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A  
PRACTICAL TREATISE  
OF THE  
**LAW OF EVIDENCE,**  
AND  
*DIGEST OF PROOFS,*  
IN  
**CIVIL AND CRIMINAL PROCEEDINGS.**

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**SECOND EDITION,**  
WITH CONSIDERABLE ALTERATIONS AND ADDITIONS.

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

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

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

Number of  
witnesses.

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

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

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

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

(*h*) The admitting evidence of loose

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

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

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

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

But although the testimony of a single witness, whose credit is untainted, be sufficient to warrant a conviction, even in a criminal case, yet undoubtedly any additional and concurrent testimony adds greatly to the credibility of testimony, in all cases where it labours under doubt or suspicion; for then an opportunity is afforded of comparing the testimony of the witnesses on minute and collateral points, on which, if they were the witnesses of truth, their testimony would agree, but if they were false witnesses, would be likely to differ (*m*).

Where direct testimony is opposed by conflicting evidence, or by ordinary experience, or by the probabilities supplied by the circumstances of the case, the consideration of the number of witnesses becomes most material. It is more improbable that a number of witnesses should be mistaken, or that they should have conspired to commit a fraud by direct perjury, than that one or a few should be mistaken, or wilfully perjured. In the next place, not only must the difficulty of procuring a number of false witnesses be greatly increased in proportion to the number, but the danger and risk of detection must be increased in a far higher proportion; for the points on which their false statements may be compared with each other, and with ascertained facts, must necessarily be greatly multiplied.

Consistency  
of testi-  
mony.

The *consistency* of testimony is also a strong and most important test for judging of the credibility of witnesses. Where several witnesses bear testimony to the same transaction, and concur in their statement of a series of particular circumstances, and the

extricate itself out of this absurdity, the practice of the Civil-law Courts has plunged itself into another. For as they do not allow a less number than two witnesses to be *plena probatio*, they call the testimony of one *semiplena probatio* only, on which no sentence can be founded: to make up, therefore, the necessary complement of witnesses, where they have one only to a single fact, they permit the party himself, plaintiff or defendant, to be examined on his own behalf, and administer to him what is called the suppletory oath; and if his oath happen to be in his own favour, this immediately converts the half proof into a whole one. By this ingenious device satisfying at once the forms of the

Roman law, and acknowledging the superior reasonableness of the law of England, which permits one witness to be sufficient where no more are to be had, and to avoid all temptations of perjury, lays it down as an invariable rule that "*nemo testis esse debet in propria causa.*" The instances of perjury and treason are exceptions to the rule; the former, upon grounds of strict principle, for there the oath of one witness is opposed to the oath of another witness; and in the latter, as a mere rule of policy devised for protecting the liberty of the subject.

(*m*) Quia a cordato iudice mendacia testium deprehendi possunt si diversi interrogantur cum contra unus facile sibi constare possit. Puffendorf, 568.

order in which they occurred, such coincidences exclude all apprehension of mere chance and accident, and can be accounted for only by one or other of two suppositions; either the testimony is true, or the coincidences are the result of concert and conspiracy. If, therefore, the independency of the witnesses be proved, and the supposition of previous conspiracy be disproved or rendered highly improbable, to the same extent will the truth of their testimony be established (*n*).

So far does this principle extend, that in many cases, except for the purpose of repelling the suspicion of fraud and concert, the credit of the witnesses themselves for honesty and veracity may become wholly immaterial. Where it is once established that the witnesses to a transaction are not acting in concert, then, although individually they should be unworthy of credit, yet if the coincidences in their testimony be too numerous to be attributed to mere accident, they cannot possibly be explained on any other supposition than that of the truth of their statement.

The considerations which tend to negative any suspicion of concert and collusion between the witnesses, are either extrinsic of their testimony, such, for instance, as relate to their character, situation, their remoteness from each other, the absence of previous intercourse with each other or with the parties, and of all interest in the subject-matter of litigation; or they arise internally, from a minute and critical examination and comparison of the testimony itself.

Effect of  
inconsistency.

The *nature* of such coincidences is most important: are they natural ones, which bear not the marks of artifice and premeditation? Do they occur in points obviously material, or in minute and remote points which were not likely to be material, or in matters the importance of which could not have been foreseen? The number of such coincidences is also worthy of the most attentive consideration: human cunning, to a certain extent, may fabricate coincidences, even with regard to minute points, the more effectually to deceive; but the coincidences of art and invention are necessarily circumscribed and limited, whilst those of truth are indefinite and unlimited: the witnesses of art will be copious in their detail of circumstances, as far as their provision extends; beyond this they will be sparing and reserved, for fear

(*n*) See *Ld. Mansfield's* remarks in *R. v. Genge*, Cowp. 16. "It is objected that these books are of no authority; but if both the reporters were the worst that ever reported, if substan-

tially they report a case in the same way, it is demonstrative of the truth of what they report, or they could not agree."

of detection, and thus their testimony will not be even and consistent throughout: but the witnesses of truth will be equally ready and equally copious in all points.

