v. *Sire*, 65 N. Y. Supp. 101, 52 App. Div. 443; *Crossman* v. *Lurman*, 68 N. Y. Supp. 311, 57 App. Div. 393.

The evidence of the plaintiff may be impeached by her cross-examination upon a former trial, which is evidence for that purpose, although her attention was not called to it. *Fisher* v. *Monroe*, 51 N. Y. St. R. 585, reversing 1 Misc. Rep. 14; reargument denied in 3 Misc. Rep. 633. See 16 Daly, 461.

The evidence stated in a *case* made on a former trial is not admissible to impeach the testimony of a witness. *Neilson* v. *Columbian Insurance Co.*, 1 Johns. 301.

Corroborating a witness.— A witness cannot be permitted to corroborate the testimony of another witness, by stating that she heard the latter say, in a prior conversation, what he had testified to at the trial. *Eggleston* v. *Columbia Turnpike Road,* 82 N. Y. 278, re-

versing 18 Hun, 146, on a point not considered below. And see *People* v. *Cox,* 21 Hun, 47, 83 N. Y. 610.

Mode of proof.— *Pennsylvania Co.* v. *Trainer,* 5 Circ. Dec. 519, 12 Ohio Circ. Ct. 66; *Mt. Adams, etc., Ry. Co.* v. *Isaacs,* 10 Circ. Dec. 49, 19 Ohio Circ. Ct. 177; *Monroeville* v. *Weihl,* 6 Circ. Dec. 188, 13 Ohio Circ. Ct. 689; *Spaulding* v. *Toledo Consol. St. Ry. Co.,* 10 Circ. Dec. 660, 20 Ohio Circ. Ct. 99.

Foundation for the evidence.—A foundation must be laid for impeaching testimony. *Redmon* v. *Holley,* 10 Brad. 202. Compare *Teal* v. *Meravey,* 12 Brad. 32; *Mills* v. *Buffin,* 12 Brad. 111.

Before statements out of court can be admitted the attention of the witness must be called to them. *Seckel* v. *York Nat. Bank,* 57 Ill. App. 579; *T. P. Acc. Assn.* v. *McKinney,* 57 Ill. App. 147; *Regnier* v. *Cabot,* 2 Gilm. 34; *Gotloff* v. *Henry,* 14 Ill. 384; *G. & C. U. R. R. Co.* v. *Fay,* 16 Ill. 558; *Root* v. *Wood,* 34 Ill. 283; *Miner* v. *Phillips,* 42 Ill. 123; *Winslow* v. *Newlan,* 45 Ill. 145; *Craig* v. *Rorer,* 63 Ill. 325; *N. W. Ry. Co.* v. *Hack,* 66 Ill. 238; *McCoy* v. *People,* 71 Ill. 111; *Bock* v. *Weigant,* 5 Brad. 643; *Presley* v. *Powers,* 82 Ill. 125; *Richardson* v. *Kelly,* 85 Ill. 491.

Where a witness denies that he has made contrary statements out of court, the fact of making them may be proved. *Chicago W. D. Ry. Co.* v. *Ingraham,* 131 Ill. 659, 668; *Consolidated Coal Co.* v. *Seniger,* 79 Ill. App. 456.

If a witness neither admits or denies an inconsistent statement, such statement may then be proved. *Ray* v. *Bell,* 24 Ill. 444; *Wood* v. *Shaw,* 48 Ill. 273.

Impeaching one's own witness.— A party cannot impeach his own witness, by proving inconsistent statements. *Rindskopf* v. *Kuder,* 145 Ill. 607; *Tobin* v. *C. C. Ry. Co.,* 17 Ill. App. 82, 84; *Mitchell* v. *Sawyer,* 115 Ill. 650, 653; *Pennsylvania Co.* v. *Cohen,* 66 Ill. App. 318; *United States Life Ins. Co.* v. *Kielgast,* 26 Ill. App. 567.

A mere nominal party may impeach his co-party. *Carey* v. *Henderson,* 61 Ill. 378.

A party may contradict his own witness by other witnesses. *Waller* v. *Carter,* 8 Brad. 511; *Rockwood* v. *Poundstone,* 38 Ill. 199.

As to an adverse witness, see *National Syrup Co.* v. *Carlson,* 42 Ill. App. 178.

Sustaining witness.— The testimony of a witness cannot be corroborated by proof of declarations made out of court. *Stolp* v. *Blair,* 68 Ill. 541.

A witness's declarations may be given to corroborate his testimony when his credibility is attacked. *Gates* v. *People*, 14 Ill. 434.

Mode of proving statements.— A report of a stenographer cannot be used to impeach a witness at a subsequent trial. *Stayner* v. *Joyce*, 120 Ind. 99.

The testimony as set out in a bill of exceptions cannot be used to establish contrary statements. *Pennsylvania Co.* v. *Marion*, 123 Ind. 415; *Glenn* v. *State*, 46 Ind. 368; *Starrett* v. *Burkhalter*, 86 Ind. 439; *Stayner* v. *Joyce*, 120 Ind. 99; *Terry* v. *Shivley*, 93 Ind. 143.

Contrary statements given in a deposition in another case may be proved. *McAfee* v. *Montgomery*, 21 Ind. App. 196.

Testimony in writing before a coroner cannot be contradicted by parol evidence. *Robinson* v. *State*, 87 Ind. 292.

Testimony before a coroner, reduced to writing, may be used to contradict a witness. *Woods* v. *State*, 63 Ind. 353.

Explaining statements.— Where it is sought to impeach a witness by proof of contrary statements, the witness may be called to give his account. *Railway Co.* v. *Harris*, 49 Ind. 119.

As to immaterial matters.— A witness cannot be impeached by proving contradictory statements with reference to immaterial or collateral matters. *Driscoll* v. *People*, 47 Mich. 413; *Dalman* v. *Koning*, 54 Mich. 320; *Dunn* v. *Dunn*, 11 Mich. 284; *Fisher* v. *Hood*, 14 Mich. 189; *Hamilton* v. *People*, 46 Mich. 186; *Leavitt* v. *Stansell*, 44 Mich. 424.

Immaterial matters cannot be brought into the case for the purpose of impeachment. *McDonald* v. *McDonald*, 67 Mich. 122.

A witness cannot be asked as to irrelevant matters on cross-examination, for the purpose of contradicting him. *People* v. *Hillhouse*, 80 Mich. 580.

New Jersey.

Previous inconsistent statments may be proved. *Crane* v. *Sayre*, 1 Hal. 111; *Brewer* v. *Poreh*, 2 Harr. 379; *Schenck* v. *Griffen*, 38 N. J. L. 462, 472.

Statements of an alleged paramour are not admissible against the defendant, but are admissible to contradict his testimony at the trial. *Graham* v. *Graham*, 50 N. J. Eq. 701.

Cross-examination allowed as to testimony given on a former trial of the case. *Miller* v. *Rambo*, 66 N. J. L. 191.

Laying foundation.— Where a witness is also a party to the suit, no foundation need be laid before introducing evidence of inconsist-

ent statements. They are affirmative evidence as admissions, not merely impeaching evidence. *McBlain* v. *Edgar*, 65 N. J. L. 634.

Inconsistent statements provable after laying the foundation on cross-examination. *Fries* v. *Brugler*, 7 Hal. 79.

Impeaching one's own witness.— A party cannot prove inconsistent statements to impeach his own witness. *Brewer* v. *Porch*, 17 N. J. L. 377.

The State may contradict statements made by a defendant in a confession. *State* v. *Abbatto*, 64 N. J. L. 658.

Though a party may not impeach the character of his own witness for truth and veracity, yet when she denies that a certain signature is hers he may contradict her as to that particular fact. *Ingersoll* v. *English*, 66 N. J. L. 463.

Maryland.

Statute.— Inconsistent statements of the adverse party may be proved. P. G. L. 1888, art. 35, sec. 4.

Prior contradictory statements may be proved. *Balto., etc., Ry. Co.* v. *Knee*, 83 Md. 77; *Garlitz* v. *State*, 71 Md. 293.

When a witness has said he did not have a certain conversation with another, it may be shown that he did have. *Turnbull* v. *Maddox*, 68 Md. 579; *Railroad Co.* v. *Andrews*, 39 Md. 329.

As to a matter of *fact* it cannot be shown that the witness has expressed a contrary *opinion*. *Sloan* v. *Edwards*, 61 Md. 89.

Inconsistent statements are to be used only as discrediting a witness, not as primary evidence of the facts stated. *Stirling* v. *Stirling*, 64 Md. 138.

Interest and crime.— A witness may be shown to have an interest or to have been convicted of crime. P. G. L. 1888, art. 35, sec. 5.

Foundation must be laid.— *Paterson* v. *State*, 83 Md. 194; *Brown* v. *State*, 72 Md. 468; *Kriete* v. *Myer*, 61 Md. 558; *Ins. Co.* v. *Traub*, 83 Md. 524.

The foundation required consists in giving the witness a fair chance to recollect by referring him to the dates, names, and the surrounding circumstances of his supposed former contradictory statement. *Whiteford* v. *Burckmyer*, 1 Gill, 127; *Smith* v. *Cooke*, 31 Md. 174; *Higgins* v. *Carlton*, 28 Md. 115; *Matthews* v. *Dare*, 20 Md. 248; *Waters* v. *Waters*, 11 G. & J. 37; *Bank* v. *Navig. Co.*, 11 G. & J. 28.

The previous admissions of a party to the suit are admissible against him without first questioning him concerning them. *Kirk* v. *Garrett,* 84 Md. 383.

Irrelevant matters.— A witness may not be cross-examined as to irrelevant matters merely for the purpose of contradicting him later. *Sloan* v. *Edwards,* 61 Md. 89; *Kriete* v. *Myer,* 61 Md. 558; *Whiteford* v. *Burckmeyer,* 1 Gill, 127. See *Mason* v. *Poulson,* 43 Md. 161; *Goodhand* v. *Benton,* 6 G. & J. 481.

If irrelevant cross-examination has been allowed, that does not authorize evidence to contradict the witness as to such irrelevant matters. *Pass. Ry. Co.* v. *Tanner,* 90 Md. 315.

Contradicting one's own witness.— When a witness has made a statement to a party or his attorney wholly contradictory to his sworn testimony, he may be asked concerning such former statement, and if he denies making it, it may be proved. The statement must have been made with reference to the case in question, and he must have been called on the faith of such statement. *Smith* v. *Briscoe,* 65 Md. 561.

One cannot impeach his own witness by introducing a previous letter written by such witness. *Sewell* v. *Gardner,* 48 Md. 178.

A party may prove the facts as they are, though one of his witnesses has stated them otherwise and he cannot impeach the witness directly. *Sewell* v. *Gardner,* 48 Md. 178; *Wolfe* v. *Hunter,* 1 Gill, 84.

A party may call a witness to testify in direct contradiction of a former witness called by him. *Bank* v. *Steam Nav. Co.,* 11 G. & J. 28.

Pennsylvania.

Authorities.— A witness may be discredited by showing that he testified differently at a former trial (*Travis* v. *Brown,* 43 Pa. 9); or by reading a former deposition in the same case (*Bull* v. *Towson,* 4 W. & S. 557; *Parker* v. *Donaldson,* 6 W. & S. 132); or by proving other previous inconsistent statements (*Craig* v. *Craig,* 5 Rawle, 91; *Wertz* v. *May,* 21 Pa. 274; *Schlater* v. *Winpenny,* 75 Pa. 321).

If the accused on trial for murder deny on cross-examination that he made threats, he may be contradicted. *Gaines* v. *Com.,* 50 Pa. 319.

If a witness says he does not remember having made a certain statement, it may be shown that he did make it. *Gregg Twp.* v. *Jamison,* 55 Pa. 468.

Manner of questioning the impeaching witness. *Insurance Co.* v. *Bair,* 87 Pa. 124.

Party's own witness.— Inconsistent statements are not admissible to impeach one's own witness. *Stearns* v. *Bank,* 53 Pa. 490. But a party may prove the facts as they are by other witnesses. *Railroad Co.* v. *Fortney,* 90 Pa. 323.

Hostile witnesses.— An unwilling or hostile witness may be asked by the party calling him whether he has not testified otherwise on a former occasion. *Bank* v. *Davis,* 6 W. & S. 285.

The evidence of one's own witness may be contradicted, if he comes under the class of necessary, unwilling, or adverse witnesses. *Gantt* v. *Cox,* 199 Pa. 208.

The foundation necessary to show that one's own witness is hostile. *Fisher* v. *Hart,* 149 Pa. 232.

Rule when adverse party is called as for cross-examination. Pepper & Lewis' Digest of Laws, "Witnesses," sec. 21.

Surprise.— A party surprised by the testimony of his witness may call to his recollection conversations wherein he made contrary statements and thus give him a chance to explain. *McNerney* v. *Reading,* 150 Pa. 611.

Laying foundation.— Previous inconsistent statements cannot be proved, unless the witness be first asked concerning them and given a chance to explain them, thus laying the foundation for contradiction. *McAteer* v. *McMullen,* 2 Pa. 32; *Wright* v. *Cumpsty,* 41 Pa. 102; *Coates* v. *Chapman,* 195 Pa. 109. But the trial court has discretion to allow proof of such inconsistent statements without laying a foundation. *Sharp* v. *Emmet,* 5 Whart. 288; *Kay* v. *Fredrigal,* 3 Pa. 221; *Walden* v. *Finch,* 70 Pa. 460; *Cronkrite* v. *Trexler,* 187 Pa. 100; *Rothrock* v. *Gallagher,* 91 Pa. 108.

The court may allow the witness to be recalled to explain the inconsistency when no foundation was laid on cross-examination. *Rothrock* v. *Gallagher,* 91 Pa. 108.

When one's opponent is called as a witness, his testimony may be contradicted by proving inconsistent statements without giving him any chance to explain, for they would be admissible as admissions in any event. *Brubaker* v. *Taylor,* 76 Pa. 83; *Kreiter* v. *Bomberger,* 82 Pa. 59.

Testimony in a former proceeding.— Pepper & Lewis' Digest of Laws, "Criminal Procedure," sec. 84; "Witnesses," sec. 20.

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 indictment or proceeding, 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 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.[31]

AMERICAN NOTE.

General.

Authorities.— 1 Greenleaf on Evidence (15th ed.), secs. 463–465; 1 Wharton on Evidence, sec. 68; 10 Encyclopædia of Pleading and Practice, p. 291, *et seq.* See *Whitman* v. *Morey*, 63 N. H. 448.

