A

TREATISE

ON THE

LAW OF EVIDENCE.

PART I.

OF THE NATURE AND PRINCIPLES OF EVIDENCE.

CHAPTER I.

PRELIMINARY OBSERVATIONS.

§ 1. The word Evidence, in legal acceptation, includes all the means, by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved.[1] This term, and the word *proof*, are often used indifferently, as synonymous with each other; but the latter is applied, by the most accurate logicians, to the *effect* of evidence, and not to the *medium* by which truth is established.[2] None but mathematical truth is susceptible of that high degree of evidence, called *demonstration*, which excludes all possibility of error, and which, therefore, may reasonably be required in support of every mathematical deduction. Matters of fact are proved by *moral evidence* alone; by which is meant, not

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1 See Wills on Circumstantial Evid. 2; 1 Stark. Evid. 10; 1 Phil. Evid. 1.

2 Whately's Logic, B. iv. ch. iii. § 1.

only that kind of evidence which is employed on subjects connected with moral conduct, but all the evidence which is not obtained either from intuition, or from demonstration. In the ordinary affairs of life, we do not require demonstrative evidence, because it is not consistent with the nature of the subject, and to insist upon it would be unreasonable and absurd. The most that can be affirmed of such things, is, that there is no reasonable doubt concerning them.[1] The *true question*, therefore, in trials of fact, is not, whether it is possible that the testimony may be false, but, whether there is *sufficient probability* of its truth; that is, whether the facts are shown by competent and satisfactory evidence. Things established by competent and satisfactory evidence are said to be *proved*.

§ 2. By *competent evidence*, is meant that which the very nature of the thing to be proved requires, as the fit and appropriate proof in the particular case, such as the production of a writing, where its contents are the subject of inquiry. By *satisfactory evidence*, which is sometimes called *sufficient* evidence, is intended that amount of proof, which ordinarily satisfies an unprejudiced mind, beyond reasonable doubt. The circumstances which will amount to this degree of proof can never be previously defined; the only legal test of which they are susceptible, is their sufficiency to satisfy the mind and conscience of a common man; and so to convince him, that he would venture to act upon that conviction, in matters of the highest concern and importance to his own interest.[2]

[1] See Gambier's Guide to the Study of Moral Evidence, p. 121. Even of mathematical truths, this writer justly remarks, that, though capable of demonstration, they are admitted by most men solely on the moral evidence of general notoriety. For most men are neither able themselves to understand mathematical demonstrations, nor have they, ordinarily, for their truth, the testimony of those who do understand them; but, finding them generally believed in the world, they also believe them. Their belief is afterwards confirmed by experience; for whenever there is occasion to apply them, they are found to lead to just conclusions. Ib. 196.

[2] 1 Stark. Evid. 514.

Questions, respecting the competency and admissibility of evidence, are entirely distinct from those, which respect its sufficiency or effect; the former being exclusively within the province of the Court; the latter belonging exclusively to the Jury.[1] *Cumulative* evidence, is evidence of the same kind, to the same point. Thus, if a fact is attempted to be proved by the verbal admission of the party, evidence of another verbal admission of the same fact is cumulative; but evidence of other circumstances, tending to establish the fact, is not.[2]

§ 3. This branch of the law may be considered under three general heads, namely, *First*, The Nature and Principles of Evidence; — *Secondly*, The Object of Evidence, and the Rules, which govern in the production of testimony; — And *Thirdly*, The Means of proof, or the Instruments, by which facts are established. This order will be followed in farther treating this subject. But before we proceed, it will be proper first to consider what things Courts will, of themselves, take notice of without proof.

[1] Columbian Ins. Co. *v.* Lawrence, 2 Pet. 25, 44; Bank U. States *v.* Corcoran, Ib. 121, 133; Van Ness *v.* Pacard, Ib. 137, 149.

[2] Parker *v.* Hardy, 24 Pick. 246, 248.

CHAPTER II.

OF THINGS JUDICIALLY TAKEN NOTICE OF, WITHOUT PROOF.

