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COMPETENCY OF WITNESSES.

Jeremy Bentham was certainly a very remarkable man. With all his radicalism, there was so much common sense in his conclusions upon legal reform, that in spite of very strong prejudices they have been gradually making their way both in England and the United States, and in England faster than in the United States. For more than twenty years the professional mind in England may be considered as settled upon the opinion that all arbitrary rules of exclusion of testimony are unjust and inexpedient; and this opinion is not merely founded upon speculation, but created and confirmed by actual experience in the administration of the Law. Practically now in the English courts all persons are competent witnesses, their credibility being left to the jury. In a letter from Sir John Barnard Byles, author of the Treatise on Bills of Exchange—and now one of the justices of the Court of Common Pleas—to the writer of this article, March 3, 1860, he says: "You do me the honor to desire my opinion on the practical effect of the English statutes, tending to the abolition of the incompetency of witnesses. As to the removing all disqualification from wit-

nesses *not parties to the cause*, no difference of opinion exists. The change has proved a salutary reform with no attendant evils. As to admitting the parties themselves, and their wives, it has been found (as might have been expected) that on the one hand, the discovery of the truth is greatly facilitated, but that on the other hand, perjury is greatly increased. Yet I think the general opinion is, that the advantages of the change much outweigh the evils. Certainly my experience at the bar and on the bench has led me to that conclusion decidedly, yet I would not extend the capacitation to defendants in criminal cases, nor to inquiries into adultery between man and wife."

England, however, did not jump at once to the conclusion finally reached, but proceeded slowly and cautiously step by step, trying the effect of one change before proceeding to adopt another more extreme and radical. First came the statutes 3 and 4 William IV. c. 42; which enacted, that "in order to render the rejection of witnesses on the ground of interest less frequent, if any witness should be objected to as incompetent, on the ground that the verdict or judgment in the action would be admissible in evidence for or against him, he should nevertheless be examined; but in that case the verdict or judgment should not be admissible for or against him, or any one claiming under him." A much greater change was, however, made by the statute 6 and 7 Vict., c. 85; which removed incompetency by reason of incapacity from crime or on the ground of interest in all persons except the parties to the suit, or the persons whose rights were involved therein, such as the real plaintiff in the fictitious action of ejectment, or any person in whose immediate and individual behalf any action was brought or defended, or the husband or wife of such persons. These provisions having been found to operate beneficially, the statute 14 and 15 Vict., c. 99, was passed, by the first section of which the proviso in the statute 6 and 7 Vict., c. 85, (which excluded all persons directly interested in the suit) was repealed. By the second section, the parties and persons in whose behalf any action, suit, or other proceeding is brought or defended, are made (except as therein excepted) competent and compellable to give evidence on behalf of either or

any of the parties to the suit in any court of justice. The third section of the statute provides that it shall not render any person charged with an offence, competent or compellable to give evidence against himself, nor shall it in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband. The fourth section of the statute further provides, that it shall not apply to any proceeding instituted in consequence of adultery, or to any action for breach of promise of marriage. It was decided soon after it had become law, that the second section of the statute did not render a wife admissible as a witness for or against the husband; and in consequence, the statute 16 and 17 Vict., c. 83, was passed, enacting that the husband and wife of the parties to any suit, or of the person on whose behalf any such proceeding is brought or defended, shall thereafter be competent and compellable to give evidence on behalf of either party or any of the parties. Neither husband nor wife is compellable, however, to disclose any communication made or received during marriage; and neither party is a competent witness in a criminal proceeding, or in any proceeding instituted in consequence of adultery.

Such is a brief synopsis of British legislation upon the subject; and now the important question is, whether some or all of these changes ought not to be introduced into the jurisprudence of the United States. In the State of New York they have been all introduced—parties are competent for themselves, and compellable to testify for the adverse interest. So far the change seems to have worked well in that State.

It would seem the dictate of prudence, that such alterations should be proceeded in gradually and cautiously, as they have been in England. The public should be accustomed to such important changes by degrees. The danger is, that the sudden throwing open the doors of evidence might at once admit too great a crowd, and the profession and community might become disgusted with some of the immediate consequences, and the system be repealed as suddenly as it was enacted, without having had a fair trial.