Modifying rule of text. *Hosmer* v. *Groat*, 143 Mass. 16; *Chicago R. Co.* v. *McLoughlin*, 146 Ill. 353; *Lightfoot* v. *People*, 16 Mich. 507; *State* v. *Stein*, 79 Mo. 330; *Glenn* v. *Gleason*, 61 Ia. 28; *Floyd* v.

[31] 28 Vict. c. 18, s. 5, re-enacting 17 & 18 Vict. c. 125, s. 24, now repealed. I think the words between brackets represent the meaning of the sections, but in terms they apply only to witnesses under cross-examination —" Witness may be cross-examined," &c.

State, 82 Ala. 16; *State* v. *Cellegari*, 41 La. Ann. 578; *Chicago, etc., R. Co.* v. *Artery*, 137 U. S. 507; *Morford* v. *Peek*, 46 Conn. 380.

In an action for wrongful discharge from employment, where the defendant testified to the terms of the contract it was proper, on cross-examination, to call his attention to allegations in his verified answer in conflict therewith; and this though the answer was verified by advice of counsel. *Hare* v. *Mahony*, 36 N. Y. St. R. 653.

Contradictory statement in writing.— The fact that a witness has made written statements inconsistent with his evidence may be proved. *Boeker* v. *Hess*, 34 Ill. App. 332, 336; *N. L. Packet Co.* v. *Bininger*, 70 Ill. 571.

The contradictory statement in writing (*e. g.*, a letter), cannot be introduced without asking the witness if he wrote it. *Transportation Co.* v. *O'Neill*, 41 Ill. App. 425; *Seekel* v. *York Nat. Bank*, 57 Ill. App. 579.

A letter is admissible to impeach a witness. *Dick* v. *Marble*, 155 Ill. 137.

A witness may be impeached by proof of an affidavit containing contradictory statements. *Von Glahn* v. *Von Glahn*, 46 Ill. 134; *Stone* v. *Cook*, 79 Ill. 424.

A witness may be impeached by the testimony in a deposition. *Bartalott* v. *International Bank*, 119 Ill. 268.

When a witness has admitted that he made written statements contradictory to his evidence, such statements are not admissible. *Swift* v. *Madden*, 165 Ill. 41.

A witness may be asked as to former testimony in another case for the purpose of refreshing his recollection. *Battishill* v. *Humphreys*, 64 Mich. 494.

As to prior inconsistent statements in writing, see *Monyhan* v. *Detroit & S. Plank Road Co.*, 8 Det. L. N. 1104, 89 N. W. 372.

New Jersey.

A document offered to contradict testimony in regard to it must be identified as the one referred to by the witness. *West* v. *State*, 2 Zab. 212.

Maryland.

As to the use of a witness' letters for contradicting his testimony, see *de Sobry* v. *de Laistre*, 2 H. & J. 191.

Pennsylvania.

Letters.— *Morgan* v. *Browne*, 71 Pa. 130.

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. Such persons may not upon their examination in chief, give reasons for their belief, but they may be asked their reasons in cross-examination, and their answers cannot be contradicted.[32]

No such evidence may be given by the party by whom any witness is called,[33] 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.[34]

AMERICAN NOTE.

General.

Authorities.— 10 Encyclopædia of Pleading and Practice, p. 299 *et seq.;* 1 Wharton on Evidence, secs. 397, 567, 568; 1 Greenleaf on Evidence (15th ed.), sec. 461.

One who knows nothing of the character of a witness, except what he heard on two occasions, cannot testify as an impeaching witness. *Com.* v. *Rogers*, 136 Mass. 158. As to qualification, generally, see *Bates* v. *Barber*, 4 Cush. (Mass.) 107: *Wetherbee* v. *Norris*, 103 Mass. 565; *Rundell* v. *La Fleur*, 6 Allen (Mass.), 480.

An impeaching witness may be cross-examined as to the source of his information. *State* v. *Howard*, 9 N. H. 485; *Hepworth* v. *Henshall*, 153 Pa. St. 592; *Robbins* v. *Spencer*, 121 Ind. 594. See *Hollywood* v. *Reed*, 57 Mich. 234; *Bates* v. *Barber*, 4 Cush. (Mass.) 107.

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32 2 Ph. Ev. 503–4; Taylor, 1470, 1470A. See *R.* v. *Brown*, 1867, 1 C. C. R. 70.

33 28 Vict. c. 18, s. 3.

34 2 Ph. Ev. 504.

An impeaching witness may not be asked reasons on the direct, but may on the cross-examination. *Weeks* v. *Hull,* 19 Conn. 376, 379, 50 Am. Dec. 249.

An impeaching witness may be asked on cross-examination how he has received his information as to the general character of the witness impeached, and what persons he has heard speak against it. *Weeks* v. *Hull,* 19 Conn. 379.

It is well settled that a new trial should not be granted for newly-discovered evidence that would impeach the general reputation of a witness for truth and veracity. Evidence that a witness since the trial had told a different story from that which was told in court, is essentially of an impeaching character. *Husted* v. *Mead,* 58 Conn. 61, 62.

The character of a witness for truth is the only thing that can be attacked, in an attempt to impeach him. *State* v. *Randolph,* 24 Conn. 366.

The court may limit, at its discretion, the number of impeaching witnesses; though, should the limit be fixed manifestly too low, it might be ground for a new trial. Six on a side will ordinarily be sufficient. *Bunnell* v. *Butler,* 23 Conn. 69; *Hollywood* v. *Reed,* 57 Mich. 234.

Impeaching and contradicting party's own witness.— One may contradict his own witness. *Seavy* v. *Dearborn,* 19 N. H. 351; *Swamscot Mach. Co.* v. *Walker,* 22 N. H. 457; *Wheeler* v. *Thomas,* 67 Conn. 577; *Olmstead* v. *Winsted Bank,* 32 Conn. 278, 85 Am. Dec. 260.

While a party may disprove a fact testified to by his witness, he cannot impeach him under the rule of this article. *Hill* v. *West End St. R. R. Co.,* 158 Mass. 458; *Brolley* v. *Lapham,* 13 Gray (Mass.), 294; *Com.* v. *Welsh,* 4 Gray (Mass.), 535; *Com.* v. *Starkweather,* 10 Cush. (Mass.) 59; *Whitaker* v. *Salisbury,* 15 Pick. (Mass.) 534; *Whitney* v. *Eastern R. R. Co.,* 9 Allen (Mass.), 364; *Brown* v. *Bellows,* 4 Pick. (Mass.) 179; *Wheeler* v. *Thomas,* 67 Conn. 577.

This rule applies also to a witness which he is obliged to call, as an attesting witness. *Brown* v. *Bellows,* 4 Pick. (Mass.) 179, 194; *Whitaker* v. *Salisbury,* 15 Pick. (Mass.) 534.

Supporting witness.— The party whose witness is attacked may give evidence in support of his reputation. *Com.* v. *Ingraham,* 7 Gray (Mass.), 46, 48; *First Nat. Bank* v. *Wolff,* 79 Cal. 69; *Magee* v. *People,* 139 Ill. 138; *Sloan* v. *Edwards,* 61 Md. 89.

As a general rule, a witness cannot be supported by evidence of his general character for truth, excepting after a general impeachment of it. *Merriam* v. *H. & N. H. R. R. Co.*, 20 Conn. 364; *Rogers* v. *Moore*, 10 Conn. 16, 17.

Reputation only provable.— General reputation as to truthfulness may be shown. *State* v. *Howard*, 9 N. H. 485; *Titus* v. *Ash*, 24 N. H. 319; *Bd. of Commerce* v. *O'Connor*, 137 Ind. 622; *Isler* v. *Dewey*, 71 N. C. 14; *Walker* v. *Phenix Ins. Co.*, 62 Mo. App. 209; *Hodgkins* v. *State*, 89 Ga. 761, 765. *Contra*, *Webb* v. *State*, 29 O. St. 351; *Wertz* v. *May*, 21 Pa. St. 274; *State* v. *Archer*, 73 Ia. 320; *People* v. *Olmstead*, 30 Mich. 431.

Reputation eighteen months before may be shown. *Com.* v. *Billings*, 97 Mass. 405.

Particular falsehoods.— Particular instances of falsehood cannot be shown. *Com.* v. *Rogers*, 136 Mass. 158, 159; *Quinsigamond Bank* v. *Hobbs*, 11 Gray (Mass.), 250; *Com.* v. *Lawler*, 12 Allen (Mass.), 585; *Com.* v. *Kennon*, 130 Mass. 39; *Drew* v. *State*, 124 Ind. 9; *State* v. *Rogers*, 108 Mo. 202; *People* v. *Ryan*, 108 Cal. 581; *Robbins* v. *Spencer*, 121 Ind. 594; *Laclede Bank* v. *Keeler*, 109 Ill. 385; *State* v. *Spurling*, 118 N. C. 1250.

Sustaining witnesses.— See 10 Encyclopædia of Pleading and Practice, 324 *et seq.*, where there is a full citation of authorities.

The jury is at liberty to disbelieve the evidence of a party defendant or of his managing agent, although uncontradicted and although the witness is not impeached. *Brumfield* v. *Hill*, 28 N. Y. St. R. 362, 8 N. Y. Supp. 143.

The impeaching witness should first be inquired of as to his knowledge. *Carlson* v. *Wintersen*, 147 N. Y. 652.

Having testified that the witness is of bad reputation as to truthfulness, the impeaching witness may be asked if he would believe him under oath. *People* v. *Mather*, 4 Wend. 229; *People* v. *Rector*, 19 Wend. 569; *People* v. *Davis*, 21 Wend. 309; *Adams* v. *Greenwich Ins. Co.*, 70 N. Y. 166.

The impeaching witness may be cross-examined as to the sources of his information. *Fulton Bank* v. *Benedict*, 1 Hall, 480; *People* v. *Mather*, 4 Wend. 232; *Tower* v. *Winters*, 7 Cow. 263.

Form of question.—As to the proper form of question for impeaching a witness, see *Schattgen* v. *Holmback*, 52 Ill. App. 54.

A proper form of question is as to "whether he is acquainted with the general reputation of the party sought to be impeached among

his neighbors and associates for truth and veracity." *Crabtree* v. *Hagenbaugh*, 25 Ill. 233; *Foulk* v. *Eckert*, 61 Ill. 318; *Dimmick* v. *Downs*, 82 Ill. 570.

Limiting number of witnesses.— A general rule limiting the number of impeaching witnesses is unreasonable. *Larned* v. *Platt*, 26 Ill. App. 278.

Attacking impeaching witness.— The character of an impeaching witness cannot generally be attacked. *Rector* v. *Rector*, 3 Gilm. 105; *Dimmick* v. *Downs*, 82 Ill. 570.

Objections to testimony.— Objections to impeaching testimony must be specific. *Smith* v. *M'Cartney*, 33 Ill. App. 178.

Reputation only provable.— General reputation as to truthfulness may be shown. *Board of Commerce* v. *O'Connor*, 137 Ind. 622.

Particular falsehoods.— Particular instances of falsehood cannot be shown. *Drew* v. *State*, 124 Ind. 9; *Robbins* v. *Spencer*, 121 Ind. 594.

Cross-examination of impeaching witnesses.—As to cross-examination of impeaching witness, see *Oliver* v. *Pate*, 43 Ind. 132; *Hutts* v. *Hutts*, 62 Ind. 240.

An impeaching witness may be cross-examined as to the source of his information. *Robbins* v. *Spencer*, 121 Ind. 594.

New Jersey.

Reputation for truth.— Evidence of a witness' reputation for truthfulness may be given as it exists at the time such witness testifies, though the witness is also the defendant in a criminal prosecution. *State* v. *Sprague*, 64 N. J. L. 419.

An impeaching witness who went to the neighborhood for the purpose of learning another's reputation is incompetent. *Reid* v. *Reid*, 17 N. J. Eq. 101.

Proof of specific instances not permissible. *Atwood* v. *Impson*, 20 N. J. Eq. 151.

General reputation in the neighborhood for truth and veracity is admissible; but without giving such reputation a witness may not

say he would not believe the person under oath. *Schenck* v. *Griffen*, 38 N. J. L. 462; *King* v. *Ruckman*, 20 N. J. Eq. 317; *Atwood* v. *Impson*, 20 N. J. Eq. 151.

Not proper to admit evidence that witness is quarrelsome. *State* v. *Mairs*, Coxe, 453.

Evidence of witness' reputation for truthfulness at a place where he lived eighteen years before properly excluded. *Shuster* v. *State*, 62 N. J. L. 521.

The impeaching witness may be asked whether he would believe the other witness on oath. *State* v. *Polhemus*, 65 N. J. L. 387; *King* v. *Ruckman*, 20 N. J. Eq. 316.

Impeaching one's own witness.— A party may discredit a subscribing witness whom the law requires him to call. *Beake* v. *Birdsall*, Coxe, 15.

Impeaching the character of one's own witness is not permitted, but other evidence may contradict him as to a fact. *Skellinger* v. *Howell*, 3 Hal. 310.

One cannot contradict his own witness by proving previous inconsistent declarations made by such witness. *Brewer* v. *Porch*, 2 Harr. 377.

A party may show that what his own witness says is untrue. *Thorp* v. *Leibrecht*, 56 N. J. Eq. 499.

Maryland.

Authorities.— It may be shown that a witness offered for a sum of money to leave the State and not to testify. *Chelton* v. *State*, 45 Md. 564.

The impeaching witness may be cross-examined as to his means of knowledge. *Sloan* v. *Edwards*, 61 Md. 89.

The veracity of a witness cannot be impeached by showing that he often got drunk and accused people of stealing from him. *Hoffman* v. *State*, 93 Md. 388.

The credibility of a witness cannot be impeached by proof that he had been *indicted* for false pretenses. *Bonaparte* v. *Thayer*, 95 Md. 548.

Impeaching witnesses may themselves be impeached in like manner as other witnesses. *Wyeth* v. *Walzl*, 43 Md. 426.

A witness who says he knows another's reputation for truth and veracity among his business associates but not among his general associates is not competent. *Bonaparte* v. *Thayer*, 95 Md. 548.

Credibility on oath.— The impeaching witness may say whether he would believe the impeached witness on oath. *Knight* v. *House*, 29 Md. 194.

The impeaching witness must be asked whether he knows one's general reputation in the neighborhood and then what it is; he may then be asked whether he would believe such person on oath. *Sloan* v. *Edwards*, 61 Md. 89.

