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OF THE

STATE OF MAINE,

DURING ITS SESSION

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PART SECOND.

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THIRTY-FIFTH LEGISLATURE.

SENATE. **No. 23.**

REPORT.

THE Joint Standing Committee on the Judiciary, who were directed to inquire into the expediency of allowing parties of record in civil actions to be examined as witnesses, have had that subject under consideration and ask leave to present for the consideration of the Legislature a Bill which is herewith submitted.

The committee in proposing this change in the laws of evidence, deem it their duty, without going into a labored argument on a subject already exhausted, to state briefly the reasons which induce them to propose the change.

These reasons naturally arrange themselves under two heads:

First—The inherent propriety of the rule proposed.

Second—Its propriety as the complement of the changes which have already been made in the ancient common law rules of evidence.

First—The propriety of the change proposed, in itself considered:

The avowed object of judicial investigation is to ascertain the facts to which the rules of law are to be applied in any matter of controversy between parties. It is assumed that, the facts being ascertained, the Judge will properly apply the law.

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One principal means in attaining this object, is the testimony of witnesses *able* and *willing* to inform the tribunal of the facts on which the rights of the parties depend. By willingness to state the facts, is not necessarily implied the desire so to do; but such a moral principle or fear of punishment as will induce the witness, when under oath, to state the facts as they occurred, rather than commit perjury; as will overcome the particular inducements to falsehood which may exist in any case. That witnesses, however strictly you may apply the legal rules of exclusion, may, by defect of memory, want of apprehension, bias, or corrupt design, make statements which are not true, is assumed in all administration of justice; and the chief office of a jury is to discriminate between the true and the false, and from the imperfect and inconsistent statements of various witnesses, to ascertain the real truth.

In this view of the case, no one will deny that in selecting the persons most *able* to give true testimony, the parties to the suit are by far the best fitted for that purpose. Their knowledge of the facts, in all cases of contract at least, must be full and perfect, for it is in what *they* said and did the contract rests; and by the admitted rule, unless some controlling reason is shown, they should be first called upon to say what was said and done.

Only one reason for their exclusion has ever been given. It is said that, though able to give the best testimony, such is the effect produced upon them, by their pecuniary interest, that they cannot be trusted; that they will inevitably, or so commonly that it is proper to consider it the general rule, commit perjury; and that the tribunal before whom they testify cannot be trusted to discriminate between the truth and the falsehood. An occasional instance of perjury would not be sufficient to warrant the exclusion of a whole class. To justify it, we must assume, that perjury would be the rule, truth the exception; and, even then, the testimony ought not to be excluded unless we believe that the jury would be deceived thereby. This assumes a degree of corruption on the part of suitors, and a

want of discrimination on the part of judges and juries, which is not in accordance with our experience.

There are very few men whom we treat, in the ordinary affairs of life, as if their statements were entitled to no credit where their pecuniary interests are concerned, even when those statements are not supported by oath; and judges and juries are often called upon to decide questions much more difficult than which one of two parties states the truth. It is to be considered that, in every case where there is a conflict of testimony between parties, one or the other must be supposed to tell the truth, because the very interest, on which as a motive so much reliance is placed, will lead him to do so. One or the other must be in the right, and the truth must be the best support of the right. In such a case, it can rarely happen that there will not be something in the appearance of the party, the independent circumstances surrounding the main fact, evidence of which is obtained from other sources, or in the probability of the story, by which the truth and falsehood can be ascertained.

But it is not true that in all cases where the opposite parties testify, there will be perjury on the one side or the other. On the contrary, in a vast majority of the cases, both parties are honest; and a misapprehension of the facts, or a difference of opinion as to the law applicable to the facts, is the cause of the controversy. In such a case, the jury, by hearing both sides, would in most cases be able to arrive at a conclusion satisfactory to all.

Another large class of cases, we believe, would be entirely driven from the courts by adopting the rule proposed; and it will be admitted that their exclusion would be a great gain to substantial justice. We refer to those cases where one, or the other party relies upon the absence, or loss of some legal proof material to his adversary's case. Strange as it may appear, there are many men who would not commit direct perjury, and yet would take advantage of such absence or loss of proof to prosecute or defend a suit. Let such a person understand that he may be called upon, on oath, to supply the missing evidence,

and he would at once abandon his unjust prosecution or defense.

The almost universal practice of referees to hear the testimony of parties — the proceedings in equity — the proof of claims against insolvent estates — the disclosure of trustees and other like provisions of law, show the absurdity of adopting or continuing it as a principle, that pecuniary interest necessarily or generally leads to perjury. The admission of witnesses actuated by motives of friendship, consanguinity, heirship, love, anger, revenge and other passions, which, no less than this control the conscience, shows the absurdity of adhering longer to this one exception.

Second—The propriety of the change proposed to make the law consistent with itself under the changes which have already been made:

The Ancient Common Law, if it adopted the absurd principle that pecuniary interest necessarily produced perjury, was consistent in its absurdity, by excluding every witness who had any pecuniary interest in the result of the suit, however small.

This rule has been gradually relaxed; by Courts, from motives of public policy and necessity; and by Legislatures, from a view of its absurdity and hardship, until it is at last reduced to the single exclusion of the parties to the record.

