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"REAL" EVIDENCE

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The phrase "Real Evidence" has not attracted much discussion from text-writers, nor can it be said to have obtained a very firm foothold in our legal nomenclature. Introduced by Bentham in one of his numerous classifications, Best adopts it without examination; Greenleaf, Taylor, Wharton and Stephen ignore it; Thayer accords it but the barest notice; Wigmore criticises it only to discard; and Chamberlayne, who subjects it to a lengthened analysis, dismisses it as, for the most part, profitless. Indeed had it not been for the outstanding importance claimed for it by the late Mr. Gulson in his able and suggestive *Philosophy of Proof*,[1] it might perhaps have dropped out of forensic currency altogether. Whether, in spite of such newly acquired prestige, that fate should not still be reserved for it seems to be a point worthy of consideration.

What is "real" evidence? It is a term which is applied mainly to classification and raises few, if any questions of admissibility. Unfortunately, however, it has been the subject of several conflicting definitions, none of which can be said to be wholly satisfactory or generally accepted. Three significations have been assigned to it, and these we propose to examine in detail.

Evidence from things as distinct from persons. Bentham, who is responsible for most of our evidentiary divisions, begins by describing evidence *in general,* natural evidence. He says:

"The Evidence by which in any mind persuasion is capable of being produced is derived from two sources: from the operation of the perceptive or intellectual faculties of the individual himself, and from the supposed operation of the like faculties on the part of others."[2]

[1] Gulson, *The Philosophy of Proof* (1905).
[2] 1 Bentham, *Rationale of Judicial Evidence* (1827) 51-52.

The former he calls evidence *ab intra,* the latter evidence *ab extra.* He then treats of the several classes into which *judicial* evidence may be divided, the first of these being "Personal and Real."

"Personal evidence is that afforded by some human being, either voluntarily by discourse or signs (testimonial is the term by which evidence of this description will henceforth be designated), or involuntarily by changes of deportment or countenance. Real evidence is that afforded by a being belonging, not to the class of persons, but to that of things. . . . By real evidence I understand all evidence of which any object belonging to the class of things is the source, persons being included in respect of such properties as belong to them in common with things."[3]

He adds that "physical real evidence," whether arising from a real or personal source, is either *immediate,* i. e., where the thing which is the source of the evidence is present to the senses of the judge; or *reported,* i. e., where its state is testified to by a percipient witness, in which case it is "immediate" to the witness, but "reported" to the judge.[4]

One or two questions arise on these definitions. What does Bentham mean to include in real and personal evidence respectively? No difficulty arises with regard to that portion of real evidence which he describes as arising from a "real" source, i. e., from purely inanimate objects; but considerable difficulty arises, and conflicting views prevail, when he speaks of real evidence arising from a "personal source." What precisely does he mean by this, and wherein does "real evidence from a personal source" differ from "personal evidence" as he has above described it? We think that he here refers solely to "those *properties of persons which belong to them in common with things*"; and that Best[5] and Gulson[6] are wrong in assuming that Bentham intends to include in this class the *voluntary conduct of persons.* It is certainly curious that he should give no direct indication of his views on this point; but his various references thereto seem to leave little doubt of his meaning. Thus,

"Persons being composed of matter as well as spirit, having their physical as well as their psychological properties, belong in virtue of their physical properties to the class of things. Hence real evidence may flow alike from a personal as well as a real source, personal evidence cannot flow from any but a personal source."[7]

"Any sort of circumstantial evidence which though it have for its source a person, *serves not to convey an indication of his mind* may, with more propriety, be ranked under the head of *real* than of *personal* evidence, as, for example, the appearance produced on the body of a man already dead or still alive by a wound."[8]

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[3] *Ibid.;* 3 *ibid.,* 26; Dumont, *Treatise on Judicial Evidence* (1825) 19.
[4] 3 Bentham, *op. cit.,* 33-34.
[5] 1 Best, *Law of Evidence* (1st Am. fr. 5th London, 1875) secs. 196-197.
[6] Gulson, *op. cit.,* secs. 223-225.
[7] 3 Bentham, *op. cit.,* 11, note.
[8] 1 *ibid.,* 69, note; 3 *ibid.,* 11, note.

