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right of search for contraband and colonial articles springs at once into existence, a right which is universally conceded to exist, which is acknowledged in treaties by which contraband or prohibited commodities are defined, and to which all neutrals are bound to submit. S. F. D.

ART. VIII.—GREENLEAF ON EVIDENCE.

A Treatise on the Law of Evidence. By SIMON GREENLEAF, LL.D, Royall Professor of Law in Harvard University. Boston: Charles C. Little and James Brown. London: A. Maxwell. 1842. 8vo.

Omnes debere Jurisprudentiæ libris componendis animum adjicere; all men ought to addict themselves to the composing books of law. So says our great master, Sir Edward Coke; and we should most heartily join with him, if all the books composed should compare in value with that now before us. Professor Greenleaf has taken a difficult, important, and interesting branch of our law, and treated it with originality, clearness, neatness, method, completeness and learning. His work will be the most agreeable manual for the student, introducing him to the principles of the law of evidence, at the same time that it will engage the attention of the practitioner, and render him most essential aid in the application of the rules to the affairs of actual life. It is not necessary to say, in enhancement of its merits, that it will supersede all other works on the same subject; but we should fail in justice to the learned author, and in expressing our high opinion of his work, if we did not frankly declare, after a careful examination of it, that no other work on the subject can be of equal value to the American lawyer, and that, wherever, in our broad country, the common law is administered, professor Greenleaf's Treatise on

the Law of Evidence, will be studied and referred to alike by the student and practitioner.

The subject is of an importance, only equalled by its interest, in a professional point of view. The rules of evidence must be familiar as his alphabet to the practitioner. He is constantly called upon to apply them at a moment's warning. To use a sporting phrase, he must be able *to shoot flying*. In the currents of forensic debate, an unexpected emergency may arise, allowing no opportunity for deliberation, or for reference to authorities, when the decision is to be made as rapidly as the human voice can give it utterance. It is on occasions like these, when great affairs are in question, that the advocate evinces his full mastery of his profession. But the experience of every day in court offers instances, often in no humble way, in illustration of the importance of this knowledge.

It has been said in that parent country, from which we derive our laws, that king, lords and commons, the whole constitution of government, were devised in order to get twelve men into a box — a strong form of expression denoting the superlative importance of the administration of justice in the arrangements of society. And is it not strictly true? Why do we come together in society, and build these various fabrics of state, except to protect individuals in the enjoyment of their rights, whether assailed by foreign or domestic wrong? But in carrying out these purposes of protection, in the administration of justice, we must use the rules of evidence. These are the scales which the law holds aloft.

To the lawyer, engaged in courts, or dealing with the questions of practical life, no other department of jurisprudence can be of equal importance, if, indeed, it be possible to separate a knowledge of this department from that of all the others. For, to understand the law of evidence thoroughly we must be familiar with the whole range of juris-

prudence. In determining the proofs necessary to sustain a title to property, to enforce a contract, or to uphold innocence, we must accurately comprehend the nature of the title, and of the contract, and the ingredients which constitute crime. The occasion for this knowledge seems, in practice, to precede that of evidence, though it will be often found to mix with it, so as not always to be distinguishable from it. The late treatises on this subject have worn the air of Grand Abridgments, wherein are treated the whole circle of legal relations, both civil and criminal; one of these works making, what an old writer might have called, a microcosm of law.

Mr. Starkie's very valuable work, occupying, in the last edition, upwards of eighteen hundred octavo pages, presents a survey of the whole field of jurisprudence; so that one, who has completely mastered all its details, may make boast of no mean professional attainments. In discussing with such fulness the general topics of the law, we doubt if he has not departed from the most appropriate and logical treatment of his subject. It has been professor Greenleaf's object to confine himself, as much as possible, within the exact limits of the law of evidence, to expound its principles, and show their application, but not to allow himself to wander at large in the other departments of law. In this way he has been able to keep his work within a moderate compass, and to present a view of the subject, divested of all matters which do not tend directly to the elucidation thereof.

We believe it was Addison who defined good writing to be *proper words in proper places;* so, in a larger view, a good work embraces *proper topics in proper places*, rejecting all other things as surplusage. A treatise, wrought with care and method, and strictly confined to the law of evidence, has long been desiderated by the students of law in our country; and we are happy that it has fallen to our Dane Law School, — towards which we turn with filial re-

gard, as the place where the study of the law was first made delightful to us, — to supply this want, and to offer this new token of the ability and learning of its distinguished professors.

Professor Greenleaf has dedicated his work to his associate professor in the law school, Mr. Justice Story; and we cannot but notice the dedication as a beautiful tribute of friendship and regard. "With unaffected sincerity," says Professor Greenleaf, "I may be permitted to acknowledge, that while my path has been illumined for many years by your personal friendship and animating example, to have been selected as your associate in the arduous and responsible labors of this institution,[1] I shall ever regard as the peculiar honor and happiness of my professional life. *Beatè vixisse videam, quia cum Scipione vixerim.*"

It is not a little curious to note the development and expansion of the principles of the law of evidence in comparatively modern times. The Year Books, so full of nice distinctions in other branches of law, are silent on this; and we doubt if six cases can be found in all their dark pages touching the competency of witnesses, a topic prolific of questions at the present day. This excites more astonishment when we consider the attention bestowed in those times upon questions of the competency of jurors, and the validity of challenges, on which the cases seem to be almost without number.