Impeaching one's own witness.— One may not impeach the credit of his own witness. *Queen* v. *State*, 5 H. & J. 232; *Hepburn's Case*, 3 Bland, 95; *B. & O. R. Co.* v. *Woodward*, 41 Md. 268.

Sustaining witness.— An impeached witness may be sustained by evidence of his good reputation. *Vernon* v. *Tucker*, 30 Md. 456.

When a witness is impeached he may be sustained by proof that his general reputation is good by witnesses who are acquainted with it; they may say that they would believe the person on oath. *Sloan* v. *Edwards*, 61 Md. 89.

When a witness has been impeached by showing that he has corrupt motives or fabricated evidence, he may be sustained by proving former statements that he made before such motives could exist. *Baltimore, etc., Ry. Co.* v. *Knee*, 83 Md. 77. See also *Railway Co* v. *Cooney*, 87 Md. 261.

Pennsylvania.

Authorities.— *Bogle* v. *Kreitzer*, 46 Pa. 465; *Kimmel* v. *Kimmel*, 3 S. & R. 336.

A discrediting witness should be asked as to his acquaintance with the witness to be impeached, as to his knowledge of such witness' general reputation for truth and veracity in the neighborhood where he lives, as to what that reputation is, and then he may be asked whether he would believe such witness on oath. *Bogle* v. *Kreitzer*, 46 Pa. 465.

A witness may be impeached by showing that he lied as to some things in his testimony. *Stahle* v. *Spohn*, 8 S. & R. 317: *Fehley* v. *Barr*, 66 Pa. 196.

Cross-examination of the impeaching witness. *Hepworth* v. *Henshall,* 153 Pa. 592.

Time and place of reputation.— Evidence as to the credibility of a witness four years before the trial is not admissible. *Miller* v. *Miller,* 187 Pa. 572.

The reputation of a witness for veracity that is material is his reputation at the time he testifies, not his reputation at remote times. *Smith* v. *Hine,* 179 Pa. 203.

Testimony as to reputation for veracity need not be confined to the immediate neighborhood. *Chess* v. *Chess,* 1 P. & W. 32.

Belief on oath.— One cannot state that he would believe another on oath until he says he knows such other's good general reputation for truth and veracity. *Lyman* v. *Philadelphia,* 56 Pa. 488.

General reputation not specific instances.— The impeaching testimony must be as to general character, not as to particular acts or as to what specific individuals say. *Wike* v. *Lightner,* 11 S. & R. 198; *Ramsay* v. *Johnson,* 3 P. & W. 293.

Character for care, skill, or truth cannot be established by proof of specific acts. *Frazier* v. *Railroad Co.,* 38 Pa. 104.

Character for drunkenness is not admissible. *Brindle* v. *McIlraine,* 10 S. & R. 282. Nor is character for chastity. *Gilchrist* v. *McKee,* 4 Watts, 380.

Party's own witness.— One may not impeach the credibility of his own witness; but he may put in evidence contradicting him. *Stearns* v. *Bank,* 53 Pa. 490; *Ayres* v. *Wattson,* 57 Pa. 360; *Stockton* v. *Demuth,* 7 Watts, 39.

Necessary and hostile witnesses.— A party may discredit his own witness when he is hostile and the party is compelled to call him to account for the nonintroduction of a contract in the hands of the adverse party. *Morris* v. *Guffey,* 188 Pa. 534.

When a party is obliged to call an attesting witness to a deed, he may impeach the credibility of such witness. *Hart* v. *Burns,* 4 Clark, 337.

Sustaining witnesses.— A witness may be sustained by evidence of his good reputation in a county where he formerly resided. *Morss* v. *Palmer,* 15 Pa. 51.

Evidence of good character of a witness is not admissible unless impeaching testimony has been given. *Braddee* v. *Brownfield,* 9 Watts, 124; *Wertz* v. *May,* 21 Pa. 274.

Statements made by a witness at a former time are not admissible to sustain him when impeached. *Craig* v. *Craig*, 5 Rawle, 91: *Com.* v. *Carey*, 2 Brewst. 404; *Crooks* v. *Bunn*, 136 Pa. 368. Except to show that the testimony was not given because of some recent motive. *Clever* v. *Hilberry*, 116 Pa. 431.

If a witness is impeached he may be sustained by showing that he testified the same in a former trial. *Foster* v. *Shaw*, 7 S. & R. 156; *Henderson* v. *Jones*, 10 S. & R. 322; *Good* v. *Good*, 7 Watts, 195; *Bricker* v. *Lightner*, 40 Pa. 199.

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.[35] The woman may in such a case be asked whether she has had connection with other men, but her answer cannot be contradicted.[36] She may also be asked whether she has had connection on other occasions with the prisoner, and if she denies it she may be contradicted.[37]

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35 *R.* v. *Clarke*, 1817, 2 Star. 241.

36 *R.* v. *Holmes*, 1871, 1 C. C. R. 334.

37 *R.* v. *Martin*, 1834, 6 C. & P. 562, and remarks in *R.* v. *Holmes*, p. 337, per Kelly, C.B. See also *R.* v. *Cockroft*, 1870, 11 Cox 410; 41 L. J., M. C., 12, and *R.* v. *Riley*, 1887, 18 Q. B. D. 481.

AMERICAN NOTE.

General.

Authorities.— 1 Greenleaf on evidence (15th ed.), sec. 458, *n.;* vol. 3, sec. 214.

The bad character of woman for chastity may be shown. *Com.* v. *McDonald*, 110 Mass. 405; *O'Blenis* v. *State*, 47 N. J. L. 279; *Bedgood* v. *State*, 115 Ind. 275.

Particular acts of unchastity with others cannot be proved. *Gore* v. *Curtes*, 81 Me. 403; *Com.* v. *Harris*, 131 Mass. 336; *Com.* v. *Regan*, 105 Mass. 593; *People* v. *McLean*, 71 Mich. 307; *Shartzer* v. *State*, 63 Md. 149; *Rice* v. *State*, 35 Fla. 236; *Richie* v. *State*, 58 Ind. 355. *Contra*, *State* v. *Hollenbeck*, 67 Vt. 34; *Hoffman* v. *Kemerer*, 44 Pa. St. 453; *Doyle* v. *Jessup*, 29 Ill. 460; *Smith* v. *Yaryan*, 69 Ind. 445; *People* v. *Benson*, 6 Cal. 221; *State* v. *Forstner*, 43 N. H. 89; *State* v. *Knapp*, 45 N. H. 148.

When woman is under age of legal consent, such evidence in rape cases has been held incompetent. *People* v. *Johnson*, 106 Cal. 289; *People* v. *Abbott*, 97 Mich. 484; *State* v. *Duffey*, 128 Mo. 549.

As to indecent assault, see *Mitchell* v. *Work*, 13 R. I. 645; *Watrey* v. *Ferber*, 18 Wis. 525.

In rape cases the woman's bad character for chastity may be shown. *Woods* v. *People*, 55 N. Y. 515; *Conkey* v. *People*, 1 Abb. Dec. 418. And so in actions for indecent assault. *Gulerette* v. *McKinley*, 27 Hun, 320. *Compare Young* v. *Johnson*, 123 N. Y. 226.

General reputation, not particular acts.—The character of the prosecutrix cannot be impeached by proof of particular acts, but only by general reputation. *McCombs* v. *State*, 8 Ohio St. 643.

Particular acts of unchastity with others cannot be proved. *McCombs* v. *State*, 8 Ohio St. 643.

Particular acts of unchastity with others cannot be proved. *Contra*, *Doyle* v. *Jessup*, 29 Ill. 460.

The bad character of the woman for chastity may be shown. *Bedgood* v. *State*, 115 Ind. 275.

Particular acts of unchastity with others cannot be proved. *Richie* v. *State*, 58 Ind. 355.

Particular acts of unchastity with others cannot be proved. *People* v. *McLean*, 71 Mich. 307.

New Jersey.

Authority for text.— *O'Blenis* v. *State,* 47 N. J. L. 279.

In a prosecution for having carnal knowledge of a woman under the age of consent, the defendant may prove his "reputation for morality, virtue, and honesty in living." *State* v. *Snover,* 63 N. J. L. 383.

Reputation for chastity may be proved by witnesses who move in the same circle and have never heard the woman's chastity questioned. *State* v. *Brown,* 64 N. J. L. 414; *Zabriskie* v. *State,* 43 N. J. L. 644.

Maryland.

Evidence that the prosecutrix in rape had had intercourse with another person is not admissible, but her general character for chastity may be proved. *Shartzer* v. *State,* 63 Md. 149.

One who is indicted as the keeper of a bawdy-house for harboring the prosecutrix when brought there by a man may show that the prosecutrix is a lewd girl and had previously been the inmate of such a house with her mother's knowledge. But evidence of her "general bad character" is not admissible. *Brown* v. *State,* 72 Md. 468.

Pennsylvania.

In an action for seduction particular acts of unchastity with others cannot be proved. *Hoffman* v. *Kemerer,* 44 Pa. 453.

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, and had denied upon cross-examination the truth of the matter suggested.[38]

AMERICAN NOTE.

Authorities.— 1 Greenleaf on Evidence (15th ed.), sec. 163; *Com. v. Cooper,* 5 Allen (Mass.), 495; *Carver* v. *State,* 164 U. S. 677; *Battle* v. *State,* 74 Ga. 101; *People* v. *Chin Mook Low,* 51 Cal. 597; *Lester* v. *State,* 37 Fla. 382; *Keran* v. *Trice's Excrs.,* 75 Va. 690; *Richards* v. *State,* 82 Wis. 172; *Dabney* v. *Mitchell,* 66 Ala. 495.

New Jersey.

Authority.— Credit of a dying declaration may be attacked by proof of the conduct of the declarant. *Donnelly* v. *State,* 26 N. J. L. 465.

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.[39]

An expert may refresh his memory by reference to professional treatises.[40]

[38] *R.* v. *Drummond,* 1784, 1 Lea. 337; *R.* v. *Pike,* 1829, 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.

[39] 2 Ph. Ev. 480, &c.; Taylor, ss. 1406–1413; R. N. P. 175–6; Phipson, 471–474.

[40] *Sussex Peerage Case,* 1844, 11 C. & F. 114–117.

AMERICAN NOTE.

General.

Authorities.— 1 Greenleaf on Evidence (15th ed.), secs. 436–438; 8 Encyclopædia of Pleading and Practice, p. 135; *Nat. Bank of Dubois* v. *Nat. Bank of Williamsport,* 114 Pa. St. 1; *People* v. *Cotta,* 49 Cal. 166; *Bonnet* v. *Glattfeldt,* 120 Ill. 166; *Colloway* v. *Varner,* 77 Ala. 541; *Mason* v. *Phelps,* 48 Mich. 126; *Healy* v. *Visalia R. Co.,* 101 Cal. 585; *Downer* v. *Rowell,* 24 Vt. 343; *Kelsea* v. *Fletcher,* 48 N. H. 282; *Davis* v. *Field,* 56 Vt. 426; *Chamberlain* v. *Sands,* 27 Me. 458; *Pinney* v. *Andrus,* 41 Vt. 631; *Chamberlain* v. *Ossipee,* 60 N. H. 212; *Welcome* v. *Batchelder,* 23 Me. 85; *Morrison* v. *Chapin,* 97 Mass. 72; *Coffin* v. *Vincent,* 12 Cush. (Mass.) 98; *Fletcher* v. *Powers,* 131 Mass. 333; *Alvord* v. *Collin,* 20 Pick. (Mass.) 418; *Crittenden* v. *Rogers,* 8 Gray (Mass.), 452; *Parsons* v. *Manufacturers' Ins. Co.,* 16 Gray (Mass.), 463; *Com.* v. *Jeffs,* 132 Mass. 5; *Com.* v. *Ford,* 130 Mass. 64; *Com.* v. *Clancy,* 154 Mass. 128; *Com.* v. *Watson,* 154 Mass. 135; *Dugan* v. *Mahoney,* 11 Allen (Mass.), 572; *Card* v. *Foot,* 56 Conn. 369; *Erie* v. *Miller,* 52 Conn. 446; *Norwalk* v. *Ireland,* 68 Conn. 13.

A writing, under this article, is not evidence. *Field* v. *Thompson,* 119 Mass. 151.

A witness may be required to look at a memorandum. *Chapin* v. *Lapham,* 20 Pick. (Mass.) 467.

The witness need have no present recollection. *State* v. *Miller,* 53 Ia. 209; *Hill* v. *State,* 17 Wis. 675; *Robinson* v. *Mulder,* 81 Mich. 75; *Paige* v. *Carter,* 64 Cal. 489; *Culver* v. *Scott Lumber Co.,* 53 Minn. 360; *Dugan* v. *Mahoney,* 11 Allen (Mass.), 572; *Coffin* v. *Vincent,* 12 Cush. (Mass.) 98; *Morrison* v. *Chapin,* 97 Mass. 72; *Com.* v. *Jeffs,* 132 Mass. 5; *Costello* v. *Crowell,* 133 Mass. 352.

The paper need not have been written by the witness. *Com.* v. *Ford,* 130 Mass. 64; *Chapin* v. *Lapham,* 20 Pick. (Mass.) 467; *Coffin* v. *Vincent,* 12 Cush. (Mass.) 98; *Adae* v. *Zangs,* 41 Ia. 536; *Billingslea* v. *Smith,* 77 N. Y. 504; *Brown* v. *Galesburg Brick Co.,* 132 Ill. 640; *King* v. *Faber,* 51 Pa. St. 387. Compare *Moots* v. *State,* 21 O. St. 653.

A plaintiff had testified that she had earned the money invested in certain bonds in large part in her business as a milliner and that she had a high class of customers. She was asked the names of her

customers, and in answering was allowed to refresh her recollection by referring to a list of them made by her son upon her dictation. Held, to be no error. *Card* v. *Foot*, 56 Conn. 374.

A witness may refer to memoranda made by himself or others for the purpose of refreshing his recollection, and it is of no consequence whether the memoranda thus referred to are originals or copies: they are solely for the use of the witness and are not evidence to go to the jury. *Erie Preserving Co.* v. *Miller*, 52 Conn. 446.

The writing must have been made, if by the witness at the time the transaction was fresh in mind. *Russell* v. *Hudson River R. R. Co.*, 17 N. Y. 134.