"Circumstances comprehend the state of things and the conduct of persons. Things furnish what is called 'real' evidence; but whether we argue from things, or from the conduct of persons, this species (circumstantial evidence) is always founded on the connection between cause and effect."[9]

And in developing the topic of circumstantial evidence, these two main divisions, *real evidence* and the *conduct of persons,* each treated in great detail, are kept entirely distinct. Confining his illustrations, for reasons of convenience, to criminal cases, he includes under the former head, the following items: (1) Subject-matter of the offense (the person killed or hurt—the thing damaged or destroyed—the document or coin fabricated); (2) the fruits of the crime (the goods stolen—the money or profit obtained); (3) instruments used in committing the crime; (4) materials designed to assist in its perpetration; (5) place of deposit of the object of the crime; (6) neighboring bodies suffering change in consequence of the crime (places spotted with blood). These matters, he remarks, may indicate the crime either with, or without, indicating its author.[10] Under "The conduct of persons," on the other hand, he includes preparations, attempts, declarations of intention, threats, silence or confessions of the accused, concealment or suppression of evidence, flight, motives and character.[11] It may be added that the heading "Real Evidence" is pre-fixed to *each* of the four chapters above quoted,[12] but is not prefixed to, or used in connection with, *any* of the six subsequent chapters.[13] On the whole, therefore, it seems reasonably certain that, under "physical real evidence, whether arising from a real or personal source," Bentham does not intend to class the voluntary conduct of individuals.

This being so, we should naturally expect him to class it as "personal" evidence, under which head it seems obviously and properly to belong. Oddly enough, however, in his various definitions of personal evidence, he makes no mention whatever of the voluntary conduct of persons, but speaks only of their utterances or demeanor. Thus (1) in his main definition, already quoted, he designates personal evidence as "that afforded by a human being, either voluntarily by discourse or signs, or involuntarily by changes of demeanour or countenance"; (2) "Personal evidence is that furnished by a human being and is generally called testimony; real evidence is that deduced from the state of things. A deposes that he saw B pursue C with threats. C is found killed and B's bloody knife is found near by. A's testimony is personal evidence; the knife is real evidence. 'Real' technically signifies merely thing";[14] (3) "Division taken from the will of the witness deposing: personal voluntary and personal invol-

[9] Dumont, *op. cit.,* 143.
[10] 1 Bentham, *op. cit.,* chs. 3-6.
[11] *Ibid.,* chs. 7-12.
[12] Chs. 3-6, *supra.*
[13] Chs. 7-12, *supra.*
[14] Dumont, *op. cit.,* 12.

untary. Personal voluntary evidence is that furnished, on the request of the judge, or even before any request, without menace or coercion. Personal involuntary evidence is that extorted by rigor or restraint, or given, not by an act of the will, but in defiance of the will, as the effect of the emotions, displaying itself in the behaviour, gesture, or physiognomy of the witness. These signs are of the nature of circumstantial evidence."[15] "Evidence derived from discourse is direct evidence, that derived from deportment is circumstantial."[16] In all this, it will be noticed, Bentham seems almost pointedly to avoid including voluntary conduct in "personal" evidence.