In the early and minute Abridgment by Brooke, there is no title of *Evidence;* there are two pages under the head of *Testmoignes.* In the Abridgment of Fitzherbert there is no title of *Evidence;* though both Brooke and Fitzherbert have a title of *Trial,* in which, perhaps, there are one or two entries that bear on the subject. In D'Anvers's Abridgment we find the titles *Evesque* and *Excommunication,* but *Evi-*

[1] The Dane Law School at Harvard University, Cambridge, Mass.

dence does not come between them. There is no such title in Roll's Abridgment, though there is a subdivision under this head in the article *Triall.* But Sheppard's *Epitome*, which appeared about the same period with Roll's Abridgment, does not contain anything on this subject.[1]

The earliest work which aims to give any view of the Law of Evidence, is the *Trials per Pais*, "originally compiled by Giles Duncombe, heretofore of the Inner Temple, Esq.," and published at the close of the seventeenth century. The author, as appears from his preface, was an ardent lover of the law; for he says, "notwithstanding the hard-favored objections which some men cast upon it, I really think the study of the law to be the most pleasant study in the world." He also appears to have entertained an exalted idea of the importance of the Law of Evidence. "The hopes" he says, "and life of all the process, the force of the judgment and the truth, nay, the right of the parties lie in the trial; for as one elegantly says, *Qui non probat*, at the trial, *dicitur veritate et jure carere;* and indeed the knowledge of all the law tends to this; for without victory at the trial, to what purpose is the science of the law? The judge can give no sentence, no decision without it, and must give judgment for that side the trial goes; therefore, I may well say, it is the chief part of the practice of the law." The author, in his preface, speaks of reading "the elaborate books of *Farinacius de Testibus*, and the exquisite and incomparable volumes of *Mascardus de Probationibus*, in the *Cæsarian* and *Pontifical Laws*, which works were so valuable and esteemed that they were

[1] We cannot allude to this work without bearing our testimony to its great value in illustration of the early English law. It is dedicated to "his Highness Oliver, Lord Protector of the Commonwealth of England, Scotland and Ireland, and the dominions thereunto belonging," and we venture to suppose, that, on this account, it failed to find favor with the loyal generations that succeeded; a suspicion which is confirmed by an unworthy fling of Viner in one of the prefaces to his Abridgment.

looked upon as new lights sent from heaven, by the professors of those laws." We question whether Duncombe was not the earliest explorer, furnished by Westminster Hall, in the field of Roman law, since Bracton: if this great writer may be considered to have belonged to Westminster Hall.

The great digest of *Comyns*, though remarkable, for its fulness and completeness, contains but a few pages under the head of *Evidence*, and these are of comparatively small importance. On the other hand, the title *Pleader* is comprehensive and copious to such an extent that it is referred to constantly at this day, and may be read with profit by any student of the niceties of that branch of learning. The relative spaces, occupied by these two subjects in this work, may be regarded as a just measure of the different cultivation which the two had thus far received from the professors of the common law. The early history of English jurisprudence shews that *pleading* was a favorite pursuit. The Year Books abound in illustrations of this. Every learned "apprentice at law," and serjeant, seemed to take pleasure in the subtleties of this system. He was a splitter of hairs, or, in the less homely language of Cicero, *auceps syllabarum.* All the acuteness of the schoolmen was applied in counts, demurrers, and special traverses; and the genius of the Aristotelian philosophy penetrated into the science of pleading in the English law.

The Commentaries of Sir William Blackstone were published as late as 1765, and present a beautiful and lucid view of the law of England at that period. The subject of *Actions* is laid open with method and fulness. A whole chapter is devoted to *Ousters of Chattels Real;* another to *Trespass;* another to *Nuisances;* another to *Waste;* another to *Process;* and another to *Pleading.* But the important title of *Evidence* is hidden in the chapter *of the trial by jury*, where it is despatched in less than *eight* pages. The only authorities referred to by the learned commenta-

tor, are the little book of lord chief baron Gilbert on Evidence; the introduction to the law of nisi prius, afterwards attributed to Mr. Justice Buller; Salkeld's Rep., 285; Gail's Observations, a work of the Roman law; Potter's Grecian Antiquities; Coke Littleton; the Registrum Brevium, 182; 2nd Institute, 487; 5 Rep., 104; Hale's History of the Common Law; Quinctiliani Institut. Orat. b .5, c. 7; and a citation from the Pandects and another from the code of the Roman Law.

But of late years a change has taken place. Evidence has become a favorite title in the English law. Cases in illustration of it have multiplied infinitely. The table of cases, in the last edition of Starkie on Evidence, is truly appalling in its extent. Judges have devoted their best powers in explaining and determining the principles of the subject, and in applying them to new circumstances; and practitioners at the bar have found it necessary to master it. They become cunning in the rules of evidence, as a swordsman in fence. Writers have illustrated the subject; and books of various dimensions have pressed on the heels of each other, till they form by themselves a library of no mean size.

We have compiled, from a recent catalogue, the following list of English works on the law of Evidence at the present time.

Archbold's (J. F.) Digest of the Law relative to Pleading and Evidence in Civil Actions. Second edition. 12mo. 1837.

Beaumont's (G.) Table of Evidence. On a sheet. 1833.

Bentham's (J.) Treatise on Judicial Evidence, by M. Dumont. 8vo. 1825.

Bentham's (J.) Rationale of Judicial Evidence, specifically applied to English Practice. 5 vols. 8vo.

Christian's (E.) Dissertation, shewing that the House of Lords, in cases of Judicature, are bound by the same Rules of Evidence that are observed by all other Courts. Second edition. 1820.

Coventry's (T.) Conveyancer's Evidence. Royal 8vo. 1832.

Espinasse's (Isaac) Practical Treatise on the Settling of Evidence for Trials at Nisi Prius, and on the preparing and arranging the necessary proofs. Second edition, with considerable additions. 1825.

Garde's (R.) Practical Treatise on the General Principles and Elementary Rules of the Law of Evidence. 12mo. 1830.

Garratt's (W. A.) Suggestions for Reform in Proceedings in Chancery, particularly in respect of the Pleadings, for the mode of taking Evidence, and the Accounts and Inquiries usually directed. 8vo. 1837.

Gilbert's (Lord Chief Baron) Law of Evidence, by J. Sedgwick, Esq. Sixth edition. 8vo. 1801.

Glassford's (J.) Principles of Evidence, and their application to subjects of judicial inquiry. 8vo. 1820.