A motion to strike out the testimony of a witness, because he testified from a copy of a memorandum, must be made as soon as the fact is discovered. *Pitney* v. *Glens Falls Ins. Co.*, 61 Barb. 335, 65 N. Y. 6.

The witness need have no present recollection. *Moots* v. *State*, 21 Ohio St. 653.

As to whether the paper read to refresh recollection need to have been written by the witness, see *Moots* v. *State*, 21 Ohio St. 653.

A writing made subsequently to a transaction and when by lapse of time the facts cannot be considered as fresh in witness' mind cannot be introduced to refresh his recollection. *Jones* v. *State*, 54 Ohio St. 1.

Nor if its accuracy is justly questioned. *Lovell* v. *Wentworth*, 39 Ohio St. 614.

Refreshing memory.— A witness may refresh his recollection from a memorandum. *Dunlap* v. *Berry*, 4 Scam. 327; *C. & W. Coal Co.* v. *Liddell*, 69 Ill. 639; *C. & A. Ry. Co.* v. *Adler*, 56 Ill. 344; *C. & N. W. Ry. Co.* v. *McCahill*, 56 Ill. 28; *Seaverns* v. *Tribby*, 48 Ill. 195; *Elston* v. *Kennicott*, 46 Ill. 187; *Bonnett* v. *Glattfeldt*, 120 Ill. 166; *Flynn* v. *Gardner*, 3 Brad. 253.

The paper need not have been written by the witness. *Brown* v. *Galesburg Brick Co.*, 132 Ill. 648.

A witness may refer to a copy of an account or writing. *Bush* v. *Stanley*, 122 Ill. 406; *Hayden* v. *Hoxie*, 27 Ill. App. 533; *Massey* v. *Farmers' Nat. Bank*, 113 Ill. 334, 338; *Bonnett* v. *Glattfeldt*, 120 Ill. 166, 172.

A paper may be shown to a witness on rebuttal to refresh his memory. *Erie P. D.* v. *Stanley*, 22 Ill. App. 459.

A street car conductor may refresh his recollection by referring to

a trip sheet. *West Chicago St. Ry. Co.* v. *Kromshinsky,* 56 N. E. 1110, affirming 86 Ill. App. 17.

An invoice or a copy of a writing may be used by the witness to refresh his recollection. *Bredt* v. *Simpson, Hall, Miller & Co.,* 95 Ill. App. 333.

The recollection of a witness may be refreshed by showing him a published article. *Clifford* v. *Drake,* 110 Ill. 135.

A witness may refresh his recollection by referring to a memorandum. *Clark* v. *State,* 4 Ind. 156; *Johnson* v. *Culver,* 116 Ind. 278; *Prather* v. *Pritchard,* 26 Ind. 65.

Or to his former testimony. *Harvey* v. *State,* 40 Ind. 516; *Stanley* v. *Stanley,* 112 Ind. 143; *Ehrisman* v. *Scott,* 5 Ind. 596.

Or to shorthand notes. *Miller* v. *Prindle,* 142 Ind. 632.

A stenographer may read notes, testified by her to be correct, of evidence taken before the grand jury. *Keith* v. *State,* 157 Ind. 376, 61 N. E. 716.

The error in allowing entries to be read to the jury when witness has personally testified to having refreshed his memory from them is harmless. *Wilbur* v. *Scherer,* 13 Ind. App. 428.

As to refreshing the recollection of nonexpert witnesses on the subject of handwriting, by looking at other specimens, see *McDonald* v. *McDonald,* 142 Ind. 55.

Witness may refresh his memory from memoranda. *Johnston* v. *Farmers' Fire Ins. Co.,* 106 Mich. 96; *Ford* v. *Savage,* 111 Mich. 144; *Crane Lumber Co.* v. *Bellows,* 116 Mich. 304.

A witness need have no present recollection. *Robinson* v. *Mulder,* 81 Mich. 75.

A witness may refresh his recollection by a paper written by his agent upon which he has acted as being authentic. *Watkins* v. *Wallace,* 19 Mich. 57.

In order to refresh recollection, the attention of the witness may be called to his evidence at a former trial. *Beaubien* v. *Cicotte,* 12 Mich. 459. Compare *Bashford* v. *People,* 24 Mich. 244.

One may refresh his memory from a memorandum made by himself. *Robinson* v. *Mulder,* 81 Mich. 75; *Caldwell* v. *Bowen,* 80 Mich. 382.

It is within the discretion of the trial court to allow leading questions for the purpose of refreshing the recollection of the witness. *Dillon* v. *Pinch,* 110 Mich. 149.

New Jersey.

Memoranda to refresh memory.— *Railroad Co.* v. *May*, 48 N. J. L. 401.

Entries in diary may be used to refresh recollection, but are not themselves admissible. *Lindenthal* v. *Hatch*, 61 N. J. L. 29.

Witness may read from a memorandum which he is using to refresh his memory. *Meyers* v. *Weger*, 62 N. J. L. 432.

A witness may refer to memoranda before taking the stand in order to refresh his recollection, and need not produce the memoranda themselves. *Patton* v. *Freeman*, Coxe, 113.

Maryland.

Authorities.— *Evans* v. *Murphy*, 87 Md. 498; *Spiker* v. *Nydegger*, 30 Md. 315.

What memoranda may be used.— The memoranda need not be original entries, provided the witness has independent recollection of the facts. *Bullock* v. *Hunter*, 44 Md. 416.

In testifying as to the price of articles the witness may refer to authorized price lists. *Morris* v. *Columbian, etc., Co.*, 76 Md. 354.

When a witness swears that an occurrence was about the same date as a certain publication, he may use the publication to refresh his memory as to the date. *Bull* v. *Schuberth*, 2 Md. 38.

A book of original entry, not admissible itself because made by a party to the suit, may be used to refresh recollection. *Stallings* v. *Gottschalk*, 77 Md. 429.

A notary public may use his record to refresh his memory. *Sasscar* v. *Bank*, 4 Md. 409.

Independent recollection.— A witness may testify from a memorandum, even though he has no independent recollection of the facts, if he knows it was made by him and states the truth. *Martin* v. *Good*, 14 Md. 399; *Owens* v. *State*, 67 Md. 307; *Billingslea* v. *Smith*, 77 Md. 504.

A witness may not testify from a memorandum when all his knowledge on the subject is derived from the memorandum. *Lewis* v. *Kramer*, 3 Md. 265.

An account may be used when the witness has an independent recollection of the items, though he could not enumerate them without assistance. *Bullock* v. *Hunter*, 44 Md. 416.

A witness who is testifying as to genuineness of handwriting

may examine a genuine writing to refresh his recollection. *Smith v. Walton*, 8 Gill, 77.

By whom the memorandum must be made.— The memorandum need not have been made by the witness, if after seeing it he has an independent recollection. *Billingslea v. Smith*, 77 Md. 504.

The memorandum must have been written by the witness himself at about the time of the transaction set forth in it. *Insurance Co. v. Evans*, 15 Md. 54.

One may not use copies of original entries when it does not appear when or by whom they were made. *Ward v. Leitch*, 30 Md. 326.

Time of making memorandum.— The memorandum must have been made about the time of the transaction and the witness must have then seen it and recognized it as stating the truth. *Green v. Caulk*, 16 Md. 556.

Memoranda made long after the event are not admissible for refreshing recollection. *Swartz v. Chickering*, 58 Md. 290.

Pennsylvania.

One may not use notes taken by another person in order to refresh his memory. *Withers v. Atkinson*, 1 Watts, 236.

A typewritten copy of a memorandum permitted to be used to refresh memory. *Edwards v. Gimbel*, 202 Pa. 30.

Character of the writing is immaterial if the witness can testify from his independent recollection after it is refreshed. *Bank of Dubois v. Bank of Williamsport*, 114 Pa. 1.

A witness may testify as to a date after examining a contemporaneous memorandum, even though he has no independent recollection. *Dodge v. Bache*, 57 Pa. 421; *Henry v. Martin*, 32 Leg. Int. 100.

Dates, numerous details, known at the time by the witness to be correct. *King v. Faber*, 51 Pa. 387.

Other accounts and papers may be used to refresh recollection as to the items of a voluminous account. *Insurance Co. v. Hanlon*, 31 Leg. Int. 372.

A book kept by the witness which he knows to be correct may be used by him in testifying to the number of days on which men were employed. *Heart v. Hammel*, 3 Pa. 414.

Witness may refresh his memory as to handwriting by inspecting a writing known to be genuine. *McNair v. Com.*, 26 Pa. 388.

ARTICLE 137.

RIGHT OF ADVERSE PARTY AS TO WRITING USED TO REFRESH MEMORY.

Any writing referred to under Article 136 must be produced and shown to the adverse party if he requires it; and such party may, if he pleases, cross-examine the witness thereupon.[41]

AMERICAN NOTE.

General.

Authorities.— 1 Greenleaf on Evidence (15th ed.), sec. 437 *et seq.*; 8 Encyclopædia of Pleading and Practice, p. 142; *State* v. *Bacon*, 41 Vt. 526, 98 Am. Dec. 616; *Com.* v. *Haley*, 13 Allen (Mass.), 587; *Com.* v. *Burke*, 114 Mass. 261; *Dugan* v. *Mahoney*, 11 Allen (Mass.), 573; *Chute* v. *State*, 19 Minn. 271; *Duncan* v. *Seeley*, 34 Mich. 369; *Adoe* v. *Zangs*, 41 Ia. 536; *Jones* v. *State*, 54 Ohio St. 1. See *Peck* v. *Lake*, 3 Lans. 136; *People* v. *McLaughlin*, 150 N. Y. 365, 392.

The adverse party has a right to see at once a memorandum used for the purpose of refreshing recollection. *Duncan* v. *Seeley*, 34 Mich. 369; *People* v. *Lyons*, 49 Mich. 78; *Cortland Mfg. Co.* v. *Platt*, 83 Mich. 419, 47 N. W. 330.

Maryland.

As to the writing itself as evidence. *Owens* v. *State*, 67 Md. 307.

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 pro-

[41] See Cases in R. N. P. 176.

duction, 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.[42]

AMERICAN NOTE.

General.

Authorities.— 1 Greenleaf on Evidence (15th ed.), sec. 563; *Merrill* v. *Merrill*, 67 Me. 70; *Austin* v. *Thompson*, 45 N. H. 113, 116; *Penobscot Boom Corp.* v. *Lawson*, 16 Me. 224; *Blake* v. *Russ*, 33 Me. 360; *Ellison* v. *Cruser*, 40 N. J. L. 444; *Cushman* v. *Coleman*, 92 Ga. 772; *Edison Light Co.* v. *U. S. Lighting Co.*, 45 Fed. Rep. 55; *Clark* v. *Fletcher*, 1 Allen (Mass.), 53, 57; *Long* v. *Drew*, 114 Mass. 77. *Contra* to text. *Laufer* v. *Bridgeport Traction Co.*, 68 Conn. 485; *Austin* v. *Thompson*, 45 N. H. 113; *Smith* v. *Rentz*, 131 N. Y. 169.

The mere production does not make the documents evidence. *Merrill* v. *Merrill*, 67 Me. 70.

See *Smith* v. *Rentz*, 131 N. Y. 169; *Rumsey* v. *Lowell*, Anth. N. P. 26.

Though a document be expressly put in evidence for a particular purpose, the opposite party may use it for any purpose pertinent to his case. *Kelly* v. *Dutch Church*, 2 Hill, 105; *Winants* v. *Sherman*, 3 Hill, 74.

A party having given evidence to the jury is not at liberty to withdraw it; it becomes the common property of both parties. *Decker* v. *Bryant*, 7 Barb. 182.

The mere marking of a paper does not make it evidence. *Casteel* v. *Millison*, 41 Ill. App. 61, 65.

New Jersey.

Sustaining text.— *Ellison* v. *Cruser*, 40 N. J. L. 444.

This rule does not apply to a second trial of the case unless there has been a new notice to produce. *Ellison* v. *Cruser*, 40 N. J. L. 444.

Maryland.

Papers produced on notice if inspected by the party calling them become admissible for both sides. *Morrison* v. *Whiteside*, 17 Md. 452.

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[42] *Wharam* v. *Routledge*, 1805, 5 Esp. 235; *Calvert* v. *Flower*, 1836, 7 C. & P. 386.

Pennsylvania.

This rule applies only to such papers as were actually called for in the notice. *Heaffer* v. *Life Ins. Co.*, 101 Pa. 178.

Defendant held to have no right to introduce a paper in evidence merely because the plaintiff called upon defendant to produce it and then failed to introduce it. *Summers* v. *M'Kim*, 12 S. & R. 405.

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.[43]

AMERICAN NOTE.

Authorities.— *Bogart* v. *Brown*, 5 Pick. (Mass.) 18; *Doon* v. *Donaher*, 113 Mass. 151. See also *McGuinness* v. *School District*, 39 Minn. 499; *Powell* v. *Pearlstine*, 43 S. C. 403; *Mather* v. *Eureka Co.*, 118 N. Y. 629.

New Jersey.

Authority.— A receipt not produced in accordance with an order of court cannot afterward be given in evidence. *Fleming* v. *Lawless*, 56 N. J. Eq. 138.

Maryland.

A party professing his inability to produce a document cannot at a subsequent trial of the same cause require a notice to produce as a condition to the introduction of secondary evidence. *Union Banking Co.* v. *Gittings*, 45 Md. 181.

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[43] *Doe* v. *Hodgson*, 1840, 12 A. & E. 135; but see remarks in 2 Ph. Ev. 270.

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 ;

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1 *R.* v. *Stephenson,* 1862, L. & C. 165.

2 *R.* v. *Scaife,* 1851, 17 Q. B. 238.

3 Analogy of *R.* v. *Scaife.*

or [perhaps] that it was not read over to or signed by the witness].[4]

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.[5]

AMERICAN NOTE.

General.

Depositions.— 6 Encyclopædia of Pleading and Practice, p. 471; *State* v. *George*, 60 Minn. 503; *State* v. *Elliott*, 90 Mo. 350; *People* v. *Ward*, 105 Cal. 652; *Brown* v. *Com.*, 73 Pa. St. 321; *Pittman* v. *State*, 92 Ga. 480; *People* v. *Dowdigan*, 67 Mich. 95; *State* v. *Fitzgerald*, 63 Ia. 268; *Lucas* v. *State*, 96 Ala. 51; *Doon* v. *Donaher*, 113 Mass. 151; *Bogart* v. *Brown*, 5 Pick. (Mass.) 18; *Gage* v. *Campbell*, 131 Mass. 566; *Kingman* v. *Tirrell*, 11 Allen (Mass.), 97.