But if he excludes it from "real" and does not include it in "personal," where else does it come in? If under neither head, then his division, "real and personal" would not be a complete division embracing all evidence, but only a partial one embracing some. Is this what he means? We think not, since he states emphatically that, "considered in respect of its source, *all* evidence flows either from persons or things; all evidentiary facts as well as all principal facts, are afforded either by persons or things."[17] We are therefore driven to conclude that he does, after all, intend to class voluntary conduct as personal evidence, although he nowhere says so in terms, and we base this view on the grounds (1) that he expressly limits "real evidence arising from a personal source" to "those properties of persons belonging to them in common with things," i. e., to such evidence as, "though it has for its source a person, serves not to convey an indication of his mind"; (2) that in his detailed illustrations of "real evidence" he does not cite a single instance of voluntary acts or conduct; and (3) that, in explaining the nature of circumstantial evidence, he states it may consist "either of some physical fact from a real source, or a psychological fact from a personal source, such psychological fact having necessarily for its index, some physical fact issuing from the same personal source," adding that "all psychological evidence cannot come under any other denomination than that of *personal* evidence."[18] Considering, however, that the voluntary conduct of persons constitutes by far the most important part of judicial evidence, and that he had already fully elaborated it elsewhere, it is strange that he should here lay all the stress on the *testimonial* side of personal evidence and none on the *circumstantial.* One result of this is that text-writers have uniformly, but quite excusably, misread his meaning.

Bentham, as we have seen, divides "real" evidence into *immediate* and *reported,* but he makes no similar division of "personal" evidence. There seems no reason for this difference. Suppose, in a criminal trial, a witness gives damaging evidence against the accused

[15] *Ibid.*, 13.
[16] 1 Bentham, *op. cit.*, 52-54, 69.
[17] 3 *ibid.*, 11, note.
[18] *Ibid.*

who thereupon changes countenance. Here, under Bentham's definition, there would be two examples of "personal" evidence, one voluntary and one involuntary, and both would also be "immediate." Suppose, however, that the same statement were made and change of countenance occurred out of court, and were afterwards proved in court by a percipient witness. This would be "personal," but "reported" evidence.

Bentham states that "real" evidence is always circumstantial.[19] But this is not so. When an item of "real" evidence is one from which the principal fact may be inferred, the evidence is, no doubt, circumstantial. But when its own existence, or some visible quality of it, is itself the principal fact, the evidence seems clearly direct.[20]

Best's conception of real evidence, while in the main following that of Bentham, appears to differ in three respects: (1) He classes *involuntary* changes of deportment or countenance as real and not as personal evidence; (2) although accepting Bentham's definition of real evidence as "that of which any object belonging to the class of things is the source," he yet incongruously includes thereunder the voluntary conduct of persons, for "where an offence or contempt is committed in presence of a tribunal it has direct real evidence of the fact";[21] and (3) he recognizes a *direct* as well as a *circumstantial* class of such evidence.[22]

The views of the above writers have been sharply criticised both by Gulson and Chamberlayne. Gulson formulates two main charges. The first is that the division of evidence into real and personal affords

> "a striking illustration of the confusion engendered by the failure to distinguish between the *quid probandum* and the *modus probandi;* between the fact the subject-matter of proof and the means of ascertaining it, or Evidence. . . . For it is not the quality of the *fact* which is the subject of proof, that must determine how evidence should be classed, but the nature of the *means* employed to prove it."[23]

The basis of this criticism, it will be seen, is the distinction its author draws between facts and evidence, a distinction he elsewhere describes as of the most vital importance[24] and which he makes one of the cardinal features of his book. It is a little curious perhaps, that he does not, as he might, cite in support of this distinction the authority of Sir J. Stephen who, thirty years earlier, had framed his *Digest* upon practically the same division, viz., *relevancy* (facts), and *proof* (evidence, oral and documentary), and who equally complained that "the neglect of the distinction has thrown the whole subject into confusion and made what is really plain appear almost incompre-

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[19] 1 *ibid.*, 55; 3 *ibid.*, 33-34.
[20] Best, *op. cit.*, sec. 196; Gulson, *op. cit.*, secs. 227-228.
[21] Best, *op. cit.*, sec. 196. [22] *Ibid.*
[23] Gulson, *op. cit.*, secs. 223, 225. [24] *Ibid.*, sec. 12.

