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Recommended Citation
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An Historical Sketch of the Law of English Evidence From the Reign of Henry the Fourth to the Commencement of the Present Century

by

Charles Searing Gifford.

1889.

Introduction.

The character of the rules of evidence in any system of jurisprudence, it is obvious, must depend largely on the nature of the tribunals through which the law is administered.

This is well illustrated in the history of English evidence. The Wise Men of the little Saxon villages in their northern father land, whom the historian Green describes as meeting around some sacred tree or moot hill there framing the few laws that were needed by that simple people and settling the disputes between farmer and farmer according to the usage and local customs of the settlement, could not have had nor could they have used the complicated system of evidence belonging to a more advanced state of civilization.

Nor was such a system more

possible, when these people first settled on the Island of Britain; they had nearly the same customs as before, and were hampered by the same superstitions.

In all their judicial proceedings civil and criminal, they still firmly held to the belief, that the Gods in some miraculous way would reveal the truth of the facts in question. Hence we find them frequently resorting to the trial by ordeal. This method of trial was used for the most part where other means of ascertaining the truth were not to be had, as where the defendant was unable to procure the requisite number of compurgators to swear to their belief in his innocence: still it does not seem to have been strictly confined to such cases.

Their more rational means of proof, as proof by oath, by document,

and by the testimony of preappointed witnesses, were unlike ours and reflect the primitive condition of society, and of law during these times.

The Conquest of England by the Normans had a marked influence on the whole of the law of the country; though the change appears at first to have been slow.

One of the most important results of the conquest, as regards the law of evidence, was the introduction of the trial by battle. This took the place of the Saxon ordeal; but for a long time the two forms existed together side by side.

The Danish invasions influenced the general law of England but little, and probably the law of evidence not at all; so that all the law by the time of Henry II. was that of the Anglo Saxons.

modified and enlarged by the Normans.

Growth of the Jury.

In order to fully understand the early history of English evidence, it will now be necessary to briefly outline the growth of the jury system with especial attention to their means of obtaining knowledge on which to base their verdicts.

The English jury as it is known at present is of comparatively modern origin; although the institutions out of which it has grown were apparently old, when the history of Northern Europe first finds them.

The juries of the Anglo Saxons were nothing but bodies of compurgators, and it was not until the fifteenth century, that jurors came regularly and as a matter of course to hear the testimony of witnesses given in open court.

That under this state of affairs, there could be no extensive systems of evidence is easy to be seen. But during the reigns of the later Plantagenet kings, the jury began slowly to lose their functions as witnesses and to assume the single capacity of judges of facts.:

By the time of Henry IV. this change had become quite complete; for we find the jury sitting to hear the testimony of outside parties, who acted as witnesses. And in the eleventh year of this reign, the court set aside a judgment in favor of a plaintiff; because he had privately put a document into the hands of a juror, that had not been offered in evidence. [1 Year Book 2 Henry IV.]

It is not probable that this change was an abrupt one. Like most developments in the English constitution, it appears to have been of slow growth. In the time of Bracton

disputes growing out of deeds and in which there were attesting witnesses were determined by their evidence, and these witnesses were sought out by the sheriff and returned to the jury.

This was one of the first steps toward a jury not of witnesses. At first these attesting witnesses appear to have been associated with the jury; but gradually a separation took place, which in the reign of Edward III. seems to have been well established. For here we find a witness challenged, because he was kin to the plaintiff, but the objection was overruled on the ground, that the verdict could not be received from witnesses but from the jurors of the assize; and it was said that when the verdict was given against evidence the defeated party might have an attaint. [23. Assis. 11 Ed. III.]

In the latter part of this reign, we also find witnesses who were not attestators of documents occasionally adjoined to the jury to give them testimony, but who did not have a direct part in the verdict.