There are dangers and inconveniences attending it, as well as advantages, and it is only by carefully weighing them all, which can only be the work of time and experience, that a sound estimate of the balance on one side or the other can be arrived at. What should be done at first, and all that should be done, should be to abolish the objection to incompetency, arising from interest or infamy, and if after some years of trial, that change should be found to be a real reform, it will be time enough then to open the door still wider. It may be that a system which is found suitable for England would be found not suitable for this country, and then it would be comparatively easy to retrace our steps. There is the more force in this, as the disclosure of facts in the knowledge of parties may be obtained by means of a bill of discovery, in aid of legal proceedings. Thus practically, a party is *compellable* though not *competent* to testify.

The civil law abounded in restrictions upon the admission of witnesses, but it had one merit not possessed by the common law—that of consistency. Its leading principle was *exclusion*, wherever any possible motive existed, which could operate to produce falsehood. It extended its prohibition to relations (parents and children, by the Roman law—in the French law, collaterals, even to the fourth degree;) to servants and domestics; freedmen and clients; advocates, attorneys, tutors, curators, persons who had been concerned in criminal prosecutions with either party, and finally even those who by eating and drinking with the party by whom they were produced, had thrown themselves open to the suspicion of perjury. But the civil law is a system to which trial by jury is a stranger, and great power and discretion are given to the judge, both in admitting and excluding testimony, and in deciding upon the weight which is due to it.

In England, those barbarous modes of judging of controversies which belonged to the feudal system, the appeal to the special interposition of Providence, the ordeal, the corsned or morsel of execration, and the wager of battle continued long, but were finally superseded by the trial by jury. The wager of law, which lasted the longest, with its jury of compurgators, may have been the

cradle in which this last mode of trial was originally nursed. "He that has waged or given security to make his law, brings with him into court eleven of his neighbors—a custom which we find particularly described so early as in the league between Alfred and Guthrun, the Dane—for by the old Saxon constitution every man's credit in courts of law depended upon the opinion which his neighbors had of his veracity. The defendant, then standing at the end of the bar, is admonished by the judges of the nature and danger of a false oath. And if he still persists, he is to repeat this or the like oath: 'Hear this, ye justices, that I do not owe unto Richard Jones the sum of ten pounds, nor any penny thereof, in manner and form as the said Richard hath declared against me. So help me God.' And, thereupon, his eleven neighbors or compurgators shall avow, upon their oaths, that they believe in their conscience that he saith truth; so that himself must be sworn *de fidelitate*, and the eleven *de credulitate*. It is held, indeed, by later authorities, that fewer than eleven compurgators will do; but Sir Edward Coke is positive that there must be this number, and his opinion not only seems founded upon better authority, but also upon better reason; for as wager of law is equivalent to a verdict in the defendant's favor, it ought to be established by the same or equal testimony, namely, by the oath of *twelve* men. And so, indeed, Glanvil expresses it, *jurabit duodecima manu:* and in 9 Henry III., when a defendant in an action of debt waged his law, it was adjudged by the court *quod defendat se duodecima manu*. Thus, too, in an author of the age of Edward the First, we read *adjudicabitur reus ad legem suam duodecima manu*. And the ancient treatise, entitled *Dyversité des Courts*, expressly confirms Sir Edward Coke's opinion." 3 Blackst. Com. 343.

In the first rude state of the trial by jury there are strong grounds for believing that the twelve men drawn from the immediate vicinage of the parties, or rather of the fact to be determined, decided in most instances from their own personal knowledge. Hence arose, as we know, the necessity that a place as well as time should be avowed in pleading every fact. We know, too, that upon one issue, that arising upon the plea of *non est factum*, the wit-