hensible."[25] In the case of Stephen, however, a comparison of the various definitions and articles in the *Digest* will show that it is quite impossible to maintain this distinction; and Gulson is confronted with much the same difficulty. Thus he is forced to admit that the distinction between facts and evidence is a purely arbitrary one, and also that any fact which generates proof "is in some sense a means of proof."[26] But he does not seem to realize that while he excludes facts because they are the subject of evidence, he yet admits testimony although it is the subject-matter of perception. On his own showing, therefore, one element may be the subject-matter of another without forfeiting its title to be classed as "evidence." Here, also, then, the subject-matter test breaks down. It seems, indeed, that it is not Bentham and Best who err in failing to distinguish the *quid probandum* from the *modus probandi,* but Gulson himself who fails fully to recognize that a *quid probandum,* when established, may itself become a *modus probandi.* His second criticism amounts to this: that the "reported real evidence" of Bentham and Best is practically indistinguishable from their "personal" evidence, and so should be eliminated; and that the remaining heads "immediate real" and "personal" are already covered by their own previous but more scientific *ab intra* and *ab extra,* which latter classification he thinks should, as the only valid one, be adopted.[27] The arguments are too long to quote; but no doubt Best, by enlarging his "real" evidence to cover practically everything but testimony does, when he adds "reported," tend to assimilate it to his personal, or *ab extra,* class. Bentham, however, makes it clear that in speaking of "real reported" evidence he, at least, is treating of one strictly limited species (i. e., objects belonging to the class of things) as forming the subject-matter of, and being brought before the court by, another and quite distinct species (i. e., personal evidence, or at least that portion of it which he calls testimonial), and in so doing he cannot be said to identify or confuse the two classes. Indeed he seems to have anticipated this very objection by explaining that "immediate real evidence is a case of purely real, purely circumstantial evidence," while

> "reported real evidence is a compound of real evidence exhibited through the medium of personal, of circumstantial exhibited through the medium of direct. To the reporting witness, it was so much immediate, so much pure real evidence; but to the judge it is but reported real evidence."[28]

Bentham's "real immediate" evidence, therefore, embraces something less than his *ab intra* class, and his "personal" evidence something more than his *ab extra* class.

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[25] Stephen, *Digest of the Law of Evidence* (1876) xii.
[26] Gulson, *op. cit.,* secs. 203, 260.
[27] *Ibid.,* secs. 223-226.
[28] 1 Bentham, *op. cit.,* 34.

Turning now to Chamberlayne's criticisms, these unfortunately are somewhat marred by his occasional misreading of the above authors. Thus, he attributes to Best, instead of to Bentham, the paternity of the division of real evidence into "immediate" and "reported," and this initial mistake generates other subsidiary errors.

"This (Best's) classification of real and personal evidence obviously announces several propositions in excess of that stated by Bentham. Among these are: (1) Real evidence may be either immediate or reported. (2) The involuntary action of a witness is not personal but real evidence. These additional propositions seem entirely inconsistent with Bentham's original definition . . . and much confusion has necessarily resulted. . . . Best's definition of the classification of real and personal evidence seems to be quite as seriously mistaken in adding Bentham's definition of the *ab intra* and *ab extra* to his definition of real and personal evidence as he has been in adding Bentham's distinction between voluntary and involuntary. . . . There is no limitation in Bentham's view, in dealing with evidence which is directly perceived by the court, that it should be or be thereby created real evidence. It is apparently Best's conception that this classification of real evidence as a term coextensive with whatever the court perceives for itself is in accordance with Bentham's definition."[29]

But Best does not add the division immediate and reported to "real and personal evidence," he confines it, as does Bentham, to "real evidence" alone; nor does he conceive, or suppose Bentham to conceive, that real evidence and evidence by perception are coextensive, since, having just copied Bentham in showing that real evidence is sometimes *not* immediate but reported, he could hardly think, or attribute to Bentham the thought, that they were coextensive. Best's mistake, therefore, does not lie here; it lies rather in supposing, as he appears to, that his own wide conception of real evidence and Bentham's much narrower one, are identical. In summarizing the views of Gulson, Chamberlayne seems, again, to be not quite a reliable guide. Thus, he remarks that "the view expressed by Best as to the proper meaning of the term "real evidence" has been endorsed by the opinion of Mr. Gulson";[30] and in support of this quotes the case of an offense committed in the presence of a tribunal, which is cited by Best and approved by Gulson as an instance of real evidence. But he omits to notice the reason of this approval. Gulson asks, Why is it real?