A form of trial older than that by jury was the trial *per sectam* without jurymen, which was where a complainant offered to prove his case by vouching a certain number of witnesses in his behalf who had been at the transaction in question. The defendant rebutted the presumption by producing a larger *secta* to outweigh the evidence of his opponent. [*Forsyth's Trial by Jury p. 129.*]

Thus the jury at first hearing only the evidence of attesting witnesses, then as the advantage of employing juries became more apparent, the evidence of the witnesses composing the secta

were laid before them. So that by the time of Henry VI., the jury in most respects was very much as it is at present; although they still had the right of basing their verdict on their own personal knowledge of the facts, and were still summoned from the immediate vicinity where the cause of action arose. However, in the first year of Anne's reign, it was held by the judges of the Court of Queens Bench, that if the jury gave a verdict from their own knowledge they ought to inform the court, so that they might be sworn as witnesses. The statute 27 Elizabeth had enacted that it should be sufficient, if two hundredors were on the jury for the trial of issues in any personal action; and, finally, in the sixth year of George the fourth a law was passed providing that jurors might be taken from the body of the

county.

This was the transition state of the jury. And as Mr Best remarks in his "Law of Evidence": "It was not until the final determination of that state, that the rules of evidence, which depend so much on the functions of the component parts of the judicial tribunal being clearly defined, could assume a permanent and consistent form."

Before taking up in detail the minor branches of our subject, let us briefly outline some other changes in the procedure of the English Courts, which have to a great extent affected the history of evidence.

One of the most important of these is that anciently no witnesses were allowed against the crown. How this rule crept into practice is hard to understand. Sir Edward Coke speaking of it says: "We never read in any act of Parliament, ancient

author, book, or record that in a criminal case the party accused should not have witnesses for him." [3 Institute. 79.]

Nevertheless it is undisputed that for a long time such witnesses were not allowed. Mary seems to have been the first sovereign to advise a more lenient rule. And in the trial of Sir Nicholas Throck-morton, acquitted of treason 1554, the prisoner asks that certain statutes be read, and witnesses be heard in his favor; and quotes the instructions of Queen Mary, directing; that whatsoever could be brought in the subjects favor should be allowed to be heard. The judges refused to allow the reading of the statute, nor were any witnesses admitted for the defense. And in the trial of John Udal 31 Eliz. witnesses offering their testimony in favor of the defendant were answered that because they were witnesses against the Queen their

evidence was inadmissable. [1 State Trials 148]

Later witnesses were heard in behalf of the accused but it was not until a statute had been passed in the reign of Anne permitting it that such witnesses were sworn [2 State Trials 296] In cases of misdemeanor witnesses were always sworn [2 State Trials 429]

Not only was the defendant in criminal trials thus hindered in the production of testimony in his defence, but for a long time he was forbidden the right of cross examining the witnesses of the crown. Of this hardship, Lord Camden, in the defence of the Duchess of Kingsley, speaks with enthusiastic eloquence.

Worse than this, at least as regards the growth of the law of evidence, was the fact that until the time of William and Mary, counsel were not permitted fully to conduct the defence

in cases of treason, and in trials for impeachment this was not allowed till the twentieth year of George II.

——— Another cause that prevented our system of evidence for a long time from becoming consistent, uniform, and binding was the dependence of the judges on the crown. Their independence was secured by the Act of settlement passed during the reign of William III. securing them against removal from office save by Parliament. This undoubtedly had a great influence in obviating artificial distinctions being made between the proofs in state prosecutions and in other cases. [Best on Evidence p. 119.]

——— It was not until the more important of the changes, I have roughly sketched, were nearly accomplished that the rules of evidence became obligatory and consistent. Still

most of the elementary principles of that system are not, as some have maintained, of a very modern origin, but on the contrary were known and sometimes applied long before the English Revolution.

While the judges of the ancient courts and writers of these early times appear to have had knowledge of the primary rules and many of the secondary ones and to admit their justice, yet they did not regard them to be obligatory and inflexible. Here was the characteristic difference between the ancient and modern law of evidence. Our ancestors had much of the theory, but left more to the discretion of the court. The English common law judges were early the slaves of precedent in every other branch of jurisprudence but this. Especially was this true in criminal cases, where as we have seen the accused had not

the benefit of counsel and the judges, servile to their royal master, did not care to restrict themselves by laying down fixed and determined rules.

In crimes not political in their nature, rules excluding objectionable evidence as for example hearsay were more often enforced; and these together with the civil cases reflect the real condition of the law much better than the State Trials and the trials in the Star Chamber in times of great public excitement and which lend a black line to the history of English criminal jurisprudence that was dark enough without.

Best Evidence.

It is the great and distinguishing principle of English evidence that all facts must be proved by the highest evidence of which the thing is capable.