nesses named in the deed, as they usually then were, instead of its being subscribed by them, were required to be summoned as jurors, joined in the inquest, and united in the verdict. "But seeing the witnesses named in a deed shall be joined to the inquest, and shall in some sort join in the verdict, (in which case, if jury and witnesses find the deed that is denied to be the deed of the party, the adverse party is debarred of his attaint, because there is more than twelve that affirm the verdict,) it is reason that in that case of joining, such exception shall be taken against the witness as against one of the jury, because he is in the nature of a juror:" 1 Inst. 66. "Trial by jury," says Sir Francis Palgrave, "according to the old English law, was a proceeding essentially different from the modern tribunal still bearing the ancient name, by which it has been replaced, and whatever merits belonged to the original mode of judicial investigation—and they were great and unquestionable, though accompanied by many imperfections—such benefits are not to be exactly identified with the advantages now resulting from the great bulwark of English liberty. Jurymen of the present day are triers of the issue: they are individuals, who found their opinion upon the evidence, whether oral or written, adduced before them; and the verdict delivered by them is their declaration of the judgment which they have formed. But the ancient jurymen were not empannelled to examine into the credibility of the evidence; the question was not discussed and argued before them; they, the jurymen, were the witnesses themselves; and the verdict was substantially the examination of those witnesses, who, of their own knowledge, and without the aid of other testimony, afforded their evidence respecting the facts in question, to the best of their belief. In its primitive form, a trial by jury was, therefore, only a trial by witnesses, and jurymen were distinguished from any other witnesses only by the custom, which imposed upon them the obligation of an oath, and regulated their number, and which prescribed their rank and defined its territorial qualification from whence they obtained their degree and influence in society." Palgr. 243. "If any of those knights, who appeared upon the grand assize, happened to be unacquainted with the truth of the

matter they were rejected and others chosen, until twelve were unanimous. If the jurors professed to know the truth, but dissented from one another in their statements of the fact, the array was 'afforced,' that is to say, other witnesses were sought for, cognisant of the disputed allegation, until twelve at least could be found, who would give testimony, for that number was deemed almost indispensable." Ib. 247. "Trial by jury was an appeal to the knowledge of the country; and the sheriff, in naming his panel, performed his duty by summoning those individuals from amongst the inhabitants of the country who were best acquainted with the points at issue. If, from peculiar circumstances, the witnesses of a fact were previously marked out and known, then they were particularly requested to testify. Thus, when a charter was pleaded, the witnesses named in the attesting clause of the instrument, and who had been present in the folk mote, the shire or manor Court, when the seal was affixed by the donor, were included in the panel; and when a grant had been made by parol the witnesses were sought out by the sheriff and returned upon the jury." Ib. 248.

When the system, thus sketched, came subsequently in the progressive advancement of population and wealth to be of necessity changed, reasons existed of sufficient force to lead to the adoption of exclusionary rules.

It was, in effect, but applying, with some modification, the rules in regard to the competency of jurors, who were, as we have seen, both witnesses and triers, and, therefore, required to be *omni exceptione majores*, to witnesses examined before them. It is certain, however, that from the earliest periods, of which authentic records have reached us, the judges, in whose presence the trial took place, have exercised the power of determining what witnesses shall be heard or excluded, and what evidence shall be submitted to the jury. The jury was usually composed of rude and illiterate men. It was supposed to be advisable to keep from them altogether, not only all which was not clearly relevant to the issue, but every thing coming from sources open to suspicion. Thus grew up a technical and artificial system: and as jurors became more capable of exercising their functions intelligently, the courts

have struggled constantly, so far as they could consistently with the settled principles of such a system, to open the door as wide as possible to the admission of all evidence, calculated to assist in attaining equal justice in the controversy. Hence, so many rules and so many exceptions to every rule: so many chapters where the exceptions cover much broader ground than the rule itself.

Let us consider briefly the practical operation of the simple change proposed of abolishing all objections to the competency of witnesses on the score of infamy and interest.

I. Of infamy. It may be stated briefly, as the result of the cases, that judgment against any person for treason, felony, or the *crimen falsi*, renders him incompetent to testify. The *crimen falsi* includes forgery, perjury, subornation of perjury, and other crimes affecting the administration of justice. It is not competent for a party, when a person is offered as a witness, to give evidence to prove him to have been guilty of such a crime. Even the verdict of a jury, if not followed by judgment, is inadmissible. Nor will even a judgment of the court of a foreign state render him incompetent, though it is admissible, to affect his credit. If a domestic judgment be reversed, though for mere irregularity, it restores his competency, and a pardon completely rehabilitates him, except when the statute, as a part of the punishment, expressly imposes the incapacity.

