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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innocence, a defendant may be convicted of a heinous and even improbable crime upon the testimony of a single witness.

As experience shows that events frequently occur which would antecedently have been considered most improbable, from their inconsistency with ordinary experience, and as their improbability usually arises from want of a more intimate and correct knowledge of the causes which produced them, mere improbability can rarely supply a sufficient ground for disbelieving direct and unexceptionable witnesses of the fact, where there was no room for mistake.

Conformity with circumstances.

Fifthly, Conformity with collateral circumstances: Direct testimony is not only capable of being strengthened or weakened to an indefinite extent, by its conformity on the one hand, or inconsistency on the other, with circumstances collateral to the disputed fact, but may be totally rebutted by means of such evidence. These positions lead immediately to an inquiry into the nature and force of indirect or circumstantial evidence.

is from our own knowledge and experience, the stronger ought the evidence to be to warrant our assent. Neither is it meant to deny that in particular instances, and under particular circumstances, the want or absence of previous experience may not be too strong for positive testimony, especially where it otherwise labours under suspicion. What is meant is this, that mere inexperience, however constant, is not in itself, and in the abstract, and without consideration of all the internal and external probabilities in favour of human testimony, sufficient to defeat and to destroy it, so as to supersede the necessity of investigation. Mr. Hume's conclusion is highly objectionable in a philosophical point of view, inasmuch as it would leave phænomena of the most remarkable nature wholly unexplained, and would operate to the utter exclusion of all inquiry. Estoppels are odious, even in judicial investigations, because they tend to exclude the truth; in metaphysics they are intolerable. So conscious was Mr. Hume himself of the weakness of his general and sweeping position, that in the second part of his 10th section he limits his inference in these remarkable terms, "I beg the limitations here made may be remarked, when I say that a miracle can never be proved so as to be the foundation of a system of religion; for I own that otherwise there *may possibly* be miracles or violations of the usual course of nature of such a kind as *to admit of proof from human testimony.*"

In what way the use to be made of a fact when proved can affect the validity of the proof, or how it can be that a fact *proved* to be true is not true for all purposes to which it is relevant, I pretend not to understand. Whether a miracle, when proved, may be the foundation of a system of religion, is foreign to the present discussion; but when it is once admitted that a miracle *may be proved by human testimony,* it necessarily follows, from Mr. Hume's own concession, that his general position is untenable; for that, if true, goes to the full extent of proving that human testimony is *inadequate* to the proof of a miracle, or violation of the laws of nature.

Circumstantial evidence.

Circumstantial, or, as it is frequently termed, presumptive evidence, is any which is not direct and positive.

An inference or conclusion from circumstantial or presumptive evidence, may be either the pure result of previous experience of the ordinary or necessary connection between the known or admitted facts and the fact inferred; or of reason exercised upon the facts; or of both reason and experience conjointly. And hence such an inference or conclusion differs from a presumption; although the latter term has sometimes, yet not with strict propriety, been used in the same extended sense: for a presumption in strictness is an inference as to the existence of one fact, from a knowledge of the existence of some other fact, made solely by virtue of previous experience of the ordinary connection between the known and inferred facts, and independently of any process of reason in the particular instance (*r*).

The consideration of the nature of circumstantial evidence, and of the principles on which it is founded, merits the most profound attention. It is essential to the well-being, at least, if not to the very existence of civil society, that it should be understood, that the secrecy with which crimes are committed will not ensure impunity to the offender. At the same time it is to be emphatically remarked, that in no case, and upon no principle, can the policy of preventing crimes, and protecting society, warrant any inference which is not founded on the most full and certain conviction of the truth of the fact, independently of the nature of the offence, and of all extrinsic considerations whatsoever. Circumstantial evidence is allowed to prevail to the conviction of an offender, not because it is necessary and politic that it should be resorted to (*s*), but because it is in its own nature capable of pro-

(*r*) Vide Vol. II. tit. PRESUMPTIONS.

(*s*) It is almost superfluous to remark upon the absurd and mischievous doctrine, that the nature of the crime ought at all to influence the measure of proof, and that, out of policy, slighter proof is sufficient in proportion to the atrocity of the offence, according to the pernicious maxim, *in atrocissimis leviores conjecturæ sufficiunt et licet judici jura transgredi.* Where any doubt exists as to the *corpus delicti*, whether any crime has been committed, the very reverse of the above position is true; the more atrocious the nature of a crime is, the more repugnant it is to the common feelings of human nature, the more improbable it is that it has been perpetrated at all. "La credibilità di un testimonio diviene tanto sensibilmente minore quanto più cresce l'atrocita di un delitto e l'inverisimiglianza delle circonstanze; tali sono per esempio la magia, è le azioni gratuitamente crudeli." Beccaria, s. 13. But when it has once been clearly

ducing the highest degree of moral certainty in its application. Fortunately for the interests of society, crimes, especially those of great enormity and violence, can rarely be committed without affording vestiges by which the offender may be traced and ascertained (*t*). The very measures which he adopts for his security not unfrequently turn out to be the most cogent arguments of guilt. On the other hand, it is to be recollected that this is a species of evidence which requires the utmost degree of caution and vigilance in its application, and in acting upon it, the just and humane rule impressed by Lord Hale (*u*) cannot be too often repeated: "*tutius semper est errare in acquietando, quam in puniendo, ex parte misericordiæ quam ex parte justitiæ.*"

Grounds of circumstantial proof.

By circumstantial or presumptive proof, is meant that measure and degree of circumstantial evidence which is sufficient to produce conviction in the minds of the jury of the truth of the fact in question.

To the validity of every such proof it is essential, first, that a basis of facts be established by sufficient evidence; and in the next place, that the proper conclusion should be deduced by the aid of reason and experience, from those facts and circumstances so established.

The force and tendency of circumstantial evidence to produce conviction and belief depend upon a consideration of the coincidence of circumstances with the fact inferred, that is, with the

established that a heinous crime has been perpetrated, and the only question is as to the perpetrator, it is manifest that the atrocity of the crime *in the abstract* raises no probability either for or against the accused, although under particular circumstances it may be a matter of great importance.

Thus on a charge of infanticide, where there is a doubt whether the child was destroyed by design, or by accident, during a secret delivery, the very atrocity of the offence raises a strong degree of probability in favour of the latter conclusion. On the other hand, were it clear from the circumstances under which a body was found, that the party had been murdered, then the *corpus delicti* being established, the atrocity of the offence would in the abstract raise no probability either in favour of or against any individual; but if in the particular instance the question were, whether the son of the deceased, or a stranger, was the guilty agent, then a probability from the particular circumstances would operate in favour of the son. It would, without reference to circumstances, be more probable that a stranger had committed the heinous crime of murder, than that a son had committed that horrible offence upon the person of his own father.

(*t*) See the observations of Beccaria, *supra*, 484.

(*u*) Hale, 290.

Grounds of circumstantial proof.

hypothesis, and the adequacy of such coincidences to exclude every other hypothesis (x).

All human dealings and transactions are a vast context of circumstances, interwoven and connected with each other, and also with the natural world, by innumerable mutual links and ties. No one fact or circumstance ever happens which does not owe its birth to a multitude of others, which is not connected on every side by kindred facts, and which does not tend to the generation of a host of dependent ones, which necessarily coincide and agree in their minutest bearings and relations, in perfect harmony and concord, without the slightest discrepancy or disorder.

It is obvious that all facts and circumstances which have really happened were perfectly consistent with each other, for they did actually so consist. It is therefore a necessary consequence, that if a number of the circumstances which attended a disputed fact be known and ascertained, and these so coincide and agree with the hypothesis that the disputed fact is true, that no other hypothesis can consist with those circumstances, the truth of that hypothesis is necessarily established.

And again, where the known and ascertained facts so coincide and agree with the hypothesis that the disputed fact is true, as to render the truth of any other hypothesis, on the principles of reason and experience, exceedingly remote and improbable, and morally, though not absolutely and metaphysically, impossible, the hypothesis is established as morally true. It also follows, that if any of the established circumstances be absolutely inconsistent with the existence of the supposed fact, the hypothesis cannot be true, notwithstanding the degree and extent of coincidence in other respects; for if that fact really existed, it was necessarily consistent with all the circumstances.

Coincidences between the facts and the hypothesis.

Thus, in the first place, it sometimes happens that the coincidence between the known facts and the hypothesis is such as

(x) In one respect, proof by circumstantial evidence is analogous to the indirect proof, or *reductio ad absurdum*, in geometry: in each case the truth of the proposition is attained to by negativing and excluding the truth of any other hypothesis; in the one case to a metaphysical and absolute, in the other to a moral certainty. In another and essential point they usually differ: in the geometrical proof the exclusion of *one* other hypothesis frequently excludes *all* others, and thus at once establishes the truth of the proposition; in the case of moral circumstantial proofs it may not only be necessary to exclude several different hypotheses by as many different processes of reasoning, but a doubt may still exist whether some other hypothesis may not remain unanswered.

absolutely and demonstratively to exclude any other. If, for instance, it were to be proved, that *A. B.* entered a room containing a watch, and that the watch was gone upon his departure, and it were also proved that no agent but *A. B.* in the interval had had access to the room, the proof that *A. B.* took the watch would be conclusive and complete; for the supposition that it had been removed by any other agent would be entirely excluded. Force of.