§ 4. All civilized nations, being alike members of the great family of sovereignties, may well be supposed to recognise each other's existence, and general public and external relations. The usual and appropriate symbols of nationality and sovereignty are the national flag and seal. Every sovereign therefore recognises, and, of course, the public tribunals and functionaries of every nation take notice of, the existence and titles of all the other sovereign powers in the civilized world, their respective flags, and their seals of state. Public acts, decrees, and judgments, exemplified under this seal, are received as true and genuine, it being the highest evidence of their character.[1] If, however, upon a civil war in any country, one part of the nation should separate itself from the other, and establish for itself an independent government, the newly formed nation cannot without proof be recognised as such, by the judicial tribunals of other nations, until it has been acknowledged by the sovereign power under which those tribunals are constituted;[2] the first act of recognition belonging to the executive function. But though the seal of the new power, prior to such acknowledgment, is not permitted to prove itself, yet it may be proved, as a fact, by

[1] Church *v.* Hubbart, 2 Cranch, 187, 238; Griswold *v.* Pitcairn, 2 Conn. 85, 90; U. States *v.* Johns, 4 Dall. 416; The Santissima Trinidad, 7 Wheat. 273, 335; Anon. 9 Mod. 66; Lincoln *v.* Battelle, 6 Wend. 475. It is held in New York that such seal, to be recognised in the Courts, must be a Common Law seal, that is, an impression upon wax. Coit *v.* Milliken, 1 Denio, R. 376.

[2] Grierson *v.* Eyre, 9 Ves. 347; United States *v.* Palmer, 3 Wheat. 610, 634.

other competent testimony.[1] And the existence of such unacknowledged government or State may in like manner be proved; the rule being, that if a body of persons assemble together to protect themselves, and support their own independence, make laws, and have Courts of justice, this is evidence of their being a State.[2]

§ 5. In like manner, the Law of Nations, and the general customs and usages of merchants, as well as the public statutes and general laws and customs of their own country, as well ecclesiastical as civil, are recognised, without proof, by the Courts of all civilized nations.[3] The seal of a notary public is also judicially taken notice of by the Courts, he being an officer recognised by the whole commercial world.[4] Foreign Admiralty and Maritime Courts too, being the Courts of the civilized world, and of coördinate jurisdiction, are judicially recognised every where; and their seals need not be proved.[5] Neither is it necessary to prove things, which

[1] United States *v.* Palmer, 3 Wheat. 610, 634; The Estrella, 4 Wheat. 298. What is sufficient evidence to authenticate, in the Courts of this country, the sentence or decree of the Court of a foreign government, after the destruction of such government, and while the country is possessed by the conqueror, remains undecided. Hatfield *v.* Jameson 2 Munf. 53, 70, 71.

[2] Yrissarri *v.* Clement, 2 C. & P. 223, per Best, C. J. And see 1 Kent, Comm. 189; 1 Lieber's Political Ethics; Grotius, De Jur. Bel. b. 3, c. 3, § 1.

[3] Ereskine *v.* Murray, 2 Ld. Raym. 1542; Heineccius ad Pand. l. 22, tit. 3, sec. 119; 1 Bl. Comm. 75, 76, 85; Edie *v.* East India Co. 2 Burr. 1226, 1228; Chandler *v.* Grieves, 2. H. Bl. 606, n.; Rex *v.* Sutton, 4 M. & S. 542; 6 Vin. Abr. tit. Court, D; 1 Rol. Abr. 526, D. Judges will also take notice of the usual practice and course of conveyancing. 3 Sugd. Vend. & Pur. 28; Willoughby *v.* Willoughby, 17 R. 772, per Ld. Hardwicke; Doe *v.* Hilder, 2 B. & Ald. 793; Rowe *v.* Grenfel, Ry. & Mo. 398, per Abbott, C. J.

[4] Anon. 12 Mod. 345; Wright *v.* Barnard, 2 Esp. 700; Yeaton *v.* Fry, 5 Cranch, 335; Brown *v.* Philadelphia Bank, 6 S. & R. 484; Chanoine *v.* Fowler, 3 Wend. 173, 178; Bayley on Bills, 515, (2d Am. Ed. by Phillips & Sewall;) Hutcheon *v.* Mannington, 6 Ves. 823.