Surely, the mere statement thus given condemns the rule of exclusion as arbitrary and unreasonable in the highest degree. The worst criminals, if they have no motive to commit perjury, will prefer to tell the truth, and the fact of legal infamy, though very strong evidence, if such motive be shown to exist, that they are wanting in moral principle to resist it, proves nothing, standing alone, even as to the probability of perjury. The judgment should in all cases be admissible to affect credibility—and the very distinction established between a foreign and domestic judgment is a confession of the unreasonableness of the rule of exclusion. It is a distinction without a difference, so far as any reason bearing upon the probability of perjury is concerned. In like manner the reversal of the judgment for error, not being the award of a new

trial on the merits, surely ought not, upon any sound reason, to restore the capacity of the witness. The moral taint is not wiped out by such a reversal. Nor has a pardon any such effect. If, therefore, a heinous crime should be committed, a gross fraud or personal injury perpetrated, or important money transaction take place, and no one present but a legally infamous person, however much his testimony and all the circumstances corroborating its truth, would leave no doubt upon the mind, yet, as he is incompetent to testify, the ends of public and private justice are all prostrated, because he might commit perjury. So may any witness, convicted or unconvicted, and the business of the tribunals is to sift evidence, to weigh its credibility, and to decide upon all the light which can be thrown upon the subject. Had the incapacity been confined to the single case of a conviction of perjury, something plausible might be urged in its favor. But why should treason exclude, and riot not; murder exclude, and assault and battery not; robbery exclude, and embezzlement or cheating not. The list of offences might be gone over, and when you came to settle what crimes do and what do not indicate that want of moral principle which would probably produce perjury, no line of demarcation can possibly be drawn.

II. Interest. The rule is that a present interest in the event of a suit excludes the witness. But it must be a *certain* interest, and then no matter how small it is. If *contingent*, and no matter how slightly contingent, then, without reference to its character or amount, it is an objection to credibility only and not to competency. The only son and heir apparent of a party, who is claiming or defending a valuable estate, is heard without objection. A gentleman of known probity, of high and honorable character, of liberal education, of wealth and station, whose word in the society in which he moves would be taken as readily as his bond, is excluded because he has some trifling pecuniary interest which he is unwilling, and which it would be unreasonable to expect him to release, while a poor wretched dependent of one of the parties, a servant or retainer, who has no other resource but his bounty or favor for his daily bread, is heard without scruple.

A debtor in failing circumstances makes a bill of sale of his goods to a friend. They are levied upon by one of his creditors and the bona fides of the bill of sale is tried between the vendor and the creditor. The legal interest of the debtor is, that the creditor should recover; he is, accordingly, an incompetent witness for him, but competent for the vendee in the bill of sale. Every day's experience proves, that if the rule of exclusion is to be based upon the probabilities of falsehood, the case should be reversed.

It is too low an estimate of human nature to presume that the force of pecuniary interest will generally or even probably lead to the commission of wilful perjury. The character of a man is of more value in the society where he lives, than the amouut in controversy in any ordinary case. Men not only know this, but they feel it. The hazard of detection is great, and would be increased by the abolition of the exclusionary rule. In fact, a new and valuable security would thus be gained for the truth of evidence. Pride of character is a more powerful principle of action than love of money, and when it comes to the use of such means as falsehood and perjury, it will instinctively shrink back and betray itself in all but the most abandoned wretches, whose characters, in general, may easily be proved *aliunde*. On the other hand, for one case gained by perjury ninety-nine have been lost on account of the parties being precluded, by artificial rules, from submitting all the facts to the tribunal to which is committed the decision of their cause.

No stronger exposition of the inconvenience of the rule of exclusion could be made than that which would be afforded by a digest of all the cases, *pro* and *con*, which have been decided in this country and England, upon the subject of the incompetency of witnesses arising from interest. How often are collateral issues thus introduced into a cause, and frequently, after years of litigation, the decision reversed in the appellate court, and sent back, because a mistake was committed in the admission or rejection of a witness on an objection of this sort—and how often are other witnesses introduced to prove a witness incompetent, when, if the same rule

was applied to them, which it is not, issue would branch out upon issue, and the decision become complicated beyond measure.

