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ART. I.—PRESUMPTIVE EVIDENCE.

A Treatise on Law and Fact, with the Theory and Rules of Presumptive or Circumstantial Proof in Criminal Cases. By W M. Best, A.M. LL.B. Barrister at Law S. Sweet. London. 1844.

As CERTAIN diseases, from the repeated instances in which they have baffled the skill and sagacity of medical practitioners, have been designated as "*opprobrium medicorum*," so may the law of evidence be described as the reproach of lawyers. Nor will this surprise any one who reflects on the comprehensive and in many instances abstruse nature of the subject, the necessity of some general rules to serve as landmarks in the judicial examination of human affairs, and the difficulty of introducing any that will not in many instances operate harshly, and endanger those interests which they are intended only to secure. To these considerations must be added the reflection, that the peculiar evil of excessive refinement and perfection in any pursuit is, that in time the end is sacrificed to the means, that arrangements, important only because they lead to a certain result, are thought of essential and intrinsic value, that pedantry takes the place of reasoning, and blind routine of sound and manly principle, so that the public welfare is postponed to the love of the art, the pride of superior proficiency, the natural reluctance to part with curious though useless learning, which many years have been devoted to acquire, in short, to the feelings that naturally exist in a numerous, powerful and ambitious body, set apart in great measure from the community whose interests are intrusted to their knowledge and integrity In the history of no pursuit[1] are these truths more exemplified than in

[1] In order to avoid constant repetition, we beg to acknowledge our obligations to:— Grimm, Deutsche Rechts-Alterthümer; Eichorn, Deutsche Staats- und Rechts-Geschichte, Savigny, Geschichte des Römischen Rechts Muratori, Antichita It., Toullier, Droit Civil Français Domat, Loix Civiles, Roscoe on Evidence, 6th ed. by Smirke Starkie on Evidence, Merlin, Répertoire Judiciaire; Questions sur le Droit, tit. Preuve, Présomption.

the history of the English law, and in no branch of the English law more deplorably (we hope the conveyancers will forgive us) than in the history of the law of evidence.

Proof has been admirably defined to be all that leads the mind to believe a truth as truths are various, so are the proofs by which they are ascertained. The signs which distinguish truth belong to philosophy Jurisprudence, one of the offshoots of that vast trunk, has for its object the actions of man in society as they affect his fellow citizens, and in some instances himself leaving to the contemplative inquirer all questions as to the existence of speculative truth, and the degree in which the knowledge of it is vouchsafed to man, it takes for granted that in the ordinary affairs of life a knowledge of truth is attainable, and endeavours to point out certain rules by which that knowledge may be acquired.

The subjects of legal investigation are contingent. In the language of him who was undoubtedly the greatest master of reason that the world has seen, it relates to those subjects which admit of degree, which may be partly true and partly false, which are connected with time and place, and in which experience, and experience only, can be our guide. As the orator cannot hope always to persuade, or the physician always to heal, neither can the judge hope always to draw the correct inference from the circumstances laid before him, he must be satisfied if the rules by which he is directed are such as in the vast majority of instances will lead to a right conclusion. To complain of uncertainty is to censure Providence. Were absolute certainty obtruded upon our faculties inquiry would be needless, were total uncertainty to prevail, it would be unavailing, in either case the state of man would be different from that in which we are placed, a state in which faculties have been given us that may be improved by exercise, and in which rules, elicited by experience and arranged by reason, may lead us, in spite of the fleeting phenomena with which those rules are conversant, to distinguish right from wrong and truth from falsehood. "*Jus*," say the Civilians, "*est ars boni et æqui*,"—and we may not improperly be described as dedicated to its worship—"*boni et æqui notitiam profitemur, æquum ab iniquo separantes, licitum ab illicito discernentes*," and, undoubtedly, if these magnificent promises were ever fulfilled, if this high and almost sacred task was ever adequately discharged, it was by the jurists of ancient Rome. The science of methodizing facts and of judicial analysis since that time has made but little progress, and the experience of centuries has, generally speaking, served to confirm their precepts and establish their authority In spite of all

the resources we possess it must be owned that every day brings with it a lesson, that our efforts are uncertain and our experience incomplete, while we endeavour to see what is beyond our sphere of vision, to grasp what we cannot reach, and to supply by a necessarily fallacious medium the want of personal knowledge and observation. In the early periods of society the act of the individual is the business of the state. Everything that happens in so narrow a circle affects more or less directly all whom it contains. Contracts, transfers of property, bequests, agreements, gifts, reconciliations, are public. By the law of Athens, before the time of Solon, no citizen could make a will. At Rome, putting aside the testament made in war, the citizen might choose his heir calatis comitiis, under the sanction and by the authority of the people—*quia jus publicum privatorum pactis constari non potuit*·[1] this method of making a will became obsolete after the law of the Twelve Tables, in which the principle borrowed from the law of Solon was adopted, but still the form of appealing to the people was retained. After the ceremonies of a fictitious sale had been performed the testator called upon the people, whom five witnesses were appointed to represent, to witness the disposition of his property. So where writing is unknown or uncommon, bodily acts, set forms of words, will be substituted for written documents, judicial proceedings are associated with certain forms and solemnities which fasten them on the memory of the spectators. Hence the festuca[2] by which the slave was liberated, the stipulatio so long prominent in Roman jurisprudence, with the other forms which Cicero has ridiculed so happily,[3] hence the proceedings before the county court of our ancestors, the festuca and other symbols used before the Rachinburgi at a period still more barbarous. The first object was to strike the senses[4] of the judge. It is clearly proved that to this habit the institution of juries among our ancestors may be traced, the same word, ἵστωρ, in Homer, means a judge and a witness. No one among the ancient Germans could be a witness who was not qualified to be a judge (schöffenbar), the distinction between the judge (richter), to whom the execution of the law, and, perhaps, in a certain degree, its declaration, was confided, and the (urtheiler), who were to pronounce on the facts, or on the custom, is a characteristic of the

[1] Heineccius, Ant. J. R., Bynkershoek, Obs. 2, 2, Caus. Just. 2, 104.

[2] "Hic hic quem quærimus, hic est
Non in festucâ lictor quem jactat ineptus."—Pers. Sat. 5, 154.

[3] Pro Murenâ.

[4] Fœdus ferire.

Χειρὶ δὲ τῇ ἑτέρῃ ἕλε χθονα πουλυβότειραν
Τῇ δ'ἑτέρῃ ἄλλα μαρμαρεην.

Teutonic institutions. The neighbours summoned to decide the point in dispute pronounced the sentence. The functions of witnesses, compurgators and judges were all blended together, the words urtheiler, zeugen, gekorene to gewitness, wissende, were applied indiscriminately to the same persons. In those simple ages, when the facts were known, the law was not disputed, those who proved one, decided the other. As the exigencies of society increased, and more knowledge of the law became requisite, the functions of the jury in England were limited to facts, while a separate class arose in France, the (Scabini),[1] to whom the task of judging was exclusively confided.[2]

[1] Savigny, in a recent work, which it is sufficient praise to say is worthy of its great author, expresses most decidedly this opinion "Auf einem solchen Zustand unmittelbarer Erkenntniss des Gewohnheitsrechts beruhte das altgermanische Institut der Schöffengerichte die aus kundigen zusammengesetzt waren."—System des heut. Röm. Rechts, vol. i. p. 183.

[2] The proofs of this doctrine are innumerable. So we find, "testes qui præsentes fuerunt, et hanc causam dijudicaverunt."—Meibomius, cit. ap. Grimm. A.D. 858. Witnesses were brought to prove not only the facts but the custom, and the law, which, as yet unwritten, lived only in the breasts of those subjects whom it controlled. Every citizen was competent to prove the institutions under which he lived, so rooted was this custom, that in the beginning of the fifteenth century, Urban the Fifth in vain endeavoured to prevent the inhabitants of a town from deciding a cause in which he was interested in the north of Italy.—Lex Al. tit. 36, doc. 1, Urbanus, &c. "Nuper ad nostrum pervenit auditum, quod in civitate Aquilegensi, &c. tuæ temporali jurisdictioni subjectis, in criminali et civili foro quædam abusiva consuetudo, quæ potius corruptela dici debet, inolevit rectorum judiciorum quamplurium perversiva. Ex eo quia in judiciis antedictis, patriarcha et ipsius officiales examinare non possunt. sed solum inquantum in instanti per astantes, seu majorem partem astantium, indifferenter et passim, sive nobiles, innobiles, litterati, et illiterati, artifices, seu cujusvis alterius conditionis, dignitatis, et status homines: existant etiam per patriarcham seu ipsius officiales in judicio præsidentes non vocati, sed eorum motu proprio vel ex casu, in loco judicii convenientes et facto per partes, seu ipsarum advocatos vel procuratores, atque omnibus quæ ipsæ partes dicere vel allegare in ipso instanti voluerint respectu articuli causæ, de quo in termino ipsis partibus statuto litigare contigerit, enarratis, tunc ad vocationem patriarchæ, seu officialium ejusdem, quasi more præconis, eosdem astantes requirentium, quid in præmissis actibus, seu articulis judicialibus de jure videtur, sententiatum et dictum fuerit ipso instanti, nulla alia deliberatione præmissa, qualis et quantacumque fuerit causa seu negotium in judicio deductum non attentis, iidem patriarcha, et ipsius officiales ita et taliter, sicut per prædictos astantes, seu majorem partem dictum et sententiatum extiterit ipso instanti, promulgare et sententiare tenentur; et quæ prædictorum astantium, sicut præmittitur, sententiantium major pars existat, per elevationem et numerationem digitorum eorundem, divisim et successive factas, demonstratur. Ex quibus incaute, et absque congrua deliberatione, et sæpe cum fraude partium, et dictorum astantium, vel convenientium in loco et tempore judicii antedicti ad amicorum, parentum, seu aliquorum potentium litigantium actus judiciarii, interlocutoriæ sententiæ, et definitivæ, ac præcepta indebite promulgantur."—Mabillon, No. 31, 32, Histoire Generale du Languedoc, vol. i. preuves, p. 122.

"Comes quidam ex genere Francorum, cognomine Dotto, *congregata non minima multitudine Francorum*, in urbe Tornaco, ut erat illi injunctum, *ad dirimendas resederat actiones*. Tunc *præsentatus est quidam reus, quem omnis turba acclamabat dignum esse morte*."—Bouquet, vol. iii. p. 533. In the first form cited by Marculfus, Appendix, we find that the person cited appears "ante viro illo comite, vel aliis *quamplurimis personis ibidem residentibus*." See also tome 6. "Omnis populus," "cunctus populus,"

A strong impression of the irresistible power of God, precedes, in the mind of the barbarian, any distinct or reasonable conception of his moral attributes. To consult the Deity on future events[1] is one of the earliest practices of rude nations. To seek refuge from doubt and ignorance, in the decisions of infallible wisdom and perfect justice—to expect divine interposition to chastise guilt and uphold innocence,—is a feeling common to the uneducated mind in every condition of society The same powerful instinct has produced similar effects in every quarter of the globe, in the East, where the beginnings of civilization are lost in the darkness of antiquity,—among the Romans, formed to conquer and instruct mankind, as well as amid the gross rudeness of our German ancestors, to whom the judicial combat of the feudal ages may with great probability be traced. The word ordeal (urtheil) is a proof of the same origin. Trial by battle was one species of ordeal. A consciousness of inability to grapple with prevarication, to unravel falsehood, to detect perjury, led the judge, ignorant of rules, and little versed in sifting testimony, to exonerate himself from his own responsibility, by a direct appeal to providence. Thus the knot was cut which his skill did not enable him to untie. As might be expected, with the exception of the West Gothic Law,[2] in which a great portion of Roman jurisprudence is embodied, the law of the barbarous nations contains very meagre information on the

" die menige," " die frommen leut," " boni homines," " veraces homines," " plurimi homines circum astantes," are the expressions used repeatedly to denote the judges. " Tunc omnis plebs tum principes quam mediocres judicaverunt justissimum judicium." It is curious to trace in the wapentake of our Saxon ancestors the " sonus armorum," and clashing of spears, quoted by Tacitus as the mark of their most solemn deliberations. The church skilfully turned a pagan rite into a religious ceremony — " Et quod Angli vocant hundredum supradicti comitatus vocant wapentachium, et non sine causa cum quis enim accipiebat præfecturam wapentachii, die statuto in loco ubi consueverant congregari, omnes majores natu contra eum conveniebant et descendente eo de equo suo omnes assurgebant ei ipse vero erecta lancea omnes enim quotquot venissent cum lanceis suis ipsius hastam tangebant et ita se confirmabant per contactum armorum pace palam concessa leges."—Edowardi conf. cap. 33.

[1] Tacit. De Moribus, Germ. 8. " Auspicia, sortesque, ut qui maxime, observant. Sortium consuetudo simplex. Virgam, frugiferæ arbori decisam, in surculos amputant, eosque, notis quibusdam discretos, super candidam vestem temere ac fortuito spargunt. Mox, si publice consuletur, Sacerdos civitatis, sin privatim, ipsi paterfamiliæ, precatus Deos, cœlumque suspiciens, ter singulos tollit, subiatos, secundum impressam ante notam, interpretatur. Si prohibuerunt, nulla de eadem re in eundem diem consultatio, sin permissum, auspiciorum adhuc fides exigitur. Et illud quidem etiam hic notum, avium voces volatusque interrogare proprium gentis, equorum quoque præsagia ac monitus experiri.

Est et alia observatio auspiciorum, qua gravium bellorum eventus explorant. Eius gentis, cum qua bellum est, captivum, quoquo modo interceptum, cum electo popularium suorum, patriis quemque armis, committunt. Victoria huius vel illius pro præiudicio accipitur."

Velleius Pat. 2, says the Germans thanked the prætor, " Quod lites Romana justitia finiret, et solita armis discerni, jure terminarentur."