Gresley's (R. N.) Treatise on the Law of Evidence in the Courts of Equity. Royal 8vo. 1836.

Harrison's (S. B.) Evidence ; forming a title of the Code of legal proceedings, according to the plan proposed by Crofton Uniacke Esq. 12mo. 1825.

Holroyd's (E.) Observations upon the Case of A. Thornton, who was tried at Warwick, August, 1817, for murder, showing the danger of pressing presumptive evidence, &c. 8vo.

Hubback's (J.) Treatise on the Evidence of Testate and Intestate Succession to Real and Personal Property.

Mackinnon's (D.) Philosophy of Evidence. 1812.

Macnally's (L.) Rules of Evidence on Pleas of the Crown. 2 vols. 8vo.

Mathew's (J. H.) Treatise on the Doctrine of Presumption and Presumptive Evidence affecting the Title to Real and Personal Property. Royal 8vo. 1827.

Morgan's (J.) Essays on the Law of Evidence. 3 vols. 8vo. 1789.

Peake's (T.) Compendium of the Law of Evidence. Fifth edition, with considerable additions. 8vo. 1822.

Phillips's (S. M.) Treatise on the Law of Evidence. Eighth edition, with considerable additions, by A. Amos, Esq. In 2 vols. Royal 8vo. 1838.

Roscoe's (H.) Digest of the Law of Evidence in Criminal Cases. 12mo. Second edition. By T. C. Granger, Esq. Barrister at Law.

Roscoe's (H.) Digest of the Law of Evidence on the Trial of Actions at Nisi Prius. Fifth edition, with considerable additions. By C. Crompton and E. Smirke, Esqrs., Barristers at Law. 12mo. 1839.

Saunders's (J. S.) Law of Pleading and Evidence in Civil Actions, arranged alphabetically, with Practical Forms. 2 vols. 8vo. 1828.

Starkie's (T.) Practical Treatise on the Law of Evidence, and Digest of Proofs in Civil and Criminal Proceedings. Third edition, with numerous additions and corrections, and newly arranged. 2 vols. Royal 8vo.

Tait's Treatise on the Law of Evidence in Scotland. The third edition. By A. Urquhart, Esq. 8vo. 1834.

Theory of Presumptive Proof, or an Inquiry into the Nature of Circumstantial Evidence. 8vo.

Tomlins's (T. E.) Cases explanatory of the Rules of Evidence before Committees of Election in the House of Commons, &c. 8vo. 1796.

Van Heythuysen's (F. M.) Essay upon Marine Evidence in the Courts of Law and Equity, in which is considered the Competency of a Marine Witness, the Legal Title to British Ships, the Proof and Construction of a Ship's Policy, and the evidence necessary to establish a variety of Nautical Subjects. To which is added a Glossary of Sea Terms which frequently occur in Marine Pleading. 8vo. 1819.

Whitcomb's (R.) Inquiry into the Evidence relating to the incompetency of Witnesses. 1824.

Wigram's (James) Examination of the Rules of Law, respecting the admission of extrinsic Evidence in aid of the Interpretation of Wills, contained in Observations on the Case of Goblet *v.* Beechy and others. Second edition. 8vo. 1834.

Wills's (William) Essay on the Rationale of Circumstantial Evidence, illustrated by numerous cases. 8vo. 1838.

Of these several are small and of no importance. Others have different degrees and kinds of value. The works of

Jeremy Bentham, we deem, very important contributions to jurisprudence, in a general sense, but not susceptible of practical use. They indicate the abuses, incongruities, and imperfections of the system, and, in this way, enlighten the steps of those who honestly desire to reform it. And this was the express object with which they were composed. It does not appear to have been professor Greenleaf's design to consider the law in this point of view. His aim has been to expound *the law as it is*, and not to enter into the entangled discussion of the various questions of its reform. Of course, this consideration must be borne in mind, in forming our opinion of his labors; and we must not expect to find the untutored spirit of the reformer in what professes to be a practical treatise. We must keep before our mind the warning of Pope;

> "In every work regard the author's end;
> Since none can compass more than they intend."

Among the practical treatises, that of Gilbert is the earliest in point of time. It is, we think, very little consulted now, though it has been much enlarged by the labors of several editors. It is, however, but a meagre outline. And yet sir William Blackstone, in apologising for not entering into the numberless niceties of what is, or is not, legal evidence, says; "this is admirably well performed in lord chief baron Gilbert's excellent treatise of Evidence; a work which it is impossible to abstract or abridge, without losing some beauty and destroying the chain of the whole."

After Gilbert, the works that have been most extensively used by the profession, are those of Macnally, Peake, Phillips and Starkie — and we may add Roscoe, though his two volumes have not been published for a long time. The treatise of Macnally is confined to the rules of evidence on pleas of the crown, and we suspect it is very rarely used in our country at the present day. Peake's Compendium of the

Law of Evidence appears to have enjoyed considerable reputation. The edition mentioned above is the fifth in England, and that was as long ago as 1822; and more than one edition has appeared in our country with ample notes of American decisions. But the works of Mr. Phillips and Mr. Starkie, (we may include those of Mr. Roscoe,) have to a great degree superseded all former and other treatises on the same subject. These have justly sustained a high character, and been extensively used by the profession both in England and America. That of Mr. Phillips, though well-esteemed among us, seems to have enjoyed a higher reputation in Westminster hall than in the United States, while the contrary is true, perhaps, of the work of Mr. Starkie. At this present moment we have on our table the *seventh* American edition of this work, reprinted from the *third* London edition; and the *fourth* American edition of Mr. Phillips's Treatise, reprinted from the *seventh* London edition. We doubt if any other volume of the law, with the exception of Blackstone's Commentaries, is so often cited in the courts of the various states as Starkie on Evidence. The works of Mr. Roscoe — one a *Treatise on the Law of Evidence* generally and the other a *Digest of the Law of Evidence in Criminal Cases* — have always seemed to us very agreeable and instructive manuals, and every way worthy of the high reputation they have enjoyed. Our opinion with regard to them was expressed several years since in this journal. The early death of this writer, his amiable character, and the name, distinguished in literature, which he bore, have given his productions an interest beyond their mere professional value. The volume of Mr. Wills on *Circumstantial Evidence* is a valuable and interesting contribution to the elucidation of that topic, for which we render to the author our hearty thanks.