In the next place, the nature and degree of coincidence between the circumstances and the hypothesis may oftentimes be sufficient to exclude all reasonable doubt, and thus generate full moral conviction and belief, although it be not, as in the former case, of an absolute and demonstrative nature. And the probability of the hypothesis must always be proportioned to the *nature, extent* and *number* of its coincidences with the circumstances proved (*y*).

(*y*) All theories which explain the connection between natural phænomena and their causes are of this description. They consist in showing the existence and operation of a cause, and its adequacy to explain the phænomena; in other words, their coincidence with the hypothesis. Evidence, therefore, of the truth of any such theory is in no case demonstrative, although it reaches to the highest degree of moral certainty. The most splendid, important and beautiful of all philosophical theories, that of Sir Isaac Newton, for explaining the solar system, as exhibited by that great philosopher, amounts simply to this: a cause, viz. gravitation, exists. It is matter of demonstrative proof, that if such a cause did really operate upon the system, it would produce all the effects or phænomena which are actually observed; that is, the supposed cause is sufficient to explain all the phænomena; hence it is inferred to be true, and the force of this inference is in proportion to the improbability that all the minute coincidences between the phænomena and the hypothesis should be merely fortuitous, and that they should have resulted, not from a cause known to exist, and which is adequate to produce them, but from some other cause unobserved and unknown. To a certain extent, philosophical proofs as to the relations of cause and effect, in the natural world, are similar to circumstantial judicial proofs; in each case the basis of proof consists in the coincidences proved to exist between the phænomena or circumstances and the hypothesis. Beyond this point, and with respect to the effect of such coincidences, they frequently differ essentially. The philosophical proof rests on mere coincidences, indefinite in point of number, and the absence of any other cause adequate to account for the phænomena; but the agency of some other, but unknown, cause can never be absolutely excluded. On the other hand, although circumstantial proof must rest on a limited number of coincidences, yet their nature and force are frequently such as wholly to exclude the truth of any other hypothesis.

Lord Coke, as an instance of presumptive judicial proof, supposes the case where a man is found dead in a house, having been stabbed with a sword, and another is seen coming out of the house with a bloody sword in

Coincidences between the circumstances and the hypothesis.

Connections and coincidences between the circumstances and the hypothesis which they tend to prove, are either those of a natural or mechanical nature, which are the objects of sense, or they are of a moral nature. Those of the first class may consist generally in proximity in point of time and space, and all other circumstances which show that the supposed agent had the means and opportunity of doing the particular act, and connect him with it. As common instances, the possession of stolen goods, in case of robbery, and stains of blood upon the person, the possession of deadly weapons recently used, marks of conflict and violence, in case of homicide, may be cited. Happy it is for the interests of society that forcible injuries can seldom be perpetrated without leaving many and plain vestiges by which the guilty agent may be traced and detected. Instances of this nature, where apparently slight and unexpected circumstances have led to the detection of offenders, are familiar to all who are concerned in the practical administration of justice. In a case of burglary the thief had gained admittance to the house by opening a window by means of a penknife, which was broken in the attempt, and part was left in the wooden frame: the broken knife was found in the pocket of the prisoner, and perfectly corresponded with the fragment left. A murder had been committed by shooting the deceased with a pistol, and the prisoner was connected with the transaction by proof that the wadding of the pistol was part of a letter belonging to the prisoner, the remainder of which was found upon his person (*z*). In another case of murder, one of the circumstances to prove the prisoner to have been the criminal agent was the correspondence of a patch on one knee of his breeches, with impressions made upon the soil close to the place where the murdered body lay. In a case of robbery, it appeared that the prosecutor when attacked, had, in his own defence, struck the robber with a key upon the face, and

his hand, no other person having been in the house. Here the circumstances, and consequently the coincidences, are few, but they are of such a nature as wholly and necessarily to exclude any but one hypothesis. So in the ordinary case of larceny, where stolen goods, recently after the commission of the felony, are found in the possession of the prisoner, who gives no account for the purpose of explaining that possession; although the coincidences between the hypothesis that he was the thief, and the circumstances, be but two in number, viz. his *possession* of the property, and his *omission* to account for that possession, yet the latter is of an exclusive nature and tendency, it forcibly tends to *exclude* any supposition of an honest possession.

(*z*) This case was cited by the Lord Chancellor, in the course of a debate in the House of Lords, 1820.

the prisoner bore an impression upon his face which corresponded with the wards of the key. All circumstances of this nature are, as it were, mechanical links or ties which connect the supposed agent with the act which is the subject of inquiry. Further observations on this branch of the subject would be superfluous, and inconsistent with the object of the present work. There are, in fact, no existing relations, natural or artificial, no occurrences or incidents in the course of nature, or dealings of society, which may not constitute the materials of proof, and become important links in the chain of evidence.

Moral coincidences.

Circumstances of the above description, although they may be in themselves of an imperfect and inconclusive nature, frequently derive a conclusive tendency from those which are of a moral kind, and which depend upon a knowledge and experience of man as a rational and moral agent. Experience points out some laws of human conduct almost as general and constant in their operation as the mechanical laws of the material world themselves are. That a man will consult his own preservation, and serve his own interests; that he will prefer pleasure to pain, and gain to loss; that he will not commit a crime, or any other act manifestly tending to endanger his person or property, without a motive; and conversely, that if he has done such an act he had a motive for doing it: are principles of action and of conduct so clear that they may be properly regarded as axioms in the theory of evidence.

The presumption that a man will do that which tends to his obvious advantage, if he possess the means, supplies a most important test for judging of the comparative weight of evidence. It is to be weighed according to the proof which it was in the power of one party to have produced, and in the power of the other to have contradicted (*a*).

If, on the supposition that a charge or claim is unfounded, the party against whom it is made has evidence within his reach by which he may repel that which is offered to his prejudice, his omission to do so supplies a strong presumption that the charge or claim is well founded; it would be contrary to every principle of reason, and to all experience of human conduct, to form any other conclusion. This consideration in criminal cases frequently gives a conclusive character to circumstances which would otherwise be of an imperfect and inconclusive nature (*b*).

(*a*) See Lord Mansfield's observations in *Blatch* v. *Archer*, Cowp. 65.

(*b*) Notisi che le prove imperfette delle quale puo il reo giustificarsi è non lo faccia dovere divengono perfette. Beccaria, s. 14.

Thus, where the evidence against a prisoner on a charge of larciny consists in his recent possession of the stolen property, his very silence as to the fact of possession raises a strong presumption against him; for if his possession was an innocent one, as the fact must necessarily be within his knowledge, he might show, by statement, at all events, if not by proof, that such possession was consistent with his innocence. The same observations apply in general where appearances are proved against an accused person, which he refuses to account for or explain; such as marks of blood and violence on his dress and person, the possession of concealed weapons, and the like.

Moral coincidences.

The same principle applies where a party, having more certain and satisfactory evidence in his power, relies upon that which is of a weaker and inferior nature. So pregnant with suspicion is conduct of this nature, that the law, as has been seen, has laid down an express and peremptory rule upon the subject, which in cases within the scope of its operation actually excludes the inferior evidence. It is for the jury in their discretion to apply the principle, in cases which do not fall within the defined limits of the rule. Although a party may not be compellable to produce evidence against himself, yet if it be proved that he is in possession of a deed or other evidence, which, if produced, would decide a disputed point, his omission to produce it would warrant a strong presumption to his disadvantage (*o*). Again, the maxim of law is, *omnia præsumuntur contra spoliatorem* (*d*).

In the case of *Harwood* v. *Goodright* (*e*), where it was found by a special verdict that a testator made his will, and gave the premises in question to the plaintiff in error, but afterwards made another will different from the former, but in what particulars did not appear; the Court decided that the devisee under the first will was entitled against the heir-at-law. But Lord Mansfield said, that in case the defendant had been proved to have *destroyed* the last will, it would have been good ground for the jury to find a revocation. And as the destruction or withholding of evidence creates a presumption against the party who has had recourse to such a practice, so *à fortiori* does the actual fabrication or corruption of evidence.

(*c*) See Lord Mansfield's observations in *Roe d. Haldane* v. *Harvey*, Burr. 2484.

(*d*) See Lord Mansfield's observations in *Haldane* v. *Harvey*, Burr. 2484.

(*e*) Cowp. 86.

(*f*) See the judicious remarks of Mr. Evans (2 Pothier, by Evans, 337). He justly observes, that one of the most difficult points in the *Douglas cause* arose from Sir John Stewart's

The discovery of such practices must naturally and unavoidably excite a considerable degree of jealousy and suspicion, and ought undoubtedly to be most seriously weighed in estimating the degree of credit to be attached to other evidence adduced by the same party, where it is in its own nature doubtful and suspicious, or is rendered so by conflicting evidence. A considerable degree of caution is nevertheless to be applied in cases of this description, more especially in criminal proceedings; for experience shows that a weak but innocent man will sometimes, when appearances are against him, have recourse to falsehood and deception, for the purpose of manifesting his innocence (*g*) and ensuring his safety.