Mr. Bentham here, as in his other opinions, while he has treated the general subject with great, though eccentric ability, in his elaborate work in five volumes on Judicial Evidence, has gone to extremes. He is for the admission of everything, however remote, whether in the witness's own personal knowledge or the mere hearsay of others, even cotemporaneous declarations, letters, and papers of either party tending to throw light upon the subject in dispute. There certainly ought to be some barriers interposed against the manufacture of evidence; at least care should be taken not to hold out encouragement to such practices. Such would inevitably be the consequence of interfering with those most salutary rules, which forbid the introduction of mere hearsay, what may have been said by persons not produced in the face of the court and subjected to cross-examination, and to declarations of the party himself, which may be cunningly framed with an eye to a future lawsuit. As to the question of admitting parties to the suit as competent witnesses, it had better be deferred until the experiment of admitting those affected with infamy or interest is first tried. The rule adopted in New York, which allows a party to call his adversary to the stand, and extract from him, if he can, material facts, and yet leaves him at liberty still to contradict him, seems to be rather a dangerous weapon in the hands of an unscrupulous man. It would be preferable that the pleadings between the parties, confirmed by their respective oaths or affirmations, ascertaining thus what matters of fact were admitted or denied, should be submitted, or, at all events, that the old and tried method by a bill of discovery should be retained as sufficient to answer every valuable purpose. G. S.

In the Supreme Court of Vermont.—General Term, Nov., 1861.

CLARK COURSER *vs.* NOAH POWERS.[1]

1. A justice of the peace, in an action against himself for an arrest under a warrant issued by him, cannot justify, if he had not, before such arrest, taken the oath of office prescribed by the Constitution of the State.
2. Nor will a subsequent administration of the official oath, on the same day of the arrest, enable him to do so, and the true time when such oath was taken may be shown.
3. Neither will the taking of the official oath under an election to the same office for the previous year enable him to justify; the official oath is only commensurate with the appointment, and covers only the existing term of office.

This was an action for trespass for false imprisonment, and was tried by the Orange County Court, at the June term, 1860. The defendant pleaded not guilty, and gave notice of a special justification.

It appeared that on the 19th day of July, 1859, the grand jurors

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1 We are indebted to the courtesy of Chief Justice Poland for the following very able and satisfactory opinion and review of the cases, upon a question of considerable practical importance to public functionaries. The deference expressed in regard to a doubt of our own, thrown out by way of argument, in the 29 Vermont Reports, is more than full compensation for our loss, in removing both the doubt and difficulty, at the same time. We feel the less disposition to attempt any counter argument, since the decision is evidently in the right direction, in attempting to make something of official oaths, which the practice of public functionaries seems, sometimes, to be doing all it can, wholly to abrogate. My own former doubts, whether the oath of office could any longer be regarded as matter of substance, was evidently based mainly upon the results of practical experience, in seeing the utter uselessness of such a ceremony, which is wholly without any penal sanction, and, in the majority of cases, apparently, quite as void of all religious sanction, binding the conscience of the incumbent. But we admire to find Courts attempting to hold on firmly by the principles upon which the foundations of our Government are laid; even while their house is tumbling about their ears, in consequence of the utter disregard of the spirit and force of those dead forms into which it is certainly a commendable zeal to attempt to infuse some shadow of life and energy. We say, with the full appreciation of the solemnity of our words, God prosper the effort. I. F. R.

of Thetford made complaint to the defendant, as justice of the peace, against the plaintiff, and the defendant, as such justice, thereupon issued his warrant against the defendant, who was arrested thereon about eight o'clock in the morning, and was detained by the officer until near night, when he gave bail and was released.

It appeared that the defendant was duly appointed and commissioned as a justice of the peace for the year commencing December 1, 1858, but had not taken the oath of office when said warrant was issued, but did take such oath about two o'clock in the afternoon of said 19th day of July, 1859.

It also appeared that the defendant held the office of justice of the peace for the previous year, and that within that year he duly took the oath of office.

The defendant objected to the evidence offered by plaintiff to prove at what time the official oath was administered to the defendant on said 19th day of July, 1859, and the Court received the same, subject to such objection.

It was thereupon agreed by the parties that the Court should assess the plaintiff's damages, and that, if the Supreme Court should decide that such evidence was admissible, and that upon the whole case the plaintiff was entitled to recover, the plaintiff should recover final judgment for such damages in the Supreme Court.

The Court assessed the plaintiff's damages at five dollars.