[5] Croudson *v.* Leonard, 4 Cranch, 435; Rose *v.* Himely, Id. 292; Church *v.* Hubbart, 2 Cranch, 187; Thompson *v.* Stewart, 3 Conn. 171, 181; Green

must have happened according to the ordinary course of nature;[1] nor to prove the course of time, or of the heavenly bodies; nor, the ordinary public fasts and festivals; nor, the coincidence of days of the week with days of the month;[2] nor, the meaning of words in the vernacular language;[3] nor, the legal weights and measures;[4] nor, any matters of public history, affecting the whole people;[5] nor, public matters, affecting the government of the country.[6]

§ 6. Courts also take notice of the territorial extent of the jurisdiction and sovereignty, exercised *de facto* by their own government; and of the local divisions of their country, as into states, provinces, counties, cities, towns, local parishes, or the like, so far as political government is concerned or affected; and of the relative positions of such local divisions; but not of their precise boundaries, farther than they may be described in public statutes.[7] They will also judicially recognise the political constitution or frame of their own government; its essential political agents or public officers, sharing in its regular administration; and its essential and regular political operations, powers and action. Thus, notice is taken, by all tribunals, of the accession of the Chief Executive of the nation or state, under whose authority they act; his powers and

v. Weller, 2 Ld. Raym. 891, 893; Anon. 9 Mod. 66; Story on the Conflict of Laws, § 643; Hughes *v.* Cornelius, as stated by Ld. Holt, in 2 Ld. Raym. 893. And see T. Raym. 473, 2 Show. 232, S. C.

1 Rex *v.* Luffe, 8 East, 202; Fay *v.* Prentice, 9 Jur. 876.

2 6 Vin. Abr. 491, pl. 6, 7, 8; Hoyle *v.* Cornwallis, 1 Stra. 387; Page *v.* Faucet, Cro. El. 227; Harvy *v.* Broad, 2 Salk. 626; Hanson *v.* Shackelton, 4 Dowl. 48.

3 Clementi *v.* Golding, 2 Campb. 25; Commonwealth *v.* Kneeland, 20 Pick. 239.

4 Hockin *v.* Cooke, 4 T. R. 314.

5 Bank of Augusta, *v.* Earle, 13 Pet. 519, 590; 1 Stark. Ev. 211, (6th Am. Ed.)

6 Taylor *v.* Barclay, 2 Sim. 221.

7 Deybel's case, 4 B. & Ald. 242; 2 Inst. 557; Fazakerley *v.* Wiltshire, 1 Stra. 469; Humphreys *v.* Budd, 9 Dowl. 1000.

privileges;[1] the genuineness of his signature;[2] the heads of departments, and principal officers of state, and the public seals;[3] the election or resignation of a senator of the United States; the appointment of a cabinet or foreign minister;[4] marshals and sheriffs,[5] and the genuineness of their signatures;[6] but not their deputies; Courts of general jurisdiction, their Judges, their seals, their rules and maxims in the administration of justice, and course of proceeding;[7] also, of public proclamations of war and peace,[8] and of days of special public fasts and thanksgivings; stated days of general political elections; the sittings of the legislature, and its established and usual course of proceeding; the privileges of its members, but not the transactions on its journals.[9] The

1 Elderton's case, 2 Ld. Raym. 980, per Holt, C. J.

2 Jones *v.* Gale's Ex'r, 4 Martin, 635. And see Rex *v.* Miller, 2 W. Bl. 797; 1 Leach, Cr. Cas. 74; Rex *v.* Gully, 1 Leach, Cr. Cas. 98.

3 Rex *v.* Jones, 2 Campb. 121; Bennett *v.* The State of Tennessee, Mart. & Yerg. Rep. 133; Ld. Melville's case, 29 How. St. Tr. 707. And see, as to seals, *post*, § 503, and cases there cited.