Conduct and intention.

The connection between a man's conduct and his motives is also one of a moral nature, pointed out by experience. It is from their experience of such connections that juries are enabled to infer a man's motives from his acts, and also to

having fabricated several letters as received from La Marre the surgeon; and cites the following passage from Mr. Stuart's observations on the subject:—

"I had been accustomed to think, that in judging upon evidence, a matter of such infinite importance in the constitution and jurisprudence of every well-regulated State, there were certain rules established, which in every court, and in every country, were received as most invaluable guides for the discovery of truth. For instance, when it appeared that on the one side there was *forgery* and *fraud* in some of the material parts of the evidence, and especially when that forgery could be traced up to its source, and discovered to be the contrivance of the very person whose guilt or innocence was the object of inquiry; in such a case I have always understood it to be an established rule, that the whole of the evidence on that side of the question must be deeply affected by a deliberate falsehood of this nature."

The natural and necessary effect of such a practice upon the minds of judges possessed of discernment and candour, is to make them extremely suspicious of all the evidence tending to the same conclusion with the forged evidence; parol testimony in support of it will be little regarded; the forgery of the written evidence contaminates the testimony of the witnesses in favour of the party who has made use of that forgery; and nothing will gain credit on that side, but either clear and conclusive written evidence, free from suspicion, or the testimony of such a number of respectable, disinterested and consistent witnesses, speaking to decisive and circumstantial facts, as leaves no room to doubt of the certainty of their knowledge, and the truth of their assertions.

On the other hand, the proof of a forgery, such as has been described, must also have the effect to gain a more ready admission to the evidence of the other party. If that evidence be consistent, if it be established by the concurring testimony of a crowd of witnesses, and supported by various articles of written and unsuspected evidence, the bias of a fair mind will be totally in favour of the party producing such authorities, and against that which had been obliged to have recourse to the forged evidence."

(*g*) *Supra*, 53.

infer what his conduct was, from the motive by which he was known to be influenced. In criminal cases, proof that the party accused was influenced by a strong motive of interest to commit the offence proved to have been committed, although exceedingly weak and inconclusive in itself, and although it be a circumstance which ought never to operate in proof of the *corpus delicti*, yet when that has once been established *aliunde*, it is a circumstance to be considered in conjunction with others which plainly tend to implicate the accused (*h*).

Again, presumptions of great importance, especially in criminal proceedings, arise frequently out of the connection between the acts of a party, and his intentions, consciousness and knowledge. That a rational agent must be taken to contemplate and intend the natural and immediate consequences of his own act, is a presumption so cogent as to constitute rather a rule of law than of mere evidence (*i*). Again, the usual connection between the conduct of a criminal agent and the supposition of his guilt, are of too obvious a nature to be dwelt upon. The seeking for opportunities fit for the occasion; the providing of poison, or instruments of violence, in a secret and clandestine manner; the subsequent concealment of them; attempts to divert the course of inquiry (*k*), or prevent investigation as to the cause of death; not unfrequently excite just cause of suspicion: above all, the restless anxiety of a mind conscious of guilt very frequently prompts the party to take measures for his security which eventually supply the strongest evidence of his criminality.

Coincidences from ordinary experience.

In judicial investigations, as well as in the ordinary course of life, that is more or less probable and likely, and is therefore, in a greater or less degree, an inducement to belief, which more or

(*h*) On the other hand, the total absence of any apparent motive must always operate strongly as a circumstance in favour of the accused, especially where there is no reason to apprehend any unsoundness of intellect. *A fortiori*, does the principle operate where the supposed agent was actuated by contrary motives. And even in cases which involve a conflict of motives, such as infanticide, where natural feelings on the one hand are opposed to a desire of avoiding shame and detection on the other, the former are necessarily entitled to the highest consideration.

(*i*) See Vol. II. tit. INTENTION—MALICE.

(*k*) I have remarked that persons of the lowest classes of society, before the commission of premeditated murders, not unfrequently throw out some dark and mysterious hints as to the death of the intended victim. This is a circumstance which I apprehend is to be attributed principally to an expectation that by this means less of surprise and of inquiry will take place when the crime has been accomplished.

less agrees with former observation. This is a ground of assent, warranted as well by philosophy as by ordinary experience. It is probable that whatever has happened will again happen under similar circumstances, however ignorant we may be of the nature or necessity of the connection; the very frequency of the association is evidence of the connection; there is no association whatsoever, whether it be moral, natural or artificial, whether it depend on the nature and constitution of the human mind, the laws of nature, or the artificial manners and habits of society, which is not rendered probable in proportion to the frequency and constancy of the connection. Hence it is, that where circumstances found to be usually associated with the fact in question are known to exist, such associations are connecting links between the known circumstances and the fact, and render its existence more or less probable (*l*). On the other hand, it is scarcely necessary to remark, that experience of the usual or constant disunion of particular facts and circumstances necessarily renders their future association unlikely and improbable, and is a proper inducement to disbelief more or less strong according to circumstances.

Absence of evidence tending to a different conclusion.

It is further to be remarked, that the force of evidence resulting from the concurrence of circumstances depends not merely upon the degree of improbability that those coincidences were merely casual and fortuitous, but frequently also upon that improbability, compounded with the further improbability that another hypothesis is true which is not supported by any circumstances. Thus in a criminal case where all the circumstances of time, place, motive, means, opportunity and conduct, concur in pointing out the accused as the perpetrator of an act of violence, the force of such circumstantial evidence is materially strengthened by the total absence of any trace or vestige of any other agent, although, had any other existed, he must have been connected with the perpetration of the crime by motive, means and opportunity, and by circumstances necessarily accompanying such acts, which usually leave manifest traces behind them.

Dependent and independent circumstances.

In estimating the force of a number of circumstances tending to the proof of the disputed fact, it is of essential importance to

(*l*) A striking instance to show the extent to which philosophical inferences may be carried by means of careful observation and analogical reasoning, may be derived from the science of comparative anatomy. From a single fossil bone of an animal whose very species is extinct, a skilful anatomist is able to represent the original animal perfect in all its parts.—See Cuvier's Fossil Remains.

Independency of the circumstances.

consider whether they be dependent or independent. If the facts *A. B. C. D.* be so essential to the particular inference to be derived from them when established, that the failure in the proof of any one would destroy the inference altogether, they are dependent facts; if, on the other hand, notwithstanding the failure in proof of one or more of those facts, the rest would still afford the same inference or probability as to the contested fact which they did before, they would be properly termed independent facts (*m*). The force of a particular inference drawn from a number of dependent facts is not augmented, neither is it diminished, in respect of the number of such dependent facts, provided they be established; but the probability that the inference itself rests upon sure grounds, is, in general, weakened by the multiplication of the number of circumstances essential to the proof; for the greater the number of circumstances essential to the proof is, the greater latitude is there for mistake or deception. On the other hand, where each of a number of independent circumstances, or combinations of circumstances, tends to the same conclusion, the probability of the truth of the fact is necessarily greatly increased in proportion to the number of those independent circumstances (*n*).

It seems to have been considered, that even mere coincidences, although not of an exclusive nature, may by their number and joint operation be sufficient to constitute a conclusive proof (*o*). It rarely, however, happens in practice, that circumstantial proofs consist purely in mere natural and mechanical coincidences,

(*m*) Quando le prove di un fatto tutte dipendono egualmente da una sola, il numero delle prove non aumente nè sminuisce la probabilità del fatto, perchè tutto il loro valore si resolve nel valore di quella sola da cui dipendono. Quando le prove sono indipendenti, l'una dall' altra, cioè quando gli indizi si provano altronde che da se stessi, quanto maggiori prove si adducono tanto più cresce la probabilità del fatto, perchè la fallacia di una prova non influisce sull' altra. Beccaria, s. 14.

(*n*) *Infra*, note (*p*).

(*o*) Matthæus de Crim.: Possunt diversa genera ita conjungi ut quæ singula non nocerent ea universa tanquam grando reum opprimunt.—According to Beccaria, chap. 14: Possono distinguersi le prove di un reato in perfette ed in imperfette. Chiamo perfette quelle che escludono la possibilità che un tale non sia reo; chiamo imperfette quelle che non la escludono. Della prima anche una sola è sufficiente per la condanna, delle seconde tante son necessarie quante bastino a formarne una perfetta, vale a dire que se per ciascuna di queste in particolare è possibile che uno non sia reo, per l'unione loro nel medesimo soggeto è impossibile che non lo sia. Beccaria, s. 14.—Singula levia sunt et communia, universa vero nocent etiam si non ut fulmine, tamen ut grandine. Quinctil.

unconnected with any of a moral nature and conclusive tendency.