[2] Instituciones del Derecho Civil de Castilla. Aso y Manuel, vol. ii. p. 251.

subject of judicial proof. Montesquieu supposes that the Salian, law differs from the law of the other German tribes, in requiring no negative proof, and in allowing no trial by combat but this is one of the instances in which that great writer has been betrayed by the liveliness of his fancy into error. The Salian law mentions negative proof under the fifty-sixth and seventy-sixth titles. The omission of judicial combat in the Salian law is certainly no proof of so extraordinary a difference from the custom of kindred tribes, as the absence of such a mode of trial would indicate. Nothing can be further from a complete code than the collection of the laws of the Barbarians which we possess.[1] They are extremely minute on some points, and almost silent on others. The expression "*mos antiquus Francorum, more Francis solito,*" are applied by the French annalists to describe the trial by battle, without any exception or reserve. It is not likely that an opposite custom in the noblest of their tribes should have been passed over by them in total silence. Montesquieu himself admits that the other modes of ordeal[2] existed among the Salian

[1] We find the ordeal in the Antigone Soph.

ἦμεν δ' ετοιμοι και μύδρους αιρειν χερσῖν,
και πῦς διερπειν και θεους ορκωμοτειν
το μητε δρᾶσαι, κ. τ. λ.

And Virgil, Æn. xi. has this passage,

" cujus freti pietate per ignem
Cultores multâ premimus vestigia prunâ."

" O, gentlemen, see, see! dead Henry's wounds,
Open their congealed mouths and bleed afresh."

Richard the Third.

And Falconbridge tells Hubert,

"If thou didst but consent
To this most cruel act, do but despair,
And, if thou want'st a cord, the smallest thread
That ever spider twisted from her womb
Will serve to strangle thee; a rush will be
A beam to hang thee on, or would'st thou drown thyself,
Put but a little water in a spoon
And it shall be as all the ocean,
Enough to stifle such a villain up."

A remarkable instance of the ordeal is cited in Phillips, from Hincmar of Rheims.

" Hludowicus, Hludowici regis filius, decem homines aqua calida, et decem ferro calido et decem aqua frigida ad judicium misit coram eis, qui cum illo erant, petentibus omnibus, ut Deus in illo judicio declararet, si per jus et dictum ille habere deberet portionem de regno, quam pater suus illi dimisit ex ea parte, quam cum fratre suo Carolo per consensum illius et per sacramentum accepit. Qui omnes illæsi reperti sunt. Tunc ipse Hludowicus cum suis ad Andernacum castrum Rhenum transivit."

Englische Rechts Geschichte, 274.

[2] The following is a remarkable instance of the proof by compurgators

" IX. Post hæc Rex Parisius venit, et coram omnibus loqui cœpit, dicens Germanus meus Chilpericus moriens dicitur filium reliquisse, cujus nutritores, matre

Francs, from which trial by battle would of necessity ensue. The great character of the Teutonic system was, that the charge alone, unsupported by proof, obliged the accused to defend himself by witnesses or documents, or compurgators, as the case might be. So L. Rip. tit. 1, we find 36 solidis culpabilis judicetur aut cum 6 Jurat. The accuser might charge these witnesses with perjury, and appeal to the issue of a judicial combat. The authenticity of documents was tried in the same manner. The compurgators of the accused might be challenged to combat, or the ordeal. "Mallatus ad æneum," literally "summoned to the kettle," is an expression we find used on such an occasion. The ordeal was of various kinds. One consisted in letting the accused down by a rope into the river if he sunk into the water he was drawn out immediately and declared innocent, if he floated, he was pronounced guilty This ceremony took place under the immediate superintendence of the priest, and the most notorious malefactors generally escaped. It did however happen that this test was usually fatal to heretics, of which Dachery has preserved a curious instance.[1] Besides this, there was the "*Judicium panis et casei*," the trial by burning ploughshares. Cedrenus mentions a Catholic who astounded, without convincing, an Arian, by walking unhurt through a furnace, A. D. 506. The last appeal to this kind of evidence was, as far as we recollect, in the case of the patriot Savonarola, who, in the fifteenth century, fell a victim to the corruptions of the court of Rome.

The questions, whether the son of the deceased or the uncle should inherit in Germany,—whether the Mozarabic or Roman ritual should be used in Spain,—and whether the Roman or Gothic law should prevail in that country, were decided by single combat, such was the condition to which the nations of

deprecante, petierunt ut eum de sancto lavacro in Dominici Natalis sollemnitate deberem excipere et non venerunt. Rogaverunt deinceps ut ad sanctum Pascha baptizaretur sed nec tunc allatus est infans. Deprecati sunt autem tertio, ut ad festivitatem sancti Johannis exhiberetur · sed nec tunc venit. Moverunt itaque me per tempus sterile de loco ubi habitabam veni igitur, et ecce absconditur, nec ostenditur mihi puer. Unde, quantum intelligo, nihil est quod promittitur · sed, ut credo, alicujus ex leudubus nostris sit filius nam si de stirpe nostra fuisset, ad me utique fuisset deportatus. Ideoque noveritis quia a me non suscipitur, nisi certa de eo cognoscam indicia. Hæc audiens Fredegundis Regina, conjunctis prioribus regni sui, *id est tribus Episcopis, et trecentis viris optimis, sacramenta dederunt, hunc a Chilperico Rege generatum fuisse*. et sic suspicio ab animo Regis ablata est."

Greg. Jur. Hist. Franc. Lib. 8.

[1] A. D. 166. "Duo Hæretici adducti sunt ad judicium examinis aquæ, et eorum unus omnium judicio salvus per aquam factus est, &c. Alter porro remersus in aquam, fere omnium ore damnatus est, &c. Ipso petente, ad aquæ judicium reductus, et secundo demersus, nec vel parum ab aqua receptus est. Bis denique damnatus, igni ab omnibus adjudicatus est."

Europe were reduced, not from disdain of justice, but from want of settled law In vain were new expedients devised for rendering purgation by oath certain and satisfactory, oaths were administered with great solemnity, and accompanied by every circumstance that could strike terror into the mind of the witness, "Omnia sacramenta in ecclesiis aut super reliquias jurentur," said the law imposed by Charlemagne on the Lombards. It was in vain, the temptations to perjury were irresistible. There is a passage in the Burgundian law[1] which sets in the clearest light the causes which propagated and established the cruel and absurd custom of judicial duels from Sicily to the Baltic.

The following extract[2] shows how ineffectual all attempts to combat the evil must have been "*Quia incerti sumus de judicio Dei, et multos audivimus per pugnam sine justa caussa suam caussam perdidisse. Sed propter consuetudinem gentis nostræ Langobardorum legem impiam vetare non possumus.*" "*Sæpe,*" said Saint Avitus, "*ut cernimus, pars aut juste tenens, aut justa deposcens, laborat in prœliis, et prævalet iniquæ partis vel superior fortitudo, vel furtiva subreptio.*"

The Church,[3] after vacillating for some time, ended by sanc-

[1] L. Burgund. tit. 45. "De his qui objecta sibi negaverint, et præbendum obtulerint jusjurandum. Multos in populo nostro et pervicatione causantium et cupiditatis instinctu, ita cognoscimus depravari, ut de rebus incertis sacramenta plerumque offerre non dubitent, et de cognitis jugiter perjurare. Cujus sceleris consuetudinem submoventes præsenti lege decernimus, ut quotiens inter homines nostros causa surrexerit, et is qui pulsatus fuerit, non deberi a se quod requiritur, aut non factum quod objicitur, sacramentorum obligatione negaverit, hac ratione litigio eorum finem oportebit imponi, *ut si pars ejus, cui oblatum fuerit jusjurandum, noluerit sacramento suscipere, sed adversarium suum veritatis fiducia armis dixerit posse convinci*, et pars diversa non cesserit, pugnandi licentia non denegetur. Ita ut unus de eisdem testibus qui ad danda convenerunt sacramenta, Deo judicante confligat, quoniam justum est, ut si quis veritatem rei incunctanter scire se dixerit, et obtulerit sacramentum, pugnare non dubitet."

[2] Lomb. Reg. l. 6, 65.

[3] Fleury, Institution au Droit Ecclesiastique, t. 2, p. 142, p. 31, c. 16, a most useful manual. The naïveté with which Gregory of Tours relates the manner in which two Catholic deacons contrived to boil an Arian is extremely comical. One of the Catholics, after a long dispute on the merits of their respective creeds, ended by saying, "Quid longis sermocinationum intentionibus fatigamur? factis rei veritas adprobetur, *succendatur igni æneus et in ferventi aqua annulus cujusdam projiciatur.* Qui vero eum ex ferventi unda sustulerit, ille justitiam consequi comprobatur, quo facto pars diversa ad cognitionem hujus justitiæ convertatur." The Arian agrees. "Circa horam tertiam *in foro* conveniunt, concurrit populus ad spectaculum, *accenditur ignis, æneus super ponitur fervet valde, annulus in unda ferventi projicitur*" The Catholic invites the Arian to plunge his arm first into the seething water, the latter declines the first trial, urging the Catholic, as the challenger, to begin. The Catholic bares his arm, but the malignant Arian, beholding it smeared with oil, exclaims that a fraud is intended on which Jacinthus, another Catholic deacon, happening accidentally (of course) to pass that way, inquires into the cause of strife. The issue is thus related "Nec moratus, extracto a vestimentis brachio *in æneum dexteram mergit. Annulus enim*, qui ejectus fuerat, *erat valde levis ac parvulus*, nec minus ferebatur ab unda, quam vento possit ferri vel palea. Quem diu multumque quæsitum, *infra unius horæ spatium reperit.*

tioning these horrible mockeries of justice and religion, in which the gross impostures that it inculcated as divine truths had prepared the minds of the people to acquiesce. In 1523, Innocent the Fourth abolished the trial by battle in matters of ecclesiastical jurisdiction. It is fair, however, to mention, that Agobard, Archbishop of Lyons, wrote a treatise, which is now extant, (*Contra damnabilem opinionem putantium divini judicii veritatem igne, vel aquis, vel conflictu armorum patefieri,*) against the law of Gondebald, in which there are flashes of light that enable us for a moment to see the image of justice amid the deep gloom which shrouded her from the eyes of his contemporaries, "*vani homines nominabant ista judicium Dei,*" and with much spirit he continues, "*Non oportet mentem fidelium suspicari, quod Omnipotens Deus occulta hominum in præsenti vita per aquam calidam, aut ferrum, revelari velit quanto minus per crudelia certamina? Frequenter non solum valentes viribus, sed etiam infirmi et senes lacessuntur ad certamen et pugnam, etiam pro vilissimis rebus. Quibus feralibus certaminibus contingunt homicidia injusta, et crudeles ac perversi eventus judiciorum non sine amissione fidei, et caritatis ac pietatis, dum putant Deum illi adesse, qui potuerit fratrem suum superare, et in profundum miseriarum dejicere Talia certamina vehementer contraria sunt simplicitati et pietati Christianæ, et doctrinæ evangelicæ nimis adversa.*"

Mr Best's work is an useful and able summary of the principles of presumptive proof as they are applied in English courts of justice. He has moreover illustrated this argument by many very apposite citations from the writings of the civilians and from the Roman law His work displays abundant proof of no common research, as well as of a mind thoroughly imbued with the importance of his subject, and anxious to extricate the real principles of the law of evidence from the mass of heterogeneous matter under which they are too often buried. The English law, in conformity with other systems,[1] annexes a

Accendebatur interea vehementer focus ille sub dosio, quo validius fervens non facile adsequi possit annulus a manu quærentis, extractumque tandem *nihil sensit* diaconus *in carne sua*, sed potius protestatur, *in imo quidem frigidum* esse æneum, in summitate vero calorem *teporis modici continentem. Quod cernens hæreticus*, valde confusus, *injecit* audax *manum in æneo*, dicens præstabit mihi hæc fides mea. Injecta manu, protinus *usque ad ipsa ossium internodia-omnis caro liquefacta defluxit*, et sic altercatio finem fecit."

[1] Pothier, Traité des Contrats, p. 4. c. 3, page 412 Voet. ad Pand. l. 22, tit. 3, c. 16. "Præsumtionem juris et de jure appellant interpretes, quoties jus præsumit aliquid, ac super eo præsumto disponit, nec admittit in contrarium probationem veluti puellam minorem annis duodecim necdum viripotentem esse, ideoque nullas cum eâ posse nuptias contrahi, licet in domum mariti deducta, jam loco nuptæ esse ceperit

"Minores viginti quinque annis, qui curatores acceperunt, impares esse rebus suis

technical importance, varying in degree, to certain facts, as furnishing a proof of others, which it will not allow to be overthrown. These correspond to the "*Præsumptiones juris et de jure*" of the canonists, but were in fact unknown to the Roman jurists. They prevail where the legislator, "*super præsumpto tanquam sibi comperto statuens,*" draws a particular conclusion from certain premises. Some of them rest on the vast majority of instances in which the rule so established is true. Others on the evil that would result, if, supposing it false, that falsehood would under the circumstances be established. In the first class of these presumptions may be raised the presumption that no one under the age of seven is able to commit a felony, nor a boy under the age of fourteen a rape. In the second class we may place the presumption that the original title of the landlord is good, where the tenant admitted by that landlord is the other party to the suit. So the French Code [1] has established a presumption juris and de jure of fraud, against the insured or the insurer, if, according to a calculation of a league and a half an hour from the place where a ship has arrived or been lost, or where intelligence of its arrival or loss was first received, such intelligence could have travelled to the spot where the contract of insurance was signed before the signature of that contract. Emerigon's statement of this principle is a good illustration of this subject "Cette matière est tellement susceptible de fraude, et la fraude est souvent si difficile à prouver, que les nations commerçantes se sont comme accordées à établir une présomption juris et de jure de vol, contre l'assuré ou contre l'assureur, toutes les fois que, par le peu de distance des lieux, il est possible que, lors de la signature de la police, ils aient été instruits du sinistre ou de l'heureuse arrivée du navire." Casaregis, disc. 6, no. 7, disc. 215, no. 6, Roccus, not. 51, Scaccia, § 1, gl. 1, no. 160, Marquardus, lib. 2, cap. 13, no. 30, Pothier, no. 21, chap. 14, sect. 54, Traitée des Assurances. "En fait de présomption," Montesquieu says,[2] "celle de la loi vaut mieux que celle de

administrandis, licet res bene gerant, et ob id ad eam usque ætatem curatorum auxilio debere regi

"Eum, qui cum alienâ uxore loqui deprehenditur in domo mariti, vel uxoris, vel in pomis, vel in suburbano, cum ei jam ter a marito in scriptis sub præsentiâ trium testium fide dignorum denuncia esset, ut abstineret, adulterum esse, ac propterea impune a marito occidi."

