

THE
AMERICAN LAW REGISTER.

FEBRUARY 1879.

INVIOIABILITY OF TELEGRAPHIC CORRESPOND-
ENCE.

PERHAPS nothing in recent legal history is more remarkable than the general acquiescence of the public in the asserted right to bring into court and before legislative bodies, as instruments of evidence, the private messages sent by telegraph. It is remarkable not only because legal analogies and precedents seem to be against the right, but also because the power to make this use of telegrams is liable to enormous abuses, and seems to be opposed to one of the first and most vital principles of liberty.

Telegraphy is a new business in the world. When it first began it became manifest at once that a very considerable proportion of the correspondence of the world must be done by it, and the question arose how it should be dealt with by the law. Governments then controlled the carriage of correspondence, and the telegraph assumed the position, to some extent at least, of a rival of the government. It would perhaps have been competent for our own government at that time to do what the government of Great Britain has since done—take charge of telegraphy as a part of the postal service, and wholly exclude competition. The government did not see fit to do this. On the contrary it welcomed the telegraph as an important and useful auxiliary, and the states proceeded to pass laws for its regulation, and to lend aid in its extension. It may justly be said then that public policy favored and encouraged the telegraph.

For the most part telegraph companies were left to make rules and regulations to govern their own business, and they have established many rules which have passed under judicial supervision, but with which we are not concerned now. One rule, which has probably come into existence by usage rather than by legislation, is that under which the original of any message sent and a copy of the reply are left in possession of the telegraph company. The chief and possibly the only purpose of this is that the telegraph company may have in its own hands the means of protection, in case it is charged with mistakes in transmitting messages, or with sending forged or fraudulent despatches. The most important regulation which has been established by statute is that inviolable secrecy shall be preserved in respect to messages by those through whose hands they shall pass; severe penalties being imposed upon operators who violate this injunction. Government has thus done all that was in its power to give to parties conducting correspondence by telegraph the advantages they would have in conducting private correspondence by the mail, while they also have the additional advantage of expedition.

There are thus to every telegraphic despatch three parties—the sender, the receiver and the telegraph company. No doubt each of these has a certain control in respect to the message. For their own purposes the sender and receiver may make use of it as they would or might of any private letter which had passed between them. The telegraph company must preserve inviolable secrecy in respect to it, but if the company were to be sued for error or negligence in transmitting it, the message would thereby be brought before the court, and the company might make use of it for its own protection. The privilege of secrecy is the privilege of the parties, and would necessarily be waived by either if he were to complain of the company's action in respect to it. It is customary to provide by statute that the operator shall transmit all messages in the order in which they are received; and it has been held that he has no authority to refuse to transmit any message, even though it be sent to favor an immoral purpose, (*Western Union Telegraph Co. v. Ferguson*, 57 Ind. 495), any more than a postmaster has to detain a letter for a similar reason. Of course it is competent to provide by law—as is sometimes done—that such telegrams may be refused.

The question to which attention is now directed is whether the

telegrams, thus left in custody of telegraph companies, may, by any process of law, be brought into court without the consent of either of the parties, in order that they may be used as evidence in suits or prosecutions instituted by others. In discussing this question it will be assumed that there is no express prohibition of law, and that if prohibited at all it is by the penalty which is imposed for voluntary disclosures, or by those maxims of the common law by which individual liberty is guarded and protected. The question is therefore one of constitutional law; a question, too, not dependent so much upon the words of any express provision of the Constitution as upon the previous history in the light of which constitutions must be interpreted.

As popular and legislative power increases in this country, less attention is paid to the English precedents by the aid of which constitutional liberty has been established. We come, perhaps habitually, to look upon these as having been useful in setting bounds to the authority of the crown; forgetting that upon them may still depend the liberty of the citizen. Constitutional discussions take a direction somewhat different from that in former days: they involve technicalities more; the construction of words and phrases, and the extent of prohibitions, while the general principles which are the animating spirit of constitutional law, and without which the organic forms may support despotism as readily as liberty, are passed by with little notice. Such a course would be proper enough if those principles had become so firmly settled and fixed in the minds and consciences of all classes of officials as to be habitually recognised and observed; but no thoughtful and observant person will venture to affirm that he believes this to be the case. On the contrary, a sentiment prevails which favors the exercise of doubtful powers. The popular impression, though it may not often find voice, is that, when the monarchical principle was eliminated from the Constitution, dangers to personal liberty were in great measure precluded; and one who often appeals to ante-revolutionary precedents, against oppressive official action, is likely to be charged with excessive conservatism, and perhaps with pedantry. Under the influence of this impression popular majorities have freely exercised questionable powers, legislation has been too little regardful of private rights, and executive authorities, when the popular feeling has accompanied their action, have often exercised, with little criticism, authority that would not be acquiesced