"Not certainly because 'any object belonging to the class of *things* is the source of the evidence,' for here the fact in question is the act of a *person*—the voluntary act of an inanimate being, involving, as we have seen, a psychological fact; but the evidence is real because

[29] 1 Chamberlayne, *Modern Evidence* (1911) sec. 28.
[30] *Ibid.*, sec. 29.

the fact or act is itself manifested to the perceptive faculties of the tribunal."[31]

Again, in quoting Stephen's example of a judge looking out of the window to see if it rains, Chamberlayne remarks that "Mr. Gulson, following Bentham and Best, speaks of this as *real* evidence."[32] But why? He calls it real merely because it is "immediate," whereas Bentham and Best would have called it real because its source was "a thing." He does not in either case, therefore, adopt or follow these writers. Nor is it, as Chamberlayne alleges, "suggested by Best and endorsed by Mr. Gulson"[33] that evidence by perception is limited to the scope of real evidence. Gulson, indeed, maintains this view, but he does so in direct opposition to Best. In conclusion, Chamberlayne is of opinion that the terms "real" and "personal," if retained at all, are only defensible when employed from the standpoint of the court, and not from that of the witness:

"That which the tribunal perceives of an evidentiary nature furnished by a thing, a physical object, is real evidence; that which it perceives of an evidentiary nature furnished by a person, is personal evidence. . . . If this mental concept of the viewpoint of the tribunal be abandoned, the distinction has no value, and only confusion results from its use."[34]

Material objects produced for the inspection of the Court. This is the second and most widely accepted meaning of "real evidence." It is obviously derived from Bentham for, though it eliminates his "real reported" evidence, it is precisely equivalent to his "real immediate" class. Taylor does not use the term "real" at all; but under the heading of "Evidence addressed to the senses," he treats of the same subject and from the standpoint of the present definition, confining it to the physical appearance or condition of material objects (persons, places, or things) produced to or viewed by the tribunal.[35] Wharton also avoids the word, dealing however under the head of "Inspection" with the same items as Taylor, and from the same point of view. On the other hand, Stephen omits not only the term, but the whole topic of "real" evidence, both from the Indian Evidence Act and the *Digest,* and has been a good deal criticised in consequence. Thayer remarks:

"Stephen's limitation of the term 'evidence' to (1) statements of witnesses and (2) documents is too narrow. When, in a controversy between a tailor and his customer, involving the fit of a coat, the customer puts on the coat and wears it during the trial . . . it seems impossible to deny to this the name of 'evidence.' It is what Bentham called 'real evidence,' a phrase which imports a very valuable dis-

[31] Gulson, *op. cit.,* sec. 224.
[32] 1 Chamberlayne, *op. cit.,* sec. 30.
[33] *Ibid.,* sec. 31.
[34] *Ibid.*
[35] Taylor, *Evidence* (8th ed. 1875) secs. 544-566.

crimination, when limited to that which is presented directly to the senses of the tribunal. It is not, practically, of much importance when divided further into 'reported real evidence.' "[36]

Thayer, therefore, so far as can be gathered, lends the weight of his authority to the present signification. Chamberlayne follows suit. After remarking that "it is one of the few fundamental errors of Stephen's classification that it entirely omits perception as a medium of evidence," and making various conjectures as to the reason of the omission, he adopts in effect the present definition: "That which the tribunal perceives of an evidentiary nature furnished by a thing, a physical object, is real evidence." It is curious that Stephen's own explanation of this matter should have been overlooked by all his critics. It is this: that although, in addition to oral and documentary evidence, a third class might be formed of things produced in court, not being documents, yet this division would introduce needless intricacy, since as the condition of material things is usually proved by oral evidence, there is no need to distinguish between oral and material evidence.[37] This explanation, though not perhaps very convincing, shows at least that the omission was designed and not inadvertent. After a brief examination of the phrase "real evidence," Wigmore likewise comes out as a supporter of the present connotation.