As early as the middle of the sixteenth century, perhaps much sooner, this rule existed in theory; although in practice it was not always followed as we shall see hereafter.

Let us first examine the application of the primary principle in the rule which generally compels witnesses to give their testimony orally and in open court. Sir Edward Coke who wrote in the latter part of the sixteenth century laid down, apparently as an old and well established doctrine, the following: "In some cases the courts of the common law do judge upon witnesses, but they must ever give testimony viva voce". That the rule was shamefully violated in many of the State Trials is indisputable as in the case of Sir Nicholas Throckmorton before cited. But even here the prisoner, who displayed no mean knowledge of the laws

of his time, demanded as a right that the depositions of certain witnesses be not read against him as they were living and could be produced in open court to give their testimony viva voce. It is true that the request was denied him, and the objectionable evidence was admitted as it also was in the trial of the Duke of Norfolk in 1571.; John Udal, 1589.; the Earl of Essex, 1600.; and one Weston in 1613. But the fact that Throckmorton objected to this kind of evidence, as did the defendants in most of the other cases I have cited where this kind of proof was allowed, helps to show that the admission of such testimony was irregular and not the customary practice.

Sir Matthew Hale in his "History of the Pleas of the Crown" says: "Information thus taken and returned may be read in evidence against the prisoner, if the

informant be dead or so sick that he is not able to travel, and oath of that fact is made; but otherwise not." [Hale's Pleas Crown Vol 2 cap 38 p 284.] Thus certainly as early as the beginning of the seventeenth century, the law on this subject would seem to have been practically the same as at present.

Probably the rule was of greater antiquity than this. The quotation from Coke last mentioned, the exception by the accused in the several cases where such evidence was allowed, taken together with the condition of the other rules of evidence existing at the time, would give the strongest ground for that inference.

Another illustration of the doctrine that all facts are to be proved by the highest evidence of which the thing is capable is that of requiring

the record of conviction to be given in evidence whenever it became necessary for any reason to show that a party had been convicted of crime. This rule appears to have been quite early recognized. It was, of course, of much more importance formerly, when the testimony of a convicted felon was totally excluded than at present when his evidence is admitted, and the jury allowed to give to it what weight they choose. We have an example of the application of the principle in the trial of Anderson for high treason who was convicted in 1679. [2 State Trials 436, also see 3 id. 330.] There the accused excepted to the evidence of one Dangerfield, a witness produced by the crown. The judges ruled that this objection would not avail him, unless he produced the record of conviction. There is a case with the same ruling as the last decided nearly three

quarters of a century earlier. [Le. E. fol 2.] Hence we may judge the rule to have been long known to the law.

Another branch of the main rule is that a written instrument shall be given in evidence itself, and not by copy. The law on this point does not seem to have been so clearly established in early times. In the reign of Elizabeth all the court held that the copy of a release might be used as evidence, although the original could have been procured. [Brown v. Car Croke 863 fol 41.] But in the eighth year of James I. it was held that parties desiring to prove any matter of evidence by record of a court ought to produce the the records themselves and not a copy of them [Smith v. Jennings Lane 97 Hill.]

When later on, the great labor and impracticability of conveying the

whole record of a court from place to place became apparent, it was held that an immediate sworn copy of a record if of a public nature could be given in evidence; though in the same case it was decided that such a copy of an instrument of a private nature was not admissible, unless the original had been lost or destroyed by fire. [Leinch v. Clerk 3 Salk. 154 pl 6.]

There are circumstances under which it is difficult, if not impossible, to obtain the original writing to put in evidence, as in the instances just recited. In such cases our ancestors accepted copies when proved to be true in lieu of the original as do the courts of the present day. The formalities under which transcription were compelled to be made in order to be admissible were very similar to those of the modern courts.

Thus all through the reigns of the Tudor sovereigns, certified and exemplified copies were in frequent use. The latter being in most cases preferred to the former and sometimes the only ones allowed.

[3 Ed. 6. c. 4. 13 Eliz. c. 6. Co. Lit. 225.]