[1] Code de Commerce, 366.

[2] Voet. ad Pand. 22, 3, 15. "Juris præsumtio dicitur, quæ ex legibus introducta est, ac pro veritate habetur, donec probatione aut præsumtione contrariâ fortiore enervata fuerit. Cumque ex ipso jure descendat, in potestate vero judicis facti quidem quæstio fit, non juris autoritas, consequens est, eam ab arbitrio judicis haud dependere

l'homme. La loi Françoise regarde comme frauduleux tous les actes faits par un marchand dans les dix jours qui ont precédé sa banqueroute, c'est la présomption de la loi. La loi Romaine infligeoit des peines au mari qui gardoit sa femme après l'adultère, à moins qu'il n'y fût déterminé, par la crainte de l'événement d'un procès, ou par la négligence de sa propre honte, et c'est la présomption de l'homme. Il falloit que le juge présumât les motifs de la conduite du mari, et qu'il se determinât sur une manière de penser très obscure. Lorsque le juge présume, les jugements deviennent arbitraires, lorsque la loi présume, elle donne au juge une règle fixe."—Book 27, ch. 16. In civil cases, the judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea or bar, and as evidence conclusive between the same parties upon the same matter directly in question in another court. The principles of the English law on this subject are luminously stated in the admirable judgment of Lord Chief Justice de Grey, in the Duchess of Kingston's case. They coincide substantially with those of the Roman law Dig. 44, tit. 2, s. 3.—"Julianus libro tertio Digestorum respondit, exceptionem rei iudicatæ obstare quoties eadem quæstio inter easdem personas revocatur." Ib. 5.—"De eadem re agere videtur, et qui non eadem actione agit, qua ab initio agebat, sed *etiam si alia experiatur*, de eadem tamen re." Ib. 7 —"Si quis quum totum petissit, partem petat, exceptio rei iudicatæ nocet." Ib. 28.—"Papinianus, libro 27 Quæstionum exceptio rei iudicatæ nocebit ei, qui in dominium successit eius qui in iudicio expertus est." The rules of the French law on this subject are the following

"1350. La présomption légale est celle qui est attachée par une loi spéciale à certains actes ou à certains faits.

"1351. L autorité de la chose jugée n'a lieu qu'à l'egard de ce qui a fait l'objet du jugement. Il faut que la chose demandée soit la même, que la demande soit fondee sur la même cause, que la demande soit entre les mêmes parties, et formée par elles et contre elles en la même qualité.

"1352. La présomption légale dispense de toute preuve celui au profit duquel elle existe."

In addition to these presumptions, which no evidence is

"Hujus exempla prope infinita per universum jus dispersa, singulis in materiis fere adnotata sunt, veluti, neminem velle suum jactare

"Ademtum legatum, quod testator ex libera voluntate alienavit
aut si capitales inter testatorem et legatarium inimicitiæ exerserint.

"Pignore per creditorem legato ei, qui id obligaverit, remissum esse pignoris jus.

"Negotium unumquodque, quod gestum est, rite atque ordine, solennitatibus omnibus tum externis adhibitis gestum esse."

allowed to contradict, there are others, which, when no evidence to contradict them is given, will be taken by the court for granted. A presumption exists against crime or guilty negligence, which however may be overcome by presumptions of a different nature. Fabrication or suppression of evidence raises a presumption[1] against the person who has recourse to such an artifice. In the absence of all information concerning a person for seven years, his death will be presumed, but not at any particular time. When acts are to be done by official persons, it will be presumed that they have discharged their duty This rule, "*omnia præsumuntur ritè esse acta*," is one of very frequent application, and has been extended to the acts even of private persons. The regular course of business in public departments, as well as in private offices, also gives rise to a presumption that it has been followed in a particular case. Under this head is included the presumption that one who acts in an official capacity has been invested with authority so to act, but it does not comprehend private persons or agents acting under this authority

So if a landlord gives a receipt for the rent last due, it is presumed that the former rent is paid. So it is presumed that a child between the age of seven and fourteen cannot commit a felony, and that a child born in wedlock is legitimate. Possession of land is *prima facie* evidence that the possessor is seised in fee of it. A bill of exchange is supposed to be given for a good consideration a party is supposed to intend the immediate and probable consequences of his own act. So the Roman law held that property bought by a married woman during the life of her husband was purchased with his money A remarkable instance of this species of presumption is given in the Roman code, 34, Ad legem Juliam, de adulteriis. Two people accused of adultery were absolved on proof of their relationship, the judges being reluctant to assume the existence of an enormous crime. They married afterwards, and it was held that such a marriage was a conclusive proof of the guilt formerly imputed to them. Another striking instance of a presumption adopted in a criminal case was the edict of Henry II. of France, 1556, according to which every woman who has concealed her pregnancy and her delivery, and her child has died without baptism, and no public burial has been solemnized over its remains, is to be "*tenue et reputée avoir homicidé son enfant.*" In the same spirit the law 21 James I. c. 27, required any mother endeavouring to conceal the death of the child, to prove by one witness at least that the child was born dead. Deeds thirty

[1] This, as Mr. Best observes, was the great argument of the successful party in the Douglas case.

years old prove themselves, and where the fact of signing only is proved, the jury may be directed to presume a sealing and delivery Where an instrument has been lost, it will be presumed to have been duly stamped. A state of things once proved will be supposed to continue, and this has been carried the length of inferring the continuance of adulterous intercourse. Every thing will be presumed against a "spoliator," or a person who has been guilty of any malpractice, by which, if successful, the course of justice would be defeated. "When," Lord Holt says, "a man destroys a thing that is designed to be evidence against himself, a small matter will supply it." As certain facts lead by established rules to particular presumptions, there are other facts from which the law, as stated in many decisions, will allow no presumptions to be drawn, and which, for that cause, are not allowed to be given in evidence. To draw the line between those presumptions, which, though faint and weak, are admissible, and those which are excluded altogether, often requires great sagacity and experience. Among the presumptions which the law considers irrelevant, we may enumerate the following —After goods have been lost a certain time, their possession is no presumption of guilt against the holder In an inquiry into the contract which A. has entered into with B., evidence of similar contracts entered into by the same party with other persons would be irrelevant. Where a right is claimed by custom in one manor, evidence, generally speaking, cannot be given of the custom of other manors.[1] In civil suits, where the character of the parties is not in issue, evidence of it is irrelevant and in criminal cases, evidence cannot be given of the bad character of the prisoner, unless to repel evidence of a contrary nature adduced in his defence neither in inquiring into the crime can evidence of another be received not immediately connected with it nor would it be evidence to show a tendency to commit a specific offence by proof of a guilty habit. When the question was, whether A. had supplied B. with proper articles,[2] A. was not allowed to show the quality of the articles with which he had supplied other customers on the other hand, collateral evidence is admissible where a question arises as to the intent[3] or knowledge of a party to the suit. In a prosecution for uttering forged notes,[4] evidence that other legal notes are in the possession of the prisoner, and also that they were uttered by him, is admissible. The same rule

[1] Duke of Somerset v. France, 1 Stra. 661 Hollis v. Goldfinch, 1 B. & C. 205.
[2] Holcombe v. Hewson, 2 Camp. 391.
[3] Phillipps on Evid. vol. i. p. 497, Webb v. Smith, 4 N. C. 373.
[4] R. v. Wylie, 1 N. R. 92, R. v. Ball, 1 C. 324.

applies to a person charged with uttering counterfeit money, and it may be proved that on such occasions the prisoner passed by different names. On an indictment for maliciously shooting, evidence that the prisoner had shot intentionally at the same person whom he was charged with shooting at, a quarter of an hour before the particular offence in question, was held admissible. On a charge of writing threatening letters, other letters written by the prisoner may be given in evidence against him.[1] In actions for libel or slander,[2] other libels and words may be adduced to show the spirit of the defendant's conduct. In an action on a bill of exchange by indorsee against acceptor, when the name of the payee was fictitious, a question arising whether the acceptor was, at the time of acceptance, aware of that fact, and whether the defendants had given authority[3] to the drawer to draw the bill in favour of a fictitious payee, evidence was admitted (and the decision was afterwards confirmed on appeal to the House of Lords), that the defendants had given a general authority to the drawer to draw bills upon them payable to fictitious persons. In trials for murder, evidence of former declarations by the prisoner, favourable or hostile to the deceased, are received, and in trials for conspiracy, the conduct and declarations of the accused, at meetings held to further the conspiracy, are held to be relevant. The cry of the mob in the case of Damaree, and in that of Lord George Gordon, was considered evidence. The declarations, acts, and letters of one conspirator, uttered, done and written to further the common purpose, are evidence against his accomplices. In a civil case, where the soil and freehold of part of a woody belt of considerable extent was in issue, acts of ownership acquiesced in by different owners of the land[4] adjoining the *whole* belt, (the defendant being one of such owners,) were admitted to establish the plaintiff's right to the spot in question. So where the question was as to the ownership of a portion of the bed of a stream flowing between the farms of the plaintiff and the defendant, the plaintiff contending that he was the owner of the whole stream, and the defendant affirming that he was the owner only ad medium filum aquæ, evidence of acts done by the plaintiff in another part of one continuous hedge, and in the whole bed of the river,[5] was held admissible.

The rule of the Roman law, as to the presumption of pay-

[1] Phillipps on Evid. vol. i. p. 496.
[2] Plunkett v. Cobbett, 5 Esp. 165, 2 C. 732.
[3] Gibson v. Hunter, 2 H. B. 288.
[4] Stanley v. White, 14 East, 332, Taylor v. Parry, 1 M. & G. 604.
[5] Jones v. Williams, 2 M. & W 326.

ment, was this —If Sempronius said that he had paid Titius a sum of money not due to him, and Titius admitted the receipt of the money, but affirmed that it was due to him, Sempronius was bound to prove that the money so paid was not a debt, for the natural presumption was, that the money paid was due. If, however, Titius denied the receipt of the money, and Sempronius proved that it was paid, the burden of proving that it was paid in discharge of a debt rested with Titius, "etenim absurdum est eum qui ab initio negavit pecuniam suscepisse, postquam fuerit convictus eam accepisse pecuniam non debite ab adversariis exigere." What a contrast to the Norman pleading do we find in every page of the Roman law

Again, if the defendant alleged facts in his defence, he was bound to prove them. Reus in exceptione actor est. De except. 44, 7, De pub. 22, 3, 19.

Besides these presumptions, however, every case abounds with others not anticipated by any legal decision, which are called by the French jurists "présomptions de l'homme,"— various, uncertain, often conflicting, the effect of which must be left to the conscience and sagacity of the tribunal before which they are presented. In the vast ocean of human affairs, where all appears vague and unstable, there are certain rules which we apply with confidence,

"The masters of our long experiment;"

and which, wherever the domain of moral science extends, the consent of nations tells us are seldom employed in vain. Without them there could be no regular course of human proceedings, and without a regular course they could never be understood. Mankind would always be at a loss, not knowing what to expect, or how to govern their judgments, or how to direct their actions for obtaining any end. Without them we never could know, in the pithy language of Hobbes, "what antecedents are followed by what consequents," but by them, even where centuries have intervened between us and the object of our inquiries, we are often able to detect imposture, and to tear away the veil which has concealed truth from the eyes of successive generations. History enables us to judge of manners, and manners lend us new resources by which to form our judgment of history To apply this method of argument let us consider the baptism of Constantine, the author of the acts of Saint Sylvester says that he was baptized by Saint Sylvester at Rome, and Baronius has adopted this account. Eusebius relates this baptism in a very different manner. On which story are we to rely? The author of the acts of Saint Sylvester is anonymous, its date

uncertain, and his book filled with most improbable fictions. The book of Eusebius was published four or five years after the death of Constantine, the founder of the temporal power of the Christian Church. The baptism of so celebrated a man must have been an event perfectly notorious to every reader of Eusebius at the period when his work was written, it is therefore most improbable that Eusebius should, with a full knowledge of the facts, have published a statement in the face of the Church, the falsehood of which must have been apparent to every one who read it. So the letters of Mary Queen of Scots, leaving, if they are genuine, no doubt as to her guilt, her advocates have endeavoured to destroy all belief in their authenticity Now these letters were written originally in French, and were translated into Scotch, Latin, and French in the Scotch version which we possess there is a constant recurrence of gallicisms which prove them to be taken from a French original. These letters enter much more into detail, and are far more numerous than the purpose of any forgery would have required,, they allude in a natural and easy manner to a great variety of circumstances, they do not in direct terms admit Mary's guilt, as they left it open for her friends to affirm that their meaning was tortured to make her appear criminal. The letters were exposed to the scrutiny of those best qualified to judge of them, they throw the strongest light on many parts of Mary's conduct. The Duke of Norfolk, who lost his life in Mary's cause, was fully persuaded of her guilt, not only must he have seen the letters, but he must have known the effect produced by them on the mind of the Bishop of Ross, Mary s chosen counsellor. Again, the disappearance of these letters is a strong proof of their authenticity, they were destroyed by the adherents of King James. All these circumstances taken together leave little doubt in the mind of any candid person[1] of the conclusion which they establish.