in without protest in Great Britain. The decision in *Milligan's Case*, 4 Wall. 2, did very much to check a tendency in this direction, but did not by any means overcome it. And this must be our apology for calling attention briefly to precedents which we may suppose are familiar, but the full import of which is not so generally acknowledged as it should be.

Our constitutional provisions for the protection of private papers may unquestionably find their best explanation in *Wilkes's Case*, and in the legal proceedings which grew out of it. It will be remembered that, enraged by the attacks of the "North Briton" upon the prerogative, Lord Halifax, Secretary of State, issued a general warrant, which commanded the messengers, taking with them a constable, to search for the authors, printers and publishers, and to apprehend and seize them, together with their papers. It was under the pretended authority of this warrant that the premises of Wilkes were invaded, his desks broken open, and his papers carried off. All the cases which grew out of this transaction turned upon the validity of the warrant, as a protection to the parties executing it; but the court, in disposing of them, did not overlook the seizure of private papers, and in the name of the law condemned it unsparingly. "Papers," said Lord CAMDEN, "are the owner's goods and chattels: they are his dearest property, and are so far from enduring a seizure that they will hardly bear an inspection; and, though the eye cannot by the laws of England be guilty of a trespass, yet, where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives a magistrate such a power? I can safely answer, there is none; and, therefore, it is too much for us, without such authority, to pronounce a practice legal which would be subversive of all the comforts of society." *Entinck v. Carrington*, 19 State Trials 1030, 1065; s. c. 2 Wils. 275; s. c. Broom Const. L. 558; *Wilkes v. Wood*, 19 State Trials 1154; s. c. Lofft's Reports 1; s. c. Broom Const. L. 548. The case, as will be seen, did not by any means turn wholly upon the breaking into the tenement and the forcing of locks, but it brought to the front as a principal grievance the injury the subject might sustain by the exposure of his private papers to the scrutiny and misconception of strangers.

The writs of assistance in the colonies, against which Otis, Adams

and Gridley spoke so ably and so boldly, were obnoxious on the same grounds as the general warrants of Lord Halifax, and were susceptible of the same abuses.¹

These were fresh in the public mind when the convention which framed the Federal Constitution was in session, and it was one of the complaints commonly made against that body that it did not declare the fundamental right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures. The fourth article of the amendments to the Constitution supplied the defect. No one ever doubted, so far as we are aware, that the purpose of this amendment was to embody in the fundamental law of the land the principles laid down by Lord CAMDEN in the *Wilkes Case*, and upon which the opponents of the writs of assistance in this country had planted themselves.

The question now made is, whether telegrams in possession of the telegraph authorities are the private papers of those who have sent and received them. We concede that for their own protection telegraph companies may retain them, and that they have a qualified property in them for that purpose. It is also provided by statute in some states that messages sent by telegraph shall be retained for a certain time, in order that, if necessary, they may be used as evidence; and such a statute may raise an implication that they are subject to be used in evidence generally; though its terms would be fully answered by restricting the use to the parties directly concerned, namely, the sender, the receiver and the telegraph company. But except for the benefit and protection of the parties concerned, it would seem that the ground on which Lord CAMDEN denounced the seizure of private papers would be strictly applicable here, namely, that their exposure to the idle or malicious curiosity of others "would be subversive of all the comforts of society."

The proper view to take of this subject seems to be to consider it in the light of the rules which govern private correspondence by mail. The secrecy of private correspondence by mail has been protected from the earliest days, and every invasion of it has been punishable. In Great Britain an exception is theoretically made of the case of suspected treasonable correspondence, in which a secretary of state is allowed to issue his warrant for opening and

¹ The best account of these writs is found in the Appendix to Quincy's *Massachusetts Reports*, where some current misconceptions are corrected.

inspecting particular letters;¹ but even this is not permitted in this country, and the officer who opens letters to obtain evidences of criminal conduct is himself guilty of a crime. In a few cases the postmaster is permitted to open packages to ascertain whether the privilege of the mails is being abused; as where he suspects papers are being sent as a medium of correspondence, or obscene publications are being transmitted, and the like; but these cases are few and exceptional, and every person who sends such packages through the mails understands what rights the government reserves when accepting them. In respect to correspondence proper the secrecy of the mails may be said to admit of no exception.

