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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VOL. I.

LONDON:

J. & W. T. CLARKE,

LAW BOOKSELLERS AND PUBLISHERS,

PORTUGAL-STREET, LINCOLN'S-INN.

1833.

be observed, that it very frequently happens in criminal as well as civil proceedings, that evidence which in itself is but inconclusive derives a conclusive quality from mere defect of proof on the part of the adversary or accused.

Where a party, being apprised of the evidence to be adduced against him, has the means of explanation or refutation in his power if the charge or claim against him be unfounded, and does not explain or refute that evidence, the strongest presumption arises that the charge is true, or the claim well founded. It would be contrary to all experience of human nature and conduct, to come to any other conclusion.

Direct evidence.

Evidence to be weighed by a jury consists either in, 1st. the direct testimony of witnesses; or 2dly, indirect or circumstantial evidence (*u*); or 3dly, in both, either united or opposed to each other. The nature and force of such evidence may be considered either separately or in conflict. *First*, as to the direct testimony of witnesses. The credit due to the testimony of witnesses depends upon, 1st, their honesty; 2dly, their ability; 3dly, their number, and the consistency of their testimony; 4thly, the conformity of their testimony with experience; and 5thly, the coincidence of their testimony with collateral circumstances.

Integrity of witnesses.

First, their *integrity*: A witness, to be faith-worthy, must be both *willing* and *able* to declare the truth. His credibility is founded, in the first instance, upon experience of human veracity, from which the law presumes that a disinterested witness, who delivers his testimony under the sanction of an oath, and under the peril of the temporal inflictions due to perjury, will speak the truth.

Although general and peremptory rules of law absolutely exclude persons actually convicted of infamous crimes (*w*), and such as have a certain legal interest in the event of the suit, or in the record (*x*), yet the credit of a witness not actually excluded is always for the consideration of the jury.

A witness of depraved and abandoned character may not be unworthy of credit, where it appears that there is not the slightest motive or inducement for misrepresentation; for there is a natural

(*u*) Such indirect evidence corresponds with the signa of the Roman law, and with the σημεια or τεκμηρια of the Greeks, and supplied principally the materials of the *artificiulis probatio* of the Roman lawyers. Argument, according to Quinctilian, is defined to be "*ratio probationem præstans quâ colligitur aliud per aliud, et quæ quod est dubium per id quod dubium non est confirmat.*"—See Glassford's Essay on the Principles of Evidence, 563.

(*w*) *Supra*, tit. WITNESS.

(*x*) Ib.

tendency to declare the truth, which is never wholly eradicated, even from the most vicious minds; and the danger of detection, and the risk of temporal punishment, may operate as restraints upon the most unprincipled, even where motives for veracity of a higher nature are wanting. Integrity of witnesses.

But it is to be remarked, that it is difficult to detect the motives which may influence a depraved and corrupted mind; and hence it is for the jury to consider, whether the apparent want of motive to deceive be sufficient to accredit an exceptionable witness, and whether some assurance of the actual absence of such a motive be not necessary to warrant their confidence. A jury may, no doubt, in a criminal case, convict on the testimony of an accomplice, but then it is expected that the tainted credit of the witness should be supported by circumstances confirmatory of his testimony in material points; so that in practice such a witness is considered to be, not incompetent, but incredible, unless his testimony and his character be supported by undoubted facts and unexceptionable witnesses.

It frequently happens that a witness labours under some influence arising from natural affection, near connection, or mere expectation of contingent benefit or evil, which may afford a much stronger temptation to perjury than that which would arise from many defined and vested legal interests, which yet would have absolutely excluded his testimony. This is a necessary consequence resulting from the consideration that the law must operate by means of certain definite and peremptory rules, and the great mischief and inconvenience which would result from laying down rules too wide and exclusive in their operation. When, therefore, the peremptory rules of law cease to operate, it is for the jury to estimate the degree of influence by which the testimony of a witness is likely to be corrupted, and to determine whether, under all the circumstances, he be the witness of truth (*y*). Influence.

In arriving at this conclusion, a consideration of the demeanour Manner of the witness.

(*y*) The Roman law, De testibus, provides thus: "Testium fides diligenter examinanda est. Ideoque in *personâ* eorum exploranda erunt imprimis conditio cujusque; utrum quis decurio an plebeius sit, vero et an honestæ et inculpatæ vitæ, an notatus quis et reprehensibilis; an locuples vel egens sit ut lucri causâ quid facile admittat; vel an inimicus ei sit versus quem testimonium fert, vel amicus ei sit pro quo testimonium dat. Nam si careat suspicione testimonium, vel propter personam a quâ fertur quod honesta sit, vel propter causam quod neque lucri neque gratiæ neque inimicitiæ causâ fit, admittendum."

Manner of the witness.

of the witness upon the trial, and of the manner of giving his evidence, both in chief and upon cross-examination, is oftentimes not less material than the testimony itself (*z*). An over-forward and hasty zeal on the part of the witness in giving testimony which will benefit the party whose witness he is, his exaggeration of circumstances, his reluctance in giving adverse evidence, his slowness in answering, his evasive replies, his affectation of not hearing or not understanding the question, for the purpose of gaining time (*a*) to consider the effect of his answer; precipitancy in answering, without waiting to hear or to understand the nature of the question; his inability to detail any circumstances wherein, if his testimony were untrue, he would be open to contradiction, or his forwardness in minutely detailing those where he knows contradiction to be impossible; an affectation of indifference; are all to a greater or less extent obvious marks of insincerity.

On the other hand, his promptness and frankness in answering questions without regard to consequences, and especially his unhesitating readiness in stating all the circumstances attending the transaction, by which he opens a wide field for contradiction if his testimony be false, are, as well as numerous others of a similar nature, strong internal indications of his sincerity. The means thus afforded by a *vivâ voce* examination, of judging of the credit due to witnesses, especially where their statements conflict, are of incalculable advantage in the investigation of truth; they not un-

(*z*) Sir W. Blackstone, 3 Comm. 373, observes, "In short, by this method of examination, and this only, the persons who are to decide upon the evidence have an opportunity of observing the quality, age, education, understanding, behaviour, and inclinations of the witness; in which points, all persons must appear alike when their depositions are reduced to writing, and read to the Judge in the absence of those who made them, and yet as much may be frequently collected from the manner in which the evidence is delivered as the matter of it."

(*a*) Mr. Evans (2 Pothier, 258,) observes that "a Welch witness, who intends to give unfair testimony, always affects an ignorance of the English language; in consequence of which, the effect of cross-examination is not only weakened by the intervention of an interpreter, but the witness has time to collect and prepare his answer. An ignorant witness will, however, frequently express himself with doubt and hesitation, out of mere awkwardness, or from superabundant caution, especially if he imagine that there is any design to entrap him into expressions contrary to his real meaning.

"This kind of hesitation is very general with such persons when plied with questions of an hypothetical nature, and when the answer is not so much an act of testimony as of reasoning; such as, *If it had been so, must you not have recollected*, &c. Where proof is actually given of a fact which a witness could not but know and recollect, his expressing himself with doubt and uncertainty is to be regarded as an act of wilful misrepresentation."

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