The probability derived from the concurrence of a number of independent probabilities increases not in a merely cumulative, but in a compounded and multiplied proportion (*p*). This is a

Force of concurring probabilities.

(*p*) According to the principles of pure abstract mathematical reasoning, the probability arising from the concurrence of a number of independent circumstances, each of which induces a probability in favour of a particular event, is *compounded* of all the probabilities incident to the individual circumstances. When, therefore, the circumstantial probabilities are each considerable, the compound probability in favour of the event increases by a rapid progression. If the circumstances *A*, *B*, *C*, severally induce probabilities in favour of an event represented by $\frac{a}{m}$ $\frac{b}{m}$ $\frac{c}{m}$, that is, if in every m cases the circumstance *A* necessarily involved the event in question a times, and excluded it $m-a$ times, and so on, and the circumstances *A*, *B*, *C*, were wholly independent of each other, then the probability of the event, arising from the happening of all these circumstances, would be to the probability against it as $m^3-\overline{m-a}\,.\,\overline{m-b}\,.\,\overline{m-c}$ to $m-a\,.\,\overline{m-b}\,.\,\overline{m-c}$.

If the witnesses *A*, *B*, *C*, bore testimony to independent facts, each of which, if true, involved the truth of a particular event, and *A* were the witness of truth in a cases, and his testimony were false in $m-a$ cases, and so of the testimony of *B*, and of *C*, then the probability of the event, arising from their joint testimony, would be to the probability against it in the ratio above expressed.

And if $m=2$ and $a=b=c=1$, the probability in favour of the event would be to the probability against it as 7 : 1.

Again, if the probability in favour of a particular fact, arising from the testimony of *A*, were to the probability against it as $a : m-a$, and so on, as to the testimony of *B*, and *C*, the probability of the fact from their united testimony would be to the probability against it as $a\,.\,b\,.\,c$ to $m-a\,.\,\overline{m-b}\,.\,\overline{m-c}$. And if $m=2$ and $a=b=c=1$, the ratio would be that of 1 : 1; that is, their united testimony would produce no increase of probability in favour of the fact.

Such considerations admit but of a very partial and limited application in the investigation of questions arising out of the common concerns of life. The basis of all such calculations is a comparison of all the different cases which involve the particular event with those which exclude it, which assumes the possibility of resolving all possible cases, which either involve or exclude the event, into a definite number of the one class and of the other, each of which is equally likely to happen *. The most complicated and laboured analytical results on the subject of probabilities, are little more than modifications of this comparison. It is obvious, upon the slightest consideration, that the probability of error or mistake on the part of a witness, or of his honesty and sincerity, usually admits of no such comparison; still less can the complicated transactions of life, dependent as they are upon an almost infinite variety of circumstances and motives, be subjected to such an ana-

* Wood's Algebra. La Place, Theorie Analitique des Probabilités.

consequence derived from pure abstract arithmetical principles. For although no definite arithmetical ratio can be assigned to each independent probability, yet the principle of increase must operate by way of approximation, although the concurring probabilities may admit of no numerical measure; and whenever probabilities are deducible from independent circumstances, the degree of probability must necessarily be multiplied by their concurrence. In criminal cases, however, it seems to be perfectly clear in principle that the conjoint effect of circumstances which individually are inconclusive in their nature, cannot in its nature be conclusive, unless the resulting probability be indefinite, and exceed the powers of calculation. Where mere independent and unconnected circumstances are in their nature imperfect and inconclusive, the degree of probability which results from their united operation, although greatly increased in degree, must still in its nature be definite and inconclusive, and therefore inadequate to the purposes of conviction. Let it, for instance, be supposed that *A.* is robbed, and that the contents of his purse were one penny, two sixpences, three shillings, four half-crowns, five crowns, six half-sovereigns and seven sovereigns, and that a person, apprehended in the same fair or market where the robbery takes place, is found in possession of the same remarkable combination of coin, and of no other, but that no part of the coin can be identified, and that no circumstances operate against the prisoner except his possession of the same combination of coin: here, notwithstanding the very extraordinary coincidences as to the number of each individual kind of coin, although the circumstances raise a high probability of identity, yet it still is one of a definite and inconclusive nature.

On the other hand, evidence of a *conclusive* nature and tendency is restricted by no limits of mere probability. In the case of the ordinary presumption, that an admission of a fact made by a party contrary to his obvious interest, is truly made, the probability that the admission is true far exceeds the limits of mere numerical comparison. In some instances mere mechanical coincidences are of this description. Thus, in the ordinary case where cloth is cut and stolen from a loom, the perfect coincidence between the cloth found in the possession of the prisoner and the remnant left behind, is of this description; the probability of identity arising from the perfect coincidence of the severed threads exceeds the bounds of arithmetical calculation, and deprives the mind of all power of attributing such a series of coincidences to mere accident.

But even in criminal cases, where a high degree of probability results from repeated coincidences, although that probability be of a definite and numerical nature, such coincidences may, in conjunction with others, constitute a complete and satisfactory proof. Thus, in the case already supposed, of a singular coincidence between the quantity and description of coin stolen with that found in the possession of the prisoner, although the fact, taken nakedly and alone, without any collateral evidence, would in principle be inconclusive, yet, if coupled with circumstances of a conclusive tendency, such as flight, concealment of the money, false and fabricated statements as to the possession, it might afford strong and pregnant evidence of guilt for the consideration of the jury.

obtain wherever independent probabilities in favour of an event concur, although they cannot be precisely measured by space or numbers; and even although every distinct probability which is of a conclusive tendency exceeds every merely definite numerical ratio. Force of concurrent probabilities.

It is, however, to be remarked, that wherever mere inconclusive probabilities concur, the result, however the degree of probality may be increased by the union, will still be of a definite and inconclusive nature. And hence it seems, that in criminal cases the mere union of a limited number of independent circumstances, each of which is of an imperfect and inconclusive nature, cannot afford a just ground for conviction.

On the other hand, the force of circumstances of a conclusive nature may be greatly confirmed and strengthened by their combination with other and independent circumstances, which render the fact probable, although the latter be in themselves of an imperfect and inconclusive nature. Again, it is to be observed, that although in the course of judicial proofs the number of concurring probabilities is usually limited, yet that cases may be put where the number and extent of the coincidences are so great as to exceed all definite limits, and where, consequently, the resulting probability is of a conclusive nature (*q*).

It is to be remarked, that in thus referring to the doctrine of numerical probabilities, it is the principle alone which is intended to be applied, in order that some estimate may be formed of the force of independent and concurring probabilities. The notions of those who have supposed that mere moral probabilities or relations could ever be represented by numbers or space, and thus be subjected to arithmetical analysis, cannot but be regarded as visionary and chimerical.

From this short view of the subject it appears to be essential to circumstantial proof, First, *that the circumstances from which the conclusion is drawn should be fully established.* If the basis be unsound, the superstructure cannot be secure. The party upon whom the burthen of proof rests is bound to prove every single circumstance which is essential to the conclusion, in the same manner and to the same extent as if the whole issue had rested upon the proof of each individual and essential circumstance. It is obvious that proof of this nature is more strong and cogent where the circumstances are numerous, and derived from many different and independent sources, than where they are but few, Basis of circumstances.

(*q*) See the preceding Note.

Proof of circumstances.

and depend on the credit and testimony of one or two witnesses. Where all the circumstances rest on the testimony of a single witness the evidence can never be superior to the lowest degree of direct evidence, and must frequently fall below it: for in addition to the question whether the witness was faith-worthy, another question would arise, that is, whether the inference was correctly drawn from the facts which he was supposed to prove.

It is obvious that the number of circumstances stated by a witness does not add to the force of his testimony, unless they be such as admit of contradiction if his testimony be false.

Number of circumstances.

The number of circumstances is not only essential, inasmuch as it repels any suspicion of fraud, but from the consideration that the greater the number of circumstances is, the greater will be the certainty as to the conclusion deduced. A few circumstances may be consistent with several solutions; but the whole context of circumstances can consist with one hypothesis only; and the wider the range of circumstances is, the more certain will it be that the hypothesis which consists with and reconciles them all is the true one.

False circumstances.

Although all facts and circumstances connected with the subject of inquiry be admissible in evidence to explain its nature, and although all facts must necessarily be consistent with truth, yet it is to be recollected that facts themselves may be simulated and fabricated with a view to deceive and mislead. Such facts, however, are necessarily exposed to great danger of detection, from the obvious difficulty of uniting by artful means that which is false with that which is genuine, and thus substituting a false and artificial for a real consistency and context of circumstances.

The great difficulty of practising frauds of this description, and their liability to detection from a careful examination and comparison of circumstances, will be best elucidated by a few examples. Attempts at this kind of deception have not unfrequently been made with a view to conceal the crime of murder, and in order to produce belief that the party died from natural or accidental causes, or was *felo de se*; in the detection of such impostures the testimony of medical practitioners cannot be too highly appreciated.