Not only, for ages has it been the rule to admit only the original of documents, when they were attainable; but from the earliest times, parol evidence of the contents of a writing has been excluded. Thus it was expressly ruled by Lord Holt in the trial of Vaughan (1696) that a witness could not give evidence of the subject matter of a letter, but that the letter itself should be produced in open court. And the same was held in a civil case two years before, where the rule was stated to be of great antiquity. [4 T. Rev. 341 } Rev. 7 Ed. D.R.]

In the proceedings against

Queen Mary in the year 1830, Abbot C. J., in delivering the answer of the judges to a question put by the House of Lords, said: "In their opinion it is a rule of evidence as old as any part of the common law of England that the contents of a written instrument, if it be in existence, are to be proved by the instrument itself and not by parol evidence."

From the authorities I have cited, it will be seen that in a great number of instances the principle was applied, and rules regulating its application identical with ours were anciently established; but this by no means proves that all derivative evidence was excluded nor that the law in this particular was the same as at present. The contrary is the truth, as is well illustrated in the history of the admission of hearsay.

If we should trace back to the

reign of Henry IV. the three great primary rules of English evidence, we should find that through all those centuries there was no time, when they were not recognized by the courts as fundamental principles. It was in their application and in secondary rules, that we find the ancient jurists weak.

As has before been stated the rules did not have the binding and obligatory force they now possess. In certain cases where the Judges of the early common law courts thought that the strict application of evidence rules would work hardship or do injustice, they did not hesitate to ignore or evade them. Thus in the State Trials, where the court was often prejudiced against the accused, we find them excluding evidence as irrelevant or improper when produced by the prisoner and admit-

ting the same kind of evidence, when it was in favor of the crown. It was this arbitrary power of admitting or rejecting testimony and regulating the production and effect of evidence, which explains many of the apparent inconsistencies of the old law on this subject.

With the restoration of the monarchy by the ascension of Charles II. to the throne, commences a new era in English legal history during which this discretionary power to a great extent fades out of our law. The independence of the judges, secured by the Act of settlement probably, aided largely in accomplishing this result.

But laxity in applying in the courts as inflexible rules of law the principles of evidence, died hard, as is shown by the language of Lord Chief Justice Lee in the frequently cited case

of Cimychund v. Barker, in 1745. In the opinion Lee L. C. J. says: "I do not apprehend that the rules of evidence are to be considered as artificial rules, framed by men for convenience in courts of justice and founded on good reason. But one rule can never vary; viz. The eternal rules of natural justice. This is a case that ought to be looked at in that light; and I take it, considering evidence in this way, is agreeable to the law of England." [1 Atkins 21.]

Nor had this doctrine entirely disappeared at the beginning of the present century. For it appears, that by custom, the rules of evidence were not applied quite alike in different circuits. Thus the Western Circuit allowed certain kinds of testimony, which, by the Circuit of Oxford, were deemed inadmissible. [Starkie Law of Evidence Vol. I. p. 27. note.]

However, this, the last trace of the old discretionary theory which is really the characteristic difference between the modern and ancient systems of evidence soon became obsolete. And now the rules of evidence are deemed to be binding, and no more the subject of evasion to suit the circumstances of some particular case than are any other rules of the common or statute law.

Hearsay.

Having noted the early recognition by the old courts of some of the underlying principles, the skeleton as it were of our law of evidence; let us go back and see the little there is to be seen of the growth of some of the more subordinate rules.

Long experience has taught the English jurists that there are three kinds of evidence which it is generally

unsafe to admit. These are hearsay, character, and opinion. The unreliability of the former would seem to be apparent to every prudent person; yet in the ordinary every day affairs of life, the greater part of our knowledge of persons, things, and events is gained by this very kind of evidence.

But the courts of to-day cannot have the tests which the individual applies to such evidence. Hence it is excluded.

We have seen that the ancient jury were taken from the immediate vicinity of the place where the cause of action arose, and were chosen, not as at present for their ignorance of the matter in litigation, but for their personal knowledge of the disputed facts. Indeed, it might be said that knowledge of his neighbors affairs was a desirable point in the jurors of those times.

[4 Vaughn Rep. 135.]

Now if we consider, as has just been remarked, the manner in which people obtain the greater part of their every day knowledge of affairs, it will readily be seen how often the verdicts of the old time jury must have been based on hearsay evidence. Every one of the twelve jurymen could rarely have witnessed or personally known all the events which went toward making up the issue they were to decide. But in most cases, undoubtedly, a majority of them had heard the case discussed out of court and knew from the common speech of the people, what was the general belief of the public in regard to the facts.