Foreign depositions may be translated. *Christman* v. *Ray*, 42 Ill. App. 111.

A deposition may be admitted in a subsequent suit. *Pratt* v. *Kendig*, 128 Ill. 293, 303.

A copy of a lost deposition may be read. *Gage* v. *Eddy*, 167 Ill. 102.

The court should not charge the jury that testimony in open court is entitled to more credit than evidence by way of depositions. *Millner* v. *Eglin*, 64 Ind. 197; *Voss* v. *Prier*, 71 Ind. 128.

As to agreements with reference to the use of depositions in former trials, see *Gemmill* v. *Brown*, 25 Ind. App. 6.

The adverse party may be examined out of court. Sec. 517 *et seq.*, Rev. Stat., 1894; *Wabash, etc., Ry. Co.* v. *Morgan*, 152 Ind. 430; *Working* v. *Garn*, 148 Ind. 546; *Tullis* v. *Stafford*, 134 Ind. 258; *Gilbert* v. *Swain*, 9 Ind. App. 88; *Marvin* v. *Sager*, 145 Ind. 61; *Grant* v. *Davis*, 5 Ind. App. 116.

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[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 brackets, also by common practice. Nothing can be more rambling or ill-arranged than the language of the section itself. See 2 Ph. Ev. 87–100: Taylor, 7th Ed., s. 480.

[5] *R.* v. *Tait*, 1861, 2 F. & F. 553.

A deposition on a preliminary examination may be offered. *People v. Prague*, 72 Mich. 178. See p. 339, acts of 1895.

New Jersey.

Depositions.— G. S. 1895, "Evidence," 25–46, 63, 64, 66, 67; Laws of 1902, chap. 135.

Maryland.

Depositions.— P. G. L. 1888, art. 35, secs. 15–34.

Pennsylvania.

Depositions.— Pepper & Lewis' Digest of Laws, "Evidence," secs. 1–5; "Justices of the Peace," secs. 86–96; "Witnesses," sec. 19.

ARTICLE 141.

DEPOSITIONS UNDER 30 & 31 VICT. C. 35, S. 6.

A deposition taken for the perpetuation of testimony in criminal cases, 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[6] 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 in writing[7] of the intention to take such deposition was served upon the person (whether prosecutor or accused) against whom it was proposed to be read, and

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6 *Sic.*

7 *R.* v. *Shurmer*, 1886, 17 Q. B. D. 323.

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.[8]

ARTICLE 141A.

DEPOSITIONS UNDER THE FOREIGN JURISDICTION ACT, 1890.

Where a person is charged with an offence cognizable by a British Court in a foreign country and is liable to be sent for trial to any British possession, he may, before being so sent for trial, tender for examination to the Court in the foreign country any competent witness whose evidence he deems material for his defence, and whom he alleges himself unable to produce at the trial in the British possession;

and the Court in the foreign country shall proceed in the examination and cross-examination of the witness as though he had been tendered at a trial before that Court, and shall cause the evidence so taken to be reduced into writing, and shall transmit to the Criminal Court of the British possession a copy thereof certified as correct under the seal of the Court before which it was taken, or the signature of the judge of that Court;

and thereupon the Court of the British possession before which the trial takes place shall allow so much of the evi-

[8] 30 & 31 Vict. c. 35, s. 36. 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. I have not referred to depositions taken before a coroner (see 50 & 51 Vict. c. 71, 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.

dence so taken as would have been admissible according to the law and practice of that Court, had the witness been produced and examined at the trial, to be read and received as legal evidence at the trial.[9]

ARTICLE 141B.

DEPOSITIONS OF CHILDREN.

Where on the trial of any person on indictment for any offence of cruelty within the meaning of the Prevention of Cruelty to Children Act, 1894,[10] or of any of the offences mentioned in the Schedule to the Act,[11] the Court is satisfied by the evidence of a registered medical practitioner that the attendance before the Court of any child in respect of whom the offence is alleged to have been committed would involve serious danger to its life or health, any deposition of the child taken under the

[9] 53 & 54 Vict. c. 37, s. 6.

[10] The definition of "cruelty" is contained in sect. 1 of the Act, which is as follows:—"If any person over the age of sixteen years who has the custody, charge, or care of any child under the age of sixteen years, wilfully assaults, ill-treats, neglects, abandons, or exposes such child, or causes or procures such child to be assaulted, ill-treated, neglected, abandoned, or exposed in a manner likely to cause such child unnecessary suffering, or injury to its health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement)," &c., &c.

[11] *i.e.* offences mentioned in the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), sect. 27 (exposing a child); sect. 55 (abducting a girl under sixteen); sect. 56 (stealing a child); sect. 43 (aggravated assault, if the child is under sixteen); sect. 52 (indecent assault on a female, if she is under sixteen); and any offence under the Children's Dangerous Performances Act, 1879 (42 & 43 Vict. c. 34); and any other offence involving bodily injury to a child under the age of sixteen years.

Indictable Offences Act, 1848, and mentioned in Article 140, or under this Act, as hereinafter mentioned, is admissible in evidence either for or against the accused person without further proof thereof—

(*a*) if it purports to be signed by the justice by or before whom it purports to be taken; and

(*b*) if it is proved that reasonable notice of the intention to take the deposition has been served upon the person against whom it is proposed to use the same as evidence, and that that person or his counsel or solicitor had, or might have had if he had chosen to be present, an opportunity of cross-examining the child making the deposition.[12]

Where a justice is satisfied by the evidence of a registered medical practitioner that the attendance before a Court of any child in respect of whom an offence of cruelty,[13] or any of the offences mentioned in the Schedule to the Act,[14] is alleged to have been committed, would involve serious danger to its life or health, the justice may take in writing the deposition of such child on oath, and shall thereupon subscribe the same, and add thereto a statement of his reason for taking the same, and of the day when and place where the same was taken, and of the names of the persons (if any) present at the taking thereof. The justice taking any such deposition shall transmit the same with his statement —(*a*) if the deposition relates to an offence for which any accused person is already committed for trial, to the proper

[12] 57 & 58 Vict. c. 41, s. 14. [13] See Note 11, p. 490.
[14] See Note 10, p. 489.

officers of the Court, for trial at which the accused person has been committed; and (*b*) in any other case to the clerk of the peace of the county or borough in which the deposition has been taken.[15]

The deposition of the child referred to in this article need not be taken on oath in the case mentioned in Article 123A.

ARTICLE 142.

DEPOSITIONS UNDER MERCHANT SHIPPING ACT, 1894.

[16] 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 authorised by law or by consent of parties to receive evidence, the testimony of any witness is required in relation to the subject-matter of that 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.

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[15] 57 & 58 Vict. c. 41, s. 13.

[16] *Id.* c. 60, s. 691. There are some other cases in which depositions are admissible by statute, but they hardly belong to the Law of Evidence.

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 that British possession.

4. If the proceeding is criminal the deposition is not admissible unless it was made in the presence of the person accused.

A deposition so made must be authenticated by the signature of the judge, magistrate, or consular officer before whom it was made, and he must certify (if the fact is so) that the accused was present at the taking thereof.

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; and 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.

AMERICAN NOTE.

General.

Authority.— 2 Encyclopædia of Pleading and Practice, p. 1.

First paragraph of text. *Hornbackle* v. *Stafford*, 111 U. S. 389; *Gilbert* v. *Moline Co.*, 119 U. S. 491; *Bulkley* v. *Devine*, 127 Ill. 406; *Girard Ins. Co.* v. *Warr*, 46 Pa. St. 504; *Ham* v. *Wis., etc., R. Co.*, 61 Ia. 716; *Thorndike* v. *Boston*, 1 Metc. (Mass.) 242; *Richardson* v. *Warren*, 6 Allen (Mass.), 552; *Flood* v. *Clemence*, 106 Mass. 299; *Barry* v. *Bennett*, 7 Metc. (Mass.) 354; *Holbrook* v. *Jackson*, 7 Cush. (Mass.) 136; *Toapley* v. *Forbes*, 2 Allen (Mass.), 20; *McAvoy* v.

[1] S. C. R., Order XXXIX., 6.

Wright, 137 Mass. 207; *State* v. *Alford*, 31 Conn. 40; *Morehouse* v. *Remson*, 59 Conn. 401; *State* v. *Kinkead*, 57 Conn. 157; *People's Sav. Bank* v. *Norwalk*, 56 Conn. 558; *Bradley* v. *Bailey*, 56 Conn. 379; *Main's Appeal*, 73 Conn. 638, 48 Atl. 966.

The fact that evidence was erroneously admitted or rejected will not insure the granting of a new trial in a criminal case where the defendant manifestly could not have been injured thereby. *Ryan* v. *State*, 83 Atl. (N. J.) 672; *Wallace* v. *People*, 159 Ill. 446; *People* v. *Marshall*, 112 Cal. 442.

An error in the admission of incompetent evidence, in a court of record, is cured by a subsequent direction to the jury to disregard it. *People* v. *Parish*, 4 Den. 153.

Striking out of competent evidence is no ground for reversing a judgment, where testimony to the same general affect is subsequently admitted. *Miller* v. *Fort Lee Park & Steamboat Co.*, 73 Hun, 150; affirmed in 149 N. Y. 598. (No opinion.)

When improper evidence has been erroneously received, a direction to disregard it is equivalent to striking it out. *Mattes* v. *Frankel*, 65 Hun, 203, 47 N. Y. St. R. 507.

Harmless error disregarded.—*Mims* v. *State*, 16 Ohio St. 221, 233.

A reversal is not necessarily required by irrelevant evidence, but if there is excitement and the accused was prejudiced a reversal would be granted. *Sharkey* v. *State*, 4 Ohio Circ. Ct. 101.

Waiver.— Objection to evidence must be made at the trial; otherwise the point is waived. *St. L., A. & T. H. R. R. Co.* v. *Eggmann*, 161 Ill. 155.

Curing error.— Errors in the admission of evidence may be cured by subsequent exclusion. *Taylor* v. *Cox*, 153 Ill. 221; *C. & G. T. Ry. Co.* v. *Gaeinowski*, 155 Ill. 189. Compare *Norris* v. *Warner*, 59 Ill. App. 300.

Errors in ruling in evidence may be cured in the charge. *McNamara* v. *Godair*, 161 Ill. 228.

Error in admitting evidence is not cured by a direction in a charge to disregard it. *Chicago* v. *W. & L. O. & L. Mfg. Co.*, 14 Ill. 219; *Peck* v. *Cooper*, 13 Brad. 27.

Presumed to be prejudicial.— Irrelevant evidence is presumed to be injurious. *Johnson* v. *Anderson*, 143 Ind. 493; *Ohio, etc., Ry. Co.* v. *Stein*, 133 Ind. 243, 246.

It is presumed that evidence improperly admitted influenced the trial, unless the contrary appears. *Baker* v. *Dessauer*, 49 Ind. 28; *Barnett* v. *Leonard*, 66 Ind. 422; *Thompson* v. *Wilson*, 34 Ind. 94.

Effect of evidence.—An erroneous admission of testimony is cured by the charge of the judge to disregard it as immaterial. *Wreggett* v. *Barnett*, 99 Mich. 477.

The erroneous exclusion of evidence is cured if such question is subsequently answered or the answers to the excluded questions are drawn from the witness, or when counsel have opportunity to inquire into the subject. *Mason* v. *Patrick*, 100 Mich. 577; *Rice* v. *Rankans*, 101 Mich. 378; *Burt* v. *Long*, 106 Mich. 210.

Error is not cured in a criminal case where evidence which has an injurious tendency against the defendant when received under an objection is stricken out. *People* v. *Fowler*, 104 Mich. 449.

New Jersey.

Rule in criminal cases.—*Genz* v. *State*, 59 N. J. L. 488; *Ryan* v. *State*, 83 Atl. 672.

The admission of illegal testimony is no ground for reversal in the absence of injury. *Hunter* v. *State*, 40 N. J. L. 538.

Error cured by instructions.—Where evidence is improperly received, the error is cured if the judge subsequently excludes it in such manner that the accused could not be injuriously affected. *Bullock* v. *State*, 65 N. J. L. 557; *State* v. *Sprague*, 64 N. J. L. 419.

Civil cases.—Not reversible error when the exclusion of evidence works no injury. *Freeman* v. *Bartlett*, 47 N. J. L. 33; *Nordsick* v. *Baxter*, 64 N. J. L. 530.

The error of admitting oral evidence of a writing without producing the writing itself is cured if the writing be afterward produced. *Lyons* v. *Davis*, 30 N. J. L. 301; *Kutzmeyer* v. *Ennis*, 27 N. J. L. 371.

Verdict not set aside because merely cumulative evidence was improperly admitted, when there was sufficient legal evidence to justify the verdict. *Chase* v. *Caryl*, 57 N. J. L. 545.

Maryland.

Authorities.—*Heptasophs* v. *Miles*, 92 Md. 613.

No reversal for error in admission of evidence unless injury be shown. *Coal Co.* v. *Cox*, 39 Md. 1; *Williams* v. *Higgins*, 30 Md. 404; *Beatty* v. *Mason*, 30 Md. 409; *Hayes* v. *Wells*, 34 Md. 512; *Wyeth* v. *Walzl*, 43 Md. 426; *B. & O. R. Co.* v. *Cain*, 81 Md. 87; *B. & O. R. Co.* v. *Chambers*, 81 Md. 371; *Lake Roland R. Co.* v.

Hibernian Society, 83 Md. 420; *B. & O. R. Co.* v. *Strunz*, 79 Md. 335.

When improper evidence was admitted as to facts which were proved by other and competent evidence there will be no reversal. *Leffler* v. *Allard*, 18 Md. 545; *Hayes* v. *Wells*, 34 Md. 512; *Black* v. *Bank*, 96 Md. 399.

If evidence that was improperly admitted is withdrawn and the jury instructed to disregard it, the error is cured. *Williams* v. *Higgins*, 30 Md. 404; *Boone* v. *Purnell*, 28 Md. 607.

No reversal for the refusal to admit evidence so indirect and inconclusive that there could have been no injury. *Buschman* v. *Codd*, 52 Md. 202.

Pennsylvania.

Authorities.— *Steel* v. *Glass*, 189 Pa. 283; *Insurance Co.* v. *Marr*, 46 Pa. 504.

Error cured by instruction to the jury to disregard. *Costello* v. *Costello*, 191 Pa. 379.