The County Court gave judgment for the defendant.

The plaintiff filed his exceptions thereto, and brought the case into this Court.

The case was argued by

Howard and *Collins*, for plaintiff, and by

C. W. Clarke, for the defendant.

The opinion of the Court was delivered by

POLAND, Ch. J.—The question presented by this case is, whether a justice of the peace can justify an arrest upon a warrant, issued and signed by him, before he has taken the official oath required by the Constitution of the State. The defendant insists that it was not necessary that he should take such official oath in order to

justify under the warrant; that this requirement of the constitution is merely directory.

If this cannot be maintained, then the defendant contends that the oath taken by him, as a justice of the peace for the previous year, when he held the office, extended over, and covered the succeeding year, when the warrant was issued; and also, that the administration of the oath subsequent to the arrest of the plaintiff, on his warrant, had relation back, and covered the whole of that day, upon the doctrine that in law there are no fractions of a day.

Upon the two grounds last named the Court have experienced no difficulty. Where a person is elected, or appointed to an office for a fixed term, and takes the oath of office, the oath is commensurate with the appointment, and covers that official term, and no more. If the same person be re-appointed or re-elected, he holds his office under the new appointment or election, and must be inducted into office in the same manner as at the first. This was held to be the law in relation to official bonds, in the case of *Orange County Bank* vs. *Mann et al.*, on the present circuit. The doubt in that case arose from the general language made use of, which, without any violence, might include the performance of the same duties under another election. Nor do we regard this as a case in which the rule, that in law there are no fractions of a day, properly applies. This rule has in general been held applicable to transactions of a public character, such as legislative acts, or public laws, or such judicial proceedings as are matters of record, when parol testimony would be inadmissible to prove any thing in relation to them, and if it were received, and an issue of fact allowed to be made in every case when they came in question, would lead to uncertainty and confusion. Hence, as a rule of policy, as well as of law, the day on which such act was done, as shown by the record, is either wholly included or excluded from its operation. But this doctrine is never applied in mere private transactions, involving rights between individuals, either of property, or for an injury to the person of one by the act of another; there the true time, when an act was done, or a right or authority acquired by one, may always be shown. We do not regard the taking of the official oath

by the defendant as being an act of that public character, coming within the rule, and if the arrest of the plaintiff, upon the defendant's warrant, was an illegal and unjustifiable act, as against the defendant, if he had not taken the oath when the arrest was made, we think it was admissible for the defendant to prove when such oath was taken.

The whole subject, as to when this rule of law applies, is thoroughly examined and discussed by that eminent jurist, the late Judge Prentiss, in a case before him in the District Court, reported in the 20th Vermont Reports, 653, and we refer to that opinion as embodying the true view of the law on the subject.

We are, therefore, brought to the direct question, whether the defendant can justify the arrest of the plaintiff, upon his warrant, he not having taken the official oath. The Constitution of the State, second part, section 29, provides that every officer, whether judicial, executive, or military, in authority under this State, before he enters upon the execution of his office, shall take and subscribe the oath of allegiance to the State, and the oath of office, and gives the form in which each shall be administered. The defendant having been duly elected and commissioned as a justice of the peace, held the office under such an apparent title, that if he assumed to act as such, he was undoubtedly a justice *de facto;* so that as to third persons his acts must be regarded as legal, and could not be brought in question. But here the defendant, himself, is called upon in an action to justify an arrest made by his command, and all the cases agree that in such case the officer must show every thing done necessary not only to his legal election or appointment, but also to his legal induction into office.

The reason for this distinction is obvious, and founded in good sense and substantial justice. Third persons, who are called upon to act under the authority of public officers, or who have occasion to avail themselves of the official aid of such officers, are not supposed to know, or to have the means of readily ascertaining, whether such officers have complied with all the necessary legal requirements to qualify them to perform their duties, but if such officer has been legally elected or appointed, and is in the per-

formance of the duties of his office, they have a right to presume that he has taken all the necessary steps to his due qualification.

But the officer himself has no such immunity, because there is no occasion for it, as he must always know whether he has complied with the requirements of the law in his induction or qualification to the office.