Nor does government protect correspondence on its own account, because of any interest it can have in encouraging intercourse by mail. It is true that government demands a compensation for conveying letters, as an express company or any other common carrier might do, but it does not transport the mails as a business, with a view to a remunerative profit expected therefrom. The government seeks no profits, and it arranges its tariff of charges on a consideration of what is most for the public good, rather than from regard to cost. Its principles of action are therefore governmental, not private; and its carrying the mail at all is to be justified on the ground that private enterprises could not be expected to accommodate so completely and so uniformly all sections of the country, but would govern their action by their own interest rather than by considerations of a broad and liberal public policy. It may be safely affirmed, therefore, that government does not protect the secrecy of correspondence in order that it may obtain more business, but because the secrecy tends to the promotion of public and family confidence, and encourages a most valuable feeling of security in free intercommunication between all classes of community. The reasons for protection, in other words, are precisely the same while private letters are passing through the mails as they are after the letters have been deposited in private desks or safes. No doubt correspondence by express would be protected in like manner if it were deemed politic or wise to encourage that method of communication as a rival to transportation by the government.

¹ Perhaps it may safely be assumed that this right, like the right to veto legislation, has become obsolete; the last instance in which it was exercised having been in 1844.

If the new means of correspondence by telegraph were such as countervailed some principle of public policy, or some governmental interest, and if it were purely a matter of choice with the citizen whether he would avail himself of it or not, those who used the telegraph might properly enough be left to take all the risks of their confidence being abused, or to provide against it as best they might. But it is certain that it countervails no public policy. This is fully settled by the statutes which encourage the construction of telegraph lines, permitting private lands to be appropriated for the purpose against the will of the owners, and by those which encourage the use of the telegraph by providing rules for impartiality and secrecy. Neither is the use of the telegraph a matter of mere choice. Business transactions cannot be successfully carried on without resort to its facilities, and the exigencies of family communication are daily demanding the most speedy transmission of messages that shall be found possible. Indeed the government itself is affected by the same compulsion, and not a day or an hour passes that some government official is not making use of the wires to accomplish purposes for which the post office service would be altogether too tardy. Foreign intercourse is conducted by the assistance of the telegraph; the army is moved; vessels of the navy despatched from port to port; officers guided in their duties; important consultations had between distant points; offenders arrested and payments made; all by means of the facilities it affords. In a great variety of cases, therefore, and those too of the highest importance, the use of this means of correspondence is not only urgent, but absolutely imperative.

And yet it is said that this immense and important correspondence, which concerns every possible relation of public and private life, is subject to the *subpœna duces tecum* of any court that may see fit to call for it, and must be produced on the demand of any party who believes or suspects it contains evidence important to his interest, or who chooses to cast a drag net over it in order to ascertain whether he may not use it to his advantage.

The reasons assigned for subjecting it to the process of the courts are that otherwise "the telegraph may be used, with the most absolute security, for purposes destructive to the well being of society; a state of things rendering its absolute usefulness at least questionable. The correspondence of the traitor, the murderer, the robber and the swindler, by means of which their crimes and