Our law of evidence, thus, may well be said to have had its origin in hearsay. When the comparative recentness of the change which entirely precludes jurors from lawfully giving verdicts

on their own personal knowledge is remembered, is it to be deemed strange that the rule generally excluding hearsay was of such slow development, as compared with other parts of our law of evidence? Whether that is, or is not, the correct reason, the tardy growth of the rule cannot be denied.

Two hundred years before the reign of Henry IV. the separation of the jury into grand and petit in criminal cases had not been accomplished. But this single body, which was afterwards so divided, occasionally heard the testimony of witnesses sworn before them in open court. And it would seem, that there was then considered to be no objection to the admission of hearsay. As for instance, in a case at Hilary and Easter, decided in the year 1220, one of the questions was whether a certain mare belonged to a man named Hamo. A <u>secta</u> of eight

witnesses swore that they believe the mare belonged to Hamo, and that she was foaled to him: "For all the country say so." [Select Pleas of the Crown p. 129.]

More than three and one half centuries after this case was tried, Sir Edward Coke wrote: "No witness or accuser should give hearsay testimony." A question which would naturally be asked is how and at what time during these centuries of constitutional progress did this rule become established. A like interesting problem would be as to the origin of other rules of evidence. [Coke Inst.]

When the witnesses were first examined on oath in open court, where did the common law judges first obtain the principles, that they early applied in the regulation of the admission of testimony. Did they make them out of whole cloth or were they taken from

some other system of jurisprudence?

Mr Best hints that they might have been borrowed from the civilians of the Middle Ages. There is much which sustains this view. The fact that as late as the close of the fourteenth century, the judges were all ecclesiastics and were well acquainted with the civil and canon law would be ground for such an inference, as also would, the similarity existing between some of the principles of early common law evidence and those applied in the spiritual courts at the time when England was ruled by the Plantagenets. [Wylie's Hist. of England under Henry IV. Vol. I. p. 20. 21. Reeves Hist. Eng. Law Vol IV. p. 82.]

But these are questions which, at the present day, cannot be definitely answered. The most that we can certainly know is that before the time of Henry IV., there could not have been from the nature

of the tribunal through which the law was administered, any complete system of evidence; but by the time Queen Elizabeth had taken the throne, many of its elementary principles were nearly as at present. Still, there were, as we have already seen, differences between the law of evidence as it existed under the Tudors and that law at the beginning of the nineteenth century.

And these changes can be demonstrated in no better way than by tracing the history of the rule rejecting hearsay. We have already partially treated the subject under the rule requiring the best evidence, and of which the law of hearsay is really only an example. However, it is more convenient to pay special attention to spoken hearsay under a separate head, after the fashion of the older writers.

When Coke asserted that hearsay was no evidence, he could not have intended that that statement should be taken without some qualification. He probably only meant that testimony of what another has said should not be given in evidence, when that other might have been produced in court to testify directly. And Lord Lincleys case 14 Eliz., the one cited by Coke in support of his proposition, would give it a no broader meaning than I have stated.

In the case of Stansham v. Cullington, in 1592, it was said, that hearsay was sufficient proof for the purpose of taking a case out of an ecclesiastical court; though a mere opinion would not have been. [Croke Eliz 228 pl. 17.]

Hawkins, in his "Pleas of the Crown"

says: "It seems what a stranger has been heard to say is in no strictness evidence either for or against a prisoner, but it may be used by way of inducement or illustration of what is more properly evidence." [2 Hawk. P. C. cap. 46.]

In Bacons Abridgment, after the general doctrine of the exclusion of hearsay has been expressed, the following qualification is annexed:

"What another has been heard to say, at another time, may be given in evidence in order to invalidate or confirm the testimony he has given in court." [Bacons Abridg. Vol. II. 313]

The foregoing limitations of the rule were held to be law in Sutland v. Reynell in the twenty ninth year of Charles II., where it was ruled that though hearsay was not admissable as direct evidence, it ought

to be allowed to prove that a man was consistent with himself. [1 Mod. 283 pl. 29.]

For a hundred years longer the doctrine of this case as well as the exceptions given by Bacon and Hawkins remained undisputed. [Holliday v. Sweeting Bull. N. P.]