The works on evidence in the Roman law and under the different systems of the continent have been resorted to very

little, by writers and by judges, in the exposition of our law; and we doubt if they would be found to render any steady and important lights. Mr. Giles Duncombe, in the enthusiasm of a solitary admirer, speaks of "the exquisite and incomparable volumes of *Mascardus de Probationibus*," which we are free to say we have always found dull and perplexed with cases and distinctions innumerable, which are rarely susceptible of any practical application in our courts. The study of other systems of jurisprudence, however, is one of the surest means of enriching, refining and strengthening our own. It is a source of true pleasure to be able to discover, under widely differing forms, the operation of those principles which enter into the common law. It is the remark of Selden, in his notes to Fortescue,[1] that, "to speak without perverse affectation, all laws in general are originally equally ancient. All were grounded upon nature, and no nation was, that out of it took not their grounds; and nature being the same in all, the beginning of all laws must be the same. But the divers opinions of interpreters proceeding from the weaknesse of man's reason, and the several conveniences of divers states have made these limitations, which the law of nature hath suffered, verie different. And hence it is that those customs, which have all come out of one fountain, *nature*, thus varie from and crosse one another in severall Commonwealths." This should be an incentive to the cultivation of the laws of other countries. A course of lectures on *Comparative Jurisprudence* would not be of less importance to the student of law, than lectures on *Comparative Anatomy* are to the disciples of another science. An illustration in point occurs in professor Greenleaf's treatise, pp. 137–143.

It is well received at the common law, that a party's own shop books are admissible evidence to prove the delivery of

[1] Selden in note to Cap. 17 of Fortescue de Landibus Legum Angliæ.

goods therein charged, the entries having been made by his clerk. But in the United States this principle has been carried further, and extended to *entries made by the party himself*, in his own shop books, supported by his suppletory oath. Professor Greenleaf shows very clearly, that if the American rule is not in accordance with the principles of the common law, yet it is in conformity with those of other systems of jurisprudence. In the administration of the Roman law, the production of a merchant's or tradesman's book of accounts, regularly and fairly kept, in the usual manner, was deemed presumptive evidence (*Semiplena probatio*) of the justice of his claim; and in such cases the suppletory oath of the party (*juramentum suppletivum*) was admitted to make up the *plena probatio* necessary to a decree in his favor. By the law of France, the books of merchants and tradesmen, regularly kept, and written from day to day, without any blank, when the tradesman has the reputation of probity, constitute a semi-proof, and with his suppletory oath, are received as full proof to establish his demand. The same doctrine is familiar in the law of Scotland. Our author's exposition of this whole subject is clear and instructive.

Passing now to the writers on Evidence in our own country, we find very little to notice. The principal English works, have been annotated by American editors with such fullness and accumulation of materials that the text sometimes — certainly in one instance — is overshadowed by the new structure. The last edition of Mr. Phillips's book brings to mind the description by Juvenal of the head-dress of a Roman lady;

> Tot premit ordinibus, tot adhuc compagibus altum
> Ædificat caput,

Besides the various editorial labors on English works, we find Swift's Digest of the Law of Evidence, which has been well received in Connecticut, of which state the learned

author was Chief Justice — and a series of articles, discussing proposed changes of the law in the spirit of Jeremy Bentham, of which we forbear to speak in the terms of commendation which they merit, as they appeared in our journal.

Professor Greenleaf has, therefore, been the first to occupy the field in our country, with a native work, on the law of Evidence calculated for general practical use. In the preparation of it he has diligently availed himself of the labors of his predecessors, and, on all proper occasions, has done justice to their learning and ability. In the advertisement which is prefixed by way of preface he expresses himself as follows:

"The profession being already furnished with the excellent treatises of Mr. Starkie and Mr. Phillips on Evidence, with large bodies of notes, referring to American decisions, perhaps some apology may be deemed necessary for obtruding on their notice another work, on the same subject. But the want of a proper text-book, for the use of the Students under my instruction, urged me to prepare something, to supply this deficiency; and having embarked in the undertaking, I was naturally led to the endeavor to render the work acceptable to the profession, as well as useful to the student. I would not herein be thought to disparage the invaluable works just mentioned; which, for their accuracy of learning, elegance, and sound philosophy, are so highly and universally esteemed by the American bar. But many of the topics they contain were never applicable to this country; some others are now obsolete; and the body of notes has become so large, as almost to overwhelm the text, thus greatly embarrassing the student, increasing the labors of the instructer, and rendering it indispensable that the work should be rewritten, with exclusive reference to our own jurisprudence. I have endeavored to state those doctrines and rules of the law of Evidence, which are common to all the United States; omitting what is purely local law, and citing only such cases as seemed necessary to illustrate and support the text. Doubtless a happier selection of these might be made, and the work

might have been much better executed by another hand; for now it is finished, I find it but an approximation towards what was originally desired. But in the hope, that it still may be found not useless, as the germ of a better treatise, it is submitted to the candor of a liberal profession."

The mingled experience of the author, as an advocate at the bar and as a professor of law, have eminently fitted him for his task. He knows the wants of both students and practitioners, and his work, as we have already said, is adapted to the use of both. It is condensed and pointed in its statements of the law, reaching often to the brevity and terseness of a code, at the same time that its method and expositions of the principles on which the law is founded may vindicate for it the character of a philosophical treatise. Further, it is characterized by an unusual neatness and felicity of expression, through which the idea of the author is presented visibly to the mind of the reader.