frauds could be the more readily be accomplished, and their detection and punishment avoided, would become things so sacred that they could never be accessible to the public justice, however deep might be the public interest involved in their production." (Judge KING in *Henister v. Friedman*, 2 Pars. Sel. Cas. 274.) This is perfectly true, and should not be ignored when this important subject is under discussion. But it is also true that "the correspondence of the traitor, the murderer, the robber and the swindler, by means of which their crimes and frauds [can] be the more readily accomplished, and their detection and punishment avoided," are now by the laws of the United States made so "sacred" that they are not "accessible to the public justice, however deep might be the public interest involved in their production." But the same law that protects the correspondence of offenders against the laws protects that between the husband and wife, the parent and child, the lover and his mistress, the principal and his agent, the partner and his associate, the official and his constituent; in short, the correspondence in every relation of life. To protect the correspondence of the criminal is not the purpose of the post office laws: it is protected incidentally in protecting the general correspondence of the country, and because no possible method could be devised of discovering that which is meretricious without disclosing the infinitely larger quantity which is innocent. It is therefore protected because the interests that would suffer from the violation of secrecy are vastly greater than any that can be subserved. Indeed there is scarcely room for question that public justice would suffer instead of being aided by removing the protection of the law from private correspondence; for while an offender might now and then be discovered by seizing and opening his letters, the wrongs that might be accomplished by obtaining possession of the secrets of others who were using the mails innocently would so far outweigh the inconsiderable benefits, that the American people would never tolerate official surveillance of their private and business correspondence.

It will hardly do to dismiss such a subject with the off-hand remark that "the thief or the murderer is not to be heard to demand secrecy for his criminal communications," unless at the same time it can be shown that the official mind can by intuition select the vicious correspondence and pass by without inspection that which is harmless and innocent, and the privacy of which is absolutely essential to the peace and comfort of society.

We can understand how a court may hold that telegraphic correspondence is not beyond the reach of its process when there is no statute which forbids disclosure, because it may be said with some plausibility, though as it seems to us not justly, that the despatches have not been sent under any express or implied assurance of protection ;¹ but where the observance of secrecy is required by law, the right to have telegraphic communication protected, as that by mail is, seems unquestionable. Upon this subject the following propositions are affirmed :—

1. The statutes which forbid those intrusted with them from disclosing telegraphic communications are not restricted in their force to the imposition of penalties for disobedience, but they announce and establish a principle of public policy which is violated as distinctly when a telegram is brought into court for public exposure as when it is privately shown to persons having no right to it. The disclosure contravening and tending to defeat the policy of the law cannot be legalized by any judicial command or license.

2. The case is within the principle laid down in *Wilkes v. Wood* and *Entinck v. Carrington*. If one's private correspondence is to be given to the public, the method is not important ; it is equally injurious whether done by sending an officer to force locks and take it, or by compelling the person having the custody to produce it. A *subpœna duces tecum* to the servant of Wilkes, commanding him to produce the desired letters and papers, would no doubt have been denounced by Lord CAMDEN in terms as vigorous and pointed as those which condemned the illegal warrants.

3. It is not only subject to all the mischiefs which attend the

¹ See *State v. Litchfield*, 58 Me. 267 ; s. c. 10 Am. Law Reg. (N. S.) 376, and Judge REDFIELD'S Note. This learned jurist, evidently speaking of the case where disclosure is not prohibited, says: "The rule in regard to the inviolability of correspondence by telegraph is one mainly resting upon an honorary understanding between the company or their servants and their employers. It is not in any proper sense a perfect or legal duty or obligation. It certainly could not be made the basis of an action in court that the operators on a telegraph line had made the messages public, unless some pecuniary loss ensued to the parties sending or receiving the same." We doubt this, if secrecy were required by law. When the observance of secrecy for the benefit of individuals is positively enjoined by law, we see no reason for holding that the party concerned may be protected where a slight pecuniary interest is affected by the disclosure, but shall not be if it only touches him in what is still more important, his domestic or social relations. When any distinct legal right is violated an action will lie for it ; the extent of pecuniary injury is only a question of damages.

prying into correspondence by mail, but also to others of most serious character. The evils in other cases are, the exposure of family and other private confidences, the divulging of business and official secrets which parties, of right, are entitled to preserve, the furnishing of occasion for scandal and misconceptions, to the general disturbance of the community, and others of similar nature. But these are greatly aggravated in the case of telegrams, by the manner in which the correspondence is necessarily conducted.