The remarkable case of Sir Edmundbury Godfrey may be cited as an instance of this kind (*r*). The deceased was found in a ditch at Chalk Farm, in the neighbourhood of London, his own

(*r*) In the State Trials.

sword passing through his body, so that the end projected two hands' breadth behind the back; his gloves and some other things were laid on the bank, so as to excite a belief that he had destroyed himself. But there was no blood about the place, and upon drawing the sword out of the body no blood followed. The body was discoloured and bruised, and the neck so flexible that the chin could be turned from one shoulder to the other. The deceased had in fact been strangled. False circumstances.

In the State Trials a very singular case of the same description is also mentioned, of a woman who was found in bed with her throat cut: her husband's relations (the husband being absent from home at the time) occupied the apartment adjoining to the chamber of the deceased, and there was no access to her chamber but through their apartment. The relations who thus occupied the adjoining apartment, had arranged matters so that it might be supposed that the deceased had destroyed herself; but one circumstance amongst others was conclusive to destroy this supposition, for on the *left* hand of the deceased was observed the bloody mark of a *left* hand, which of course could not have been that of the deceased.

Another instance, cited in a lately published and able work on Medical Jurisprudence (*s*), is to this effect:—A citizen of Liege was found shot, and his own pistol was discovered lying near him, and no person had been seen to enter or leave the house of the deceased; from these circumstances it was concluded that he had destroyed himself, but on examining the ball by which he had been killed it was found to be too large to have been discharged from that pistol, in consequence of which suspicion fell upon the real murderer.

Secondly: It is essential *that all the facts should be consistent with the hypothesis.* For as all things which have happened were necessarily congruous and consistent, it follows, that if any one established fact be wholly irreconcileable with the hypothesis, the latter cannot be true. Such an incongruity and inconsistency is sufficient to negative the hypothesis, even although it coincide and agree with all the other facts and circumstances of the case to the minutest extent. Undoubtedly such an intimate coincidence in other respects would suggest the necessity of investigating the truth of the incongruous circumstances with great caution; yet if the incongruity cannot Consistency of the facts with the hypothesis.

(*s*) By Dr. Paris and J. S. M. Fonblanque. See also the publications on the same subject, by Dr. Smith and Dr. Male.

eventually be removed, the hypothesis must fall, although no other can be suggested (*t*).

Conclusive tendency.

Thirdly: It is essential *that the circumstances should be of a conclusive nature and tendency.* Evidence is always indefinite and inconclusive, when it raises no more than a limited probability in favour of the fact, as compared with some definite probability against it, whether the precise proposition can or cannot be ascertained. It is on the other hand of a conclusive nature and tendency, when the probability in favour of the hypothesis exceeds all limits of an arithmetical or moral nature.

Such evidence is always insufficient, where, assuming all to be proved which the evidence tends to prove, some other hypothesis may still be true: for it is the actual exclusion of every other hypothesis which invests mere circumstances with the force of proof. Whenever, therefore, the evidence leaves it indifferent which of several hypotheses is true, or merely establishes some finite probability in favour of one hypothesis rather than another, such evidence cannot amount to proof, however great the probability may be. To hold that any finite degree of probability shall constitute proof adequate to the conviction of an offender, would in reality be to assert, that out of some finite number of persons accused, an innocent man should be sacrificed for the sake of punishing the rest; a proposition which is as inconsistent with the humane spirit of our law, as it is with the suggestions of reason and justice. The maxim of law is, that it is better that ninety-nine (*i. e.* an indefinite number of) offenders should escape, than that one innocent man should be condemned.

Thus, in practice, where it is certain that one of two individuals committed the offence charged, but it is uncertain whether the one or the other was the guilty agent, neither of them can be convicted.

The principle extends to all cases where the ultimate tendency of the evidence is of an inconclusive nature, that is, where admitting all to be proved which the evidence tends to prove, the guilt of the accused would be left either wholly uncertain, or dependent upon some merely definite probability (*u*).

(*t*) It was on this principle that the French philosophers opposed Newton's system of the world. They objected that the calculations formed upon his hypothesis made the motion of the moon's apsides but one half as great as they were proved to be by actual observation. It was afterwards discovered that the error was in neglecting a tangential force in the calculation; and it was found that when this was taken into the account, the theoretical result coincided with the fact.

(*u*) The very remarkable case of Mr. Barnard, who was tried on a

Conclusive tendency.

It is very possible, indeed, that mere coincidences may be so numerous, as by force of multiplied probability to exclude all reasonable doubt; but this can never happen in the absence of circumstances of a conclusive tendency, unless the probability be increased to an indefinite extent beyond the reach of mere calculation. Whenever the probability is of a definite and limited nature (whether in the proportion of one hundred to one, or of one thousand to one, or any other ratio, is immaterial), it cannot be safely made the ground of conviction; for to act upon it in any case would be to decide, that for the sake of convicting many criminals, the life of one innocent man might be sacrificed.

The distinction between evidence of a conclusive tendency which is sufficient for this purpose, and that which is inconclusive, seems to be this: the latter is limited and concluded by some degree or other of finite probability, beyond which it cannot go; the former, though not demonstrative, is attended with a degree of probability of an indefinite and unlimited nature.

It frequently happens, as has been seen, that where the evidence of the circumstances attending the transaction itself would be imperfect and inconclusive, it derives a conclusive nature and tendency from a consideration of the conduct of the accused. The ordinary motives of self-preservation and self-interest, common to all mankind, furnish the strongest presumption that a party would explain, by statement at all events, and by proof where it was practicable, such evidence as tended to his prejudice. Hence it is that circumstances, which abstractedly considered would be inconclusive, acquire a conclusive character and

charge of sending a threatening letter to the Duke of Marlborough, affords an illustration of these positions. The Duke was twice required, by letter, to meet the writer, and on both occasions was met by the prisoner: the one place of assignation was near a particular tree in Hyde Park; the other, in an aisle of Westminster Abbey. That Mr. Barnard should, by mere accident, have been at both places at the very time appointed for the meetings, was certainly most remarkable: yet, notwithstanding the strong degree of suspicion created by such coincidences, they were clearly insufficient, without more, to warrant a conviction. The prisoner was, nevertheless, put upon his defence, and produced evidence to show that those coincidences were purely accidental: perhaps the real clue to the transaction may be this, that the prisoner was a party to the transaction, although no real intention existed of profiting by the contrivance. The rank and situation of the prisoner in society, and the obvious impossibility of his ever enjoying that which he demanded, are circumstances strongly tending to exclude such a supposition, and the nature and style of the demand render it probable that the real object of the writer was not personal gain,

Conclusive tendency.

tendency from the silence of the adversary, or his failure in attempting to explain them (*x*).

Where the evidence to prove larciny consists in the recent possession of the stolen property, it is in itself imperfect and inconclusive. But if the evidence of possession be coupled with the consideration, that the party charged, having it in his power to account for the possession, if it really consist with his innocence, either refuses to account for the possession, or attempts to impose a false account, the evidence is then conclusive in its nature and tendency, and is proper for the consideration of the jury.

Exclusion to a moral certainty.

Fourthly: It is essential *that the circumstances should, to a moral certainty, actually exclude every hypothesis but the one proposed to be proved.*

The corpus delicti must be proved.

Hence results the rule in criminal cases, that the coincidence of circumstances tending to indicate guilt, however strong and numerous they may be, avails nothing unless the *corpus delicti*, the fact that the crime has been actually perpetrated, be first established. So long as the least doubt exists as to the *act*, there can be no certainty as to the criminal agent. Hence, upon charges of homicide, it is an established rule, that the accused shall not be convicted unless the death be first distinctly proved, either by direct evidence of the fact, or by inspection of the body: a rule warranted by melancholy experience of the conviction and execution of supposed offenders, charged with the murder of persons who survived their alleged murderers; as in the case of the uncle already alluded to, cited by Sir Edward Coke and Lord Hale (*y*). So Lord Hale recommends that no prisoner shall be convicted of larciny in stealing the goods of a person unknown, unless the fact of the robbery be previously proved (*z*). The same principle requires that upon a charge of homicide, even when the body has been found, and although indications of a violent death be manifest, that it shall still be fully and satisfactorily proved that the death was neither occasioned by natural causes (*a*), by accident, nor by the act of the deceased himself. In considering the probability of the latter supposition, it is to be recollected, that it is by no means improbable that a person bent

(*x*) *Supra*, 499.

(*y*) *Supra*, 52, and Vol. II. tit. MURDER.

(*z*) Vol. II. tit LARCINY.

(*a*) See the trial of Spencer Cowper, esq., for the alleged murder of Mrs. Sarah Stout; St. Tr. The doubt which arose in that case upon the conflicting evidence, whether the death of the deceased had been occasioned by mere accident, or by her own act, or by the act of another, afforded, as it seems, a decisive ground of acquittal.

on self-destruction would use precautions to protect his memory from the ignominy, and his property from the forfeiture, consequent on a verdict of *felo de se* (*b*).

Inquiry as to other hypotheses.