4 Walden *v.* Canfield, 2 Rob. Louis. R. 466.

5 Holman *v.* Burrow, 2 Ld. Raym. 794.

6 Alcock *v.* Whatmore, 8 Dowl. P. C. 615.

7 Tregany *v.* Fletcher, 1 Ld. Raym. 154; Lane's case, 2 Co. 16, 3 Com. Dig. 336, Courts, Q.; Newell *v.* Newton, 10 Pick. 470; Elliott *v.* Evans, 3 B. & P. 183, 184, per Ld. Alvanley, C. J.; Maberley *v.* Robins, 5 Taunt. 625; Tooker *v.* Duke of Beaufort, Sayer, 296. Whether Superior Courts are bound to take notice who are justices of the inferior tribunals, is not clearly settled. In Skipp *v.* Hooke, 2 Stra. 1080, it was objected, that they were not; but whether the case was decided on that, or on the other exception taken, does not appear. Andrews, 74, reports the same case, "*ex relatione alterius*," and equally doubtful. And see Van Sandau *v.* Turner, 6 Ad. & El. 773, 786, per Ld. Denman. The weight of American authorities seems rather on the affirmative side of the question. Hawks *v.* Kennebec, 7 Mass. 461; Ripley *v.* Warren, 2 Pick. 592; Despau *v.* Swindler, 3 Martin N. S. 705; Follain *v.* Lefevre, 3 Rob. Louis. R. 13. In Louisiana, the Courts take notice of the signatures of executive and judicial officers to all official acts. Jones *v.* Gale's Ex'r, 4 Martin, 635; Wood *v.* Fitz, 10 Martin, 196.

8 Dolder *v.* Lord Huntingfield, 11 Ves. 292; Rex *v.* De Berenger, 3 M. & S. 67; Taylor *v.* Barclay, 2 Sim. 213.

9 Lake *v.* King, 1 Saund. 131; Birt *v.* Rothwell, 1 Lord Raym. 210, 343;

Courts of the United States, moreover, take judicial notice of the ports and waters of the United States, in which the tide ebbs and flows; of the boundaries of the several States and judicial districts;[1] and in an especial manner of all the laws and jurisprudence of the several States in which they exercise an original or an appellate jurisdiction. The Judges of the Supreme Court of the United States are on this account bound to take judicial notice of the laws of jurisprudence of all the States and Territories.[2] A Court of Errors will also take notice of the nature and extent of the jurisdiction of the inferior Court whose judgment it revises.[3] In fine, Courts will generally take notice of whatever ought to be generally known, within the limits of their jurisdiction. In all these, and the like cases, where the memory of the Judge is at fault, he resorts to such documents of reference, as may be at hand, and he may deem worthy of confidence.[4]

Rex *v.* Wilde, 1 Lev. 296; Doug. 97, n. 41; Rex *v.* Arundel, Hob. 109, 110, 111; Rex *v.* Knollys, 1 Ld. Raym. 10, 15; Stockdale *v.* Hansard, 7 C. & P. 731; 9 Ad. & El 1; 11 Ad. & El. 253; Sheriff of Middlesex's case, Ib. 273; Cassidy *v.* Stewart, 2 M. & G. 437.

[1] Story on Eq. Plead. § 24, cites U. S. *v.* La Vengeance, 3 Dall. 297; The Appollon, 9 Wheat. 374; The Thomas Jefferson, 10 Wheat. 428; Peyroux *v.* Howard, 7 Pet. 342.

[2] Ibid.; Owings *v.* Hull, 9 Pet. 607, 624, 625.

[3] Chitty *v.* Dendy, 3 Ad. & El. 319.

[4] Gresley on Evid. 295.

CHAPTER III.

OF THE GROUNDS OF BELIEF.

§ 7. We proceed now to a brief consideration of the *General Nature and Principles of Evidence.* No inquiry is here proposed into the origin of human knowledge; it being assumed, on the authority of approved writers, that all that men know is referable, in a philosophical view, to perception and reflection. But, in fact, the knowledge, acquired by an individual, through his own perception and reflection, is but a small part of what he possesses; much of what we are content to regard and act upon as knowledge, having been acquired through the perception of others.[1] It is not easy to conceive, that the Supreme Being, whose wisdom is so conspicuous in all his works, constituted man to believe only upon his own personal experience; since in that case the world could neither be governed nor improved; and society must remain in the state, in which it was left by the first generation of men. On the contrary, during the period of childhood, we believe implicitly almost all that is told us; and thus are furnished with information, which we could not otherwise obtain, but which is necessary, at the time, for our present protection, or as the means of future improvement. This disposition to believe may be termed instinctive. At an early period, however, we begin to find that, of the things told to us, some are not true; and thus our implicit reliance on the testimony of others is weakened; first, in regard to particular things, in which we have been deceived; then in regard to persons, whose falsehood we have detected; and, as these instances multiply upon us, we gradually become more and more distrustful of such statements, and learn, by experience, the

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[1] Abercrombie on the Intellectual Powers, Part 2, sec. 1, p. 45, 46.