Telegraphic communication is expensive. A long message sent by mail costs three cents, when if sent by telegraph it would cost, perhaps, a thousand times that sum. Economy of words is, therefore, highly important, and is studied by all classes. The message is made as brief as possible, and every word is omitted which can be spared and still express to the receiver the intended meaning. But this renders the message much more liable to misconception when read by those who know nothing of the previous correspondence or business, and who must therefore interpret it without the extrinsic assistance which the parties themselves would have. Mr. Dickens has shown, in the "*Bardell case*," how cunning or malice may extort from an abstracted communication almost any desired meaning; and what was caricature with the novelist might be reality in innumerable cases, if the proper and innocent correspondence of business men or of families were to be placed in the hands of those interested in perverting its meaning.¹

Telegraphic correspondence is necessarily exposed to two persons, the operators at the ends of the line. But it very often happens that reasons which are entirely proper will exist for concealing from the operators the real import of a message; and in such cases pains will be taken to express it in such terms that only the sender and the receiver shall understand it. It is a known and common method of correspondence that, by previous arrangement, certain words are fixed upon to represent ideas foreign to their proper meaning, or that arbitrary signs or expressions are made use of. Not only is this true in the case of business correspondence, but in the case of family correspondence; and even the government

¹ The fact that messages by telegraph may be unintelligible to all but the sender and receiver was recognised in *Rittenhouse v. Independent Line, &c.*, 1 Daly 474; s. c. on appeal, 44 N. Y. 463. The operator must receive and send messages as they are delivered to him, whether he understands them or not, and is liable for errors if he does not. *Ibid.*

makes use of a cipher where secrecy is important. When a cipher is employed, the discovery of the key will enable one to read it with accuracy; but a mistake in any one particular might be fatally misleading. But where the message is written out, with only the substitution of one or more arbitrary terms, to conceal the nature of the negotiation, or the subject of the communication, it may not only be misleading on its face, but there may be no possibility of arriving at the proper meaning without the explanation of the parties themselves. It will be remembered that the immense correspondence by which the national loans were effected was conducted by the use of arbitrary symbols. What was done on a large scale then is done by many business men, on a smaller scale, in their correspondence with agents and factors. To open this to the public is not only to subject the parties to all the annoyances, and expose them to all the risks, which must follow from seizing correspondence in the mail, but also to the dangers which must come from misconceiving an intent which has purposely been concealed.

Telegraphic communication, if not inviolable, offers a perpetual temptation to malice. A legislative committee may employ the power of calling for it to blacken the reputation of an opponent; a business rival may be annoyed and perhaps seriously compromised by means of it; a family feud may be avenged or quickened by bringing out confidential messages, and so on. All that is requisite is a suit, and a magistrate not over-nice respecting the admissibility of evidence, and the messages are always at hand, ready to be called for. To get letters, it might be necessary to resort to stratagem, and perhaps to violence. It is idle to say that these are merely fanciful and wholly improbable cases; they may occur at any time when the interest or the malice of others is sufficiently powerful to instigate proceedings which in law are baseless. Even the judge may not be able to protect the party whose communications mischief or malice would drag before the public; for, as Mr. Justice MAULE observed, in a case where an attempt was made to require an attorney to produce the title-deed of a third person, if the judge were to decide that it was not a proper instrument of evidence, "His decision might be made the subject of an argument in open court, by bill of exceptions; and thus the contents of the deed might be communicated to all the world." *Volant v. Soyer*, 10 C. B. 231, 235. In that manner the

mischief would be accomplished, whether the writing was or was not received in evidence.

The common law required an attorney to preserve an honorable secrecy respecting the communications made to him by his client; and this secrecy not even the process of the courts was suffered to unlock. The rule was based on an unquestioned principle of public policy, which invited clients to the freest possible communication respecting their affairs with the counsel called in to advise respecting them. The tendency of modern decisions has been to extend rather than to narrow the rule, from a conviction that though sometimes the cause of justice might be advanced by compelling disclosures, the evils that would result would greatly overbalance the possible advantages: *Foster v. Hall*, 12 Pick. 89; *Cromach v. Heathcote*, 2 Brod. & B. 4; *Regnell v. Sprye*, 10 Beav. 51; *Greenough v. Gaskell*, 1 Myl. & K. 98; *Moore v. Bray*, 10 Penn. St. 519.

