A

PRACTICAL TREATISE

OF THE

LAW OF EVIDENCE,

AND

DIGEST OF PROOFS,

IN

CIVIL AND CRIMINAL PROCEEDINGS.

SECOND EDITION,

WITH CONSIDERABLE ALTERATIONS AND ADDITIONS.

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frequently supply the only true light by which the real characters of the witnesses can be appreciated (*b*).

Ability of witnesses.

Secondly, their *ability*: The ability of a witness to speak the truth must of course depend on the opportunities which he has had for observing the fact (*c*), the accuracy of his powers of discerning (*d*), and the faithfulness of his memory in retaining the facts, once observed and known.

Where a witness testifies to a fact which is wholly or partially the result of reason exercised upon particular circumstances, it is obvious that the reasons of the witness for drawing that conclusion are of the most essential importance for the purpose of ascertaining whether his conclusion was a correct one.

These observations apply with peculiar force to all questions of skill and science, and even to many of mere ordinary fact: thus where a witness is called to state that another witness is not to be believed upon his oath, his grounds for arriving at that conclusion are of the highest importance. Where, on the other hand, a witness states the impression on his senses, by any subject-matter of frequent experience, his reasons are of little weight; he will frequently assign a bad reason where his knowledge is certain.

The probability that the witness had originally a clear perception of the fact and its circumstances, is strengthened and confirmed by the consideration that they were of such a nature as were likely to attract his attention. On the other hand, it is diminished by the consideration that the transaction was remote, and such as was not likely to excite notice and observation (*e*).

(*b*) Tu magis scire potes quanta fides habenda sit testibus que et cujus dignitatis et quantæ æstimationis sunt et qui simpliciter visi sunt dicere, utrum unum eundemque meditatum sermonem attulerint an ad ea quæ interrogaveras ex tempore verisimilia responderint." Adrian's Epistle to Varus, legate of Cilicia. Ff. 22; 5. 3.

(*c*) When the guilt of the prisoner depends *wholly* on proof of identity, it is impossible to inquire too minutely into the means and opportunity which the witnesses had of observing the person, so as to able to speak with certainty. Many instances have occurred in which well-intentioned witnesses have sworn positively in this respect, and yet have been mistaken. I have frequently heard Mr. J. Bayley observe to juries, that fear has a very different effect upon different persons; in some it prevents the clear perception, whilst in other instances it assists in making an indelible impression.

(*d*) See Gil. L. Ev. 151, 2d ed.

(*e*) C. B. Gilbert, in his Law of Evidence, 151, 2d edit., says, "another thing that would render his (a single witness's) testimony doubtful, is the not giving the reasons and causes of his knowledge;" and again, "the same may be said as to persons who take upon them to remember things long since transacted, for if the

Such considerations operate strongly where detailed evidence is given of oral declarations, after the lapse of a considerable interval of time. Every man's experience teaches him how fallible and treacherous the human memory in such cases is. In its freedom from this defect consists one great excellence of documentary evidence, and its main superiority over that which is merely oral; and on this principle it is, that the law, out of policy, frequently deems mere oral evidence to be too weak, and requires a written voucher to prove the fact (*f*).

Of all kinds of evidence, that of extra-judicial and casual observations is the weakest and most unsatisfactory; such words are often spoken without serious intention, and they are always liable to be mistaken and misremembered, and their meaning is liable to be misrepresented and exaggerated (*g*).

A hearer is apt to clothe the ideas of the speaker, as he understands them, in his own language, and by this translation the real meaning must often be lost. A witness, too, who is not entirely indifferent between the parties, will frequently, without being conscious that he does so, give too high a colouring to what has been said.

The necessity for caution cannot be too strongly and emphatically impressed, where particular expressions are detailed in evidence, which were used at a remote distance of time, or to which the attention of the witnesses was not particularly called, or where misconception was likely to arise from their situation and the circumstances under which they were placed, or from the

matter be frivolous they ought to tell the causes of their memory, otherwise the memory is little to be accredited; for they are rather to be supposed as rash persons who take upon them to swear what they do not perfectly remember, than that they are really under the awe and conscience of an oath; for there they would be able to tell the reason and certain marks of their remembrance."

(*f*) See the statute of Frauds, &c. On this ground, also, it is that mere words will not constitute an overt act of treason.

(*g*) Finalmente è quasi nulla la credibilita del testimonio, quando si faccia delle parole un delitto, poichè il

tuono, il gesto, tutto ciò che precede, e ciò che siegue, le differenti idee, che gli uomini attacano alle stesse parole, alterano, e modificano in maniera i detti di un uomo, che è quasi impossibile, il ripeterle, quali precisamente furon dette. Di più le azioni violenti, e fuori dell' uso ordinario, quali sono i veri delitti, lascian traccia di se nella moltitudine delle circostanze, e negli effetti che ne derivano, ma le parole non rimangono, che nella memoria per lò più infidele e spesso sedotta dagli ascoltanti. Egli è adunque di gran lunga più facile una calunnia sulle parole, che sulle azioni di un uomo, poichè di queste quanto maggior numero di circostanze si ad-

prejudice of the witness, especially if his object was to extract an admission for the purposes of the cause (*h*).

Such evidence is fabricated easily, contradicted with difficulty. In cases of this kind, the conduct of the parties, and those facts and circumstances of the case which are free from suspicion, are frequently the safest and surest guides to truth. Evidence of this nature is of the very weakest kind, where it is doubtful whether the party making the admission knew his legal rights and situation (*i*).

Thirdly, *their number and consistency*: The testimony of a single witness, where there is no ground for suspecting either his ability or his integrity, is a sufficient legal ground for belief; that it is strong enough to produce actual belief, every man's experience will vouch. Number of witnesses.

It has been alleged (*k*) that two witnesses are essential to convict a man of a crime; for if there be but one, it is no more than the assertion of one man against that of another.

It is not easy to comprehend how the mere denial of guilt by an accused person, whose life may depend upon the credit attached to that denial, is to be placed in competition with the testimony of a witness examined upon oath. According to this species of logic, if six men were to commit a crime, it would require the testimony of at least seven witnesses to convict them upon their joint trial (*l*).

ducono in prova, tanto maggiori mezzi si sommistrano al reo per giustificarsi. Beccaria, sec. 13.

I once heard a learned Judge (now no more), in summing up on a trial for forgery, inform the jury that the prisoner, in a conversation which he had had with one of the witnesses, had said, "I *am* the drawer, the acceptor, and the indorser of the bill:" whilst the learned Judge was commenting on the force of these expressions, he was, at the instance of the prisoner, set right as to the statement of the witness, which was, that the prisoner had said, "I *know* the drawer, the acceptor, and the indorser of the bill." Had the witness, and not the Judge, made the mistake, the consequences might have been fatal. The prisoner was acquitted.

(*h*) The admitting evidence of loose conversations to revive an antiquated debt which would otherwise have been barred by lapse of time, has nearly had the effect of overturning the provisions of a most wholesome statute. See the observations of the Court, 4 B. & A. 571.

(*i*) As where, in a settlement case, the declaration of an inhabitant is given in evidence: or a party makes admissions involving matter of law as well as matter of fact; as in reference to marriage. See Vol. II. Or a discharge under an insolvent Act. *Summerset* v. *Adamson*, 1 Bing. 73.

(*k*) Montesquieu, Sp. of Law, b. 12, c. 3.

(*l*) The civil law requires proof by two witnesses, according to its universal maxim, "*Unius responsio testis omnino non audiatur.*" Sir W. Blackstone observes, 3 Comm. 370, that to