The introduction of an incorrect model of a house where murder was committed is no ground for reversal when no injury is shown. *Com.* v. *Fry*, 198 Pa. 379.

An error in admitting a witness whose incompetency is brought out on cross-examination is cured by instructing the jury to disregard the testimony. *Lester* v. *McDowell*, 18 Pa. 91.

Where a witness is excluded as incompetent, and the facts are later proved by other testimony and are undisputed, there is no error. *Powell* v. *Derickson*, 178 Pa. 612.

No reversal for the admission of improper testimony when the facts are abundantly sustained by proper evidence. *Com.* v. *Lenousky*, 206 Pa. 277.

The admission of incompetent evidence and the withdrawal of it later before the argument is no ground for a continuance or a reversal. *Rathgebe* v. *Railroad Co.*, 179 Pa. 31.

APPENDIX OF NOTES

NOTE I.

(To Article I.—Definition of Terms.)

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 contained in Chapters III., IV., V., VI.; or that they do fall within, the exceptions to those rules contained in those chapters."

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.— Relevance.)

See 1 Ph. Ev. 493, &c.; Best, ss. 111 and 251; Taylor, Pt. II. Ch. II.; Phipson, 49–52.

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. ———, 1826, 2 C. & P. 459; and *Mann* v. *Lang,* 1835, 3 A. & E. 699.

Mr. Taylor (s. 949) adopts from Professor Greenleaf the statement that there is "evidence which the law excludes on public grounds, namely, that which involves the unnecessary disclosure of matter that 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,* 1778; Cowp. 729). No action now lies upon a wager, and I can find 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.)

NOTE III.

(TO ARTICLE 4.— ACTS OF CONSPIRATORS.)

On this subject, see also 1 Ph. Ev. 157–164; Taylor, ss. 591–595; Best, s. 508; 1 Russ. on Crimes, 528–532. (See, too, *The Queen's Case,* 1820, 2 Br. & Bing. 309–10.) Phipson, 84–5, 90–1.

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.— RELEVANCY OF FACTS CONSTITUTING TITLE.)

The principle is fully explained and illustrated in *Malcolmson* v. *O'Dea,* 1862, 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., 611–622.

See also 1 Ph. Ev. 234–239; Taylor, ss. 658–667; Best, s. 499.

Mr. Philips 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 90). 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.—Statements accompanying Acts, Complaints, &c.)

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*, 1837. In the course of the argument, Bosanquet, J., observed, "How do you translate res gestæ? gestæ, by whom?" Parke, B., afterwards 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. 355.) 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. 152–57; Taylor, ss. 583–91; and Phipson, 236–43. I have stated, in accordance with *R.* v. *Walker*, 1839, 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 towards her, leaving the prisoner's counsel to bring before the jury the particulars of that complaint by cross-examination."

Lord Bramwell was in the habit, during the latter part of his judicial career, of admitting the complaint itself, and other judges have sometimes done the same. The practice is certainly in accordance with common sense.

The author's note is here left as he wrote it. His own practice on the Bench was the same as that which he ascribes to Willes, J., Parke, B., and Lord Bramwell, and the same course, of admitting the terms of the complaint as part of the evidence for the prosecution, was habitually

followed by Mr. (now Lord) Justice Smith, and the late Mr. Justice Cave, as long as they were Judges of the Queen's Bench Division.

Since the last edition of this work was published, the law on the subject has been enlarged, if not elucidated, by the decision of *R.* v. *Lillyman,* [1896], 2 Q. B. 167.

The count upon which Lillyman was substantially tried, and upon which alone (*ib.* at p. 170) he was convicted, charged that he unlawfully attempted to have carnal knowledge of a girl under sixteen and over thirteen. The question of her consent was therefore immaterial (Criminal Law Amendment Act, 1885, s. 5, by which the offence was created). In giving her evidence, however, the girl asserted that she did not consent to the attempt. Sir Henry Hawkins admitted evidence of the terms of a complaint made by the girl to her mistress, in the absence of the prisoner, very shortly after the commission of the acts charged. The prisoner was convicted, and the case was reserved on the question whether this evidence was admissible. The Court (Lord Russell, C.J., Pollock, B., Hawkins, Cave, and Wills, JJ.) affirmed the conviction. The ground of the decision is clearly stated in two passages of the judgment of the Court, delivered by Sir Henry Hawkins. "It [the complaint] is clearly not admissible as evidence of the facts complained of. . . . The complaint can only be used as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness-box, and as being inconsistent with her consent to that of which she complains" (*ib.* at p. 170). "The evidence is admissible only upon the ground that it was a complaint of that which

is charged against the prisoner, and can be legitimately used only for the purpose of enabling the jury to judge for themselves whether the conduct of the woman was consistent with her testimony on oath given in the witness-box negativing her consent, and affirming that the acts complained of were against her will, and in accordance with the conduct they would expect in a truthful woman under the circumstances detailed by her" (*ib.* at p. 177). In other words, the judgment decides that where a woman has made a statement as to her own consent, which in the case before the Court happened to be perfectly irrelevant, the details of her complaint may be admitted only because they may serve as a test of the credibility which ought to attach to the relevant parts of her testimony.

This view was reiterated by Sir Henry Hawkins in the case of *R.* v. *Rowland* tried at the Chelmsford Summer Assizes, 1898 (*Times,* July 6, 1898), when he refused to admit evidence of the terms of a complaint, though the charge was one of rape; but, it must be inferred, the woman's consent was practically not in issue. The judge said, "All that *R.* v. *Lillyman* decided was that the terms of a complaint were only admissible as evidence of a want of consent by the prosecutrix, and not as evidence of the truth of the charge against the person named in the complaint." As to this decision it must be remarked that even if the woman's consent was not in issue, and if nothing but the prisoner's identity was disputed, the woman's want of consent must have formed part of the story deposed to by her, and the distinction between this case, where consent was certainly a relevant matter, and Lillyman's case, where

it certainly was not, is not apparent. The same judge, in *Beatty* v. *Cullingworth*, 1896, 60 J. P. 740, a civil suit for an assault, held that the principle of *R.* v. *Lillyman* applied only to prosecutions for rape and similar offences, and rejected evidence either of a complaint having been made, or of the terms of the complaint, it is not clear which, but probably the latter. His decision was approved of in the Court of Appeals, *Times*, January 14, 1897.

It is not easy to see why evidence of the terms of a complaint should be admissible in order to test credibility on one point only; and the Recorder of London seems to hold there is no such restriction. In *R.* v. *Folley*, [1896], 60 J. P. 569, the prisoner and his wife were together in a room, cries were heard, and the wife came out suffering from a wound. At the trial the wife deposed that she had herself inflicted the wound. The Recorder, after referring to *R.* v. *Lillyman*, said, "that he should hold that the principle of that case applied to all cases," and allowed a constable to be recalled, who deposed that the wife in giving him an account of what happened, said, "Mr. Folley done it." Here there was no question of consent.

The total result is that the law is not easy to state with confidence, and in practice the administration of it is believed not to be uniform. On the Northern Circuit the details of complaints have, since Lillyman's case, been admitted in all cases of sexual offences against women and girls, whether or not the question of consent was, in fact or legally, at issue; and a similar practice seems to obtain more or less uniformly on other circuits and at the Old Bailey.

NOTE VI.

(To Articles 10, 11, 12.—Relevance of Similar Facts, System, &c.)

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,' 908–922). 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 generalised 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 charac-

teristic 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.— Course of Business.)

As to presumptions arising from the course of office or business, see Best, s. 403; 1 Ph. Ev. 480–4; Taylor, ss. 176–82. The presumption, "Omnia esse rite acta," also applies. See Broom's 'Maxims,' 942; Best, ss. 353–65; Taylor, s. 143, &c.; 1 Ph. Ev. 480; and Star. 757, 763.

NOTE VIII.

(To Article 14.— Hearsay.)

The unsatisfactory character of the definitions usually given as hearsay is well-known. See Best, s. 495; Taylor, ss. 567–70.[1] The definition given by Mr. Philips sufficiently exemplifies it: "When a witness, in the course of

[1] See, too, Phipson, pp. 200–204; particularly at p. 202, where Sir James Stephen's account of the objection to hearsay as evidence is criticised on the ground that it ignores the possibility of the relevancy of the fact which hearsay alleges to have been stated, and that the objection to its being stated by a non-witness ought to be considered under the head of proof in answer to the question how relevant facts may be proved. The answer is that the leading feature of hearsay is that it proves a statement by a non-witness, which, taken alone, does not come within the definition of "relevant," and that it is therefore better treated of when considering the question, What may be proved? than in dealing with the subsequent question, How may a relevant fact be proved? The practical advantage of the author's method of treatment is that he separates admissions and confessions which owe their force to the circumstances under which they are made, from public and other formal documents which for purposes of convenience are made evidence by the operation of the law.

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 evidence may sometimes be the very matter in dispute," &c. (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, &c., &c.; 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,* 1837, 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 in addition, that they had 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 applied 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 im-

plies 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 authorised 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.—Admissions defined.)

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; Taylor, ss. 723–861; and Phipson, 205–235. A vast variety of cases upon admissions of every sort may be found by referring to Roscoe, N. P. (In-

dex, 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. 725–38. 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.— ADMISSIONS, BY WHOM MADE.)

As to admissions by parties, see *Moriarty* v. *L. C. & D. Railway,* 1870, L. R. 5 Q. B. 320, per Blackburn, J.; *Alner* v. *George,* 1808, 1 Camp. 392; *Bauerman* v. *Radenius,* 1798, 7 T. R. 663.

As to admissions by parties interested, see *Spargo* v. *Brown,* 1829, 9 B. & C. 935.

See also on the subject of this article, 1 Ph. Ev. 362–3, 369, 398; Taylor, ss. 740–3, 755–7, 794; Roscoe, N. P. 67; and Phipson, 215–35.

As to admissions by privies, see 1 Ph. Ev. 394–7, and Taylor (from Greenleaf), s. 787.

NOTE XI.

(To Article 17.— Admissions by Agents.)

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,* 1804, 10 Ve. 126–7.

NOTE XII.

(To Article 18.— Admissions by Strangers.)

See, for a third exception (which could hardly occur now), *Clay* v. *Langslow,* 1827, M. & M. 45.

NOTE XIII.

(To Article 19.— Admissions by Party referred to.)

This comes very near to the case of arbitration. See, as to irregular arbitrations of this kind, 1 Ph. Ev. 383; Taylor, ss. 760–3; Phipson, 233–4.

NOTE XIV.

(To Article 20.— Admissions without Prejudice.)

See more on this subject in 1 Ph. Ev. 326–8; Taylor, ss. 774, 795; R. N. P. 62–3; Phipson, 207–8.

NOTE XV.

(To Article 22.— Confessions under Threat.)

On the law as to Confessions, see 1 Ph. Ev. 401–423; Taylor, ss. 872–84, and s. 902; Best, ss. 551–74; Roscoe, Cr. Ev. 34–49; 3 Russ. on Crimes, by Greaves, 477–537; Phipson, 244–55. 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. 35–38; and Phipson, 250–3, where most of them are collected). They are, however, for practical purposes, summed up in *R.* v. *Baldry,* 1852, 2 Den. 430, which is the authority for the last lines of the first paragraph of this article.

NOTE XVI.

(To Article 23.— Confessions on Oath.)

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 Taylor, ss. 886 and 895, n. 5; also 3 Russ. on Cri. 511, &c.). 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, and which, like that statute, authorised statements by prisoners, but not their examination on oath.

Since the decisions in *R.* v. *Scott,* 1856, 1 D. & B. 47; 25 L. J., M. C. 128, and *R.* v. *Erdheim* [1896], 2 Q. B. 260, decided on the Bankruptcy Acts of 1849 and 1883, it seems that these cases must be considered obsolete; see particularly the judgment of Russell, L.C.J., in the latter case, at pp. 267–8. The point is of considerable importance since the passing of the Criminal Evidence Act, 1898.

NOTE XVII.

(To Article 26.— Dying Declarations.)

As to dying declarations, see 1 Ph. Ev. 239–52; Taylor, ss. 714–22; Best, s. 505; Starkie, 32 & 38; 3 Russ. Cri. 388–97; Roscoe, Crim. Ev. 27–33; Phipson, 298–303; *R.* v. *Baker,* 2 Mo. & Ro., 1837, 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 de-

claration 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.

NOTE XVIII.

(To Article 27.— Declarations in Course of Business.)

1 Ph. Ev. 280–300; Taylor, ss. 714–22; Best, 501; R. N. P. 60–2; Phipson, 268–75; and see note to *Price* v. *Lord Torrington,* 1704, 2 S. L. C. 310. The last case on the subject is *Massey* v. *Allen,* 1879, 13 Ch. Div. 558.

NOTE XIX.

(To Article 28.— Declarations against Interest.)

The best statement of the law upon this subject will be found in *Higham* v. *Ridgway,* and the note thereto, 2 S. L. C. 317–8. See also 1 Ph. Ev. 253–80; Taylor, ss. 668–96a; Best, s. 500; R. N. P. 55–59; Phipson, 258–67.

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 favour of their successors.

There is no doubt as to the rule (see, in particular, *Short* v. *Lee,* 1821, 2 Jac. & Wal. 464; and *Young* v. *Clare Hall,* 1851, 17 Q. B. 529). 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 favour 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* (*ante,* p. 107), 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 indorsement of notes, bonds, &c., is distinctly opposed to such a view.

NOTE XX.

(TO ARTICLE 30.— DECLARATIONS AS TO PUBLIC AND GENERAL RIGHTS.)

Upon this subject, besides the authorities in the text, see 1 Ph. Ev. 169–97; Taylor, ss. 607–34; Best, s. 497; R. N. P. 48–51; Phipson, 276–87.

A great number of cases have been decided as to the particular documents, &c., 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*, 1839, 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* (*ante*, p. 113) 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 as 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 Western 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*, 1811, 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 Cam. 20). 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.— DECLARATIONS AS TO PEDIGREE.)

See 1 Ph. Ev. 197–233; Taylor, ss. 635–57; R. N. P. 46–48; Phipson, 288–297.

The *Berkeley Peerage Case*, 1811 (Answers of the Judges to the House of Lords), 4 Cam. 401, which established the third condition given in the text; and *Davies* v. *Lowndes*, 1843, 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 birth, &c., see *Shields* v. *Boucher*, 1847, 1 De G. & S. 49–58.

NOTE XXII.

