THE THEORY OF EVIDENCE.

The judgment of a court may be conceived of as being or including the conclusion of a syllogism, of which the major premise is a rule or proposition of law, and the minor premise a proposition stating certain facts, which may be called the principal facts. Sir J. F. Stephen in his book on Evidence calls these the "facts in issue"; but that name is not so appropriate, because these facts are not always disputed. They are facts from which the judgment may be inferred without the aid of any other premises except propositions of law, which are assumed to be known to the court.

EXAMPLE.

Major premise. (Law.)	A person who makes a contract and breaks it must pay damages.
Minor premise. (Principal facts.)	A has made a certain contract with B and has broken it.
Conclusion. (Judgment.)	A must pay damages.

Before the principal facts can be acted on by the court, *i.e.,* used as premises for a judgment, they must be established. Facts, whether the principal facts or others, can be established in the following ways:

1. By judicial notice.

2. By an inference of law, *i.e.,* an inference having a rule of law as the major premise, from facts already established, as in the case of a conclusive presumption of law.

3. By the solemn admission of the parties, either in the pleadings or made in court for the purpose of dispensing with proof. An unsolemn admission is evidence only.

4. By the rules as to the burden of proof. This is a method of last resort, only used when all others fail.

5. By proof. It is this only with which we are here concerned.

Proof of a fact, except in one case presently to be mentioned, imports its inference from some other fact. The finding of a fact by the jury or other trier of fact, such as a judge or referee, is also the conclusion of a syllogism, of which a proposition stating

some other fact is the minor premise. A fact from which another fact is to be inferred may be called a probative fact. The major premise of such a syllogism is either a rule of law, as in case of a conclusive presumption of law, or some fact of common experience which the triers, like every one else, are assumed to know.

EXAMPLES.

Major premise. (Law: a conclusive presumption.)	The possessor of a thing is, subject to certain exceptions, deemed the owner.
Minor premise. (Fact.)	A was at a certain time in possession of a certain thing and no facts are shown to bring the case under an exception.
Conclusion. (Finding of fact.)	A was the owner of the thing at that time.
Major premise. (A fact of common knowledge.)	Men are likely to act according to their desires and intentions.
Minor premise. (Facts.)	A has been murdered. B desired and intended to murder A.
Conclusion. (Finding of fact.)	B was (more or less probably) the murderer.

There may be, and generally is, a series or chain of such inferences from one probative fact to another, the conclusion of each inference or syllogism standing as the minor premise, or, perhaps, rarely, as the major, of the next. Sometimes the conclusions of two or more earlier syllogisms are lumped together to form the premise of the next, as in the last of the above examples, where the minor premise consists of two facts, each of which must have been separately proved. Then the lines of proof run together and blend toward the top.

It is plain, however, that this series of inferences or of probative facts, each depending on the preceding one, must have a starting point somewhere. It must begin with some fact which is not proved by inference from any previously established fact. This may be called the primary fact. How is this proved? By direct observation by the triers. Something is presented to them which they directly perceive by their senses and which furnishes the basis for all their inferences.

This brings us to the meaning of the word evidence. That word has two meanings, the failure to distinguish between which has led to much confusion. Evidence means:

(1) Something directly presented to the senses of the triers, on perceiving which they become aware of a fact.

(2) A probative fact.

The spoken words of a witness or a photograph produced in evidence are of the first sort. On hearing or seeing these, the jury become directly aware of the fact that such words are spoken in their presence or that certain outlines and shades exist on a piece of paper. From these facts, by the aid of some such general propositions as that witnesses usually speak the truth or that photographs usually resemble their objects, as major premises, the jury infer that some fact asserted by the witness exists or that a certain object was of a certain nature.

Evidence of this first kind is of three classes, namely:

(1) Oral evidence; spoken words; presented to the triers' sense of hearing;

(2) Written evidence; written words; presented to the triers' sense of sight;

(3) Real evidence; other objects introduced as evidence, such as photographs, models, etc.; presented to various senses of the triers.

We use the word evidence in the second sense when we say that hearsay is not evidence, *i.e.*, the fact that a person not a party to the proceeding or called as a witness has made one assertion out of court is not permitted to be used as a probative fact from which to infer the existence of a fact which he thus asserted.

In the investigations of common life and in scientific investigations we have no arbitrary rules of evidence. We observe by our senses any object or act of any sort which seems to us to disclose any fact from which our inference can be logically drawn, and we accept any fact as a proper probative fact from which we think that we can logically draw an inference. We act habitually on hearsay evidence, and such evidence is often extremely good evidence.

There is no essential difference between judicial investigations and others. But the peculiar conditions under which judicial investigations are carried on, particularly the fact that when such an investigation has once been begun it must usually be carried on without interruption to a finish, that neither party can usually know before it begins exactly what evidence will be produced against him, and that the object of each party in producing evidence is not usually so much the elucidation of the truth on the estab-

lishing of his case, as well as the danger of fraud, make it necessary to have certain artificial rules. These are mainly rules of exclusion, for barring out some kinds of evidence which we freely and rightly use in other sorts of investigations. Experience has shown that under the conditions of trials, especially before juries, certain kinds of evidence, in the first sense of the word, and certain classes of probative facts, if allowed to be presented, are likely to lead to wrong conclusions or to open the door to fraud, and therefore they are not admitted. The rule that the contents of a written document must be proved, when possible, by the document itself, relates to evidence in the first sense; the thing to be presented to the senses of the triers must be the document, written evidence, not spoken words, stating what the document contains, oral evidence. The rule excluding hearsay, as above explained, relates to probative facts; and so does the rule against opinions as evidence, the fact that a certain person has a certain opinion not being usually safe probative fact from which to infer that matters really are as he believes them to be.

There are certain so-called rules of evidence or rules of law which are usually stated in the form of rules of evidence, which really do not fall under the theory of evidence at all. Such is the rule that a written contract can not be varied by parol evidence—at least, as it seems to me. That rule might be better expressed in some such form as this: When a juristic act has been committed to writing and the writing purports on its face to contain the entire act, it is deemed to contain it all. The above is not intended, of course, as a complete and accurate statement of the rule.

The rules excluding certain kinds of evidence are based on the general principle of getting as close as possible to the original sources of knowledge, which are what the law calls the best evidence. Every time that a fact is transmitted from mind to mind there is a fresh opportunity for inaccuracy or fraud in its giving, reception or retention in memory. Therefore the law says, let us have as few transmissions as possible. No doubt in former times those rules were too strict. But as they stand now they seem to me, and I believe most lawyers will agree that experience justifies this view, to be in the main founded in good sense and well adapted to the conditions under which judicial investigations are carried on, though perhaps they might still be relaxed a little with advantage.

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