This question has been before this Court to some extent in former cases, though not expressly and directly adjudicated. In *Adams* vs. *Jackson*, 2 Aik. 145, the plaintiff claimed title to the land in question, under a deed from a constable who had sold the land for taxes.

The record was produced of the election of the constable, upon which was the word *sworn*. It was considered doubtful whether this was sufficient evidence that the constable was legally sworn, but the Court held that the constable being in office under a valid election, he was *de facto* an officer, and the legality of his acts could not be called in question between third persons. The distinction between officers *de facto*, whose official acts bind third persons, and officers *de jure*, who may themselves justify their official acts, is very clearly defined by Skinner, Ch. J., and the whole argument of the opinion proceeds upon the ground, that in order to make an officer *de jure* he must have taken the official oath. *Andrews* vs. *Chase*, 5 Vt. 409, was an action of trespass against a highway surveyor for property taken and sold for the payment of taxes against the plaintiff.

The defendant was sworn before a justice of the peace on a day subsequent to the meeting at which he was elected. The plaintiff claimed that it should appear by the record that he was sworn, and that the oath should have been administered by the town clerk, or one of the selectmen. The Court held that the plaintiff was properly sworn, and that it need not appear of record. In this case also, it is rather assumed than decided, that unless the defendant had been properly sworn, he could not justify his act of taking the plaintiff's property.

In *Putnam* vs. *Dutton*, 8 Vt. 396, it was objected to an auditor's report that it did not appear therefrom that the auditor was sworn,

but proof was made in Court that he was in fact sworn. The Court decided that it need not appear from the report that the auditor was sworn, and that unless the contrary was proved, it would be presumed he was, as the statute then required it. In the opinion of the Court, Redfield, J., says: "It is true the statute requires the auditor to be sworn, and if he proceeds without being sworn, and this is made to appear in the proper mode, the report could not be accepted."

In *McGregor* vs. *Balch et al.*, 14 Vt. 428, the question was whether the official acts of a justice of the peace, who also held the office of deputy postmaster, were valid between third persons. Williams, Ch. J., who delivered the judgment of the Court, discusses at length the distinction between an officer *de facto*, whose acts are valid, as respects third persons, but invalid, as respects himself, and an officer *de jure*, who can himself justify, and cites with approbation the case in 5th Mass., where it was held that an officer not duly sworn could not justify his acts in an action against himself. The same question has been before the Courts in other States, and by implication, at least, decided.

Colburn vs. *Ellis et al.*, 5 Mass. 427, was an action for an assault and false imprisonment; the defendants justified, as parish assessors, and the point directly decided by the Court was, that the record of the official oath of the defendants, did not show that they were properly sworn into office, and judgment was rendered for the plaintiff. No question was made, as appears by the case, either by Court or counsel, but that this was necessary to enable defendants to justify the arrest of the plaintiff.

In *Wells et al.* vs. *Battelle et al.*, 11 Mass. 477, the direct point decided was, as to the power of a parish clerk to amend his record, so as to show that the defendants were duly sworn as assessors.

In *Bucknam* vs. *Ruggles*, 15 Mass. 180, it was held that a levy of an execution upon real estate, made by a deputy sheriff, who had not been duly sworn as such, was valid between the debtor and creditor, upon the ground that he was a good officer *de facto*. Both these cases, by implication, clearly recognise the doctrine, that to make a public officer, such *de jure*, so that he can protect

himself under his official shield, he must take the official oath, when one is required by law.

In *People* vs. *Collins*, 7 Johns. 549, it was held that the acts of commissioners of highways, who had not been sworn into office, were valid as to third persons, on the ground they were officers *de facto*.

In New Hampshire the question seems to have been more directly decided. The Constitution of that State, is very similar to our own in this respect, except, that it does not apply to town officers. But by statute in that State, all town officers, before they enter upon the performance of official duties, are required to take the official oath.

In *Johnston* vs. *Wilson et al.*, 2 N. H. 202, it was decided that in an action against a town collector for property seized for taxes, the defendant could not justify the taking unless he had been duly sworn into office. The arguments of the counsel are not given, so that it cannot be known what ground was claimed, but the point is discussed with the usual fulness of learning that characterized Judge Woodbury, and is directly decided.