(TO ARTICLE 32.— EVIDENCE IN FORMER PROCEEDINGS.)

See also 1 Ph. Ev. 306–8; Taylor, ss. 464–79A; Buller, N. P. 238, and following; Phipson, 419-25.

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.—Judgments as Evidence.)

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 Taylor, ss. 1667-1723; in the note to the *Duchess of Kingston's Case*, 1776, 2 S. L. C. 726-840; and Phipson, 379-412. 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. 765-801. There is a convenient list of the cases in R. N. P. 205-6. The cases of *Godard* v. *Gray,* 1870, L. R. 6 Q. B. 139; *Castrique* v. *Imrie,* 1870, L. R. 4 E. & I. A. 414; and *Noewion* v. *Freeman,* [1889], 15 A. C. 1, are the latest leading cases on the subject.

NOTE XXIV.

(To Chapter V.— Opinions, when Relevant.)

On evidence of opinions, see 1 Ph. Ev. 520-8; Taylor, ss. 1416-1425; Best, ss. 511-17; R. N. P. 174-5; Phipson, 356-78. The leading case on the subject is *Doe* v. *Tatham,* 1837, 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.— Character, when Relevant.)

See 1 Ph. Ev. 502-8; Taylor, ss. 349-63; Best, ss. 257-63; 3 Russ. Cr. 424-8; Phipson, 154-8. The subject is considered at length in *R.* v. *Rowton,* 1865, 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

neighbours. 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.—Judicial Notice.)

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 Taylor, ss. 4-21, where the subject is gone into more minutely. A convenient list is also given in R. N. P. 80-84, which is much to the same effect; see, too, Phipson, 16-24. 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.— Oral Evidence must be Direct.)

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, 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.— PROOF OF EXECUTION OF DOCUMENT MUST BE ATTESTED.)

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,* 1815, 4 M. & S. at p. 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,* 1853, 8 Ex. at p. 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 deed (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 2 Ph. Ev. 242-61; Taylor, ss. 1839-1844; R. N. P. 131-34; Best, ss. 220, &c.; Phipson, 490-95.

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, replaced by 28 & 29 Vict. c. 18, ss. 1 & 7, and now repealed by S. L. R. Act, 1892.

NOTE XXIX.

(To Article 72.—Notice to produce.)

For these rules in greater detail, see 1 Ph. Ev. 452-3, and 2 Ph. Ev. 272-89; Taylor, ss. 449-56; R. N. P. 7-14; Phipson, 507-8.

The principle of all the rules is fully explained in the cases cited in the foot-notes, more particularly in *Dwyer* v. *Collins*, 1852, 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" (pp. 647-8).

NOTE XXX.

(To Article 75.—Public Documents; Examined Copies.)

Mr. Philips (2, 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. 1535) 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,* 1812, 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.—Public Documents; Exemplifications.)

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; Taylor, ss. 1536-1542; R. N. P. 96-102. The second paragraph of Article 77 is founded on *Appleton v. Braybrook*, 1817, 6 M. & S. at p. 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.— Documents Exclusive Evidence.)

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 makes 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; Taylor, ss. 1128-1228; Star. 648-731; Best (very shortly and imperfectly), ss. 226-9; R. N. P. (an immense list of cases), 16-33; Phipson, 528-75.

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,* 1867, L. R. 2 Ex. 135, and Pollock on 'Contracts' (6th ed.), 235, note (i). 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,* 1779, 1 S. L. C., 535-60, 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.—Oral Interpretation of Documents.)

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*), (*m*), and paragraph 8, illustrations (*n*)and (*o*)). 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,* 1871, L. R. 2 P. & M. 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,* 1873, 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* (see illustration (*m*)), 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.—EVIDENCE BY STRANGERS TO DOCUMENTS.)

See 2 Ph. Ev. 364; Star. 726; Taylor (from Greenleaf), ss. 1149, Phipson, 533. 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.—Production and Effect of Evidence.)

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, &c.; 3 Russ. on Cr. 400-403) 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 presumptions 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.— Presumption of Innocence.)

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.—"Omnia Rite Acta.")

The first part of this article is meant to give the effect of the presumption, *omnia esse rite acta,* 1 Ph. Ev. 480, &c.; Taylor, ss. 139, &c.; Best, s. 353, &c. 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.— Estoppels in Pais.)

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. 808-40, where the cases referred

to in the text and many others are abstracted. See, too, 1 Ph. Ev. 350-3; Taylor, ss. 101-3, 776, 778; Best, s. 543; Phipson, 584-8.

Article 102 contains the rule in *Pickard* v. *Sears*, 1837, 6 A. & E. at p. 474, as interpreted and limited by Parke, B., in *Freeman* v. *Cooke*, 1848, 2 Ex. 654, 663. The second paragraph of the article is founded on the application 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*, 1855, 5 H. L. Ca. 389; *Swan* v. *North British Australasian Company*, which was before three Courts, see 1859, 7 C. B. (N.S.), 400; 1862, 7 H. & N. 603; 1863, 2 H. & C. 175, where the judgment of the majority of the Court of Exchequer was reversed; and *Halifax Guardians* v. *Wheelwright*, 1875, L. R. 10 Ex. 183, in which all the cases are referred to. All of these refer to *Young* v. *Grote*, 1827, 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*, 1875, 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.— Competency of Witnesses.)

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 ii. part i. ch. ii. ss. 132-88. See, too, Taylor, ss. 1342-1393, and R. N. P. 160-4. As to the old law, see 1 Ph. Ev. 5 *et seq.*, 104.

NOTE XL.

(To Article 107.— What Witnesses Incompetent.)

The authorities for the first paragraph are given at great length in Best, ss. 146-65. See, too, Taylor, s. 1375; Phipson, 436-8. As to paragraph 2, see Best, s. 148; 1 Ph. Ev. 7; 2 Ph. Ev. 457; Taylor, s. 1376.

NOTE XLI.

(To Article 108.— Competency in Criminal Cases.)

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 sect. 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 Article 109.

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.

Various modern statutes mentioned in Note 1, p. 289, made an accused person and his or her wife or husband competent witnesses in various cases, and now the Criminal Evidence Act, 1898, has removed their incompetency to the extent mentioned in the text. The law on the subject cannot, however, be correctly stated without reference to the old Common Law Rule.

NOTE XLII.

(To Article 111.—Privilege of Judges and Witnesses.)

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; Taylor, s. 938), I have referred to them.

In the trial of Lord Thanet, for an attempt to rescue Arthur O'Connor, Serjeant Shepherd, one of the special commissioners, before whom the riot took place in court at Maidstone, gave evidence, *R.* v. *Lord Thanet,* 1799, 27 S. T. at p. 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. See, however, Article 123B.

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. at p. 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.—PROFESSIONAL COMMUNICATIONS.)

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, 1 Ph. Ev. 105–122; Taylor, ss. 911–18A; Best, s. 581. See, too, Phipson, 181–91. 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*, 1833, 1 M. & K. 98. The last leading case on the subject is *R.* v. *Cox and Railton*, 1884, 14 Q. B. D. 153. Leges Henrici Primi, v. 17: "Caveat sacerdos ne de hiis qui ei confitentur peccata alicui recitet quod ei confessus est, non propinquis, non extraneis. Quod si fecerit deponetur et omnibus diebus vitæ suæ ignominiosus peregrinando pœniteat." 1 M. 508.

NOTE XLIV.

(TO ARTICLE 117.— PRIVILEGE OF CLERGYMEN AND PRIESTS.)

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; Taylor, ss. 916–17; R. N. P. 171; 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*, 1802, MacNally, 253–4, and possibly *R.* v. *Sparkes*, which was cited by Garrow in arguing *Du Barré* v. *Livette* before Lord Kenyon, 1791, 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 recognised 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 favour 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, supra.* 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,* 1828, 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,* 1853, 6 Cox, Cr. Ca. 219.

NOTE XLIVA.

(TO ARTICLE 123A.— UNSWORN EVIDENCE, RELEVANCY OF.)

In *R.* v. *Wealand,* 1888, 20 Q. B. D. 827, the indictment, under the Criminal Law Amendment Act, s. 4, charged the prisoner with carnally knowing a girl under

13. The child, under the same section, gave evidence without being sworn. The jury acquitted the prisoner of carnally knowing the child, and found him guilty of indecent assault. The conviction was affirmed, though on a charge of indecent assault the unsworn evidence would have been inadmissible, and though the evidence apart from the child's statement was insufficient to support a conviction. The ground of the decision was that sect. 4 of the Act made the unsworn evidence admissible, and sect. 9 made the verdict lawful. Lord Coleridge, C.J., described the result as "an anomaly," and as showing "an unsatisfactory state of the law." In *R.* v. *Paul*, 1890, 25 Q. B. D. 202, the indictment was in two counts, one under sect. 4 of the Criminal Law Amendment Act, 1885, charging an attempt to have carnal knowledge of a girl under thirteen, and the other charging indecent assault. Under sect. 4 the child gave evidence without being sworn. The other evidence was insufficient to support a conviction, but contributed material corroboration of the unsworn statement. The jury acquitted the prisoner (by the direction of the judge) on the first count, and found him guilty, on the second, of indecent assault. The conviction was quashed on the ground that, on the substantial count for indecent assault, not being a charge under s. 4 of the Criminal Law Amendment Act, the unsworn evidence of the child was inadmissible. The judgment of the Court (delivered by Hawkins, J., and concurred in by Lord Coleridge, C.J., and Mathew, Day, and Grantham, JJ.) distinguished *R.* v. *Wealand* on the ground that there

the verdict was returned, as by law it could be, upon a count (under s. 4) upon which the unsworn evidence was admissible. In this judgment "the law created by the Statute" was said to be "in a very unsatisfactory state." It is clear that the two cases cannot be reconciled upon a satisfactory principle, and that, both being authoritative, the admissibility of the unsworn evidence depends in such cases upon the form of the indictment. It is to be observed that since the passing of the Prevention of Cruelty to Children Act, 1894, (57 & 58 Vict. c. 41, s. 15, & Schedule), if the indecent assault were an "offence involving bodily injury" to the child, it might be argued that the unsworn statement of the child was admissible, not under the Criminal Law Amendment Act, 1885, but under the Prevention of Cruelty to Children Act. It seems probable, however, that the words "offence involving bodily injury" mean an offence necessarily involving bodily injury, which indecent assault could hardly be said to be. If an indictment for having carnal knowledge of a girl under thirteen in one count were so drawn as to comprise — as it very well might — an allegation that the prisoner indecently assaulted the child, it would seem that *R.* v. *Wealand* would make the child's unsworn testimony admissible, and that in the event of a conviction for indecent assault *R.* v. *Paul* would not apply.

NOTE XLV.

(To Articles 126, 127, 128.—Examination, etc., of Witnesses.)

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, &c.; Taylor, s. 1394, &c.; Phipson, 467–80; see, too, Best, s. 631, &c. 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. 165.

NOTE XLVI.

(To Article 129.—Limits of Cross-examination.)

This article states a practice which is now common, and which never was more strikingly illustrated than in the case referred to in the illustration. 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 had 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 872) may perhaps be deserving of consideration. After authorising, in sect. 147, questions as to the credit of the witness the Act proceeds as follows in sect. 148:—

"If any such question relates to a matter not relevant to the suit or proceeding, except 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 he 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."

Order XXXVI., rule 38, expressly gives the judge a discretion which was much wanted, and which I believe he always possessed.

NOTE XLVII.

(To Article 131.— Statements Inconsistent with Present Testimony.)

The contents of this section are intended to represent sects. 3 and 4 of the Criminal Procedure Act, 1865, 28 & 29 Vict. c. 18, which re-enacted sects. 22 and 23 of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, now repealed by the Statute Law Revision Act, 1892. The two sections in question are as follows:—

3. 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 des-

ignate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.

4. If a witness, upon cross-examination as to a former statement made by him relative to the subject-matter of the indictment or proceeding, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.

The sections are obviously ill-arranged; but apart from this, s. 3 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,* 1859, 5 C. B. (N.S.), at 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, at 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 evi-

dence relevant to the issue—a right not only established by authority, but founded on the plainest good sense."

Cockburn, L.C.J., in the same case, at p. 806, said of the 22nd section of the Common Law Procedure Act, 1854: "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, 1820, 2 Br. & Bing. 286-91, 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 30. The number referred

to under that head in the Index to the Revised Statutes is 68. 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, appear 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); 41 & 42 Vict. c. 11 (Article 36); 7 & 8 Geo. IV. c. 28, s. 11, amended by 6 & 7 William IV. c. 111; 24 & 25 Vict. c. 96, s. 116; 24 & 25 Vict. c. 99, s. 37; 61 & 62 Vict. c. 36, s. 1 (6) (see Article 56); 61 & 62 Vict. c. 36, s. 1 (Article 108); 8 & 9 Vict. c. 10, s. 6; 48 & 49 Vict. c. 69, s. 4 (Article 121); 7 & 8 Will. III. c. 3, ss. 2–4; 39 & 40 Geo. III. c. 93 (Article 122); 11 & 12 Vict. c. 42, s. 17 (Article 140); 30 & 31 Vict. c. 35, s. 6 (Article 141); 53 & 54 Vict. c. 37, s. 6 (Article 141A); 57 & 58 Vict. c. 41, ss. 13, 14 (Article 141B); 57 & 58 Vict. c. 60, s. 691 (Article 142).

Many, again, refer to pleading and practice rather than evidence, in the sense in which I employ the word. Such are the Acts which enable 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 eleven 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. 5. Certain Acts of Parliament, proclamations, &c., may be proved by copies purporting to be Queen's printers' copies. (Article 81.)

S. 4. Penalty for forgery, &c. This is omitted as belonging to the Criminal Law.

4.

14 & 15 *Vict. c.* 99: "The Evidence Act, 1851" (7th August, 1851; 20 sections):—

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. Implicitly repealed by the Criminal Evidence Act, 1898. (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 Laws of Wills.)

S. 6. The Common Law Courts authorised to grant inspection of documents. (Omitted as part of the Law of Civil Procedure.)

S. 7. Mode of proving proclamations, treaties, &c. (Article 84.)

S. 8. Proof of qualification of apothecaries. (Omitted from the text 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, &c., admissible in all. (Article 80.)

S. 13. Proof of previous convictions. (Omitted from the text 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 misdemeanour. (Omitted as belonging to Criminal Law.)

S. 16. Who may administer oaths. (Article 124.)

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.)

5.