The force of circumstantial evidence being exclusive in its nature, and the mere coincidence of the hypothesis with the circumstances being in the abstract insufficient, unless they exclude every other supposition, it is essential to inquire, with the most scrupulous attention, what other hypotheses there may be which may agree wholly or partially with the facts in evidence. Those which agree even partially with the circumstances are not unworthy of examination, because they lead to a more minute examination of those facts with which at first they might appear to be inconsistent; and it is possible that upon a more minute investigation of those facts their authenticity may be rendered doubtful, or may be even altogether disproved. In criminal cases the statement made by the accused is in this point of view of the most essential importance. Such is the complexity of human affairs, so infinite the combinations of circumstances, that the true hypothesis which is capable of explaining and reconciling all the apparently conflicting circumstances of the case, may escape the acutest penetration; but the prisoner, so far as he alone is concerned, can always afford a clue to them; and though he be unable to support his statement by evidence, his account of the transaction is for this purpose always most material and important. The effect may be on the one hand to suggest a view of the case which consists with the innocence of the accused, and which might otherwise have escaped observation; on the other hand, its effect may be to narrow the question to the consideration whether that statement be or be not excluded and falsified by the evidence.

The recent possession of stolen property is, independently of the conduct and declarations of the accused, or of his silence, very imperfect evidence of guilt; the apparent possession may

(*b*) In a little work, intitled, The Theory of Presumptive Proof, is cited the case of Thomas Harris, who was executed at York, for the murder of James Gray, in the year 1642. According to that statement, Harris kept a public-house, and was charged by his man-servant, Morgan, with having strangled James Gray, a travelling guest, in his house; upon the testimony of Morgan, aided by some circumstantial evidence, as to the prisoner's having on the same morning concealed some money in his garden, the prisoner was convicted and executed, although *no marks of violence* appeared on the body of the deceased, and who had in fact died of apoplexy, as appeared by the subsequent confession of the witness himself.

have resulted from the malicious act of some other person. In a case, therefore, where no act of concealment or assumption of property can be proved, and the accused is consistent in denying all knowledge of possession, such a defence becomes entitled to the most serious attention, and exacts a most rigorous inquiry as to its truth or probability; where, on the other hand, the prisoner admits the possession, and attempts to account for it by a false statement, the necessity for such an inquiry does not arise (c).

To the exclusion of all reasonable doubt.

What circumstances will amount to proof can never be matter of general definition; the legal test is the sufficiency of the evidence to satisfy the understanding and conscience of the jury. On the one hand, absolute, metaphysical and demonstrative certainty, is not essential to proof by circumstances. It is sufficient if they produce moral certainty to the exclusion of every reasonable doubt; even direct and positive testimony does not afford grounds of belief of a higher and superior nature. To acquit upon light, trivial and fanciful suppositions, and remote conjectures, is a virtual violation of the juror's oath, and an offence of great magnitude against the interests of society, directly tending to the disregard of the obligation of a judicial oath, the hindrance and disparagement of justice, and the encouragement of malefactors. On the other hand, a juror ought not to condemn unless the evidence exclude from his mind all reasonable doubt as to the guilt of the accused, and, as has been well observed, unless he be so convinced by the evidence that he would venture to act upon that conviction in matters of the highest concern and importance to his own interest; and in no case, as it seems, ought the force of circumstantial evidence, where it is adequate to conviction, to be inferior to that which is derived from

(c) A lamentable case occurred some years ago (I state from common report only) which strongly illustrates the necessity of exerting the utmost vigilance in negativing satisfactorily every other possible hypothesis, in a case of purely circumstantial evidence. A servant girl was charged with having murdered her mistress. The circumstantial evidence was very strong; no persons were in the house but the murdered mistress and the prisoner, the doors and windows were closed and secure, as usual; upon this and some other circumstances the prisoner was convicted, principally upon the presumption, from the state of the doors and windows, that no one could have had access to the house but herself, and she was accordingly executed. It afterwards appeared, by the confession of one of the real murderers, that they had gained admission to the house, which was situated in a narrow street, by means of a board thrust across the street, from an upper window of the opposite to an upper window of the house of the deceased; and that the murderers retreated the same way, leaving no trace behind them.

the testimony of a single witness, the lowest degree of direct evidence.

Circumstantial evidence ought not to supersede direct evidence.

Lastly: It seems that mere circumstantial evidence ought in no case to be relied on where direct and positive evidence, which might have been given, is wilfully withheld by the prosecutor. Where direct evidence is attainable, circumstantial evidence is of a secondary nature; besides, the great excellence of indirect evidence is its freedom from suspicion, and no greater discredit can be thrown upon it than when direct evidence is withheld.

Observations on conflicting evidence.

In cases of conflicting evidence, the first step in the process of inquiry must naturally and obviously be to ascertain whether the apparent inconsistencies and incongruities which it presents may not without violence be reconciled, and if not, to what extent, and in what particulars, the adverse evidence is irreconcileable; and then, by careful investigation and comparison, to reject that which is vicious; and thus, if it be practicable, to reduce the whole to testimony and circumstances of uniform and consistent tendency.

Conflicting testimony.

Where the testimony of direct witnesses is apparently at variance, it is to be considered, in the first place, whether they be not in reality reconcileable, especially where there is no extrinsic reason for suspecting error or fraud. But if their statements upon examination be found to be irreconcileable, it becomes an important duty to distinguish between the misconceptions of an innocent witness, whieh may not affect his general testimony, and wilful and corrupt misrepresentations which destroy his credit altogether. The presumption of reason as well as of law in favour of innocence, will attribute a variance in testimony to the former rather than the latter origin. Partial incongruities and discrepancies in testimony, as to collateral points, are, as has been already observed, to be expected; and it is for a jury to determine whether in the particular instance they are of such a nature and character, under all the circumstances, that they may or cannot be attributed to mistake. In estimating the probability of mistake and error, and also in deciding on which side the mistake lies, much must depend on the natural talents of the adverse witnesses, their quickness of perception, strength of memory, their previous habits of general attention, or of attention to particular subject-matters. A physician or surgeon would be much more likely to observe particular symptoms or appearances in a medical or surgical case, and to form from them correct conclusions, than an unskilful and inexperienced person would be likely to do. Much also must depend upon

a comparison of the means and opportunity which the witnesses had for making observations, of the circumstances which were likely to excite and engage their attention, and of their reasons and motives for attending; and here it is to be observed, that there is an important distinction between positive and negative testimony.

Positive and negative testimony.

If one witness were positively to swear that he saw or heard a fact, and another were merely to swear that he was present, but did not see or hear it, and the witnesses were equally faithworthy, the general principle would in ordinary cases create a preponderance in favour of the affirmative; for it would usually happen that a witness who swore positively, minutely and circumstantially, to a fact which was untrue, would be guilty of perjury, but it would by no means follow that a witness who swore negatively would be perjured, although the affirmative were true; the falsity of the testimony might arise from inattention, mistake, or defect of memory; and therefore, even independently of the usual presumption in favour of innocence, the probability would be in favour of the affirmative. If, for instance, two persons should remain in the same room for the same period of time, and one of them should swear that during that time he heard a clock in the room strike the hour, and the other should swear that he did not hear the clock strike, it is very possible that the fact might be true, and yet each might swear truly. It is not only possible but probable that the latter witness, though in the same room, through inattention, might be unconscious of the fact, or, being conscious of it at the time, that the recollection of it had afterwards faded from his memory. It follows therefore, by way of corollary to the last proposition, that in such cases, unless the contrary manifestly appear, the presumption in favour of human veracity operates to support the affirmative.

And further, when in cases of conflicting testimony, upon a comparison between the witnesses in respect of the means and opportunity which they have had of ascertaining the facts to which they testify, it turns out that the one class has had more competent and adequate means of information than the other, or, that under the circumstances, the attention of the latter was not so likely to be so fully excited and particularly directed to the facts, this principle co-operates with the weight of evidence in favour of the former, in all cases where there is room for error or mistake.

The application of this principle supposes that the positive can be reconciled with the negative testimony without violence and constraint. Evidence of a negative nature may, under particular

circumstances, not only be equal, but superior, to positive evidence. This must always depend upon the question, whether, under the particular circumstances, the negative testimony can be attributed to inattention, error, or defect of memory. If in the instance above supposed, two persons were placed in the room where the clock was, for the express purpose of ascertaining by their senses whether it would strike or not, there would be little room to attribute the variance between their negative testimony and the positive testimony of a third witness to mistake or inattention, and the real question would be as to the credit of the witnesses.

Positive and negative testimony.

It is also observable that this principle is inapplicable where a negative depends on the establishment of an opposite positive fact. Thus an *alibi* negatives the actual commission of a crime by the prisoner; but the evidence is of as direct and positive a nature as that which tends to prove his presence and actual commission of the crime.

Where the testimony of conflicting witnesses is irreconcileable, and cannot be attributed to incapacity or error, it frequently becomes a painful and difficult task to decide to which class credit is due. And here it is to be observed, in the first place, that all those considerations which have been applied as tests of the credit and veracity of witnesses uncontradicted, are also tests of credibility in cases of conflict. The first point of comparison is their character for integrity. This may either depend on positive evidence as to their previous situation (*d*), conduct and charac-

Conflict of testimony.