It has been the aim of the author in every part, first to state the general doctrines and principles on which the rules of Evidence are founded; to exhibit the principle with clearness and precision; to define its limits and extent, and to illustrate it by adjudged cases. And herein he often shows that many cases, which *seem* to be exceptions or anomalies, and are so treated in the books, do in fact fall within the principle of the rule itself. In doing this he evinces a nice legal logic.

Next come the *exceptions* to the rule itself, with the reasons for their allowance. A great many decisions are cited in this way as harmonizing with each other, which have sometimes been cited as *contradictory*. Some of the recent editors in our country of works on evidence, have erred in this way for want of considering the true principle of the case. There is nothing in legal studies calculated to excite a more pleasurable emotion than the discovery of the hidden

chain of principle by which decisions, apparently discordant, are brought together. It is as when an erring sheep is conducted again within the fold.

While making these general remarks on the work before us, we must not omit to mention the fullness and precision with which certain rules and doctrines are treated, which have been left obscure by other writers. Such is the sketch of the true theory of the law of *Presumptive Evidence;* a chapter which we do not hesitate to say opens a clearer, more correct and more truly valuable view of this most important topic than is to be obtained from the octavo volume of *Mathews*, which is devoted expressly to its consideration. Mr. Mathews, and we fear that we might apply our remark to other writers even of greater eminence, has not apprehended the proper and most essential distinction between *presumptions of law* and *presumptions of fact.* In consequence whereof, his whole work is disjointed and incoherent. It has always been a source of no little astonishment, that a treatise, so radically defective, found in our country an editor of the eminent learning and ability of Mr. Rand.

The titles which, in different degrees, challenge our especial notice, are *Variance; Burden of Proof; Hearsay; Admissibility of Parol or Verbal Evidence to affect that which is written; Religious Belief; Alterations of Deeds; Proof of Handwriting.*

The table of contents will enable the reader to see at once the outline of the work.

Chap. II. Of the substance of the issue.

Chap. III. Of the burden of proof.

Chap. IV. Of the best evidence.

Chap. V. Of hearsay.

Chap. VI. Of matters of public and general interest.

Chap. VII. Of ancient possessions.

Chap. VIII. Of declarations against interest.

Chap. IX. Of dying declarations.

Chap. X. Of the testimony of witnesses subsequently dead, absent, or disqualified.

Chap. XI. Of admissions.

Chap. XII. Of confessions.

Chap. XIII. Of evidence excluded from public policy.

Chap. XIV. Of the number of witnesses and the nature and quantity of proof required in particular cases.

Chap. XV. Of the admissibility of parol or verbal evidence, to affect that which is written.

Part III. Of the instruments of evidence.

Chap. I. Of witnesses, and the means of procuring their attendance.

Chap. II. Of the competency of witnesses.

Chap. III. Of the examination of witnesses.

Chap. IV. Of public documents.

Chap. V. Of records and judicial writings.

Chap. VI. Of private writings.

Turning next to the works of Mr. Phillips, we shall see the map which he has presented of the law of Evidence.

BOOK I. PART I.

Chap. I. Of the attendance of witnesses.

Chap. II. Of the incompetency of witnesses from want of understanding.

Chap. III. Of incompetency from defect of religious principle.

Chap. IV. Of incompetency of witnesses from infamy. — Sect. I. What offences incapacitate; and of the mode of restoring competency. Sect II. Of the admissibility of accomplices.

Chap. V. Of the incompetency of witnesses from interest. — Sect. I. Of the nature of the interest which disqualifies. Sect. II. Of the rule on the subject of interest considered with reference to the parties in the suit. Sect. III. Of the rule on the subject of interest, considered with reference to husband or wife of the party. Sect. IV. Of the effect of admissions by a party to the suit, or by his agent, against the party's interest. Sect. V. Of the admissibility of the confession of a prisoner against himself. Sect. VI. Of the competency of the party injured in criminal prosecutions. Sect. VII. Of certain exceptions to the general rule on the subject of interest. Sect. VIII. Of the means by which the competency of an interested witness may be restored.

Chap. VI. Of the admissibility of counsel, or solicitor.

Chap. VII. Of certain general rules of evidence. — Sect. I. Of the number of witnesses for the proof of a fact. Sect. II. Of the nature of presumptive evidence. Sect. III. Evidence is to be confined to the points in issue. Sect IV. The affirmative of the issue is to be proved. Sect. V. The substance only of the issue need be proved. Sect. VI. The best evidence is to be produced which the nature of the case admits. Sect. VII. Hearsay is not evidence.

Chap. VIII. Of the examination of witnesses.

Chap. IX. Of bills of exceptions, and demurrers to evidence.

Part II. Chap. I. Of acts of parliament.

Chap. II. Of verdicts and judgments of courts of record. — Sect. I. Of verdicts and judgments, considered with reference to the parties in the suit. — Sect. II. Of verdicts and judgments, considered with reference to the subject matter of the suit. — Sect. III. Of the Admissibility, in civil cases, of verdicts in criminal proceedings.

Chap. III. Of the judgments of courts of exclusive jurisdiction. — Sect. I. Of sentences in ecclesiastical courts. — Sect. II. Of sentences in courts of admiralty and foreign courts. — Sect. III. Of judgments *in rem* in the exchequer, by commissioners of excise, and by colleges in the universities.

Chap. IV. Of certain other judicial proceedings. — Sect. I. Of

proceedings in chancery. — Sect. II. Of depositions, examinations, inquisitions, and other judicial proceedings.

Chap. V. Of the proof of records and judicial proceedings.

Chap. VI. Of public writings, not judicial.

Chap. VII. Of the inspection of public writings.

Chap. VIII. Of the proof of private writings. — Sect. I. Of the proof of deeds, agreements, and other writings. Sect. II. Of the proof of wills.

Chap. IX. Of stamping, as a requisite of written instruments.

