

Courts of the United States, moreover, take judicial notice of the ports and waters of the United States, in which the tide ebbs and flows; of the boundaries of the several States and judicial districts;¹ and in an especial manner of all the laws and jurisprudence of the several States in which they exercise an original or an appellate jurisdiction. The Judges of the Supreme Court of the United States are on this account bound to take judicial notice of the laws of jurisprudence of all the States and Territories.² A Court of Errors will also take notice of the nature and extent of the jurisdiction of the inferior Court whose judgment it revises.³ In fine, Courts will generally take notice of whatever ought to be generally known, within the limits of their jurisdiction. In all these, and the like cases, where the memory of the Judge is at fault, he resorts to such documents of reference, as may be at hand, and he may deem worthy of confidence.⁴

Rex v. Wilde, 1 Lev. 296; Doug. 97, n. 41; Rex v. Arundel, Hob. 109, 110, 111; Rex v. Knollys, 1 Ld. Raym. 10, 15; Stockdale v. Hansard, 7 C. & P. 731; 9 Ad. & El. 1; 11 Ad. & El. 253; Sheriff of Middlesex's case, lb. 273; Cassidy v. Stewart, 2 M. & G. 437.

¹ Story on Eq. Plead. § 24, cites U. S. v. La Vengeance, 3 Dall. 297; The Appollon, 9 Wheat. 374; The Thomas Jefferson, 10 Wheat. 428; Peyroux v. Howard, 7 Pet. 342.

² Ibid.; Owings v. Hull, 9 Pet. 607, 624, 625.

³ Chitty v. Dendy, 3 Ad. & El. 319.

⁴ Gresley on Evid. 295.

CHAPTER III.

OF THE GROUNDS OF BELIEF.

§ 7. We proceed now to a brief consideration of the *General Nature and Principles of Evidence*. No inquiry is here proposed into the origin of human knowledge; it being assumed, on the authority of approved writers, that all that men know is referable, in a philosophical view, to perception and reflection. But, in fact, the knowledge, acquired by an individual, through his own perception and reflection, is but a small part of what he possesses; much of what we are content to regard and act upon as knowledge, having been acquired through the perception of others.¹ It is not easy to conceive, that the Supreme Being, whose wisdom is so conspicuous in all his works, constituted man to believe only upon his own personal experience; since in that case the world could neither be governed nor improved; and society must remain in the state, in which it was left by the first generation of men. On the contrary, during the period of childhood, we believe implicitly almost all that is told us; and thus are furnished with information, which we could not otherwise obtain, but which is necessary, at the time, for our present protection, or as the means of future improvement. This disposition to believe may be termed instinctive. At an early period, however, we begin to find that, of the things told to us, some are not true; and thus our implicit reliance on the testimony of others is weakened; first, in regard to particular things, in which we have been deceived; then in regard to persons, whose falsehood we have detected; and, as these instances multiply upon us, we gradually become more and more distrustful of such statements, and learn, by experience, the

¹ Abercrombie on the Intellectual Powers, Part 2, sec. 1, p. 45, 46.

necessity of testing them by certain rules. Thus, as our ability to obtain knowledge by other means increases, our instinctive reliance on testimony diminishes, by yielding to a more rational belief.¹

¹ Gambier's Guide, p. 87; McKinnon's Philosophy of Evidence, p. 40. This subject is treated more largely by Dr. Reid in his profound Inquiry into the Human Mind, ch. 6, sec. 24, p. 428-434, in these words;—"The wise and beneficent Author of Nature, who intended that we should be social creatures, and that we should receive the greatest and most important part of our knowledge by the information of others, hath, for these purposes, implanted in our natures two principles, that tally with each other. The first of these principles is a propensity to speak truth and to use the signs of language, so as to convey our real sentiments. This principle has a powerful operation, even in the greatest liars; for where they lie once they speak truth a hundred times. Truth is always uppermost, and is the natural issue of the mind. It requires no art or training, no inducement or temptation, but only that we yield to a natural impulse. Lying, on the contrary, is doing violence to our nature; and is never practised, even by the worst men, without some temptation. Speaking truth is like using our natural food, which we would do from appetite, although it answered no end; but lying is like taking physic, which is nauseous to the taste, and which no man takes but for some end, which he cannot otherwise attain. If it should be objected, that men may be influenced by moral or political considerations to speak truth, and therefore, that their doing so is no proof of such an original principle as we have mentioned; I answer, first, that moral or political considerations can have no influence, until we arrive at years of understanding and reflection; and it is certain, from experience, that children keep to truth invariably, before they are capable of being influenced by such considerations. Secondly, when we are influenced by moral or political considerations, we must be conscious of that influence, and capable of perceiving it upon reflection. Now, when I reflect upon my actions most attentively, I am not conscious, that in speaking truth I am influenced on ordinary occasions by any motive, moral or political. I find, that truth is always at the door of my lips, and goes forth spontaneously, if not held back. It requires neither good nor bad intention to bring it forth, but only that I be artless and undesigning. There may indeed be temptations to falsehood, which would be too strong for the natural principle of veracity, unaided by principles of honor or virtue; but where there is no such temptation, we speak truth by instinct; and this instinct is the principle I have been explaining. By this instinct, a real connexion is formed between our words and our thoughts, and thereby the former become fit to be signs of the latter, which they could not otherwise be. And although this con-