(*d*) The Roman law was far more copious than our own in its rules of exclusion.—Consequens est ut in omnibus causis fidem testium elevet ætas puerilis, insania, *conditio* vitæ, turpitudo, *paupertas magnum opprobrium*, &c. Heinecc. El. J. C. Part IV. sec. CXXXVI. L. 10, ff. L. 10, c. h. t.—Nec servorum testimonio credendum esse nisi alia desit ratio veritatem eruendi. Ib. sec. CXXXVIII. L. 7. ff. h. f.—Vacillare fidem mulierum quæ quæstum corpore fecerunt. L. 3, § 5, h.—Eorum qui vitam ad cultrum vel ad depugnandas bestias locarunt. L. 3, § 5. h. f.—Omnium viliorum et pauperum quamdiu aliorum est copia ad. L. 3, ff. L. 18. c. h. t.—Ut merito repellantur pater in causâ filii, filius in causâ patris, aliique potestati vel imperio alterius subjecti vel domestici. L. 6, L. 9, L. 24, f. L. 3, L. 6, c. h. t. Ut suspecti etiam sunt amici et inimici. L. 3. pr. ff. L. 5, L. 17.—Although a proper sense of the sacred obligation of an oath may be equally strong in every condition of society, yet the temporal consequences of detected perjury or prevarication may frequently depend much on the witness's rank or situation in life. To a common labourer, the consequences of a violation of his oath would probably be confined merely to temporal punishment, and that only upon a conviction after an expensive legal process; whilst to a solicitor or attorney, whose professional existence depends upon his

Conflict of testimony.

ter, or may be matter of inference and presumption, from their relative situation as to the parties, or the subject-matter of the cause, and the various and almost innumerable circumstances by which their testimony may be influenced or biassed. Where testimony is equally balanced in all other respects, a slight degree of interest or connection may be sufficient to turn the scale. In such cases also, any variance in the testimony of the witness from a former statement relating to the same transaction, if it be established and not explained, necessarily tends to impeach either his integrity or his ability.

All those circumstances which were likely to influence and bias witnesses in favour of the party, are of course entitled to great consideration in weighing their credit, although they do not exclude their testimony. These are of too obvious and extensive a nature to require enumeration: not only may the stronger motives arising from the ties of consanguinity, friendship, or expectation of future gain, cast a doubt upon the credit of witnesses whose testimony is contrasted with that of persons who stand wholly indifferent, but so also, in cases where in other respects the weight of testimony is nicely balanced, may many considerations of an inferior and weaker description; such as the interest which the witness may possess in a similar question, or the bias and prejudice which may arise in favour of a party from connection in the way of trade, profession or membership of any description (*e*): considerations of this kind, which would frequently afford not the slightest ground for questioning the credit of an unimpeached witness, may become of essential importance when the credit of conflicting witnesses is in other respects in a state of equipoise.

reputation and credit, loss of character consequent upon detection, although there should be no conviction, might end in his ruin. Considerations of this nature must obviously possess a contrary tendency where the testimony of a witness tends to repel and remove some charge of improper conduct, which would otherwise affect his reputation. Thus, upon a question, whether a testator was capable of executing a will, a professional witness, whether legal or medical, has an interest in proving the capacity; for the fact that he had made or even witnessed a will, executed by one utterly incapable of making one, would affect his professional character. Such observations apply in those cases only of doubt and suspicion where the evidence is of a conflicting nature.

(*e*) Parimente la credibilità di un testimonio puo essere alcuna volta sminuita quand' egli sia membro d' alcuna società privata, di cui gli usi, e le massime siano o non ben conosciute o diverse dallo publiche. Un tal uomo ha non solo le proprie ma le altrui passioni.—Beccaria, c. 13.

These considerations become still more important where any suspicion arises from the manner and demeanour of the witness in delivering his testimony. These, indeed, frequently afford strong tests for judging of his sincerity, although his motive be not apparent. Manifestations of warmth and zeal beyond those which the occasion naturally calls for, over-forwardness in testifying that which will benefit the party for whom he testifies, and ill-concealed reluctance in declaring that which tends to his prejudice, flippancy and levity of manner, coldness and apathy in describing injuries which would naturally excite a contrary feeling, indications of subtlety, artifice and cunning, are, with a multitude of others, tests for estimating the true character of a witness and the value of his testimony.

Demeanour of the witnesses.

But above all, where the credit of conflicting witnesses is doubtful, as far as regards their number, their integrity, their means of knowledge, and the consistency and probability of their testimony, a comparison of their statements with each other, and with undisputed or established facts, is the great test of credibility.

The relative consistency of testimony is a most important test of comparison. The testimonies of witnesses of truth will consist with each other, and with all the established circumstances of the case, in numerous and minute particulars, which are frequently beyond the reach of invention (*f*), and will exhibit that degree of solid coherency which necessarily results from a real and actual connection and congruity in nature, which minuteness and detail of circumstances will serve but to render more complete; with false witnesses the very reverse takes place; their testimony must either be sparing in circumstances, and therefore of a nature obviously suspicious, or be liable to detection from comparing the invented circumstances with each other, and with those which are known to be true.

Consistency of testimonies and comparison with circumstances.

In cases of conflicting testimony, and particularly where the

(*f*) Dr. Paley, with reference to historical evidence, says, "The undesignedness of coincidences is to be gathered from their latency, their minuteness, their obliquity: the suitableness of the circumstances in which they consist to the places in which those circumstances occur, and the circuitous references by which they are traced out, demonstrate that they have not been produced by meditation or by any fraudulent contrivance; but coincidences from which these causes are excluded, and which are too close and numerous to be accounted for by accidental concurrence of fiction, must necessarily have truth for their foundation."

With written documents.

subject of litigation is remote in point of time, or the question depends upon the terms of oral communications, the evidence of written documents connected with the transaction are, on account of their permanency, of the most obvious and essential importance. Every day furnishes instances of the weakness of human memory in such cases, and great opportunity is afforded for misrepresentation or mistake; whilst writings are permanent, and, as has well been observed, are witnesses difficult to be corrupted (*g*).

As the depositions of dead or absent witnesses are, in point of law, of a secondary nature to the *vivâ voce* testimony of witnesses subjected to the ordeal of cross-examination, so are they inferior and weaker in point of force and effect. So true is it that a witness will frequently depose that in private which he would be ashamed to certify before a public tribunal (*h*). It is by the test of a public examination, and by that alone, that the credit of a witness both as to honesty and ability, can be thoroughly tried and appreciated (*i*). *Nam minus obstitisse videtur pudor inter paucos signatores* (*k*), is an ancient and a powerful observation in favour of oral testimony.

Total rejection of testimony.

As the credit due to a witness is founded in the first instance on general experience of human veracity, it follows that a witness who gives false testimony as to one particular, cannot be credited as to any, according to the legal maxim, *falsum in uno, falsum in omnibus*. The presumption that the witness will declare the truth ceases as soon as it manifestly appears that he is capable of perjury. Faith in a witness's testimony cannot be partial or fractional; where any material fact rests on his testimony, the degree of credit due to him must be ascertained, and according to the result his testimony is to be credited or rejected.

It is scarcely necessary to observe, that this principle does not extend to the total rejection of a witness whose misrepresentation has resulted from mistake or infirmity, and not from design; but though his honesty remain unimpeached, this is a consideration which necessarily affects his character for accuracy. Neither does the principle apply to testimony given in favour of the adversary; such evidence is rather to be considered as truth reluctantly admitted, and divulged only because it was not in the power of

(*g*) Montesquieu, Espr. de Loix, l. 28, c. 44.

(*h*) 3 Bl. Comm. 373.

(*i*) *Supra*, 25. See Pothier, by Evans, vol. 2, p. 235.

(*k*) Quinctil. l. 5, c. 6.

a corrupt witness to conceal it. Hence it is a general principle, that a jury may believe that which makes against his point who swears, although they do not believe that which makes for it (*l*). Rejection of testimony.

The rejection of the witness may not be the only consequence of detection; for if there be reason to suppose from the circumstances that his perjury or prevarication is the result of subornation, it affords a reasonable ground, in a doubtful case, for suspecting the testimony of other witnesses adduced by the same party. This observation has no weight where it is apparent that the imputation is merely personal, and results from collateral motives independent of the cause.

The presumption is always *primâ facie*, and in the absence of circumstances which generate suspicion, in favour of the veracity of a witness; but where the usual and general presumption is encountered by an opposite one, it is necessary that the credit of the witness should be established by some collateral aid, to the satisfaction of the jury. The ordinary case of an accomplice affords an illustration of this application of the principle: his testimony is in practice deemed to be insufficient unless his credit be established by confirmatory evidence.

Comparison of direct and circumstantial evidence.