28 & 29 *Vict. c.* 18: "The Criminal Procedure Act,[2] 1865" (9th May, 1865, 10 sections). This Act re-enacts ss. 22–27 of the Common Law Procedure Act, 1854, which are now repealed by the Statute Law Revision Act, 1892.

S. 1. Sects. 3–8 to apply to all courts and causes, criminal as well as civil.

S. 2. Summing up of evidence in criminal cases. (Omitted as being procedure.)

S. 3. How far a party may discredit his own witnesses. (Articles 131, 133, and see Note XLVII.)

S. 4. Proof of contradictory statements by a witness under cross-examination. (Article 131.)

S. 5. Cross-examination as to previous statements in writing. (Article 132.)

[2] This is the title given to the Act by the Short Titles Act, 1896; it seems to be based exclusively on sect. 2 of the Act.

S. 6. Proof of previous conviction of a witness may be given. (Article 130 (1).)

S. 7. Attesting witnesses need not be called unless writing requires attestation by law. (Article 69.)

S. 8. Comparison of disputed handwriting. (Articles 49 and 52.)

6.

31 & 32 *Vict. c.* 37 (25th June, 1868, 6 sections):—

S. 1. Short title. "The Documentary Evidence Act," 1868.

S. 2. Certain documents may be proved in particular ways. (Article 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 in Common Law. (Implied in Article 73.)

7.

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. (Repealed by Oaths Act, 1888.)

S. 5. Short title: "The Evidence further Amendment Act, 1869."

S. 6. Act does not extend to Scotland.

8.

48 & 49 *Vict. c.* 69: "The Criminal Law Amendment Act, 1885" (20 sections).

S. 4. Unsworn evidence of a child admitted in cases of defilement of a girl under thirteen; but corrobation needed. (Article 123A.)

9.

51 & 52 *Vict. c.* 46: "The Oaths Act, 1888" (24th Dec., 1888; 7 sections).

S. 1. A person objecting to be sworn may make an affirmation. (Article 123.)

S. 2. Form of affirmation.

S. 3. Oath valid, though no religious belief. (Article 123.)

S. 4. Form of written affirmation.

S. 5. Swearing as in Scotland. (Article 124.)

S. 6. Repeals.

S. 7. Short title.

10.

57 & 58 *Vict. c.* 41: "The Prevention of Cruelty to Children Act," 1894 (28 sections).

S. 15. Unsworn evidence of a child admitted in cases of cruelty to children, etc.; but corroboration needed. (Article 123A.)

11.

61 & 62 *Vict. c.* 36: "The Criminal Evidence Act, 1898" (7 sections).

S. 1. Person charged with offence, and their wife or husband competent witness. (Article 108.)

S. 2. When such person is called. (Omitted as procedure.)

S. 3. Right of reply. (Omitted as procedure.)

S. 4. When husband or wife a compellable witness. (Article 108.)

SS. 5, 6, 7. Application of the Article to Scotland, Ireland. Courts-martial, etc.

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. 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 eleven statutes above mentioned are the only ones which really form part of the Law of Evidence, and their effect is fully given in twenty-two[3] articles of the Digest, some of which contain other matter besides.

[3] 49, 52, 58, 69, 79, 80, 81, 83, 84, 106, 108, 109, 120, 121, 123, 123A, 124, 125, 130, 131, 132, 133.

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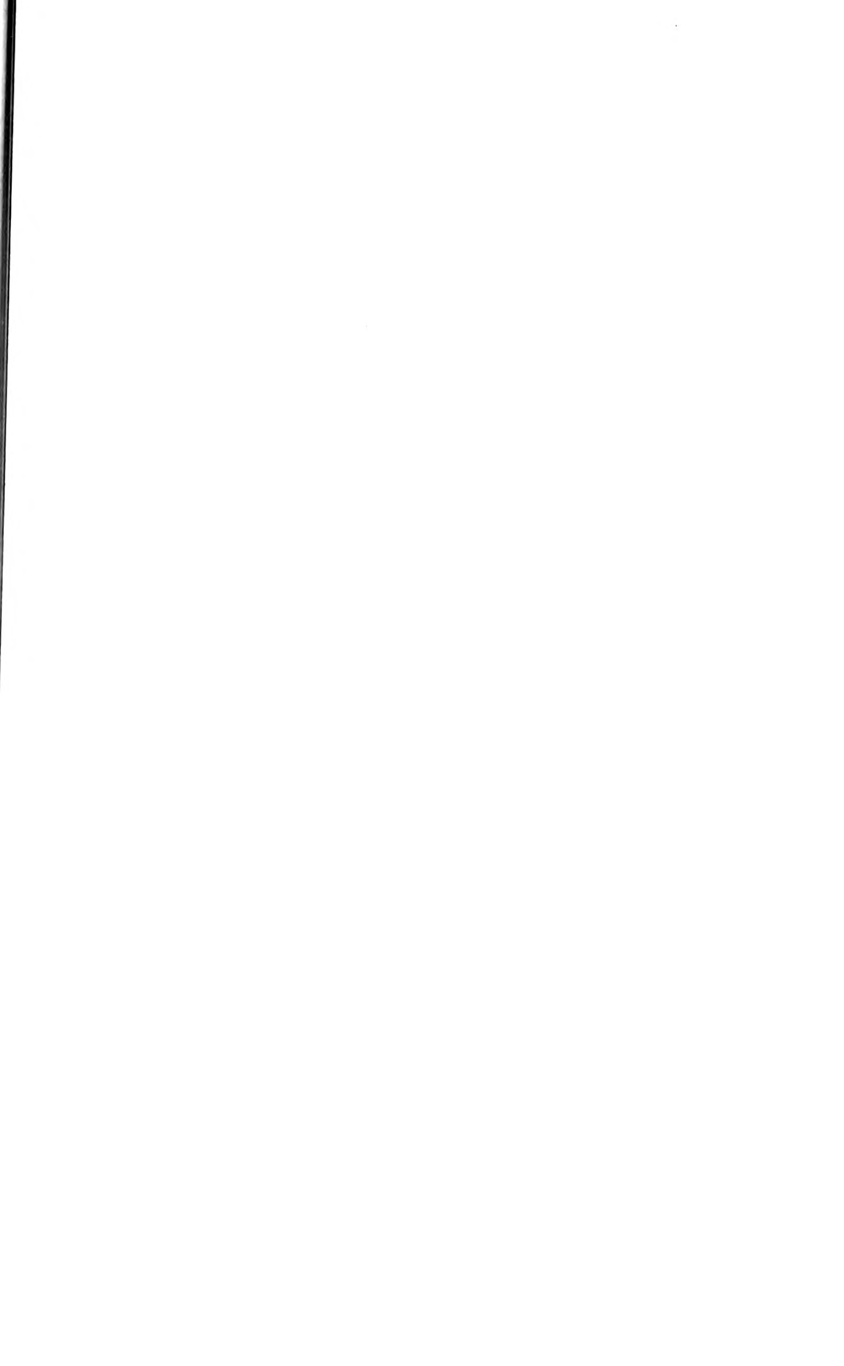

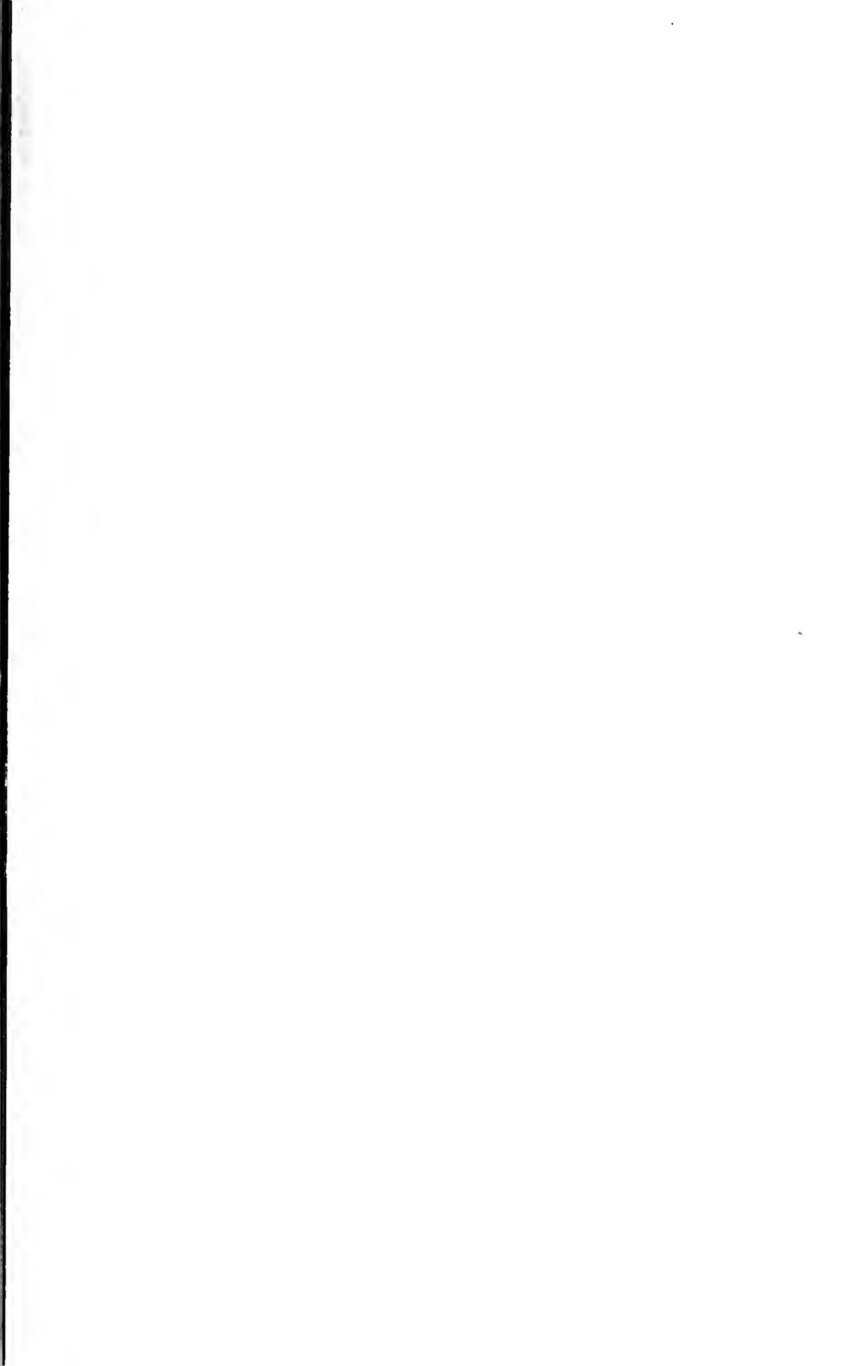

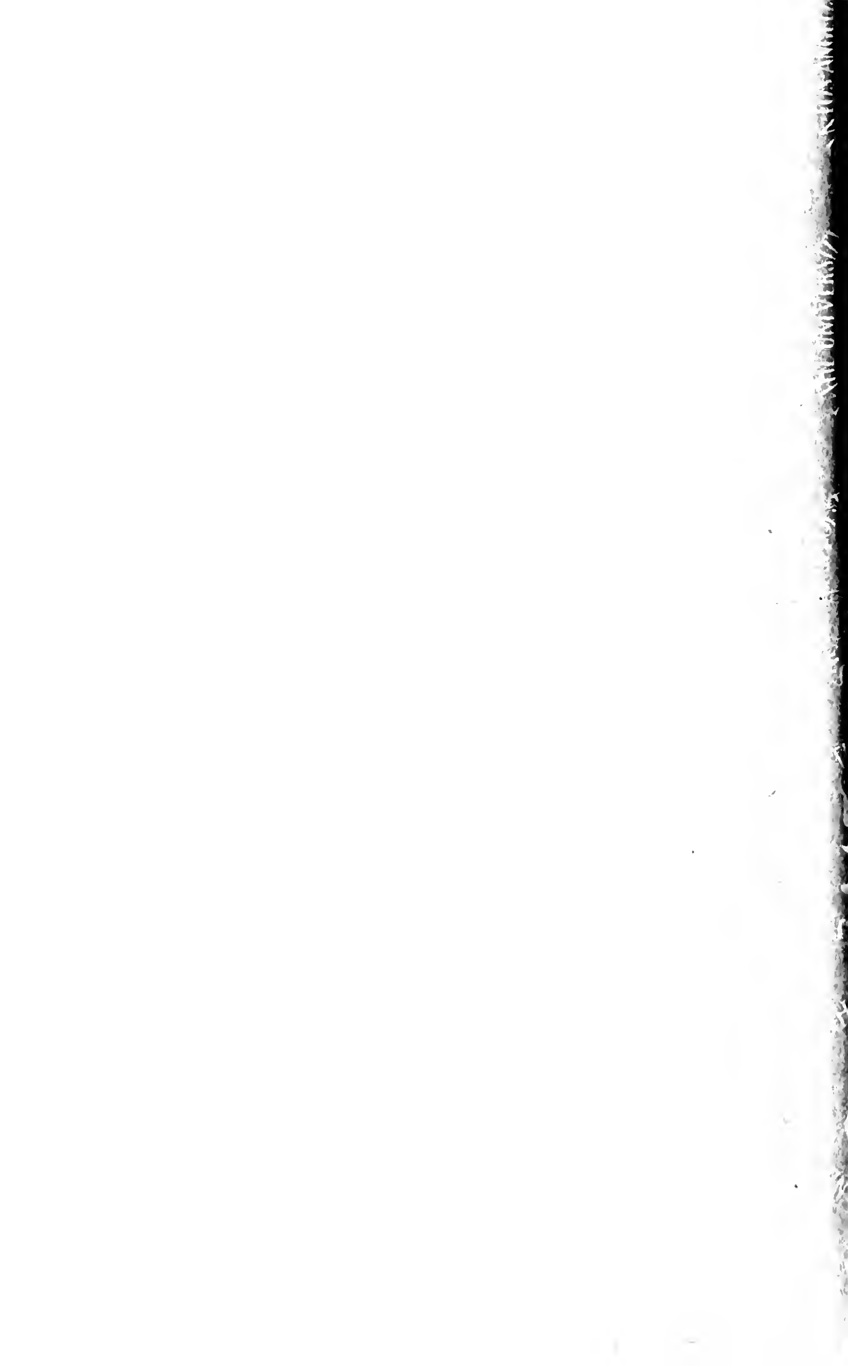

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