The most perfect argument on circumstantial evidence in the world is to be found in the speech Pro Milone nothing ever has surpassed, and in all probability no human effort ever will surpass, in dexterity, power and beauty of language, the following passage —

" Videamus nunc id, quod caput est, locus ad insidias ille ipse, ubi congressi sunt, utri tandem fuerit aptior. Id vero, judices, etiam dubitandum et diutius cogitandum est? Ante fundum Clodii, quo in fundo, propter insanas illas substructiones, facile mille hominum versabantur valentium, edito adversarii atque excelso loco superiorem

[1] Freret, Œuvres, Histoire, vols. i. ii., Méthode pour étudier l'Histoire, Lenglet du Fresnoy 5 vol. 235.

se fore putabat Milo, et ob eam rem eum locum ad pugnam potissimum elegerat? an in eo loco est potius expectatus ab eo, qui ipsius loci spe facere impetum cogitarat? *Res loquitur*, judices, *ipsa* quæ semper valet plurimum. *Si hæc non gesta audiretis, sed picta videretis tamen appareret, uter esset insidiator, uter nihil cogitaret mali*, cum alter veheretur in rheda pænulatus, una sederet uxor, quid horum non impeditissimum? vestitus, an vehiculum, an comes? quid minus promtum ad pugnam, cum pænula irretitus, rheda impeditus, uxore pæne constrictus esset?"

There are some remarkable instances of skilful inference in the orations against Verres, as well as in that for Cælius.[1]

Facts may be considered as either simple or complex simple when they express the material part of a transaction, complex when they describe its moral quality Caius took away a book, is a simple fact, Caius stole a book, is a complex one. So where the public have acquired a right of way, the jury infer from the simple fact that they have been permitted to travel along it without resistance, the complex fact that the owner intended a dedication. The combination of several facts, establishing in the mind of the judge or jury another fact, which, as it has no sensible existence, but depends entirely on the inference drawn from other circumstances, is called in French jurisprudence a moral fact. Caius affirms that he is the son of Sempronia and Titius, unable to produce the register of his birth he has recourse to the circumstances of his actual status, these satisfy the judge, and his legitimacy is recognized as a legal consequence of the proofs that he has brought forward.[2]

Evidence is apt to appear extremely formidable which rests upon a very scanty basis, the superstructure is so imposing that we forget to examine the foundation it is clear, however, that if fifty chains depend upon a single rivet, and that rivet is loosened, their efficacy is at an end, so in literature we find statements repeated by author after author, each taking for granted the credit of his predecessor, sometimes directly contradicted by the very authority to which they finally appeal. A remarkable instance of this occurs in a quotation taken from the life of St. Eligius, this is cited by Mosheim, to show the false notions of piety and virtue inculcated by the ecclesiastics in the dark ages, Robertson cites it from Mosheim, and Mr. Hallam from

[1] While on this subject Paley's Horæ Paulinæ ought not to be forgotten, it is the best specimen of circumstantial reasoning in our, perhaps in any modern, language. Demosthenes's argument in the Π. σ from the time in which the treachery he denounces was brought about, and in the Π. Π. on the changed conduct of Æschines as a politician, are also surprising instances of the tremendous power of wielding facts, that, after his awful invective, is, perhaps, the chief character of his oratory.

[2] Merlin, Faits Justif.

Robertson the passage, taken altogether, leads to a directly different inference from that which it is quoted to establish. Even so it often happens that facts, apparently supported by a cloud of witnesses, dwindle down, after a severe scrutiny, to slight and trivial surmises on which it is impossible to rely

Circumstances are common and peculiar they are common when they are such as, supposing a particular event to have taken place, would be its natural companions. Thus it may be presumed that a work which for many years has gone under the name of a particular writer, is his genuine work. There may be, however, peculiar facts by which this natural hypothesis is overthrown. The letter of St. Clement to St. James, Bishop of Jerusalem, was considered genuine 1,400 years ago, when it was translated by Rufinus, and it was cited as genuine by a council 1,300 years since. These are the common circumstances, which might, if the letter was real, be expected to prove its authenticity, nevertheless, as the letter mentions the death of St. Peter, and as St. James, Bishop of Jerusalem, suffered martyrdom before St. Peter, this is a peculiar circumstance, which proves that the letter must be a forgery Again Tertullian informs us that Pilate transmitted to Tiberius an account of our Saviour's life and death, that Tiberius was so affected by the perusal of this document as to urge the senate to bestow divine honours upon our Saviour, but that the senate, jealous because the application in the first instance had not been made to themselves, refused compliance with his request. This story is repeated by Eusebius. Now if we sift this anecdote by the rules of presumptive evidence, we must remark, in the first place, that the testimony of Eusebius, who only copied Tertullian, adds nothing to the authority of the latter, secondly, that the refusal of the senate to comply with the request of Tiberius is contradicted by the account which Tacitus has given us of that body, as tainted to a degree almost incredible with servility and adulation. (Annales, iii. 65) Thirdly, that the story is not mentioned by any contemporary writer, or any of the Christian apologists, during the two first centuries, though, if true, it would have added weight to the supplications which from time to time they addressed to the emperors. Other arguments might be added, but the presumption arising from these alone would be sufficient to make any reasonable person reject the story as incredible.

Neither should it be forgotten that the same facts produce various effects on various minds, and what is a corollary from this proposition, that among those who relate or see or hear an account of the same transaction, circumstances will fasten themselves on one mind which will be totally disregarded by another.

The story of the Turkish sultan is well known, who, on being shown the decollated head of John the Baptist, observed that the flesh at the edges of the neck did not shrink sufficiently So if a royalist and a republican and a lawyer had beheld the trial of Charles I. the attention of the first would, it is probable, be absorbed by the helpless condition of his sovereign, and the pity that the "grey discrowned head" would excite within him, and he would look with detestation and horror upon the tribunal and all connected with it. The republican would feel his heart dilate with rapture at the sublime image of an insulted nation appealing to its imprescriptible rights, and calling in the face of all mankind a perfidious tyrant to account for their violation while the lawyer's attention would probably be riveted to some change in the technical language of the indictment, or the absence of some trifling formality which he had been accustomed to consider essential to the administration of justice. It is probable that the account given by these three men of such a proceeding would be widely different, as their sensual faculties would pass different judgments on the same object to suppose that their intellectual faculties should agree, would be ridiculous, nevertheless there would be a certain coincidence, however they might differ as to details,—all three would agree that there had been a trial—that Bradshaw had been the president, and Charles I. the accused these are points on which, however contradictory their testimony might be as to other matters, none but a madman would reject it, because the very passions and inclinations which would weaken their evidence as to other circumstances, would give it irresistible strength on this. Here they could not be deceived themselves, and they could have no temptation to deceive others.

Every species of evidence brought before a court of justice partakes of one common essence. In all cases from an established truth, a consequence leading to the discovery of an unknown or doubtful circumstance is to be inferred. Now, all presumption depends on the connection between the facts that are known, and those into which we inquire. This connection being more or less necessary, presumptions also are more or less conclusive, and their certainty must depend on the relation between the known and the unknown circumstance. Caius is accused of murder. It is clearly proved that, on the day when the murder was committed in England, he was in America. The connection between this truth and his innocence is infallible. So, when the Indian, claiming a horse stolen from him by a Spaniard, suddenly flung his mantle over the head of the animal, and challenged his adversary to say of which eye the horse was

blind, the answer of the Spaniard that he was blind of the left eye, whereas the horse was blind of neither, was a fact from which his fraudulent purpose was a corollary So, when Saint Athanasius was accused of having murdered Arsenia, he brought her forward as a witness in his behalf. A curious instance of the absence of the *corpus delicti* also occurs in the speech of Isocrates against Callimachus.[1] In order to revenge himself on one Cratinus, Callimachus concealed the servant girl of the latter, and accused Cratinus of having murdered her; this charge he supported by fourteen witnesses. Cratinus in the meantime forced his way into the house where she was concealed, and produced her alive before his judges. Much perplexity has arisen from confounding together the words truth and certainty, all that is certain is not true, and all that is true is not certain. Five hundred years ago the circulation of the blood was universally denied. On the other hand, the Ptolemaic system was certain to a vast number of people. That Charles the First wrote the Εἰκὼν Βασιλικη is still certain, we suppose, to the Reverend Doctor Wordsworth. Yet the circulation of the blood has always been true, and the Ptolemaic system always false, and Charles the First never did write Εἰκὼν Βασιλικὴ. Certainty refers to the mind of the individual, truth to the fact itself. Every fact is either true or false, there is no medium between these propositions, but every fact may be at the same time, with regard to different minds, certain and uncertain. What was certain to Locke, was denied by Bishop Berkeley, what was certain to Malebranche, would be far from certain to Spinoza.

A treatise on presumptions, strictly speaking, would be a treatise upon all evidence with which courts of justice are concerned. It is a treatise upon circumstantial as well as upon that inaccurately called direct evidence. Since, from a number of circumstances, pointing to one fact, we infer the existence of that fact, and the assertion of a particular fact, by any number of witnesses, is but a circumstance from which we infer the transaction to have taken place, as they relate it. In general, if a number of facts are spoken to separately by distinct witnesses, none of them being aware of the importance of his own specific testimony, and these facts lead almost inevitably to one conclusion, the chances of error are less than where two witnesses declare upon oath that they have been the spectators (scio quia præsens fui et vidi) of a particular event. It should not be forgotten either that the greater the number of specific facts in which truth and falsehood are brought into collision, the

[1] Or. Att. Clar. ed. p. 547

greater is the chance of detecting fraud. Falsehood appears plausible when truth is absent. But like Spencer's Florimel, made of snow, it melts and vanishes, when what is real comes in sight. The evidence of a perjured witness is almost always general, details embarrass him, and furnish the means of his refutation. Direct evidence may be compared to a wall, part of which may be destroyed, while the rest is standing, but circumstantial evidence is like an arch,—the moment that any part of it is struck away, the fabric is in ruins.

If in order to make out my case, I must prove A., B., C., D., and E., a failure in establishing any one of them puts an end to it. The connection once severed, the strength of the remaining links is insignificant. Now the chances of detection are of course multiplied as the number of facts increases. The wider the surface exposed to attack, the greater the difficulty of defending it, while any part of the fortification is feeble or ill protected.

Caius is found murdered by a pistol shot. A. It is proved that Lucius has quarrelled with him. B. That Lucius has threatened him. C. That Lucius had bought powder and shot the day before the murder. D. That Lucius concealed himself close to the spot with a pistol, where the dead body of Caius was found, a short time before Caius went there. E. That Lucius was seen coming away from the spot endeavouring to conceal a pistol, at a time corresponding with the death of Caius. F That a pistol was found concealed on Lucius's premises. G. That Lucius gave a false account of his proceedings on the day of Caius's murder, and that he was absent from his usual place of business. Many of these circumstances are trifling, taken separately, each is perhaps consistent with innocence, taken collectively, they form a body of proof, which it would be almost impossible to surmount. For it should be recollected, that if all these facts be necessary to establish the case against the murderer of Caius, and all combine in the person of Lucius, the probability of the conclusion to which they lead multiplies not in an arithmetical but in a geometrical proportion—as the keystone that links together the arch increases the firmness of every material which composes it. A single additional fact may define what was ambiguous, reconcile what was contradictory, elucidate what was obscure, and join together what was incoherent. It may turn apparent trifles into overwhelming truths, causing every circumstance to fall into its proper place, and bind them together (to borrow the language of a great judge[1])

[1] Mr. Baron Alderson. The expression was used at the Oxford assizes in summing up the evidence (entirely circumstantial) on a trial for the murder of a gamekeeper. The prisoner was convicted. None who heard it will forget the extraordinary effect produced by the wisdom, eloquence and humanity of the address the learned judge delivered to the jury on that occasion.

into one harmonious whole. The trivial absurdities which have been uttered against circumstantial evidence would, if seriously acted upon, put an end to judicial investigation. No doubt, circumstances have sometimes pressed heavily, nay, fatally, against the innocent. And what then? May not the same be said of direct evidence? Have not people's lives been sworn away? Is direct evidence, also, to be put aside? The most enormous acts of iniquity have almost invariably been perpetrated by direct and perjured testimony The spies of Major Sirr, and the less abominable "*delatores*" of Tiberius, were too wise in their vocation to entangle themselves with circumstances. Could circumstances ever have led to the convictions for witchcraft, which direct unequivocal positive (quia præsens fui et vidi) testimony brought about, not in isolated cases, but by hundreds and thousands in every country of Europe up to a comparatively recent period? Did circumstantial evidence enable Titus Oates and Bedloe, and Lord Shaftesbury, to pour out like water the blood of the innocent? For one occasion, in which circumstances have been a rod to smite the innocent, there are an hundred in which they have been his shield. It is unworthy of an author, who has written so useful and creditable a work, as this undoubtedly is, on the subject of evidence, to condescend to reiterate, in a tone of declamation, the trite and ridiculous topics, which ought to be relegated to courts of quarter sessions, the soil to which every species of absurdity is natural and indigenous.[1]

[1] We subjoin a story of a precipitate inference, from slight circumstances, as it is not quoted in the work before us. It is told by Voltaire. Correspondence avec D'Alembert, vol. i. p. 19.