In *Proprietors of Cardigan* vs. *Page*, 6 N. H. 182, it was decided that a sale of lands by a town collector for taxes was void, unless it appeared by the record that such collector had taken the oath prescribed by law. It will be noticed that under a similar state of facts, this Court held, in *Adams* vs. *Jackson*, *ubi sup.*, that the acts of the collector were valid as an officer *de facto*.

In a subsequent case, *Blake* vs. *Sturtevant et al.*, 12 N. H. 567, Upham, J., speaking of this case, says: "This case is now qualified in those instances where third persons are interested, where it is merely necessary to show an officer *de facto*, but the rule is correctly laid down in all cases where an individual must be shown to be an officer *de jure*." The last named case was an action against the selectmen of Keene for causing the plaintiff's oxen to be sold for taxes, and it was held that the defendants could not justify their official acts, without proving that they were duly qualified by taking the oath prescribed by law, that without this they were not officers *de jure*.

In *Cavis* vs. *Robinson*, 9 N. H. 524, it was decided that a collector of taxes duly elected by the town, could not justify a taking of property for taxes, unless he had duly taken the oath of office. The same principle was again affirmed in *Ainsworth* vs. *Dean*, 1 Fost. 400, and in several other cases in New Hampshire. In Maryland their State Constitution has a provision in nearly the same language as our own, requiring all officers to take and subscribe the oath of office before they enter upon its duties.

In *Thomas* vs. *Owens*, 4 Maryland, 189, the question arose in the following form: The plaintiff was elected controller of the treasury on the 5th of November, 1851, and duly commissioned, but did not take the official oath until the 24th of February, 1852. The plaintiff claimed that his salary commenced at the time of his election and date of his commission. The defendant, who was treasurer of the State, refused to pay, except from the time the plaintiff took the oath of office, and the question before the Court was, which was right. The Court decided in favor of the defendant. Le Grand, Ch. J., said, "Now we hold that the late controller could not be considered as an officer until he was qualified by taking the oath prescribed by the fourth section of the first article. After his election and commission by the Governor, he had the right to invest himself with the powers and entitle himself to the salary, by qualifying in the manner pointed out by the constitution, but until he actually did qualify, he was no more controller than any other citizen, his qualification being an indispensable prerequisite to his investiture with the authority and responsibilities of the office." We have found no decision in conflict with the cases above referred to.

In considering the effect of this provision of the constitution, it is proper to refer to the common law on the subject, and the importance which had ever been attached to oaths in England, from whence our own law is mainly derived. By the common law all officers of justice were bound to take an oath for the due execution of justice; though it was held that if such *promissory* oath were broken, the violators could not be punished for perjury, but

should be punished by a severe fine: *Jac. Law Dictionary, title Oath*, Wood's Inst. 412.

The acts of Parliament requiring oaths of every person appointed to perform any office, trust, or duty, are very numerous, and not only for such purposes, but oaths applying to particular classes, and sometimes to the whole people, as the test oaths, oath of supremacy, &c., important events, not only in the legal, but also in the political history of that Government. It was ever regarded as an important guaranty for the due performance of any public office or duty, that the person to perform it should, in a public and solemn manner, call God to witness his promise to be just and faithful in the administration of it.

Such being the estimation of the importance and value of oaths, when our Constitution was formed, we cannot suppose that our ancestors, in making this requirement and express provision of the fundamental law of the State, intended it to be merely directory, and to be obeyed or not, at the pleasure of her public servants. Their idea was similar, as we think, to that expressed by a very ancient English writer, who says, "Anciently, at the end of a legal oath was added, *so help me God at his holy dome*, i. e., judgment, and our ancestors would not believe that a man could be so wicked as to call God to witness any thing which was not true, but that if any one should be perjured, he must continually expect that God would be the revenger." We are of opinion, therefore, that the official oath required by the constitution is a necessary requisite to the legal induction into office, and that any person who has been legally elected or appointed to such office, and assumes its duties without taking the oath, cannot be regarded as an officer *de jure*, and cannot, therefore, in an action against himself justify under his official character. This view, we believe, is not only in accordance with principle and authority, but also in harmony with the general understanding and practice of the people, of the legal profession, and judicial tribunals of the State ever since the constitution was formed. We have examined this subject with the more care, in consequence of an opinion advanced by a late distinguished judge of this Court, in giving the judgment of