Now pecuniary interest, if it has any effect in leading to perjury, cannot have its influence increased by making the person having it a party to the record, and we see no reason why, when we admit every other person, however direct and great his interest may be, we should exclude the person who, while he has no greater inducement to falsehood, has probably a much better knowledge of the facts. There are many cases, where this rule of excluding parties to the record and admitting other interested witnesses, may operate very hardly. It is often in the power of the real plaintiff in interest to substitute another upon the record, and thus make himself a witness, whilst the person who is made defendant has no such power.

This is true in suits on negotiable paper, sales of property, and other cases.

That the rule proposed will sooner or later be adopted, is as certain as the progress of reform; the question is, shall we adopt it now, or wait till some future time? If the rule commends itself to our judgment by its propriety and justice, it cannot too soon be adopted. That we may not fear it as an innovation unsustained by precedent, it is proper to state, that it has been, for several years, in force in England, the birthplace of the common law, and so far as known with the almost universal approbation of the Bar, the Bench and the People. In England it was first adopted and applied in the County Courts. After several years the opinions of the judges of the County Courts were taken and found to be nearly unanimous, that in their Courts the rule operated well. Of fifty-seven who gave written answers nearly all were decidedly of opinion that "the law which enables parties to be examined as witnesses has worked well;" only one of the fifty-seven gives an opinion decidedly against it. Lord Chief Justice Denman, one of the greatest jurists of the age, is decidedly in favor of it. From his letter we quote this sentence which, in the fewest possible words gives the only possible objection to the rule, and the best answer to the objection. "'Ask no questions and you will hear no lies,' is a vernacular caution often administered to inconvenient inquisitiveness. It seems to me to comprise the whole argument in opposition to this bill. But no one will advise us to prefer darkness to light, because the latter must sometimes reveal unsightly objects; still less will prudence suggest an entire abstinence from food, though that is the only perfect security against swallowing poison." These letters will be found in Livingston's Law Magazine for July and August, 1851. The rule was in 1851 applied to all the courts and to all judicial proceedings in England, and is still in operation there with high approbation. In this country it was adopted in Connecticut in 1849, in Vermont in 1852, in Ohio in 1853, and in Minnesota in 1851. In 1849 it was recommended by

the Commissioners to prepare the Code in New York, but was only partially adopted then. A law is now pending before the Legislature of that State on the subject. The same is true of Massachusetts, where it has for several years been legal partially to examine parties. In no case when once adopted has it been rescinded, and in every case the testimony is that it *promotes justice and diminishes litigation.* The measure therefore may be recommended, not merely as an experiment, but as well worthy to be introduced as a permanent principle in our administration of justice.

All which is respectfully submitted.

Per order.

A. HAYDEN.

STATE OF MAINE.

IN THE YEAR OF OUR LORD ONE THOUSAND EIGHT HUNDRED AND FIFTY-SIX.

AN ACT additional in relation to witnesses.

Be it enacted by the Senate and House of Representatives in Legislature assembled, as follows:

SECTION 1. No person shall be excused or excluded from being a witness in any civil suit or proceeding at law, or in equity, by reason of his interest in the event of the same, as party or otherwise, except as is hereinafter provided; but such interest may be shown for the purpose of effecting his credibility.

SECT. 2. Parties shall not be witnesses in suits where the cause of action implies an offense against the criminal law on the part of the defendant, unless the defendant shall offer himself as a witness, in which case the plaintiff may also be a witness; and in case the defendant in such suit shall offer himself as a witness, he shall be held to waive his privilege of not

testifying where his testimony might render him liable to a prosecution for a criminal offense.

SECT. 3. Nothing herein shall in any manner affect the law relating to the attestation of the execution of last wills and testaments, or of any other instrument which by law are required to be attested.

SECT. 4. When any party to a suit resides without the state, or is absent from the state during the pendency of the suit, and the opposite party desires his testimony, a commission under the rules of court may issue to take his deposition; and it shall be the duty of such non-resident or absent party, upon such notice to him or his attorney of record in the suit of the time and place appointed for taking his deposition as the court shall order, to appear and give his deposition. If such party shall refuse or unreasonably delay giving his testimony as above provided, he may be nonsuited or defaulted by order of the court, unless his attorney will admit the affidavit of the party desiring his testimony of what the absent party would say if present, to be used as testimony in the case.

SECT. 5. When one of several plaintiffs or defendants is used as a witness by the opposite party, testimony may be introduced to contradict or discredit

him by his co-plaintiffs or co-defendants, in the same manner as if he were not a party to the suit.

SECT. 6. When an action is prosecuted or defended by the representatives of a deceased person, the opposite party, if examined on his own behalf, shall not be allowed to testify in relation to facts which, if true, must have been equally within the knowledge of such deceased person.

SECT. 7. The rules of evidence in special proceedings of a civil nature, such as before referees, auditors, county commissioners and courts of probate, shall be the same as herein prescribed for civil actions.

STATE OF MAINE.

IN SENATE, March 5, 1856.

ORDERED, That 700 copies of the Report of the Joint Standing Committee on the Judiciary, in relation to the expediency of allowing parties of record in civil actions to be examined as witnesses, and the Bill accompanying the same, be printed for the use of the Legislature.

WM. G. CLARK, *Secretary.*