"Martin etoit un cultivateur établi a Bléurville, village du Barrois, bailliage de la Marche, charge d'une nombreuse famille. On assassina, il y a deux ans et huit mois, un homme sur le grand chemin aupres du village de Bléurville. Un praticien ayant remarqué sur le même chemin, entre la maison de Martin et le lieu ou s'étoit commis le meurtre, une empreinte de soulier, on saisit Martin sur cet indice on lui confronta ses souliers qui câdraient assez avec les traces, et on lui donna la question. Apres ce préliminaire, il parut un temoin qui avoit vu le meurtrier s'enfuir, le témoin dépose, on lui amene Martin, il dit qu'il ne reconnoit pas Martin pour le meurtrier· Martin s'écrie. Dieu soit beni! en voilà un qui ne m'a pas reconnu. Le juge, fort mauvais logicien, interprète ainsi ces paroles Dieu soit béni! j'ai commis l'assassinat, et je n ai pas été reconnu par le témoin. Le juge assisté de quelques gradués du village, condamne Martin a la roue, sur une amphibologie. Le proces est envoyé a la tournelle de Paris; le jugement est confirme Martin est executé dans son village. Quand on l'étendit sur la croix de Saint Andre il demanda permission au baillé et au bourreau de lever les bras au ciel, pour l'attester de son innocence, ne pouvant se faire entendre de la multitude. On lui fit cette grace, apres quoi on lui brisa les bras, les cuisses et les jambes, et on le laissa expirer sur la roue. Le 26 de Juillet de cette année, un scélérat ayant été executé dans le voisinage, declara juridiquement, avant de mourir, que c'étoit lui qui avoit commis l'assassinat pour lequel Martin avoit été roue."

The presumption we make when we rely on the evidence of witnesses that they have means to know the truth, and a disposition to declare it,—our opinion of their capacity and situation leads us to the fact,—our opinion of their purity, in the absence of any sufficient motive, to the second of these presumptions. [1] Moreover, to ascertain whether these qualities belong to the witness, we must consider the nature of the facts which he affirms, the manner in which his account of these facts is given, and compare the circumstances of that account with itself, with other admitted parts of the same transaction, and with the account given of it by other witnesses. The facts themselves may be probable or improbable, extraordinary or usual, of recent or of ancient date, possible or impossible, they may be transient and fugitive or permanent and lasting, clear and simple or complicated and hard to follow, they may have happened in our neighbourhood or at a distance from us in all these cases our attention will be directed to different points, and our judgment determined by different motives. The possibility of the facts relative is of course the first point to be considered, and it should be remembered, that there are moral no less than physical impossibilities;[2] though since we cannot discern the heart of man, as we can behold the works of nature, they are not equally capable of demonstration. A painter who was to represent a woman flying through the air would not be more absurd than one who were to represent a man flying from battle, and tell us that it was meant for Alexander the Great. Again, there are facts which, though not impossible in themselves, are so when considered with reference to others by which they are surrounded. [3] Here the value of circumstantial evidence is

[1] "At quam iniquum est postulare, vt hodiernis de Virgine narrationibus omnibus fides habeatur, quia extiterit olim aliqua de ipsa historia, et traditiones item aliquæ? Extitit olim proculdubio vera aliqua historia de rebus Caroli Magni, Rolandi, et cæterorum virorum fortium, quos illa ætas tulit. An propterea credere nos æquum fuerit Pseudoturpini nænijs et eiusmodi fabularum scriptoribus, qui postea lingua Romansa, id est Romana corrupta mare mera miracula memoriæ prodiderunt? Probet Baronius eam ipsam historiam, et illas traditiones, quarum meminit Epiphanius, integra fide fuisse seruatas, posteros nihil esse commentos, nihil finxisse, neque sincerum vas incrustasse. Hoc amplius probet Baronius, Epiphanium illis ipsis historiæ et traditionibus quarum mentionem facit, fidem habuisse."—Casaubon, Exercitationes in Baronium, p. 97.

[2] Dig. 22, 5, 3, 1. "*Tu magis scire potes, quanta fides habenda sit testibus qui et cujus dignitatis, et cujus æstimationis sint. et qui simpliciter visi sunt dicere, utrum unum eumdemque sermonem meditatum attulerint, an ad ea, quæ interrogaveras, ex tempore verisimilia responderint.*"—Leg. 3, § 1, ff. de test.

"*Alias numerus testium, alias dignitas et auctoritas, alias veluti consentiens fama confirmat rei, de quâ quæritur fidem.*"—Ibid § 2.

[3] "As far as swearing could go, the treason was clearly proved against Shaftesbury or rather so clearly as to merit no kind of credit or attention. That veteran leader of a party, inured from his early youth to faction and intrigue, to cabals and conspiracies,

exemplified, of which the trial of the Comte de Morangies affords a striking instance. The question was, whether Monsieur de Morangies had received a sum of 300,000 francs, for which he had given notes of hand to a person called Véron. These notes of hand he affirmed had been obtained from him fraudulently Dujonquai, grandson of Véron, affirmed that he had himself on foot transported that sum to Morangiés, at his hotel, in thirteen journeys, between seven in the morning and about one in the afternoon, making about five hours and a half or six hours. The fact was shown to be impossible, as follows Dujonquai said that he had divided the sum into thirteen bags, each containing six hundred louis, and twenty-three other sacks of two hundred pounds, twenty-five louis were given to Dujonquai by Morangiés. On each occasion Dujonquai put a sack of two hundred louis in each of his pockets, which, according to the fashion of the day, flapped over his thighs, and took a sack of six hundred guineas under his arm. According to the measured distance from the alley in which Dujonquai lived to the house of Morangiés, the space traversed by Dujonquai in his thirteen journeys would amount to five French leagues and a half, the time for each league being calculated at an hour for a person walking rather faster than usual. So far there is no absolute physical impossibility, however improbable it might be that Dujonquai should not stop a moment for refreshment or repose, but in going, Dujonquai had sixty-three steps to come down in his own house, and twenty-seven to go up at that of Morangiés, making in all ninety multiplied by twenty-six this amounted to two thousand three hundred and forty steps. Now it was known, that to ascend the three hundred and eighty steps of Nôtre Dame from eight to nine minutes are requisite. Thus an hour must be deducted from the five or six during which the journeys were said to have been made. The street of St. Jacques, which Dujonquai had to ascend, is extremely steep. This would check the speed of a man laden and encumbered with bags of gold under his arm and in his pocket. The street is a great thoroughfare, especially in the morning, for three or six hours. The obstructions inevitable from this circumstance would accumulate considerably, half a league must at least be added to the five leagues and a half, which, as the crow flies, was the distance traversed. It happened that on the very day which

was represented as opening without reserve his treasonable intentions to these obscure banditti, and throwing out such violent and outrageous reproaches on the king, as none but men of low education, like themselves, could be supposed to employ."—Hume's Hist., Charles II.

Dujonquai fixed upon for his journeys, these ordinary obstructions were increased from the removal by sixty or eighty workmen of an enormous stone to St. Généviève, and the crowd attracted by the spectacle. This must, even supposing him not to have yielded for a moment to the curiosity of seeing what attracted others, have added seven or eight minutes to each of his walks, which, in the twenty-six, would amount to two hours and a half. Both in his own house and that of Morangiés it must have been necessary for Dujonquai to open and shut the doors, to take the sacks, to place them in his pockets, to take them out, to lay them before Morangiés, who he affirmed, contrary to all probability, counted the sacks during the intervals of his journey, and not in his presence. Time must have been requisite also to take and read the receipts given by the count, during each journey On his return home Dujonquai must have given them to some other person. Therefore, reckoning the time required to take and lay down the sacks, to open and shut the doors, to receive and read and deliver the acknowledgments, to conversations which Dujonquai allowed he had with several people, together with the obstacles we have mentioned, the truth of Dujonquai's statement was reduced to a physical impossibility

To this we add the following well told and well chosen instance, from the work of Mr. Best

"William Richardson was tried at Dumfries, in 1787, for the murder of a young female in the stewartry of Kircudbright, in the autumn of 1786. It appeared from the evidence, that the deceased, who lived with her parents in rather a remote part of the district, was on the day in question left alone in the cottage, her parents having gone out to their harvest field. On their return home, a little after mid-day, they found their daughter murdered, with her throat cut in a most shocking manner The circumstances in which she was found, the character of the deceased, and the appearance of the wound, all concurred in excluding any presumption of suicide, while the surgeons, who examined the wound, were satisfied that it had been inflicted by a sharp instrument, and by a person who must have *held the instrument in his left hand.* On opening the body, the deceased appeared to have been some months gone with child, and on examining the ground about the cottage, there were discovered the footsteps seemingly of a person who had been running hastily from the cottage, and by an indirect road, through a quagmire or bog, in which there were stepping-stones. It appeared, however, that the person had, in his haste and confusion, slipped his foot and stepped into the mire, by which he must have been wet nearly to the middle of the leg. The prints of the footsteps were accurately measured, and an exact impression taken of them, and it appeared

they were those of a person who must have worn shoes, the soles of which had been newly mended, and which, as is usual in that part of the country, had iron knobs or nails in them. There were discovered also, along the track of the footsteps, and at certain intervals, drops of blood, and on a stile or small gateway near the cottage, and in the line of the footsteps, some marks resembling those of a hand which had been bloody A number of persons being present at the funeral, the stewart depute, with a view of obtaining some clue to the murderer, called all the men together, to the number of sixty He then caused the shoes of each of them to be taken off and measured, and after going nearly through the whole number, they came to the shoes of the prisoner, which corresponded exactly to the impression, in dimensions, shape of the foot, form of the sole, apparently newly mended, and the number and position of the knobs. (Up to this moment no suspicion had fallen on any one in particular) The prisoner, on being questioned where he was on the day the deceased was murdered, answered, seemingly without embarrassment, that he had been all that day employed at his master's work. Some other circumstances of suspicion, however, having transpired, he was, in a few days after, taken into custody On his examination, he acknowledged that he was *left*-handed, and some scratches being observed on his cheek, he said he had got them when pulling nuts in a wood a few days before. He still adhered to what he had said of his having been, on the day of the murder, employed constantly at his master's work, at some distance from the place where the deceased resided, but it appeared that he had been absent from his work about half an hour (the time being distinctly ascertained) in the course of the forenoon of that day, that he had called at a smith's shop under pretence of wanting something, which it did not appear he had any occasion for, and that this shop was in his way to the cottage of the deceased. A young girl, who was some hundred yards from the cottage, said, about the time the murder was committed (and which corresponded to the time that the prisoner was absent from his fellow-servants), she saw a person, exactly with his dress and appearance, running hastily towards the cottage, but did not see him return, though he might have gone round by a small eminence, which would intercept him from her view, and which was the very track where the footsteps had been traced. His fellow-servants now recollected that on the forenoon of that day, they were employed with the prisoner in driving their master's carts, and when passing by a wood, which they named, the prisoner said that he must run to the smith's shop, and would be back in a short time. He then left his cart under their charge, and they having waited for him about half an hour, which one of the servants ascertained by having at the time looked at his watch, they remarked, on his return, that he had been longer absent than he said he would, to which he replied that he had stopped in the wood to gather some nuts. They observed at this time one of his stockings wet and soiled, as if he had stepped into a puddle, on which they asked him where he had

been. He said he had stepped into a marsh, the name of which he mentioned, on which one of his fellow-servants remarked, that 'he must have been either drunk or mad, if he stepped into that marsh,' as there was a footpath which went along the side of it. It then appeared, by comparing the time he was absent with the distance of the cottage from the place where he had left his fellow-servants, that he might have gone there, committed the murder, and returned to them. A search was then made for the stockings he had worn that day, and a pair were found concealed in the thatch of the apartment where he slept, and which appeared to be much soiled, and to have some drops of blood on them. The last he accounted for, at first, by saying that his nose had been bleeding some days before, but it being observed that he had worn other stockings on that day, he next said that he had assisted at bleeding a horse, when he wore these stockings, but it was proved that he had not assisted, but had stood on that occasion at such a distance that no blood could have reached him. On examining the mud or sand upon the stockings, it appeared to correspond precisely with that of the mire or puddle adjoining to the cottage, and which was of a particular kind, none other like it being found in that neighbourhood. The shoemaker was then discovered who had mended his shoes a short time before, and he spoke distinctly to the shoes of the prisoner, which were exhibited to him, as having been those he had mended. It then came out that the prisoner had been acquainted with the deceased, who was considered in the country as of weak intellect, and had on one occasion been seen with her in a wood, under circumstances that led to a suspicion that he had had criminal conversation with her; and on being gibed with having such connection with one in her situation, he seemed much ashamed and greatly hurt. It was proved farther, by the person who sat next to him while the shoes were being measured, that he trembled much, and seemed a good deal agitated, and, in the interval between that time and his being apprehended, had been advised to fly, but his answer was, 'Where can I fly to?' In the prisoner's defence, evidence was brought to show that about the time of the murder, a boat's crew from Ireland had landed on that part of the coast, near to the dwelling of the deceased, and it was said that some of that crew might have committed the murder, though their motives for doing so it was difficult to explain, it not being alleged that robbery was their purpose, or that any thing was missed from the cottages in the neighbourhood. On this evidence the prisoner was convicted and executed. Before his death he confessed that he was the murderer, and said that it was to hide his shame that he committed the deed, knowing that the girl was with child by him. He mentioned also to the clergyman who attended him, where the knife would be found with which he had perpetrated the murder. It was found accordingly in the place he described (under a stone in the wall), with marks of blood upon it."