§ 8. It is true, that in receiving the knowledge of facts from the testimony of others, we are much influenced by their accordance with facts previously known or believed; and this

nexion is broken in every instance of lying and equivocation, yet these instances being comparatively few, the authority of human testimony is only weakened by them, but not destroyed. Another original principle, implanted in us by the Supreme Being, is a disposition to confide in the veracity of others, and to believe what they tell us. This is the counterpart to the former; and as that may be called the principle of veracity, we shall, for want of a more proper name, call this the principle of credulity. It is unlimited in children, until they meet with instances of deceit and falsehood; and it retains a very considerable degree of strength through life. If nature had left the mind of the speaker in æquilibrium, without any inclination to the side of truth more than to that of falsehood; children would lie as often as they speak truth, until reason was so far ripened, as to suggest the imprudence of lying, or conscience, as to suggest its immorality. And if nature had left the mind of the hearer in æquilibrium, without any inclination to the side of belief more than to that of disbelief, we should take no man's word, until we had positive evidence that he spoke truth. His testimony would, in this case, have no more authority than his dreams, which may be true or false; but no man is disposed to believe them, on this account, that they were dreamed. It is evident, that, in the matter of testimony, the balance of human judgment is by nature inclined to the side of belief; and turns to that side of itself, when there is nothing put into the opposite scale. If it was not so, no proposition that is uttered in discourse would be believed, until it was examined and tried by reason; and most men would be unable to find reasons for believing the thousandth part of what is told them. Such distrust and incredulity would deprive us of the greatest benefits of society, and place us in a worse condition than that of savages. Children, on this supposition, would be absolutely incredulous, and therefore absolutely incapable of instruction; those who had little knowledge of human life, and of the manners and characters of men, would be in the next degree incredulous; and the most credulous men would be those of greatest experience, and of the deepest penetration; because, in many cases, they would be able to find good reasons for believing testimony, which the weak and the ignorant could not discover. In a word, if credulity were the effect of reasoning and experience, it must grow up and gather strength, in the same proportion as reason and experience do. But if it is the gift of nature, it will be strongest in childhood, and limited and restrained by experience; and the most superficial view of human life shows, that the last is really the case, and not the first. It is the intention of nature, that we should be carried in arms before we are able to walk upon our legs; and it is likewise the intention of nature, that our

constitutes what is termed their probability. Statements, thus probable, are received upon evidence much less cogent than we require for the belief of those, which do not accord with our previous knowledge. But while these statements are more readily received, and justly relied upon, we should beware of unduly distrusting all others. While unbounded credulity is the attribute of weak minds, which seldom think or reason at all,—*quo magis nesciunt eo magis admirantur*,—unlimited skepticism belongs only to those, who make their own knowledge and observation the exclusive standard of probability. Thus the king of Siam rejected the testimony of the Dutch ambassador, that, in his country, water was sometimes congealed into a solid mass; for it was utterly contrary to his own experience. Skeptical philosophers, inconsistently enough with their own principles, yet true to the nature of man, continue to receive a large portion of their knowledge upon testimony derived, not from their own experience, but