Chap. X. Of the admissibility of parol evidence to explain, vary, or discharge written instruments. — Sect. I. Of the admissibility of parol evidence to explain ambiguities. Sect. II. Of the admissibility of parol evidence to vary or discharge written instruments. Sect. III. Of the rule in courts of equity, respecting the admissibility of parol evidence.

The work of Mr. Starkie is not subdivided into chapters; nor is there any table of contents. So that, in order to present a view of the analysis which he has adopted, we must follow his course in his pages. He begins with what he calls the *Elementary Division;* then considers *Immediate Testimony; Mediate Testimony; Indirect Evidence,* and herein of *presumptions* and circumstantial evidence; the *Instruments of Evidence,* and herein of *witnesses, hearsay, cross-examination; Written Instruments,* and herein of *Public Documents, exemplifications, records, acts of parliament, acts of state, judicial documents,* as judgments, civil, criminal and *in rem,* depositions, examinations, and inquisitions, taken in the course of a legal process, writs, warrants, pleadings, bills, and answers; *private writings,* as admissions, entries, estopels, deeds; then comes a title of *Proofs,* and herein of the *onus probandi,* arguments of counsel, order of proof, variance, quality of the evidence, matters noticed by the court, questions of law and fact, bill of exceptions, new trial, nonsuit, charge to the jury, province of the jury,

weight of evidence, force of testimony, circumstantial evidence, conflict of testimony, fraud in circumstances.

It requires but a hasty glance at the outlines of these three works to see that professor Greenleaf has the advantage over the others in the perspicuous and philosophical arrangement which he has adopted. The method of Mr. Phillips is not objectionable in a practical point of view; but it does not seem calculated to disembarrass the student of difficulties which stalk in his path. After stating the plan of his work, this writer begins at once with a dry practical point on the attendance of witnesses. "The process," he says, "which our courts of law have instituted for the purpose of compelling the attendance of witnesses is the writ of subpœna *ad testificandum*," (1 Phillips on Evidence, 2). Professor Greenleaf commences with a few preliminary observations, which explain the nature of his subject, and make the reader acquainted with some general terms which it is important to have well understood. A definition of evidence naturally leads the way. "The word evidence," he says, "includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved. 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." (Greenleaf, 3.)

Mr. Starkie, as we have seen, commences his work with some elementary remarks, having an indirect and distant bearing on his subject. Every system of municipal law, he says, consists of *substantive* and *adjective* provisions. Substantive are those which define primary rights and duties; adjective, which provide means for preventing or remedying the violation of substantive provisions. In order to annex either remedial or penal consequences to their proper predicaments in fact, it is essential that the true state of facts should be *investigated* by competent means.

By the law of England issues of fact, when arrived at by the pleadings, are to be tried by the country, that is, by a jury of twelve men. This ancient institution is vindicated and described; and we then arrive (p. 10,) at the definition of evidence; viz. "that which is legally offered by the litigant parties to induce a jury to decide for or against the party alleging such facts, as contradistinguished from all comment and argument on the subject, falls within the description of *evidence.* Where such evidence is sufficient to produce a conviction of the truth of fact to be established, it amounts to proof."

Professor Greenleaf, after defining evidence, and explaining what is meant by *competent evidence*, and *satisfactory evidence*, proceeds to state the three general heads under which this branch of law may be considered. *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 is followed in the treatment of the subject; but before proceeding further, he devotes a short but crowded chapter, where every line is a proposition, to consider what things courts will, of themselves, take notice of, without proof.

In treating of the *General Nature and Principles of Evidence*, he commences by explaining the *grounds of belief*, in a clear, simple and elementary manner, well-calculated to introduce the student to the more technical matters. The extensive chapter of *Presumptive Evidence* follows. This is divided into two branches, presumptions of law, and presumptions of fact. Presumptions of law consist of those rules, which, in certain cases, either forbid or dispense with any ulterior inquiry. They are distributed into two classes, namely, *conclusive* and *disputable.* Conclusive, or, as they are elsewhere termed, imperative, or absolute presumptions of law, are rules determining the quantity of evidence, re-

quisite for the support of any particular averment, which is not permitted to be overcome by any proof, that the fact is otherwise. They have been adopted by common consent, from motives of public policy, for the sake of greater certainty, and the promotion of peace and quiet in the community; and therefore it is, that all corroborating evidence is dispensed with, and all opposing evidence is forbidden. This common consent is sometimes expressly declared, through the medium of the legislature, in *statutes;* and sometimes through the medium of the judicial tribunals, it being the *common law* of the land. The author then collects and classifies with great distinctness the principal presumptions of this character; and herein considers presumptions in favor of judicial proceedings; from lapse of time; ancient deeds and wills; estopels; recitals in deeds; admissions; as to infants and married women; where two persons perished in the same calamity; spoliation of papers. In these cases of conclusive presumption, the rule of law merely attaches itself to the circumstances, when proved; it is not deduced from them.

The *second* class of presumptions of law, answering to the *presumptiones juris* of the Roman law, which may always be overcome by opposing proof, consists of those termed disputable presumptions. These, as well as the former, are the result of the general experience of a connection between certain facts or things, the one being usually found to be the companion, or the effect, of the other. The connexion, however, in this class, is not so intimate, nor so nearly universal, as to render it expedient, that it should be absolutely and imperatively presumed to exist in every case, all evidence to the contrary being rejected; but yet it is so general, and so nearly universal, that the law itself, without the aid of a jury, infers the one fact from the proved existence of the other, in the absence of all opposing evidence. In this mode, the law defines the

nature and amount of the evidence, which it deems sufficient to establish a *primâ facie* case, and to throw the burden of proof on the other party; and if no opposing evidence is offered, the jury are bound to find in favor of the presumption. The author then presents some of the principal presumptions of this class; as, of innocence; from conduct in the course of trade; payment of a bond after twenty years.