Mr. Best has annexed to his work an application of the calculus of probabilities to judicial evidence. We fairly own that

we look upon all such methods of trying the value of testimony as worse than useless. A certain number of probabilities lead the mind to a particular conclusion, in some cases the testimony of a single witness is sufficient testimony for this purpose; in others, the oaths of one hundred would be inadequate. By what mathematical test are the probity and faculties of any witness to be estimated? If a witness of clear understanding and irreproachable character, without any motive to misrepresent, positively declares a certain fact within the limits of common experience to have taken place in his presence, we believe him. If twenty witnesses, inflamed with passion and notoriously corrupt, swear that they beheld the transaction, bearing on the face of it the strongest marks of improbability, such, for instance, as the charge brought against Lord Strafford, we should disbelieve them. Nor is it possible for any analysis borrowed from the severer sciences, conversant with unchangeable proportions only, and building upon unvarying premises, to adjust itself to the shifting nature of human testimony The value of an Englishman's testimony is different from the value of that of an inhabitant of Hindostan, the value of a partizan's testimony is different from the value of an indifferent person's testimony The evidence of a friend, of an enemy, of a relation, of a stranger, is to be weighed in different scales, and tried by a different standard. Nay, the evidence of the same man will be entitled to far more consideration in some circumstances than in others. Where is the mathematical calculus by which we are to decide the difference between the value of Clarendon's evidence when it is against and when it is in favour of Charles the First? What analysis of the sides of a die, or of the proportion of black and white balls in a balloting box, will enable us to calculate the effect of the daring enterprize, inflexible resolution, and ardent enthusiasm, which were the ingredients of Cromwell's character? To fathom the turns and eddies of Vane's dissimulation? the grovelling superstition of Laud? and the rancorous[1] apostacy of Strafford? These are calculations which all the diagrams and tables of chances that ever were drawn out never will teach us to accomplish. For these we must have recourse not to La Place and La Croix, but to Tacitus and Shakspeare; otherwise we shall resemble in our folly those whom Lord Bacon ridicules in his time, who came black from the smoke of their furnaces and laboratories to judge of matters which far other pursuits and habits of thought could alone enable them to comprehend. The very first condition of all

[1] Our posterity will find that in these qualities at least, Strafford has found a rival in our age.

matters subject to mathematical analysis is, that they continue permanent or vary within certain limits, subject to a certain law Unless their fluctuations can be expressed with some tolerable accuracy by certain numbers, all attempts to reduce them within the domain of positive science must be chimerical, in consequence of the extreme variety of the phenomena. Mathematical science has been held inapplicable even to organized matter, and Bichat complains of the introduction of a mathematical spirit in physiology, as leading to great abuse, and fraught with most pernicious errors. Now, if this be true of what can be seen and touched and handled,—if properties subject to the examination of our senses cannot be meted out in any correct or assignable proportion, how infinitely ridiculous is it to make that part of our nature which the knife of the anatomist cannot lay bare, or the crucible of the chemist decompose, the subject of such a scrutiny?—to appeal to figures for an estimate of the ever-shifting hopes and fears, motives, passions, and ideas which chase each other in eternal succession over the human mind, inflaming the imagination, biassing the judgment, animating the will, rivalling in their number the sands of the shore and the stars in the firmament,—differing in aim and intensity according to the education, rank, country, age, sex, habits, and intellect of the individual?

> "For take thy balance, if thou be so wise,
> And weigh the wind that under heaven doth blow,
> Or weigh the light that in the east doth rise,
> Or weigh the thought that from man's mind doth flow"

In the last century a geometrician[1] distinguished himself by a famous absurdity on the subject of moral evidence. He argued that at the time when he wrote, the probability of a particular fact attested by writers of the Augustan age, and transmitted by a series of writers to posterity, was equal to the probability of a statement made to him by twenty-four witnesses,—that in about 1500 years that testimony would be equivalent to that of a single witness only, and (to make the good sense of the conclusion consistent with the evidence of the premises) that the world would then come to an end, as faith would be no longer upon earth, and the reign of Anti-Christ begin. According to this doctrine, if one witness asserts a fact and eight deny it, the chances are eight to one against the truth of it. Can human folly go farther? May not the usual character and knowledge

[1] Craig is alluded to in the Dunciad as one

> "Who, pious sage, expects to see the day
> When moral evidence shall quite decay."

and the internal probabilities prove the statement of the single witness to be true, and that of the others false? What should we say to a man who was to argue that a merchant must be insolvent, because he had eight creditors and one debtor? May not the debt due from the one be enormous, and the debt due to the others trifling? A false opinion is not the less false, or a true opinion the less true, because it is old. There is no prescription against truth. That there existed such a town as Athens will be as probable a hundred years hence as it is now, because the same reason for believing it will continue, i. e. the concurrence of a vast number of witnesses able to know and willing to relate the truth, all of whom take it for granted as an indisputable fact. And in one sense the motives which may command the report of posterity will be stronger than those which operate upon our minds, inasmuch as they may appeal to our belief, as well as to the assent of all preceding ages. But the value of tradition varies according to the truth of which it is the depository Though Thucydides[1] could not be mistaken as to the existence of such a town as Athens, he might very well mistake as to the day on which Themistocles was born, and the place of Cleon's birth would be still more liable to error. As facts cease to be public and interesting, error concerning them is more probable. The same writer, who is good authority on one point, is suspicious on another, and herein consists the gross and stupid fallacy of mathematicians, who suppose that external facts, distinct from themselves, not depending on opinion, are to be calculated in the same manner as the angles of a triangle, and would annex the same credit to Gregory of Tours, when he describes his favourite miracle of saints holding up their heads in their hands for the executioner to embrace, as when he affirms the existence of Frédégonde.

If traditions are such as naturally might be expected to elude the hold of the memory, such as are not considerable enough to make any lasting impression, or such as the interest of the transmitters might lead them to disguise or to invent, they must be admitted with much caution, or, if not otherwise supported, rejected altogether But when a tradition has existed for ages,

[1] Guevara, a celebrated Spanish bishop in the time of Charles the Fifth, invented a series of fables on Roman history, for which he referred to Cinna and Pollio. When detected, he endeavoured to vindicate himself by stating a general disbelief in all history but the Bible. He was said, in the Nouvelles de Republique de Lettres, to deserve a place with three other writers. One a person who, three years after Rochelle had been taken, denied that it had surrendered second, a person who, when told that the Duke d'Epernon had been in England by a person who had seen him there, endeavoured to prove that it was impossible, third, a man whom Vossius quotes as the author of a book written to prove that the Commentaries of Cæsar were a tissue of falsehoods, and that he had never crossed the Alps.

—when it is of sufficient importance to attract and of sufficient authority to insure an attentive scrutiny,—when it has originated among men keen to sift and able to communicate every falsehood on which it might repose, it is evident that after the first age every succeeding century through which it has passed unshaken by criticism adds to the weight of its authority, nay more, if we recollect that the prejudices of no two ages are the same,—that they contradict and expose each other, a fact attested by successive generations becomes therefore more certain and unexceptionable. Otherwise this absurdity would follow, that while every year adds to the validity of a deed, it detracts from the weight of historical evidence.

Difficulties have arisen on the distinction between mathematical and moral evidence, for want of a sufficiently severe analysis of the elements of which they respectively consist. It is said that moral evidence can never amount to demonstration. It is true, that by an imperfect being like man, moral evidence cannot be carried so far as to involve a contradiction if it were false, but this proceeds not from the inherent weakness of such evidence, but from the limited faculties of the being to whom it is addressed. Were an inhabitant of another planet to descend upon this earth, and to tell us that in the region he had quitted the radii of a circle were unequal, we should reject the statement as an absurdity, were he to tell us that lead did not melt in fire, we should admit that what he stated might be true, it would not involve a contradiction, but merely a law of nature, different from any with which we are acquainted. To suppose that, constituted as man is, he could live at the bottom of the sea, would be to involve a contradiction. The chemist mixes together an acid and an alkali, with a certainty that they will produce a particular result, to suppose that they will not produce that result, the laws of nature remaining as they are, would be to involve a contradiction. We believe that Charles the First was beheaded as firmly as we believe any mathematical truth, why? because to suppose the falsehood of this fact, constituted as the moral nature of mankind is, would be to involve a contradiction. Man might have been so made, that thousands of people, coming from different countries in different ages, ignorant of each other, without any possibility of concert, or prospect of advantage, should concur to propagate deliberate falsehood, and should in a series of complicated transactions, stretching out almost to infinity, speak, think, and act, as if these falsehoods were true, this is possible, but this is not the actual state of facts, and speaking relatively to man therefore, the evidence of the death of Charles the First, or of the

existence of such a country as China, is as strong as the evidence of mathematical truth, and would imply as great a contradiction if it were false.[1] Mr Locke, indeed, says that the highest degree of probability (to which he elsewhere gives the name of assurance) is, where the general conduct of all men, in all ages, concurs with constant experience in confirming the truth of a particular fact attested by sincere witnesses. Surely, this is more than the highest degree of probability, it is evidence stronger than any which our eyes or ears alone can furnish. So were we acquainted with the secret springs of Caius's nature, did we know every thought, wish, and motive of his heart, at the same time that we were acquainted with the external circumstances by which he was acted upon, we should have as infallible a knowledge of the actions of Caius, as of any truth with which our understandings could be conversant, it is because that knowledge is unattainable that our inferences are precarious—not because cause is not linked as closely with effect in the world of mind as in the world of matter, or that an effect without a cause is not as great an absurdity in morals, as the denial of any truth of science.[2]

Even in mathematical studies, we cannot advance a step without taking for granted the evidence of memory and personal identity The continual approximation of lines that never meet, an infinity of infinities, each infinitely greater or infinitely less, not only than any infinite quantity, but than each other, are as startling to reason as any propositions that can be stated. As long as mathematicians deal with quantity apart from matter, they reign without dispute, but when they descend into time and space and reality, the difficulties with which they are beset are insurmountable. " Non item vero physici, quibus in regno materiæ versantibus nihil licet." Gassendi, lib. 1, p. 264, l. 3, c. 3, s. 9.[3]

It was long before the danger of proving by oral testimony

[1] Buffier, Premières Vérités. p. 1, c. 19.

[2] The dates of the battle of Cérisoles, the death of Antony Bourbon, King of Navarre, the barricades of Paris in the time of Henry the Third, have all been fixed differently by contemporary writers. But it is still more singular that Ervemus, who gives in his letters a detailed account of the life and death of Louis de Berquin, one of the Protestant martyrs in 1529, should, in a letter dated the 9th May, 1529, affirm that Berquin was put to death on the 17th April, and in another letter, dated 1st July 1529, affirm that he was put to death on the 12th April, 1529. Theodore Beza fixes the date of the same event on the 10th November of the same year, and attributes to it an excessive frost, which caused much misery in France.

[3] " C'est ainsi qu'un géométre de bonne foi avouera qu'encore que l'on démontre mathematiquement que la matière est divisible a l'infini, l'on ne peut resoudre en aucune manière les objections des atomistes. Il ne prend point cette impossibilité pour une marque de la vérité de leur système, mais seulement pour une marque de la limitation de l'esprit humain."—Bayle, Réponse aux Questions d'un Provincial, vol. iii. p. 1150.

the substance of contracts forced itself upon legislators. In Code 4, 20, we find the first provision upon the subject. This prohibited the proof of payment by oral evidence, when the debt was founded on a written instrument, but five witnesses were even then admitted to establish it. It was not until many centuries after the death of Justinian, that the limits within which he had confined the admission of oral evidence were still farther removed. Cardinal Bessarion, the Legate of Nicholas the Fifth, at Bologna, 1454, confirmed the statutes of that city, by which oral evidence was excluded in certain specific cases. In the Duchy of Milan the same principle was adopted in 1498, and sanctioned by Louis the Twelfth in 1552. At length in 1566 the ordonnance de Moulins, framed by one of the most illustrious magistrates that France, fertile as her annals are in examples of judicial luminaries, can boast of—the Chancellor L'Hôpital,—restrained the power, up to that time unlimited, of giving oral evidence of contracts below the value of 100 francs. Boiceau, the author of an excellent commentary on this ordonnance, tells us that at first it shared the common lot of useful measures, and was the topic of constant obloquy among practitioners. But he tells us that after its benefits had been found experimentally, it obtained the applause of all the jurists of the age, "*Nulla toto hoc sæculo constitutio aut lex regia sanctior ac probatior visa est.*" In 1611 the Archdukes of Flanders, in the 19th article of a perpetual edict, adopted the same principle. In 1667 it was again sanctioned by the great magistrates and lawyers of that day in France. And in the 19th century it was inserted in the 1341st article of the Code Civil. There can be little doubt that our Statute of Frauds was borrowed from this ordonnance.

It has been said that negative proof is unattainable, and this has been repeated as if it were an axiom in judicial investigation. Nothing however is more easy, in many instances, than to prove a negative. Cocceius remarks acutely, that if it be impossible to prove an indefinite negative proposition, the reason of the impossibility lies not in the negative, but in the indefinite element of which it is composed.—*Dissert. de direct. prob. negat.* 13. "*Non quia negativa, sed quia indefinita.*" The mistake arose from a passage in the code—

"*Actor quod asseverat, probare se non posse profitendo, reum necessitate monstrandi contrarium non astringit* enim per rerum naturam factum negantis probatio nulla sit." *L.* 23, *Cod. de probat.* 3, 19.

This is a maxim in its proper sense perfectly reasonable, as it amounts to this only, that the plaintiff shall not fling the burden

of proof on the defendant, but the commentators, separating the last sentence from the preceding passage, laid it down as a maxim that to prove a negative was impossible. This prohibition was afterwards qualified, especially by the canonists, and three sorts of negatives were established, negative of right, negative of quality, and negative of fact. It was allowed that a negative might be proved in the two first instances, and in the third when the fact was definite, it is however apparent, that even where a negative is indefinite, in many instances it may be established. Supposing it is to be proved that Caius has never lent Titius a thousand pounds. This may be proved by showing that Caius never possessed so much money, by a letter from Caius written just before his death, admitting himself indebted to Titius, by proving that Caius never knew Titius. The principle is, that whoever advances a claim resting upon a negative or affirmative, is bound to prove it. There was an exception to this principle in the Roman jurisprudence, arising from the strictness of their rule, *ex nudo pacto non oritur actio* a "*stipulatio*" was requisite, without which the contract could not have been enforced. If therefore a written admission by Caius that he had received a sum of money was produced, and Caius affirmed that the admission had been written in the expectation of receiving the money, which had never been paid, "*quasi accepturi pecuniam quod numerata non est*" (*lib.* 7, *Cod. de non num. pec.* 4, 30.), this flung upon the opposite party the burden of proving that the money had been received.