belief should be guided by the authority and reason of others, before it can be guided by our own reason. The weakness of the infant, and the natural affection of the mother, plainly indicate the former; and the natural credulity of youth and authority of age as plainly indicate the latter. The infant, by proper nursing and care, acquires strength to walk without support. Reason hath likewise her infancy, when she must be carried in arms; then she leans entirely upon authority, by natural instinct, as if she was conscious of her own weakness; and without this support, she becomes vertiginous. When brought to maturity by proper culture, she begins to feel her own strength, and leans less upon the reason of others; she learns to suspect testimony in some cases, and to disbelieve it in others; and sets bounds to that authority, to which she was at first entirely subject. But still, to the end of life, she finds a necessity of borrowing light from testimony, where she has none within herself, and of leaning, in some degree, upon the reason of others, where she is conscious of her own imbecility. And as, in many instances, Reason, even in her maturity, borrows aid from testimony; so in others she mutually gives aid to it and strengthens its authority. For, as we find good reason to reject testimony in some cases, so in others we find good reason to rely upon it with perfect security, in our most important concerns. The character, the number, and the disinterestedness of witnesses, the impossibility of collusion, and the incredibility of their concurring in their testimony without collusion, may give an irresistible strength to testimony, compared to which its native and intrinsic authority is very inconsiderable."

from that of other men; and this, even when it is at variance with much of their own personal observation. Thus, the testimony of the historian is received with confidence, in regard to the occurrences of ancient times; that of the naturalist and the traveller, in regard to the natural history and civil condition of other countries; and that of the astronomer, respecting the heavenly bodies; facts, which, upon the narrow basis of his own "firm and unalterable experience," upon which Mr. Hume so much relies, he would be bound to reject, as wholly unworthy of belief.

§ 9. The uniform habits, therefore, as well as the necessities of mankind, lead us to consider the disposition to believe, upon the evidence of extraneous testimony, as a fundamental principle of our moral nature, constituting the general basis upon which all evidence may be said to rest.¹

§ 10. Subordinate to this paramount and original principle, it may, in the *second* place, be observed, that evidence rests upon our faith in human testimony, as sanctioned by experience; that is, upon the generally experienced truth of the statements of men of integrity, having capacity and opportunity for observation, and without apparent influence, from passion or interest, to pervert the truth. This belief is strengthened by our previous knowledge of the narrator's reputation for veracity; by the absence of conflicting testimony; and by the presence of that, which is corroborating and cumulative.

§ 11. A *third* basis of evidence is the known and experienced connexion subsisting between collateral facts or circumstances, satisfactorily proved, and the fact in controversy. This is merely the legal application, in other terms, of a process, familiar in natural philosophy, showing the truth of an hypothesis by its coincidence with existing phenomena. The connexions and coincidences, to which we refer, may be

¹ Abercrombie on the Intellectual Powers, Part 2, sec. 3, p. 70-75.

either physical or moral; and the knowledge of them is derived from the known laws of matter and motion, from animal instincts, and from the physical, intellectual, and moral constitution and habits of man. Their force depends on their sufficiency to exclude every other hypothesis, but the one under consideration. Thus, the possession of goods recently stolen, accompanied with personal proximity in point of time and place, and inability in the party charged, to show how he came by them, would seem naturally, though not necessarily, to exclude every other hypothesis, but that of his guilt. But the possession of the same goods, at another time and place, would warrant no such conclusion, as it would leave room for the hypothesis of their having been lawfully purchased in the course of trade. Similar to this, in principle, is the rule of *noscitur a sociis*, according to which the meaning of certain words, in a written instrument, is ascertained by the context.

§ 12. Some writers have mentioned yet another ground of the credibility of evidence, namely, the exercise of our reason upon the effect of coincidences in testimony, which, if collusion be excluded, cannot be accounted for upon any other hypothesis than that it is true.¹ It has been justly remarked, that progress in knowledge is not confined, in its results, to the mere facts which we acquire, but it has also an extensive influence in enlarging the mind for the further reception of truth, and setting it free from many of those prejudices, which influence men, whose minds are limited by a narrow field of observation.² It is also true, that in the actual occurrences of human life nothing is inconsistent. Every event, which actually transpires, has its appropriate relation and place in the vast complication of circumstances, of which the affairs of men consist; it owes its origin to those, which have preceded it; it is intimately connected with all others, which occur at the same time and place, and often with those of remote regions; and, in its turn, it gives birth to a thousand others, which

¹ 1 Stark. Evid. 471, note.