Presumptions of fact are usually treated as composing the second general head of presumptive evidence. They can hardly, however, be said, with propriety, to belong to this branch of the law. They are in truth but mere arguments, of which the major premise is not a rule of law; they belong equally to any and every subject-matter; and are to be judged by the common and received tests of the truth of propositions, and the validity of arguments. They differ from presumptions of law in this essential respect, that while those are reduced to fixed rules, and constitute a branch of the particular system of jurisprudence, to which they belong, these merely natural presumptions are derived wholly and directly from the circumstances of the particular case, by means of the common experience of mankind, without the aid or control of any rules of law whatever. And here we quit this most luminous chapter on Presumptive Evidence, which is of equal importance for the student and practitioner.

In *Part Second* we enter upon a new field — *the rules which govern the production of testimony.* And here we find the subject clearly and methodically expounded. The production of evidence, it is said, is governed by certain principles, which may be treated under *four* general heads or rules. The *first* of these is, that the evidence must correspond with the allegations, and be confined to the point in issue. The *second* is, that it is sufficient, if the *substance* only of the issue be proved. The *third* is, that the burden

of proving a proposition or issue, lies on the party holding the affirmative. And the *fourth* is, that the best evidence, of which the case, in its nature, is susceptible, must always be produced.

These are all considered in their natural order. The subject of *Hearsay* next occurs. This term is used with reference to that which is written, as well as to that which is spoken; and in its legal sense, it denotes that kind of evidence, which does not derive its value solely from the credit to be given to the witness himself, but rests also, in part, on the veracity and competency of some other person. Hearsay evidence, as thus described, is uniformly held incompetent to establish any *specific fact*, which, in its nature, is susceptible of being proved by witnesses, who can speak from their own knowledge. That this species of testimony supposes something better, which might be adduced in the particular case, is not the sole ground of its exclusion. Its intrinsic weakness, its incompetency to satisfy the mind as to the existence of the fact, and the frauds, which may be practised under its cover, combine to support the rule, that hearsay evidence is totally inadmissible. It becomes, therefore, of great importance clearly to distinguish between *hearsay*, and what is deemed *original* evidence. Here arise many nice and practical distinctions, often perplexing to the practitioner, which are discussed with care and fullness. Without pretending to refer to all, we shall simply mention the topics, of *pedigree, general reputation, res gestæ, declarations in disparagement of the title of the declarant, declarations of an agent, entries made by third persons, a party's own shopbooks.* This last head we have already noticed in another part of our remarks. The cases in illustration of all these points are analyzed with great skill; and materials, which seemed discordant, are wrought into the structure which supports the rule. Here arises the discussion of the evidence of indebtment, (we join with pro-

fessor Greenleaf in discarding the useless Americanism, *indebtedness*,) afforded by the *indorsement* of the payment of interest, or a *partial payment* of the principal, on the back of a bond or other security. The famous case of Searle *v.* Lord Barrington,[1] which has been so often commented on, is considered anew. It is not a little singular that this case, which occupies so much space in the books, should be found in a folio volume of original printed briefs, marked Cases in Parliament, 1728 to 1731, *in the law library of Harvard University*, wherein it is stated more at large than in any books of Reports.

Having thus illustrated the nature of hearsay evidence, and shown the reasons on which it is generally excluded, we are next led to consider the *cases in which this rule has been relaxed*, and hearsay admitted. The exceptions, thus allowed, will be found to embrace most of the points of inconvenience, resulting from a stern and universal application of the rule, and to remove the principal objections which have been urged against it. These exceptions are divided into four classes; *first*, those relating to matters of public and general interest; *secondly*, those relating to ancient possession; *thirdly*, declarations against interest; *fourthly*, dying declarations; *fifthly*, the testimony of witnesses, subsequently dead, absent, or disqualified. After these follow the important heads of *admissions* and *confessions*, which are considered in the light of exceptions to the rule rejecting hearsay evidence.

There are three remaining topics which are embraced in the *Second Part.* The first is a view of the evidence which the law excludes, or dispenses with, on grounds of public policy, because greater mischiefs would probably result from requiring or permitting its admission, than from wholly rejecting it. The principle of this rule has respect, in some cases, to the person testifying, and, in others, to

[1] 2 Stra. 826; 8 Mod. 278, and 2 Lord Raymd. 1370; 3 Bro. P. C. 593.

the matters concerning which he is interrogated; thus including the case of the party himself, and that of the husband or wife of the party, on the one hand; and, on the other, the subject of professional communications, awards, secrets of state, and some others. Another topic relates to the number of witnesses, and the nature and quantity of proof required in certain cases, as for instance, in the trial of treason, perjury, and under the statute of frauds. The last chapter of this *Part* is occupied by a consideration of the admissibility of parol or verbal evidence to affect that which is written. This subject, which is of such practical interest, is elucidated with the same clearness which characterizes the other parts of the work. The rules with regard to the interpretation of wills, which are laid down by the vice-chancellor Wigram, in his admirable treatise on that subject, are with great propriety used in support of the text.

Having thus considered the general nature and principles of evidence, and the rules which govern in the production of evidence, the author passes, in his *Third Part*, to speak of the instruments of evidence, or the means by which the truth, in fact, is established. In treating this subject he considers how such instruments are obtained, and used, and their admissibility and effect. The instruments of evidence are divided into two general classes, namely, *unwritten* and *written*. The first of these leads us at once to the subject of witnesses and the means of procuring their attendance; then the competency of witnesses; next the manner in which they are to be examined, and herein of the right of cross-examination.

And first in regard to the method of procuring the attendance of *witnesses*, it is to be observed, that every court having power definitely to hear and determine any suit, has, by the common law, inherent power to call for all adequate proofs of the facts in controversy, and to that end, to summon and compel the attendance of witnesses before it.