The chief merit of the English law of evidence, a merit which in some measure atones for that predilection for absurdity which seems to have animated some of its earliest sages, and not quite to have abandoned their posterity, consists in the general exclusion of hearsay evidence, that one man shall not be affected by what another says of him, which he has no opportunity to examine or contradict, is a dictate of natural justice, and however it may be argued that such evidence ought to be admitted, and left to find its own level, yet so long as juries are entrusted with the decision of facts, and those juries in the greater number of instances are taken from a portion of the community peculiarly susceptible of prejudices, any substantive alteration of this rule would lead to the most pernicious consequences. "Vanæ voces populi non sunt audiendæ, nec enim vocibus eorum credi oportet, quando aut noxium crimine absolvi aut innocentem condemnari desiderant."

Perhaps the most remarkable exception to this important doctrine is that by which the English law, dispensing with its formal rules in favour of higher principles, allows hearsay evidence to be given when it tends to explain an act done, and forms

part of a particular transaction · nothing can be more sound than the reasoning on which this exception is admitted, an action may bear a totally different interpretation, according to the words by which it is accompanied—nay, in many cases, an action would be altogether unmeaning were it not for words which individuate it, and impart to it a peculiar and distinctive signification, the same cause, therefore, on account of which evidence of the act is given, obliges evidence of the expression with which it is accompanied to be received. Thus, where a question arises as to the validity of an insurance, impeached on the ground of fraud committed by the party for whose benefit it was made, evidence of declarations made by the party whose life was insured is admissible. So where a tradesman leaves his house, evidence may be given of his declarations as to the motives of his absence, so his declarations as to the state of his affairs are evidence, and the answers may be read to letters written by him and requesting assistance. Another exception is, where hearsay is admitted to prove a public[1] right, in such cases that the fact of tradition exists among those who have the means of knowledge, and an interest in perpetuating that knowledge, is a circumstance entitled to great consideration, it is a moral fact, not obvious to the senses. No other evidence can be given, that such rights exist, but the prevalence of such traditions among the people. Such a persuasion is the very fact sought to be established, if it can be traced to the period when those rights were exercised, if it be constant and general, if no specific date can be assigned to its origin, hearsay is thus stripped of its most dangerous qualities, it ceases to be the loose random declarations of an individual, and assumes a character of constancy and truth in proportion to its extent and accuracy[2]

"Labeo ait cum quæritur, an memoria exstet facto opere, non diem et consulem ad liquidum exquirendum, sed sufficere, si quis sciat factum, hoc est si factum esse non ambigatur; nec utique necesse esse, *superesse qui meminerint, verum etiam si qui audierint eos, qui memoria tenuerint.*"—Dig. De aq. et aq. pluv. arc. 39, 3, 2, 8.

Justinian was requested to put the law as to *fœnus nauticum* (our bottomry) on a new footing. He ordered a commissioner to take the evidence upon oath of those engaged in that business, and in conformity with their declarations a law was drawn up establishing the existing custom, Nov 106 and again, "Magnæ auctoritatis hoc jus habetur quod in tantum probatum est ut non

[1] Manifold v. Pennington, 4 B. & C. 161.

[2] Savigny, System des heut. Röm. Rechts, vol. ii. p. 146, Rhet. i. 15. "Witnesses," says Aristotle, "are old and new by old I mean the poets."—και ὅσων ἄλλων γνωριμων εισι κρισεις φανεραι. οἷον αθηναῖοι ομηρῳ μαρτυρι ἐχρησαντο περὶ Σαλαμῖνος.

fuerit necesse scripto id comprehendere." Again, in questions of pedigree, declarations of deceased members of the family, made before any controversy has arisen, are admissible. Engravings upon rings, and charts of pedigree hung up in family mansions, or found among family documents, have been received in evidence. So a monumental inscription, on which a narrative of the descent of the family was inscribed in their burial place, is admissible. In the cases of declarations it is not supposed that the party is speaking from his own knowledge, but from what he has learnt as a member of the family, the question is, what was the opinion of the family as to a matter peculiarly bearing upon its interest, and within its knowledge, the truth or falsehood of that opinion is not proved, but left to the presumption of the tribunal before which it is adduced, on the same ground, declarations made by persons having no interest to misrepresent, made in the regular discharge of their duty, are admissible.[1]

By the Athenian law[2] hearsay evidence (ακοὴν μαρτυρεῖν) was admisible when the speaker was dead. When, through illness or absence, the attendance of the witness was impossible, his evidence was taken down in writing by two witnesses, who were bound to verify the deposition so taken at the trial, this was called εκμαρτυρία, and to verify it (μαρτυρεῖν την εκμαρτυρίαν). If the deposition was denied by him whose evidence it was professed to be, an action lay against those who verified it, if admitted, an action of false testimony might be brought against himself as in the barbarous laws the witnesses are called ἵστορες,[3] and in the laws of Solon they are called ἰδυῖοι.

Slaves at Athens could not give evidence, unless after torture. The Greeks held the evidence of him who could be commanded to give it unsafe, a principle copied in the Digest—"Idonei non videntur esse testes, quibus imperari potest, ut testes fiant." The hope of freedom was often held out to bias the testimony of slaves. Antiphon, in the speech on the murder of Herodes, says—"The slave, up to the moment he was put on the wheel, exculpated me, till, yielding to the violence of necessity, he slandered me by a false charge, desirous to escape from torment, when they ceased to torture him, he again declared that I had not done any of these things, and bewailed my fate and his as doomed to perish unjustly, corroborating thereby the truth of

[1] Slaney v. Wade, 1 Mylne & C. 338.

[2] Α αν, εἰδῆ τις, και οἷς αν παραγενηται πραττομενοις ταῦτα μαρτυρεῖν κελευουσιν ενγραμματειω γεγραμμενα ινα μητε αφελεῖν ἔξῃ μηδεν μητε προσθεῖναι τοῖς γεγραμμενοις.

Ακοην δ' ουκ ἐᾶσι ζῶντος μαρτυρεῖν—ἄλλα τεθνεῶτος.

[3] Savigny, System des heut. Röm. Rechts, vol. i. p. 182. "Auf einem solchen Umstand unmittelbarer Erkenntniss des Gewohnheitsrechts beruhte das altgermanische Institut der Schöffengerichte die aus kundigen zusammengesetzt waren."

his former declarations." "The freeman," continues Antiphon, "persevered in declaring my innocence, even in torture *he* could not be wrought upon by the hope of freedom to accuse me falsely."

The Roman law took cognizance of three sorts of writings, public, forensic, private.

To the first class belonged the documents deposited in archives appropriated to that purpose. "Quæ in publico instrumenta deponuntur in archivo aut grammatophylacio."—9 Ff. De pœnis, 48, 19.

Paulus tells us that it was usual to deposit private documents in these archives to insure their safety There also donations were registered, "ut obtinerent inconcussam firmitatem."—Lib. 30, Cod. de Don. 8, 54. This custody alone gave the documents the authority of a "publicum testimonium." They required no verification, and they were held superior to oral evidence, "census et monumenta publica potiora testibus esse senatus declarat," says 10 Ff. 22, 23. "Superfluum est privatum testimonium, cum publica instrumenta sufficerint," says the code. Lib. 31, Cod. de Don. 8, 54.

In imitation of this custom the ecclesiastics of the dark ages established similar places of deposit, there were placed the diplomas, charters, acts of donation, on which depended the right and emoluments of the bodies to which they belonged, and here were also deposited, in common with genuine instruments, the forgeries which have been exposed by the research and sagacity of modern critics. The canonists endeavoured to procure for these instruments the same authority which belonged to those deposited in the archives of the Roman empire." "Charta quæ profertur ex archivo publico testimonium publicum habet (authentic. ad hæc Cod. de fid. instrum.), etiamsi careat solemnibus publici instrumenti." A maxim which, if adopted, would have ultimately given the clergy possession of all the land in Europe.

2d. The documents called forenses, publicè confecta, publicè celebrata—these required verification. "Testimonium publicum non habebant," nor was the signature of the tabellion sufficient.

3d. Documents not attested by the tabellion were to be proved by three witnesses at least, also, in cases of doubt, it might prove that the document was subscribed in their presence.

The validity of writings not attested depended entirely on the good faith of the party whom they bound, the plaintiff could only require his antagonist to deny upon his oath the signature to be his, all comparison of hands was excluded as uncertain and insufficient. Nov 73.

As all judicial inquiry has for its object a certain portion of

that great chain of events by which the affairs of mankind are linked together, a reasoner à priori might infer that no evidence, however minute, which either party chose to offer, should be shut out, since in giving an account of human transactions, to exclude any circumstances which compose that history would be unreasonable. When we read the dry register of enormous crimes—the almanack of horrors—which Suetonius has transmitted to us, the mind labours under a painful sense of improbability and disgust, but in the luminous pages of Tacitus, the same events, traced to their causes, are fraught with deep wisdom and instructive learning. The insolence of the Duchess of Marlborough placed Philip the Fifth on the throne of Spain, yet nothing would seem more remote from the province of the Spanish historian than the intrigues of Queen Anne's chamber maids. Considering the subtle and complicated relations of events to each other, how much of what we do not see is requisite to explain what we do see, considering that the further we inquire, the more connection we discover between facts apparently the most widely distant in time, nature, and degree:[1] that there is no event, however trivial, which may not be the hinge of those which seem to us the grandest and most sublime, none that may not run out into endless combinations considering all these things, how can the judge venture not only to affirm that particular evidence in a particular case shall not be received, but to exclude beforehand whole classes of evidence, and thus deliberately shut out from his view some parts of a transaction, a complete and thorough knowledge of which can alone enable him to pronounce a just decision? Yet a single glance at the struggles of contending parties in a court of justice would satisfy the most common observer, that a system which admitted indiscriminately all the evidence that might be thought by either antagonist essential to his cause, would tend, if not to an absolute denial, to a constant perversion of justice. Even in an epic poem we ought not, as the most judicious of all writers tells us, to go back too far, or to make the origin of our story too remote. All human legislation is a compromise with evil, and the question to be decided with regard to evidence is, as it must by some general rule be contracted within certain limits, what class of evidence is most precarious. All that we

[1] Hence the mischief done by the cant of cui bono? by which some true Englishmen justify their contempt for every thing they cannot taste or touch or put into their pockets. The fine speculations of Apollonius and Archimedes on conic sections (than which nothing could be more purely theoretical) have brought the art of navigation to a degree of perfection which it would never otherwise have reached. And, according to the remark of Condorcet, the sailor who escapes shipwreck by a correct application of the rules for finding the longitude, owes his security to a theory conceived two thousand years ago, by men of genius absorbed in geometrical speculations.

can do, is to compound with the infirmities of our condition, by taking care that all the particulars are brought before us which apparently concern the question, and that there is no evidence behind which may be cast the weight of probability on the other side. Nothing can be clearer than that the exclusion of evidence is considered in itself an evil. If all the circumstances connected with a fact were brought to light, the truth would be known if all were excluded, justice would be unattainable. Evidence, then, ought only to be excluded where its own character, and the nature of the tribunal to which it is addressed, considered, it would be more likely to mislead than to direct its determination. Now, as it is quite impossible that all the facts connected with any transaction should be laid before a court appointed for its investigation, half knowledge of one class would be more perilous than total ignorance concerning them. For instance, were the rumours of neighbours as to a particular circumstance admitted, or were the letters of third parties concerning it received, nobody can doubt that to assign a proper weight to such evidence would be utterly beyond the power of minds constituted for the most part as those of jurymen are, nor does it follow, because a knowledge of all that bears remotely or immediately upon a transaction would ascertain the truth, that a partial knowledge of facts, differing in degree as to their importance, would facilitate its investigation. True, the philosopher rejects nothing that can assist his inquiries, but he can assign its proper weight, if he deserves the name, to each kind of evidence he will not allow obscure and remote analogies to obliterate the effect of direct and positive facts, he is not obliged to pronounce any immediate opinion, he may suspend his judgment, and it is upon facts that, after all, his argument however refined, his analogies however subtle, must depend, but were hearsay evidence, vague rumours, wild suspicions, loose belief—

> " Not weigh'd nor winnow'd by the multitude,
> But swallowed in the mass unchew'd and crude,"—

to be flung in a mass before a jury, far from proceeding by facts, in most instances they would not even be guided by probabilities. This evidence would in no way correspond to the experiments on which the philosopher builds an inference, however remote or fanciful. The chief obstacle to the discovery of the truth are obscurity of fact and ambiguity of language. To surmount these, great care, great capacity, and, above all, great experience, are requisite. Were they multiplied ten-fold, as they would infallibly be, by the admission of hearsay evidence, the

average faculties of man would be no more able to cope with them, than the husbandman, used to manage the spade and plough, would be to turn to their proper use the most refined instruments, which the increasing wants of science have produced. Evidence must therefore be circumscribed within certain limits. One of the evils arising from an excessively artificial state of law, has been to contract these boundaries to an unnecessary depth. We will quote two instances in which this has been done, one in conformity with the other, in contradiction to received authorities. In the first of these instances,[1] a question arose as to the sanity of the testator. In order to show that he was treated as a sane person in the business of daily life, evidence was offered of letters found among his other papers, addressed to him by different persons on ordinary transactions. This evidence was objected to, and, after much discussion, rejected by a majority of the judges in error, all who rejected it, though differing as to the fact whether the testator had done any act in consequence of these letters, agreeing that unless the testator had acted upon them they were inadmissible. We do not pretend here to affirm that the decision of these learned persons was contrary to law, though Mr. Baron Gurney, whose opinion on a point of evidence is entitled to considerable weight, both from technical knowledge and vast experience, differed from his brethren on that occasion. But be this as it may, the evil of such a rule is manifest. We are quite sure that in ordinary life any one would be thought in a literal sense distracted who was to reject the means furnished him by such evidence of judging of the sanity of another person. Imagine an individual anxious for some reason to discover whether a deceased person was sane or insane at a particular period, and turning aside from letters written to that person during that period on the ordinary affairs of life, by persons well acquainted with him and actually engaged in transacting business with him. It was ingeniously said, that as the words of those who wrote the letters could not be given in evidence, neither could their written declarations, but the distinction is obvious who can say that the words are accurately reported? They may be misquoted, from negligence or design, but "*littera scripta manet*," the letters were written at a time when there was no purpose to serve, and there they remained. On what other principle are letters written to a bankrupt before his bankruptcy, containing matters relative to the act of bankruptcy, admissible? The oral declarations of the writers of those letters would not have been received. The letters are not put in to prove the truth of the statement they