The opinion of the court and the arguments of the counsel in the case of Rex v. the Inhabitants of Eriswell, 1789., contain an exhaustive discussion of the law of hearsay. In this case it was a quaere, whether there were any instances, other than those of prescription and pedigree, where hearsay was admissible. The court were equally divided, and no decision was rendered. [3 T. R. 707.]

A few years later the position taken by the judges holding the affirmative of the quaere was rejected, and the

exceptions to the rule of hearsay were narrowed down to practically its present limits. [2 East 27. 10 East 109.]

Competency of Witnesses.

Few parts of our law have undergone greater changes, during the last two hundred years, than that branch which relates to the competency of witnesses.

On this subject our ancestors entertained views which to us seem wrong in theory and inconvenient and inequitable in practice. As civilization advanced, commerce was extended; and the people, mingling with each other and with the inhabitants of foreign countries in extensive business enterprises, lost many of their violent prejudices and commenced to realize the imperfection of that law which deemed a person having only the slightest interest in the controversy, so unlikely to tell

the truth that his testimony should be absolutely excluded.

When this and like objectionable features relating to the competency of witnesses had attracted the attention of the courts, a change began in the law, slow at first, but more rapid as it advanced and was aided by legislative enactments. To follow in detail the history of its progress in all its mutations, through all the conflicting decisions and opinions, would not only take this essay in point of time beyond the period it was intended to cover, but would of itself fill a fair sized volume. All that can be done here is to give a brief synopsis of a few of the most important phases of the first part of its transition.

The old common law excluded many persons from being witnesses, who at present would be considered as perfectly

competent. The reason for this is not hard to find. We have only to go back to the time, when the witnesses themselves, as has been explained in a preceding section, composed the jury.

The qualification of these jurors from a very remote age were substantially the same as they were in the time of Fortesque, and as they are at the present day. [Fortesque De Laudibus legum Angliae c. 27.] Now, in the early stages of the development of the jury system, the distinction between jurors and witnesses was only just being formed; and it was not strange that the judges of the ancient courts, reasoning from analogy, should apply some of the same tests in determining whether a person was a competent witness, that they were in the habit of putting to jurors.

Apparently this is what they did do. Fortesque, speaking of jurors, frequently calls them tistes, [De. Laud. Leg. Ang. c xxvi. and c xxv.] which helps in showing the common origin of jurors, and witnesses and how late it was, before a sharply drawn distinction existed between the two.

If the old law relating to the competency of witnesses be compared with that in regard to jurors, many resemblances will be noticed, as for example interest in the result of the suit, disability on account of having committed crime; etc. And the old time legal authors, in explaining the law on these topics, often by way of illustration compared the two classes of rules. Thus Lord Coke says: "Often times a man may be challenged to be of a jury that

cannot be challenged to be a witness."
[Coke Lit. 6 b.] And in an argument during the trial of Palmer for high treason at the Kings Bench Bar in 32d year of Charles II., the Attorney General used similar language to the quotation last given from Coke. Whereupon Lord Chief Justice Scroggs asked the Attorney General to give him an instance, save that of kindred, where a man might be a witness and not a juror. The Attorney General replied that a villein might be a witness and could not be a juror.

Many other illustrations might be given to show this comparison; but these will be sufficient, as it is too well known to be disputed. [Su 4 St. L. 349]

Let us see what a few of the leading principles of the law relating to witnesses were and note some of its changes. The disabilities of witnesses

have been divided into two classes: (1) Those which affected his competency and precluded him from giving evidence; (2) Those which affected his credit only, did not prevent his testimony being given, but left the jury to judge of its weight. Gradually, the law has come to regard most disqualifications as of this latter kind.

For convenience of treatment, the first class might be subdivided into four other classes: (1) Where the witness was deemed incompetent, because of his inability or unwillingness to take the requisite oath; (2) Where he had been incapacitated, by reason of having been convicted of some crime or had been excommunicated; (3) Where the person was husband or wife of one of the parties; (4) Where he had certain interests in the controversy.