"The term 'real evidence' has sometimes been applied to this source of belief; but not happily; first, because 'real' is an ambiguous term, and not sufficiently suggestive for the purpose; secondly, because the process is not the employment of 'evidence' at all, in the strict sense; and, thirdly, because the inventor of the term (Bentham, Judicial Evidence, III, 26 ff.) used the phrase in a sense different from that above and different from that commonly now attached to it; he meant by it any fact about a material or corporal object, *e. g.* a book or a human foot, whether produced in court or not; it is only by later writers that the production in court is made the essential feature."[38]

Discarding the term real evidence, then, and substituting "Autoptic Proference,"—a fact being evidenced autoptically when it is offered for direct perception by the senses of the tribunal, without depending on any conscious inference from some testimonial or circumstantial fact (it is autopsy by the *court,* but autoptic proference by the *party*),—he remarks:

"With reference to this mode of producing persuasion no question of relevancy arises. *Res ipsa loquitur.* The thing proves or disproves itself. No logical process is employed; only an act of sensible apprehension. . . . Bringing a knife into Court is in strictness not giv-

[36] Thayer, *Preliminary Treatise on Evidence* (1898) 263, note; see *ibid.,* 280-281, note; and Thayer, *Cases on Evidence* (2d ed. 1900) 720.

[37] Indian Evidence Act, 1872, introduction, 14.

[38] 2 Wigmore, *Evidence* (1904) sec. 1150, note.

ing evidence of the knife's existence. It is a mode of enabling the Court to reach a conviction of the existence of the knife, and is in that sense a means of producing persuasion, yet it is not giving evidence in the sense that it is asking the Court to perform a process of inference. . . . It is thus evidence, in the sense that evidence includes all modes, other than argument, by which a party may lay before the tribunal that which will produce persuasion."[39]

"It is unnecessary, for present purposes, to ask whether this is not, after all, merely a third source of inference (additional to testimony and circumstantial evidence), *i. e.*, an inference from the impressions or perceptions of the tribunal to the objective existence of the thing perceived. The law does not need and does not attempt to consider theories of metaphysics . . . for the purposes of judicial investigation, a thing perceived by the tribunal as existing does exist."[40]

Perception by the Court as distinct from the facts perceived. The third main signification of "real evidence" is that furnished by Gulson. As the previous definition was arrived at by eliminating Bentham's "real reported" class and retaining his "real immediate," so Gulson's conception appears to have been arrived at by eliminating from Bentham's "real immediate" evidence the factor "real," and adopting the residue "immediate." Before quoting his definitions, however, it will be well to see what he understands by the wider term evidence itself, for it is one of the blemishes of his very able work that it gives no single, unvarying, or at least reasonably stable, account of that basic word. But at least he tells us what is *not* evidence, and so to some extent clears the ground; facts are not evidence, but only its subject-matter.[41] On the other hand, he describes "evidence" sometimes as the process of ascertaining facts,[42] sometimes as proof,[43] sometimes as the means of proof, by which he refers exclusively to observation, perception, or the exercise of the senses,[44] and sometimes as the result obtained by applying these means of proof to the fact to be ascertained.[45] It is not surprising, therefore, that some of the uncertainty which characterizes his conception of the wider term, should also attach to the narrower; and here equally he seems to vacillate between two views: (1) that real evidence consists of the mere act of perception, as distinct from the fact perceived; and (2) that it consists of something independent of both, viz., the result (knowledge, persuasion, proof) obtained by applying perception to facts. As instances of the former, he speaks of real evidence as "The perception or immediate evidence by which the *evidentiary* fact is made manifest";[46] "the evidence of immediate perception exercised by the inquirer upon the thing . . . itself";[47] "inspection by the