[1] Doe d. Wright v. Tatham.

contain, but to show that such papers had reached the bankrupt's hands. This evidence was admitted by Lord Tenterden, a judge whose temper certainly did not lead him to err on the side of liberality The weight due to such evidence is another question it may be and would be in ordinary cases very great, or it may be very trifling, but to exclude such evidence altogether is wantonly to reject the most useful and *undesigned* testimony that the course of affairs lays before us for our guidance and instruction. Can there be a doubt that the party in the wrong on such an occasion would be anxious to resist the admission of such evidence? Can there be a doubt that any one, in whatever scale of understanding he claimed his place, from the highest to the lowest, from a man of letters to a banker's clerk, who out of a court of justice was to shut his eyes against such an argument, would be considered as it was desired that the testator should be considered in the case to which we are referring? To turn aside from truth that stares one in the face in this manner is peculiar to the English law Suppose a question as to the insanity of George the Third to arise hereafter,—whether, for instance, in 1795 it had long been considered certain by the community at large,—would a letter written to him by a minister of the day in the middle of that year, recommending some political intrigue and an anti-catholic agitation, or discussing military operations and the necessity of paying a fresh subsidy to some new and useless ally, be put aside as throwing no light at all upon the question? Would it not be the strongest of all evidence, namely, the existence of a fact which is incompatible with the existence of a second fact, and by which therefore that second fact is overthrown. Such is the irresistible argument of Middleton to disprove the ridiculous miracles ascribed to the early fathers of the Church. He has first shown that, after the apostolic times, there is not in all history one instance of any person who exercised or pretended to exercise the gift of tongues in any age or country whatsoever, that this gift was one which could not easily be counterfeited so as to impose on any but the most illiterate of mankind, and that to acquire a number of languages in such perfection as to make them pass for a supernatural gift was impracticable. He then asks whether any reasonable person can believe that a gift of such eminent importance, especially during the infant fortunes of the Church, should cease, while the rest were subsisting in full vigour and every day abounding more and more? That while one saint was raising the dead in Syria, another should be struggling with the difficulty of learning a barbarous dialect in Gaul? So the mention of Zancle and Messana as two different towns in the

Epistles of Phalaris was one great argument to prove them forgeries. It is the foundation of all criticism, and indeed of most reasoning on disputed points, that if an opinion be irreconcileable with what is undeniably true, that opinion is false, if it be hardly reconcileable with it, it is improbable, and, just in the degree in which it is difficult to be so reconciled, does its improbability increase. To reject evidence of this sort, by confounding it with another class, cannot but go far to defeat the end and purpose of judicial investigation altogether.

The other case to which we referred is one in which the dying declaration of a witness as to a transaction in which he was personally engaged, was rejected as inadmissible. The rules of artificial law ought to have been most peremptory and unequivocal to cause the rejection of evidence of such a nature. Common sense, and the instinctive feeling so deeply rooted in us, all tell us that such evidence, if not always infallible, is stronger, far stronger, than that on which courts of justice usually rely The most hardened and depraved of mankind would be far more likely to commit perjury in a court of justice, with the average prospect of life before him, than to be guilty of the same crime when he has no delusion to rely upon, and no purpose which he can answer.

This[1] last remark disposes of the objection drawn from the

[1] In the following instance a spy saved his life by resolutely adhering to a falsehood. It is a curious proof of resolution.—" Il est difficile de se figurer tout ce que l'on peut trouver de courage et de presence d'esprit dans des hommes dégradés comme le sont les miserables que font le metier d'espion. J'avais un agent parmi les Suedois-Russes, un nomme Chefneux, que j'avais toujours reconnu comme tres intelligent et tres exact. Etant resté long-temps sans recevoir de ses nouvelles, je commençais a avoir quelque inquiétude, et ce n'était pas sans fondement. Il fut en effet arrête a Lanenbourg, et conduit, pieds et mains lies, par des Cosaques, a Lunébourg. On trouva sur lui un bulletin qu'il allait m envoyer, et il n'échappa a une mort certaine que parce qu'il était porteur d'une lettre de recommendation d'un negociant de Hambourg, connu particulièrement de M. Alopœus, ministre de Russie a Hambourg. Cette precaution que j'avais prise, lui sauva la vie. M. Alopœus ecrivit a ce negociant qu'à sa recommendation, on renvoyait l'espion sain et sauf, mais qu'une autre fois le recommande et le recommendant n en seraient pas quittes a si bon marche. Malgre cette recommendation, Chefneux aurait paye de sa tête le metier dangereux auquel il se livrait, ce qui le sauva reellement, ce fut le sang froid inconcevable qu'il montra dans cette terrible circonstance. Encore bien que le bulletin que l'on trouva sur lui fût adresse a M. Schramm negociant, on soupçonnait vivement qu'il m'était destine. On demanda a Chefneux s'il me connaissait, il repondit hardiment qu'il ne m avait jamais vu. On chercha tous les moyens possibles pour lui faire faire cet aveu sans pouvoir y parvenir. Cette constante dénegation, jointe au nom de M. Schramm, jetait des doutes dans l'esprit de ceux qui interrogeaient Chefneux on pouvait condamner un innocent. Cependant on tenta un dernier effort pour savoir la verité Chefneux, condamne a être fusillé, fut conduit dans une plaine de Lunébourg, au moment ou les yeux bandés, il entendait commander le peloton qui devait tirer sur lui, un homme s'approche de lui, et lui dit tout bas a l'oreille, d'un ton d'intérêt et d'amitie *On va tirer, mais je suis un ami, dites seulement que vous connaissez M. de Bourrienne et vous*

fact, that felons, notoriously guilty, often die declaring their innocence. The cases are not parallel, because, in the first place, the criminal often flatters himself to the last moment, that by an obstinate assertion of his innocence, he may escape, and, in the second place, he may deceive himself by the supposition that his falsehood will injure nobody, is at any rate venial, and, if it mitigates the disgrace and sufferings of his family, even meritorious. But for a man in such a condition deliberately to utter a falsehood to blacken his own memory, for the purpose of injuring another—of causing confusion and distress, is, we certainly cannot say, impossible, but so flagrant an outrage upon all the rules by which our opinion of human conduct cannot but be guided, that to reject evidence liable only to such an imputation, would be to put a stop to all efficacious inquiry All law involves the notion, in some shape or other, of balanced evils, the question therefore is, not whether some evil may not arise from its admission, but whether greater will not result from its exclusion. And here we must take leave to say, that far from yielding to the weight of authority, the judges, in rejecting such evidence, acted in defiance of it. But to complete this great practical fallacy —The same evidence which is rejected when a dying sinner calls upon his Maker to forgive him for having forged the very bond attested by his signature, which this declaration would be cited to disprove, is admitted where a murdered man describes the manner of his death and the person of his murderer. All the reasons insisted upon by Lord Chief Justice Eyre and by Lord Ellenborough, apply as much to the one as to the other of these occasions. The want of all benefit from deceit,—the awful situation of the speaker,—the anxiety, natural, as history proves, to the sternest and worst of men, to repair in some measure the injuries they may have done, are additional reasons why it should rather be admitted in the former instance than the latter Even Louis XI., on the approach of death, began to release his victims, and yet where a man's estate may be affected, it is rejected, where a man's life is at hazard, it is received, where one strong motive, tending to prove its truth, does not exist, it is brought forward, where that motive does exist, it is withheld. The danger of admitting the *loose* expressions of a dying witness is insisted upon. Then why admit them to affect the life of another? But if such declarations so made, far from being loose, are proved by the lessons of experience, as well as of the deductions of reason, to be the most

êtes sauvé. Non, répondit Chefneux d'une voix ferme, 'je mentirais.' Aussitôt le bandeau tombe de ses yeux et la liberté lui est rendue."—Bourrienne, Mem. de Napoléon, tom. 4, p. 65.

solid that human lips can utter, if by the unanimous assent of all writers, poets, historians, moralists and lawyers,—

"Veræ voces tum demum pectore ab imo
Ejiciuntur et eripitur persona, manet res,"—

under the most tremendous guarantee for their truth that the condition of human life affords—if to suppose them false implies their maker to be steeped in wickedness, to be hardened in guilt, beyond the usual mark of human depravity, fit to be cited as a portent and a prodigy, rather than as a common instance of a wicked man, while to suppose them true, implies him only conscious of the change he is about to undergo, and to retain some traces of our common nature in his heart, on what principle of reason—on what principle of law—on what ground of public expediency or private wisdom,—can the rejection of such evidence be justified? Such an anomaly, vindicated as it is by names which command the respect and attention of every one by whom not only a profound acquaintance of the English law, but masculine sense, and surprising penetration, are appreciated, adds to the proofs which surround us on every side of the errors from which the most luminous reason, and the most extensive capacity, cannot save their possessors, and which console men less eminently gifted for their inferiority [1]

The great evil to which, in a certain degree, most lawyers—but to which, more especially, English lawyers—are exposed, is an incapacity for general reasoning, and an aversion to general rules, accustomed to particular judgments and conclusions, they find it irksome, as it is certainly unprofitable, to exchange the unconscious habit of technical experience for any broad or philosophical principle, comprehending under its range a vast number of individual cases, and furnishing theorems in which several departments of the science they profess are comprised. Accordingly, while they have been remarkable for sagacity, for technical knowledge, for professional dexterity, for subtlety second only to that of the schoolmen in the dark ages, all these qualities have been exhausted, as Lord Bacon says those of the schoolmen were, on materials of little comparative value or importance, and instead of diminishing, have contributed to increase the misery and perplexities of mankind, the same cause, viz. the diligent study of their predecessors, which made the Roman jurists refined amid encroaching barbarism, made the

[1] "O but they say the tongues of dying men
Enforce attention like deep harmony,"
said one whose opinion, where a question of human nature arises, is not altogether to be overlooked.

English lawyers barbarous amid advancing civility Leibnitz affirms "that next to the works of the mathematicians, the finest specimen of scientific reasoning is to be found in the writings of the Roman civilians;" the intellectual habits produced by such a study are not likely to be the same with those engendered by the perusal of the Year Books. Wrapt in a cloud of frivolous distinctions and unmeaning dogmas, the lawyers of the Plantagenets, the Tudors, and the Stuarts, nay, even of the first princes of the House of Brunswick, seem not to have perceived the enormous absurdities and frightful acts of deliberate cruelty, which, in obedience to precedents, they regularly perpetrated, which chill the blood, and make[1] the soul sick in their contemplation. Remarkable among a people tenacious of forms even to superstition, for a jealous hostility to innovation, they have always preferred an oblique and circuitous mode of remedying the absurdity and injustice of former ages to a direct and open abatement of the nuisance itself.[2] It is only within these few years that fines and recoveries, the barbarous invention of a barbarous age, have been abolished, posterity will scarcely believe, that the right of calling compurgators was swept away in the reign of William IV., and that the preliminary proceedings on a trial of battle (to the eternal disgrace of English legislation) took place in 1818 before the Court of Queen's Bench. Ejectment, a stupid fiction growing out of the same dark period, is still suffered to disfigure the administration of law in a civilized country, adding to the expense of the suitor, and rendering all knowledge on his part of the proceeding in which he is concerned impossible. With regard to the subject of the preceding pages, it is only during the present year that Lord Denman, by an act which insures him a lasting name among the benefactors of his country, has put an end to the shocking absurdity of excluding, on the ground of interest, the testimony of a man who might gain five shillings by the issue of a cause, while, if the fortune or the character of his son, his brother, or his father were at stake, the evidence of the same witness was received without hesitation or remark.

An antipathy to enlarged views and comprehensive propositions is the stamp of vulgar minds in all countries, yet general principles, if they are just and sound, will ultimately prevail,

[1] As a specimen, take the execution of the Rebels in 1745, especially that of Dr. Cameron. A woman was burnt alive for petty treason within living memory.

[2] Observe the difference between Paley and Blackstone in accounting for the Revolution of 1688, "when the opinion of right becomes too superstitious, it is abated by *breaking the custom.*" The manliness of the ecclesiastic stands in very advantageous relief when contrasted with the timidity of the lawyer, "si sic omnia!"

and the views of a legislature can hardly be too wide and generous. Nor is there reason to despair. Year after year large majorities, in spite of humanity, reason, and experience, upheld the savage punishments inflicted upon criminals by the English law, all that professional bigotry, that clumsy subtlety, that blind disregard of the great principles on which social happiness depends, could offer, was arrayed against the reforms that Sir Samuel Romilly, the great ornament of his profession, endeavoured to introduce. It still continued part of the law of England that the hangman might tear out the heart of a living man. Murder and sheep-stealing were still visited with the same punishment, but though Sir Samuel Romilly did not live to see the reward of his efforts, his glorious labours were not thrown away, the ferocious laws which were, as it was said, interwoven with the constitution and inseparable from its blessings, gradually fell into disrepute. The lawyer began to doubt whether so much bloodshed was useful, and the bishop whether it was Christian. At length they ceased to be the reproach and scandal of the English name, the bare notion of renewing the scenes which, twenty-five years ago, were familiar in every assize town, would now be considered inhumanity sublimed to madness. So let us hope that all the vestiges of absurdity which still adhere to the administration of justice in this country may be speedily swept away, that technical embarrassments flung in the way of substantial justice, already much diminished, may totally disappear, and that our legislators may adopt in time those principles which, sooner or later, must force their way—*opinionum commenta delet dies, naturæ judicia confirmat.*

J G P