Partial  
variances.

It is here to be observed, that partial variances in the testimony of different witnesses, on minute and collateral points, although they frequently afford the adverse advocate a topic for copious observation, are of little importance, unless they be of too prominent and striking a nature to be ascribed to mere inadvertence, inattention, or defect of memory.

It has been well remarked by a great observer (o), that "the usual character of human testimony is substantial truth under circumstantial variety." It so rarely happens that witnesses of the same transaction perfectly and entirely agree in all points connected with it, that an entire and complete coincidence in every particular, so far from strengthening their credit, not unfrequently engenders a suspicion of practice and concert.

The real question must always be, whether the points of variance and of discrepancy be of so strong and decisive a nature

(o) "I know not (says Dr. Paley) a more rash or unphilosophical conduct of the understanding than to reject the substance of a story by reason of some diversity in the circumstances with which it is related. The usual character of human testimony is substantial truth under circumstantial variety. This is what the daily experience of courts of justice teaches. When accounts of a transaction come from the mouths of different witnesses it is seldom that it is not possible to pick out apparent or real inconsistencies between them. These inconsistencies are studiously displayed by an adverse pleader, but oftentimes with little impression on the minds of the Judges. On the contrary, a close and minute agreement induces the suspicion of confederacy and fraud. When written histories touch upon the same scenes of action, the comparison almost always affords ground for a like reflection. Numerous, and sometimes important, variations present themselves; not seldom also absolute and final contradictions; yet neither the

one nor the other are deemed sufficient to shake the credibility of the main fact. The embassy of the Jews to deprecate the execution of Claudius's order to place his statue in their temple, Philo places in harvest, Josephus in seed-time; both cotemporary writers. No reader is led by their inconsistency to doubt whether such an embassy was sent, or whether such an order was given. Our own history supplies examples of the same kind: in the account of the Marquis of Argyle's death, in the reign of Charles the second, we have a very remarkable contradiction. Lord Clarendon relates that he was condemned to be hanged, which was performed the same day; on the contrary, Burnet, Woodrow, Heath and Echard, concur in stating that he was beheaded; and that he was condemned upon the Saturday, and executed upon the Monday. Was any reader of English history ever sceptic enough to raise a doubt whether he was executed or not?"

as to render it impossible, or at least difficult, to attribute them to the ordinary sources of such varieties, inattention or want of memory.

It would, theoretically speaking, be improper to omit to observe that the weight and force of the united testimony of numbers, upon abstract mathematical principles, increases in a higher ratio than that of the mere number of such witnesses. Aggregate force.

Upon those principles, if definite degrees of probability could be assigned to the testimony of each witness, the resulting probability in favour of their united testimony would be obtained not by the mere addition of the numbers expressing the several probabilities, but by a process of multiplication.

Such considerations, however, are of no practical importance. The maxim of law is *ponderantur testes non numerantur*. No definite degrees of probability can in practice be assigned to the testimonies of witnesses; their credibility usually depends upon the special circumstances attending each particular case, upon their connection with the parties and the subject-matter of litigation, their previous characters, the manner of delivering their evidence, and many other circumstances, by a careful consideration of which the value of their testimony is usually so well ascertained as to leave no room for mere numerical comparison.

In some instances, nevertheless, where from paucity of circumstances the usual means of judging of the credit due to conflicting witnesses fail, it is possible that the abstract principles adverted to may operate by way of approximation, especially in those cases where the decision is to depend upon the mere preponderance of evidence.

Fourthly, the *conformity* of their testimony with experience: As one principal ground of faith in human testimony is experience, it necessarily follows that such testimony is strengthened or weakened by its conformity or inconsistency with our previous knowledge and experience. A man easily credits a witness who states that to have happened which he himself has known to happen under similar circumstances; he may still believe, although he should not have had actual experience of similar facts; but where, as in the familiar instance stated by Mr. Locke (*p*), that Conformity with experience.

(*p*) Vol. II. p. 276. "The Dutch ambassador told the king of Siam that in his country the water was so hard in cold weather, that it would bear an elephant if he were there.

The king replied, Hitherto I have believed the strange things you have told me, because I looked upon you as a sober fair man, but now I am sure you lie."