[39] *Ibid.*, secs. 24 and 1150.
[40] *Ibid.*, sec. 1150.
[41] Gulson, *op. cit.*, secs. 26, 260-268.
[42] *Ibid.*, secs. 17, 24.
[43] *Ibid.*, secs. 24-26.
[44] *Ibid.*, secs. 24-26, 168-169, 177, 183, 223-224, 254, 259-260.
[45] *Ibid.*, secs. 174, 226, 230, 266, 314, 319.
[46] *Ibid.*, sec. 183.
[47] *Ibid.*, sec. 224.

tribunal of the contents of a writing is just as much *real* evidence of those contents."[48] As instances of the latter, he states that "Real evidence is the evidence obtained by the court through the mere exercise of its own perceptive faculties";[49] "the proof acquired by the tribunal through the use of its own faculties of perception";[50] "the evidence furnished by the perceptive faculties of the tribunal applied to the fact itself."[51]

Notwithstanding these discrepancies, however, it is clear that Gulson bases his conception of real evidence on Bentham's *ab intra,* or immediate evidence, and not on the latter's "evidence furnished by things."

"It is much to be regretted that Bentham, having, in the difference between evidence *ab intra* and evidence *ab extra,* struck the very keynote, as it were, of Evidence, should, instead of adhering to and following out that scientific division of proof, have abandoned it immediately in favour of the present fallacious distinction (between real and personal evidence). For this distorted view of real evidence, as the evidence of *things,* is the first false step, which has inaugurated a long train of errors in the theory of proof."[52]

Now, whether Bentham's view be correct or not, Gulson's is, we submit, fundamentally wrong, and for this reason: it is that which is adduced by the parties, not that which is furnished by the court in the way of sight, hearing, or reasoning faculty, which the law regards as evidence and for whose wrongful admission or rejection it provides a remedy. It is the thing produced, therefore, and not its inspection by the court, on the inference derived from its inspection, which constitutes real evidence. Indeed we cannot help thinking that Gulson himself must to some extent have realized this, otherwise it is difficult to account for his occasional lapses into what is, in effect, the conventional view. Thus in contending that Best is wrong in classing real evidence amongst the "Instruments" of evidence, since being immediate there is no medium or instrument involved, he remarks: "Still, it is obvious that the physical manifestation of facts must be classed as a means of proof distinct from Oral evidence."[53] So, in denying Bentham's distinction between written and real evidence as illustrated by written names and mere marks on timber, he states

"Not only does the manifestation of the such marks, as he describes, to the senses of a judicial tribunal afford real evidence of the marks; but equally does the manifestation of written characters traced upon paper, or the production in court of paper displaying such characters, furnish real evidence of the writing."[54]

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[48] *Ibid.*, sec. 314.
[49] *Ibid.*, secs. 226, 266.
[50] *Ibid.*, sec. 314.
[51] *Ibid.*, sec. 319.
[52] *Ibid.*, sec. 227.
[53] *Ibid.*, sec. 263.
[54] *Ibid.*, sec. 316.

And a little later, with regard to a model. he remarks: "Its own production affords real evidence (of its features)."[55] This is, of course, precisely what we contend; but it obviously conflicts with his two previous definitions which more accurately represent his distinctive view.