² Abercrombie on the Intellectual Powers, Part 2, sec. 3, p. 71.

succeed.¹ In all this there is perfect harmony; so that it is hardly possible for a man to invent a story, which, if closely compared with all the actual contemporaneous occurrences, may not be shown to be false. From these causes, minds, deeply imbued with science, or enlarged by long and matured experience, and close observation of the conduct and affairs of men, may, with a rapidity and certainty approaching to intuition, perceive the elements of truth or falsehood in the face itself of the narrative, without any regard to the narrator. Thus, Archimedes might have believed an account of the invention and wonderful powers of the steam engine, which his unlearned countrymen would have rejected as incredible; and an experienced Judge may instantly discover the falsehood of a witness, whose story an inexperienced Jury might be inclined to believe. But though the mind, in these cases, seems to have acquired a new power, it is properly to be referred only to experience and observation.

§ 13. In trials of fact, it will generally be found, that the *factum probandum* is either directly attested by those, who speak from their own actual and personal knowledge of its existence, or it is to be inferred from other facts, satisfactorily proved. In the former case, the proof rests upon the *second* ground before mentioned, namely, our faith in human veracity, sanctioned by experience. In the latter case, it rests on the same ground, with the addition of the experienced connexion between the collateral facts, thus proved, and the fact, which is in controversy; constituting the *third* basis of evidence before stated. The facts proved are, in both cases, directly attested. In the former case, the proof applies immediately to the *factum probandum*, without any intervening process, and it is therefore called *direct* or *positive* testimony. In the latter case, as the proof applies immediately to collateral facts, supposed to have a connexion, near or remote, with the fact in controversy, it is termed *circumstantial*; and sometimes, but not with entire accuracy, *presumptive*. Thus, if a

¹ 1 Stark. Evid. 496.

witness testifies, that he saw A. inflict a mortal wound on B., of which he instantly died; this is a case of direct evidence; and giving to the witness the credit, to which men are generally entitled, the crime is satisfactorily proved. If a witness testifies, that a deceased person was shot with a pistol, and the wadding is found to be part of a letter, addressed to the prisoner, the residue of which is discovered in his pocket; here the facts themselves are directly attested; but the evidence they afford is termed *circumstantial*; and from these facts, if unexplained by the prisoner, the Jury may, or may not, *deduce*, or *infer*, or *presume* his guilt, according as they are satisfied, or not, of the natural connexion between similar facts and the guilt of the person thus connected with them. In both cases, the veracity of the witness is presumed, in the absence of proof to the contrary; but in the latter case there is an additional presumption of inference, founded on the known usual connexion between the facts proved, and the guilt of the party implicated. This operation of the mind, which is more complex and difficult in the latter case, has caused the evidence, afforded by circumstances, to be termed presumptive evidence; though, in truth, the operation is similar in both cases.

§ 13 *a.* Circumstantial evidence is of two kinds, namely, *certain*, or that from which the conclusion in question *necessarily* follows; and *uncertain*, or that from which the conclusion does not necessarily follow, but is *probable* only, and is obtained by a process of reasoning. Thus, if the body of a person of mature age is found dead, with a recent mortal wound, and the mark of a bloody *left* hand is upon the *left* arm, it may well be concluded that the person once lived, and that another person was present at or since the time when the wound was inflicted. So far the conclusion is certain; and the Jury would be bound by their oaths to find accordingly. But whether the death was caused by suicide or by murder, and whether the mark of the bloody hand was that of the assassin, or of a friend who attempted, though too late, to afford relief, or to prevent the crime, is a conclusion which does not necessarily follow from the facts proved, but is obtained from these

and other circumstances, by probable deduction. The conclusion, in the latter case, may be more or less satisfactory or stringent, according to the circumstances. In civil cases, where the mischief of an erroneous conclusion is not deemed remediless, it is not necessary that the minds of the Jurors be freed from all doubt; it is their duty to decide in favor of the party, on whose side the weight of evidence preponderates, and according to the reasonable probability of truth. But in criminal cases, because of the more serious and irreparable nature of the consequences of a wrong decision, the Jurors are required to be satisfied, beyond any reasonable doubt, of the guilt of the accused, or it is their duty to acquit him, the charge not being proved by that higher degree of evidence which the law demands. In civil cases, it is sufficient if the evidence, on the whole, agrees with and supports the hypothesis, which it is adduced to prove; but in criminal cases, it must exclude every other hypothesis but that of the guilt of the party. In both cases, a verdict may well be founded on circumstances alone; and these often lead to a conclusion far more satisfactory than direct evidence can produce.¹

¹ See Bodine's case, in the New York Legal Observer, Vol. 4, p. 89, 95, where the nature and value of this kind of evidence are fully discussed. See *post*, § 44 to 48.