Vice-Chancellor KNIGHT BRUCE has said with great force in one case that "truth, like all other good things, may be loved unwisely, may be pursued too keenly, may cost too much. And surely the meanness and the mischief of prying into a man's confidential consultations with his legal adviser, the general evil of infusing reserve and dissimulation, uneasiness, and suspicion, and fear, into those communications which must take place, and which, unless in a condition of perfect security, must take place uselessly or worse, are too great a price to pay for truth itself:" *Pearse v. Pearse*, 11 Jur. 52, 54. The learned Vice-Chancellor's condemnation of enforced disclosures would probably have been made still more emphatic and pointed if the case were such that what was disclosed would tend rather to lead away from the truth than to lead toward it. That the common law did not in like manner protect communications to medical and spiritual advisers has long been felt as a reproach, and legislation in recent years has removed this reproach in some states. Will it be said if by statute a clergyman is forbidden to disclose the secrets imparted to him for the purpose of obtaining spiritual advice and direction, that nevertheless a justice of the peace or judge may compel the disclosure? If so, are we not entitled to be told whence comes this power to dispense with the laws? It is not a power commonly supposed to exist in any department of the government, and if asserted, clear warrant ought to be shown for it. Especially ought that to be the case, when,

apparently, it would antagonize and defeat the very purpose for which the law was enacted.

It was conceded at the outset that there are cases in which telegrams are proper instruments of evidence, as private letters would be under like circumstances. Contracts are made by this species of correspondence, notices are given, orders are sent and information conveyed, and wherever either of the parties may have an interest in showing the facts, no one questions the right to use the telegrams for the purpose. But this is simply using their own documents, and contravenes no policy of the law. No doubt the telegraph may be used for the purposes of defamation; and in that case the dispatch may be produced as evidence by the receiver: *Williamson v. Freer*, Law Rep. 9 C. P. 393.

No one disputes the law of these cases; it is plain enough. What is disputed is, the right to compel the telegraph authorities to produce private messages which, by the course of the business are necessarily left in their possession, but under a confidence imposed by the law. If the operator can be compelled to produce them, then on the same reasons a postmaster may be brought into court and compelled to produce the undelivered postal cards for examination, though the law of Congress forbids his exhibiting them. And why may not a justice of the peace, or a legislative committee, compel a man's servant, left in temporary possession of his letters and diaries, to produce them for the examination of his enemies, and to furnish the reporters of daily papers with sensational literature? And if a search in a telegraph office and a seizure of a man's private correspondence is not an unreasonable search and seizure, on what reasons could the search for and exposure of his private journals be held to be an invasion of his constitutional right?

It may be said with truth that postal cards in the post office are in the custody of the law, and that may be assigned as the reason why their production cannot be compelled. This is true also of telegraphic communication in England. But the mere fact that they are in the custody of the law is no reason whatever for declining to require their production. The records of every court are in the custody of the law; and so is every enrolled statute. They cannot be taken from this custody, but the proper custodian may be required to produce them as evidence whenever the cause of justice may demand it. To the government it is a matter of indifference whether these communications shall or shall not be dis-

closed, except as, by discouraging the correspondence it might tend to affect injuriously the general interests of society. The reasons against disclosure are therefore reasons that concern individuals exclusively, or only concern the government as the disclosure may tend to defeat the purposes for which the government assumes the transportation and control of correspondence.

But, it is said, if telegrams may not be called for, then in many cases the truth may not be reached; and justice requires the fullest disclosure of the truth. As a general principle that is correct; but sages of the law, as wise as any now living, long ago determined that in many cases a full revelation of the truth would produce more evils than it could possibly prevent. Every case of privileged communication rests upon that ground; it is important that the truth should be known, but it is more important that a confidence essential in the particular relation should not be violated. A wife may know that her husband is a thief; it is important that his guilt should be proved; but to make the wife a witness against the husband is to endanger the relation on which, more than any other, our civilization depends. A spy is sometimes a greater public pest than a thief, and often a man might be more injured by having what he has innocently written or received, in the unreserved confidence of affection, given to the public, than he would be by being knocked down and robbed. Truth is important, but the state cannot afford to purchase the truth at the expense of principles on which alone a peaceful and contented society may repose.

In brief, then, the doctrine that telegraph authorities may be required to produce private messages, on the application of third persons, is objected to, on the following grounds:—

1. That it defeats the policy of the law, which invites free communication, and to the extent that it may discourage correspondence, it operates as a restraint upon industry and enterprise, and, what is of equal importance, upon intimate social and family correspondence.

2. It violates the confidence which the law undertakes to render secure, and makes the promise of the law a deception.

3. It seeks to reach a species of evidence which, from the very course of the business, parties are interested to render blind and misleading, and which, therefore, must often present us with error in the guise of truth, under circumstances which preclude a discovery of the deception.