Gulson's treatment of this topic is, however, open to another objection. Though accepting Bentham's division *ab intra* and *ab extra* as scientifically sound, he is still not content to adopt Bentham's later equivalents for these terms, viz., Immediate and Reported. but prefers to substitute for them Real and Oral. His reason for adopting "real" is that it "may be a very useful equivalent in a judicial aspect for our 'immediate' evidence";[56] and for adopting "oral" is that as documents, properly considered, are a mere phase of real evidence, there remains nothing of the reported class excepting oral evidence. These substitutions, however, merely land him in further difficulties for (1) by adding a third and different meaning to the already ambiguous term "real evidence" he increases the very confusion he condemns in Bentham and Best; and (2) by limiting reported evidence to the testimony of witnesses and classing documents as "real," he introduces a qualification not only of very doubtful validity in itself, but one which, if valid, would practically wreck his own division.

"My contention is this, that inspection by the tribunal of the contents of a writing is just as much *real* evidence of those contents as the inspection or perception of the features or peculiarities of any other material object which may be produced in court, such, for instance, as a knife . . . there is this difference, and this only, between real and 'written' evidence—that in the case of writing, an ulterior meaning is attached by convention to the characters; *i. e.*, to the shape and order of the marks. . . . But this conclusion as to the ulterior meaning of words . . . is simply . . . inference from . . . our previous knowledge of the conventional meaning. . . . Such an inference, if it alters the case at all, merely converts our *direct* real evidence into *indirect* or *circumstantial* real evidence. . . . And in any case, whether we choose to regard the evidence as direct or as indirect, it is still, to the person who peruses the document, 'immediate' evidence, and where the reader is represented by a judicial tribunal, *Real.* . . . The presence or absence of this inference (from the written symbol to the conventional meaning) may affect the nature of the evidence as *direct* or *circumstantial,* but can have no bearing on its character as *Real.*"[57]

But Gulson is not correct in stating that the conventional meaning attached to words constitutes the only difference between real and written evidence. He omits a second and no less important factor, viz., the testimonial, which is involved whenever the document is used as proof of the matters asserted. These two features seem amply

[55] *Ibid.*, sec. 318.
[56] *Ibid.*, sec. 229.
[57] *Ibid.*, secs. 314, 315, 320.

sufficient to discriminate written evidence from real. But even assuming they are not, still all the arguments he uses to show that documents should be classed as real evidence, would equally apply to show that oral evidence should be similarly classed, since he admits that it, too, is "invariably brought home *in toto* to the mind of the tribunal," which not only hears the words, but sees who is the speaker and what his demeanor.[58] But if this is so, then not only documents, but oral testimony also, would have to be scrapped as separate classes, and all evidence reduced to the single category of *real*. The truth seems to be, however, that while material objects when produced furnish immediate evidence alone, witnesses and documents furnish both kinds, immediate in respect of their production to (or as Gulson would have it their inspection by) the court, and reported in respect of any facts they may narrate. As Chamberlayne remarks,

"Although any utterance, oral or documentary, is directly perceived by the Court, and so may be called real evidence, yet the mental state, intent, credibility, &c. which is the important or probative thing, is not perceived and so is not real, but personal or transmitted evidence."[59]

In view, then, of all this ambiguity, misinterpretation, and confusion, is the phrase "Real Evidence" worth preserving? It is never used in practice. Forensically, material objects are either referred to by name, or under the general head of circumstantial evidence. But in text-books, which have to deal with classification, its adoption may, perhaps, in default of a better term, be defended. If so, which of its meanings should be retained? It seems advisable to rule out both Bentham's and Best's "any object belonging to the class of things," and Gulson's mere "perception by the tribunal," and to adhere to the more usual definition "Material objects, other than documents, produced for the inspection of the court."

With regard to Bentham's general division "Immediate and Reported," Gulson's alternative of "Real and Oral" is, as we have seen, unsatisfactory. But if any change is desired, it might perhaps take the form of substituting for the term "Immediate," which Bentham applies sometimes to the court and sometimes to the witness, that of "Produced," which is in common use and unambiguous, and would emphasize the point that evidence is furnished by the parties and not by the tribunal.

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[58] *Ibid.*, secs. 323, 345.

[59] Chamberlayne, *op. cit.*, secs. 23, 24.