The ordinary summons is a writ of *subpœna*, which is a judicial writ, directed to the witness, commanding him to appear at the court, to testify what he knows in the cause therein described, pending in such court, under a certain penalty mentioned in the writ. If the witness resides abroad, out of the jurisdiction, and refuses to attend, or is sick and unable to attend, his testimony can be obtained only by taking his *deposition* before a magistrate, or commissioner duly authorized. This whole topic is eminently practical in its character, and is treated in this spirit by the author. It embraces the consideration of the fees and privileges of witnesses, and the manner of taking depositions. In a note professor Greenleaf says; "It has been held, that, for witnesses brought from another state, no fees can be taxed for travel, beyond the line of the state in which the cause is tried. Howland *v.* Lenox, 4 Johns. 311; Newman *v.* The Atlas Ins. Co., Phillips's Dig. 113; Melvin *v.* Whiting, 13 Pick. 190. But the reasons for these decisions are not stated, *nor are they very easily perceived.*" The last sentence is an instance of the quiet, but expressive, manner in which the author occasionally shews his dissent from some of the authorities.

The subject of the *competency of witnesses* opens the way to a wide survey of some of the most technical points in the law of evidence. This is the debatable ground which reformers of the law have occupied; and the pages of this Journal may attest the ardor with which the contest has been waged. There are many who think that all evidence should be presented to the jury, leaving to them to weigh its *credibility;* while others, among whom is professor Greenleaf, hold to the ancient rules of the common law, which absolutely exclude certain evidence as *incompetent.* The remarks with which the author introduces this subject shew the bias of his opinion. In private life, he says, men can inquire and determine for themselves, whom they will deal

with, and in whom they will confide; but the situation of judges and jurors renders it difficult, if not impossible, in the narrow compass of a trial, to investigate the character of witnesses; and from the very nature of judicial proceedings, and the necessity of preventing the multiplication of issues, it often may happen, that the testimony of a witness, unworthy of credit, may receive as much consideration as that of one, worthy of the fullest confidence. While, therefore, all evidence is open to the objection of the adverse party, before it is admitted, it has been thought necessary to the ends of justice, that some kinds of evidence should be uniformly excluded. In determining what evidence shall be admitted and weighed by the jury, and what shall not be received at all, or, in other words, in distinguishing between *competent* and *incompetent* witnesses, a principle seems to have been applied, which is likened by professor Greenleaf to that which distinguishes between conclusive and disputable presumptions of law, namely, the experienced connexion between the situation of the witness, and the truth or falsity of his testimony. And the question is not, it is said, whether any rule of exclusion may not sometimes shut out credible testimony; but whether it is expedient, that there should be any rule of exclusion at all. Our own impressions are strongly in favor of opening the way to all evidence, leaving to the jury the absolute judgment of its credibility; and to this conclusion there seems to be a growing tendency in the minds of legislators and of professional men. Lord Denman has recently introduced a bill into the house of lords, providing that no witness shall be incapacitated on account of *interest* or *crime*. The rule of English law, which renders a witness incompetent who has the smallest pecuniary interest in a trial, whilst the nearest relations may give evidence for one another, has long been regarded as a strange anomaly, and more than

one statute has been passed in England to modify it.[1] The same rule exists in most of the states of our country. Perhaps, the disposition to relax the rule in the case of *interest* is stronger than in that of *crime*, though the rule in this case seems anomalous in our country. On an examination of the constitutions of the different states, it appears that only a small number debar persons convicted of infamous crimes from the privileges of electors; so that it happens, that in most of the states, the *convict* may vote for officers of government, but is incompetent as a witness, and cannot be heard by a jury in a matter of mere private concern.

The persons who are held incompetent to testify by the common law, are, (1), parties, (2), persons deficient in understanding, (3), persons insensible to the obligations of an oath, and, (4), persons whose pecuniary interest is directly involved in the matter in issue. Other causes concur, in some of these cases, to render the persons incompetent. The author considers, in their order, each of these classes of persons; adding some observations on certain descriptions of persons, held incompetent in particular cases. The numerous authorities bearing on this branch of the law are classified, and the different rules are brought to the test of principle.

Time and space both admonish us that we must abridge our remarks. Leaving the broad field of the competency of witnesses, and the interesting exposition of the manner of examining witnesses, we arrive at the subject of *Written Evidence.* Under this head there is a view, *first*, of public documents, and *secondly*, of those writings which are private. And in regard to both these classes, the author's inquiries are directed (1) to the mode of obtaining an inspection of such documents and writings; (2) to the method of proving them; and (3) to their admissibility and effect. The consideration of records and judicial writings

[1] London Law Magazine, vol. 27, p. 485.

is full and instructive, and carries the reader over points of nice learning.

With the head of *Private Writings* the work is brought to a conclusion in the following words;

"And having thus completed the original design of this work, in a view of the principles and rules of the law of evidence, understood to be common to all the United States, this treatise is here properly brought to a close. The student will not fail to observe the symmetry and beauty of this branch of the law, under whatever disadvantages it may labor, from the manner of treatment; and will rise from the study of its principles, convinced, with lord Erskine, that 'they are founded in the charities of religion, — in the philosophy of nature, — in the truths of history, — and in the experience of common life.'"

Such is a rapid sketch of professor Greenleaf's Treatise, which, combining various excellencies rarely found in conjunction, must rank among the best productions of the common law in England or America. We have already spoken of its merits both for the *student* and *practitioner*. As we were closing this article, we heard that the learned author would very soon publish another volume, containing the *application of evidence to particular actions and issues*, occupying the same ground with Mr. Phillips and Mr. Starkie in the second volumes of their works. To the *practitioner* this will be a very valuable contribution. Mr. Hume, in his beautiful autobiography, tells us that the publication of the second volume of his History of England aided the circulation of its elder brother, which in the meantime had been much neglected. We are happy to understand, that professor Greenleaf's Treatise has already found such distinguished favor with the profession as to be above the necessity of that fraternal influence which was so opportune in the case of the great historian. The second volume on *Evidence* will doubtless commend itself, as the first has done, by its intrinsic merits. C. S.