With regard to the first subdivision, the old law was very strict. Coke intimated in his definition of oath that none but Christians could be witnesses, and further stated that an infidel could not be a witness. [Coke Lit. 6. b.] But Jews, being sworn on the Old Testament, have been allowed ever since the time of the Commonwealth. [Robely v Langston 2 Keb. 314 pl 23. Maddock's Hist of Exchequer 166. 167. 174.]

The great case of Omychund v. Barker, in 1745, decided that a person need not be a Christian or even believe in the Old Testament in order to be a witness, but might be a Gentoo or Mohammedan and should be sworn by the customary oath of the country of which he was a native. Thus the word Christian was blotted out of the definition of oath; and an infidel

could now be a witness if he were not an atheist.

But Quakers, by reason of their unwillingness to take any oath at all, were not permitted to give testimony, until enabled to do so in civil cases by the statute of 7 and 8 William III. This act required only a solemn affirmation, but it expressly excepted criminal actions. In such the disability was not removed until the reign of Victoria.

As to the second sub-class, the common law excluded from being witnesses all persons who had been convicted of an infamous crime. In early times a pardon was held not to remove the disability, but later a person convicted of any felony but perjury "on the statue" was, when pardoned a competent witness. [Brown v. Chrashaw 2 Bulst. 154.

Coke. Litt. 6 b. 3 Inst. 219.] But even in this latter case, a pardon by Act of Parliament would render him competent. One who had been burned in the hand was held to be restored to his credit; this punishment being considered a quasi statuary pardon. [2 St. Trials 523. 524.]

As to crimes not infamous in their punishment, a conviction did not disable the person from giving testimony, but affected his credit only. The old maxim being, "That men who are branded with infamy that they cannot be jurors, cannot be witnesses." [12 Vinnes Abridg. 29 (O)]

Later the infamy of the crime and not of the punishment came to be the test; and persons might be stigmatized by some infamous penalty, as setting in the pillory, yet if the crime itself was not infamous, they were admis

-sible witnesses. [2 Hawk. Pleas of the Crown Ca. 46. Mackenzie v. Mackenzie {3 Wilson 18. 19]

Another class of persons who could not be witnesses were those who had been excommunicated, the reason assigned for their exclusion being, that by the law of the church they are prohibited from human conversation. [Bull N. P. 292.] As late as the commencement of the present century, this last exception remained unrescaled and is a striking illustration of the tardiness characterizing every stage of development in the improvement of our law of evidence.

The third division of our subject, until very recently, underwent so little change that it is hardly worth while to speak of it. The general common law rule was that in both civil and criminal suits, husband and wife were not capable of being witnesses either for or

against each other.

We now come to the last and most important topic in our classification, which is disability because of interest. At one time it was generally held that if a witness had any interest in the question but to him, he was incompetent. Thus it was laid down in some of the earlier cases as a general rule that one commoner cannot be a witness for his fellow commoner, and that in an action on a policy of insurance one underwriter cannot be a witness of another. [Phil Ev. 36.]

Later the rule was construed more liberally. In the case of Bent v. Baker the distinction was clearly drawn between a mere interest in the question and an interest in the event. The action in this case was one on a policy of insurance against an underwriter. Another underwriter on the same policy was held a competent

witness for the defendant; for the reason that he was not directly interested in the event. [3 Term Reports 27.]

The law was now quite well settled as to what constituted a good ground of challenge to a witness; but the courts had done all they could, consistently with their prerogative, to eliminate this imperfection from our law. It was too thoroughly rooted in the doctrines of the unwritten law to be eradicated without Parliamentary aid. And the granting of that aid was an honor destined to adorn the nineteenth and not the eighteenth century.

Conclusion

An endeavor to make a mere essay like this a full and complete history of the English law of evidence from the time of the Lancastrian Sovereigns would be to attempt an impossibility. Many of perhaps the most interesting topics have

of necessity been left wholly untouched, while others have received only a very scanty treatment. But enough has been written to give some idea of its progression.

We have seen how steadily the law of evidence has kept pace with the advance of civilization and how true an index it has been of the customs, religions, and conditions of society, existing during the different epochs of its history.

It is a structure built up almost entirely by the judges, and as with other parts of the common law, is founded on the sound sense and practical wisdom which have resulted from centuries of experience. Its freedom from artificial and arithmetical rules, like those which abound in the civil law, and the ease with which it adapts itself to the ever changing wants of the people, have justly excited

the admiration of all the world.