As it is universally admitted that circumstantial evidence is in its own nature sufficient to warrant conviction, even in criminal cases, and as the test of sufficiency is the understanding and conscience of a jury, it would be superfluous and nugatory to enter into a discussion of the comparative force and excellence of these different modes of proof, where they do not conflict with each other. In the abstract, and in the absence of all conflict and opposition between them, the two modes of evidence do not in strictness admit of comparison; for the force and efficacy of each may, according to circumstances, be carried to an indefinite and unlimited extent, and be productive of the highest degree of probability, amounting to the highest degree of moral certainty. With regard to the comparative force and efficacy of these modes of proof, it is clear that circumstantial evidence ought not to be relied on where positive proof can be had, and that so far the former is merely of a secondary nature (*m*). Hence it seems to be clear that no conviction in a criminal case ought ever to be founded on circumstantial evidence, where the prosecutor might

(*l*) See Ld. Mansfield's observations in *Bermon* v. *Woodbridge*, Doug. 751.

(*m*) 3 Comm. 371.

Comparison of direct with circumstantial evidence.

have adduced direct evidence; and in civil cases the resorting to such a practice would be a circumstance pregnant with the strongest suspicion.

The characteristic excellence of direct and positive evidence consists in the consideration, that it is more immediate and more proximate to the fact; and if no doubt or suspicion arise as to the credibility of the witnesses, there can be none as to the fact to which they testify; the only question is as to their credit. On the other hand, the virtue of circumstantial evidence is its freedom from suspicion, on account of the exceeding difficulty of simulating a number of independent circumstances, naturally connected and tending to the same conclusion. In theory, therefore, circumstantial evidence is stronger than positive and direct evidence, wherever the aggregate of doubt, arising, first, upon the question whether the facts upon which the inference is founded are sufficiently established, and secondly, upon the question, whether, assuming the facts to be fully established, the conclusion is correctly drawn from them, is less than the doubt, whether, in the case of direct and positive evidence, the witnesses are entirely faith-worthy. Where no doubt exists in either case comparison is useless; but it is very possible, where there is room for suspecting the honesty or accuracy of direct witnesses, that the force of their evidence may fall far short of that which is frequently supplied by mere circumstantial evidence; and whenever a doubt arises as to the credibility of direct witnesses, it is an important consideration in favour of circumstantial evidence, that in its own nature it is much less liable to the practice of fraud and imposition than direct evidence is; for it is much easier to suborn a limited number of witnesses to swear directly to the fact, than to procure a greater number to depose falsely to circumstances, or to prepare and counterfeit such circumstances as will without detection yield a false result. The increasing the number of false witnesses increases the probability of detection in a very high proportion, for it multiplies the number of points upon which their statements may be compared with each other, and also the number of points where their testimony comes in contact with the truth; and therefore multiplies the danger of inconsistency and variance in the same proportion.

So, on the other hand, it is exceedingly difficult by artful practice to create circumstances which shall wear the appearance of truth, and tend effectually to a false conclusion. The number of such circumstances must of necessity be limited in their

nature; they must be such as are as capable of fabrication by an interested party, and such that their materiality might be foreseen. Hence all suspicion of fraud may be excluded by the very number of concurring circumstances, when they are derived from various but independent sources, or by the nature of the circumstances themselves, when either it was not in the power of the adverse party to fabricate them, or their materiality could not possibly have been foreseen, and consequently where no temptation to fabricate them could have existed.

Consistency of positive testimony with circumstances.

The correspondence or inconsistency of direct evidence with well-established circumstances, is the great, and frequently the only test, for trying the truth of direct testimony which labours under suspicion. A perjured witness will naturally, with a view to his own security, so frame his fiction as to render contradiction by direct and opposite testimony impracticable. He will also be sparing in his detail of circumstances which are false, and which are capable of contradiction; the more circumstantial his statement is, the more open it is to detection. Hence it is that circumstantiality of detail is usually a test of sincerity, provided the circumstances be of such a nature as to be capable of contradiction if they be false; and that, on the other hand, if a witness be copious in his detail of circumstances which are incapable of contradiction, but sparing of those which are of an opposite kind, his testimony must necessarily be regarded with a degree of suspicion. As circumstances are the best and frequently the only means of detecting false testimony, it follows that no fictions are more formidable and more difficult to be detected than those which are mixed up with a large portion of truth; every circumstance of truth interwoven with the fiction, so far from being merely negative in its effect, in affording no aid for detecting the fraud, actually tends to confirm and support it.

It is however to be observed, that positive testimony ought not to be rejected on the ground of inconsistency with circumstances, unless the incongruity be of a conclusive and decisive nature. Mere improbability is usually an insufficient ground for the rejection of positive testimony which labours under no suspicion; for experience frequently shows that circumstances do in reality agree and did actually co-exist, although, from ignorance of the numerous links by which they are united and connected, their co-existence would *à priori* have been deemed to be highly improbable.

When, however, the positive testimony labours under doubt

and suspicion, mere circumstantial evidence is frequently sufficient to prevail, although such testimony be not wholly and absolutely irreconcileable with the facts. Thus in the case of Mr. Jolliffe's will, the will was established on circumstantial evidence, in opposition to the direct testimony of the attesting witnesses.

Conflict in circumstances.

Where doubt arises from circumstances of an apparently opposite and conflicting tendency, the first step in the natural order of inquiry is to ascertain whether they be not in reality reconcilable, especially where circumstances cannot be rejected without imputing perjury to a witness: for perjury is not to be presumed; and in the absence of all suspicion, that hypothesis is to be adopted which consists with and reconciles all the circumstances which the case supplies. In the next place, where the circumstances are inconsistent and irreconcileable, it becomes necessary to inquire which of them are attributable to error or design. Here again, in distinguishing between the real and genuine circumstances, and those which are spurious, regard is to be had to those principles which have already been adverted to: it is rather to be presumed that one witness was mistaken, where there was room for mistake, than that another witness, where the facts exclude all mistake, was wilfully perjured. Where mistake is out of the question, an examination of the different degrees of credit due to the witnesses on whose testimony the conflicting circumstances depend, becomes material; and in such cases a careful comparison of the circumstances which they state, with facts either admitted or fully established is of the most obvious and essential importance. Every admitted or established fact affords an additional test for trying the truth and genuineness of those which are doubtful, by means of which those which are genuine may be established and become additional tests of truth, and those which are false may be rejected.

Rejection of circumstances inconsistent with those which are fully established.

Whenever any fact is found to be wholly inconsistent with those which are either admitted or indubitably proved, the mere rejection of that single fact, and the difficulty thus removed, is not the only step gained in the progress towards truth; the vicious evidence must have resulted from error or from fraud; and whether under the circumstances it is to be ascribed to the one source or the other, it affords a test for judging of the ability or integrity of the witness, and not unfrequently affords some insight into the conduct of the party.

Fraud in circumstances.

Frauds in circumstantial evidence are of two kinds: a false witness may swear to circumstances purely fictitious, or an honest

witness may swear to circumstances which he has really observed, but which have been prepared with a view to deceive; as in the instance already alluded to, where a discharged pistol was placed near the body of a murdered person, to induce a belief that he had destroyed himself. Those of the former description admit of absolute and positive contradiction, or may be detected by the inconsistency of the fictitious circumstances with those established by unexceptionable testimony; and the witness himself is liable to detection in his attempt to interweave that which he has invented with that which is true. Simulated facts, on the other hand, are in themselves true; they are false only inasmuch as they tend to induce a false conclusion. These, however, are open to detection by a careful comparison with established circumstances; it is beyond the power of human subtlety to create a false consistency of circumstances beyond a very limited extent (*n*).

Fraud in circumstances.

No cases of conflicting evidence are more difficult of solution than those where facts apparently well established lead to opposite conclusions. These, in some remarkable instances, are of such a nature as to leave the mind in a state of perplexity after the most patient and laborious investigation. This more especially happens where the obscurity arises from the conduct of the parties concerned; so difficult is it to ascertain the real motives by which the actors in a distant transaction were influenced, or even to determine whether their conduct has not resulted from weakness or caprice rather than from any settled and determinate principles of action, or from the operation of mixed, fluctuating and transitory motives, which can no longer be distinctly traced. The celebrated Douglas cause may be cited as a striking instance of this nature. The gross improbability that Sir John Stuart and Lady Jane would, under the circumstances, have attempted so monstrous a fraud, the effect of which might be to deprive their own future offspring of their legitimate rights, and the vast danger and difficulty of carrying such a scheme into execution, by the procurement of two suppositious children, either by stealth or by bribery, situated as they were, with but slender resources in a foreign capital, under the eye of a vigilant police, were circumstances so strong in favour of the legitimacy of the children, that nothing but the strange and unaccountable conduct of the parties could have induced fair and reasonable doubts

Conflict of established circumstances.

(*n*) *Supra*, 49.

upon this interesting and important question. To pursue these considerations farther would be inconsistent with the limits of the present treatise. Suffice it to add, that where conflicting probabilities are nicely balanced, it rarely happens that some rule of legal policy does not turn the scale, even in civil cases; and that in criminal proceedings, where reasonable doubts exist, they must ever prevail in favour of mercy.

END OF VOL. I.