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Right of the Courts to Compel an Exposure of the Person as Evidence

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T H E S I S

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-by-

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C O N T E N T S .

The rules of evidence recognized by the courts at the present time are the out-growth of centuries of development. According to the principles of the ancient common law a trial par took more of the nature of a combat between two subjects, than of a judicial investigation by the sovereign authority for the purpose of administering justice. A party was entitled to all the advantage, in respect to disclosing the truth, which possession and secrecy could give him. He was excluded on account of interest from being a witness in his own favor; he could not be compelled to be examined as a witness at the instance and in behalf of his adversary; and, as an incident of this, a party was not allowed to obtain either an inspection before trial, or the production at the trial, of the books, papers or documents of his opponent. The administration of justice was so much interfered with by

this barabrous rule, that the court of Chancery interposed its relief and granted the bill of discovery, by means of which a party could obtain from his antagonist evidence which courts of law could not compel to be disclosed. This innovation of the equity courts led to a great revolution in the law of evidence. The enforcement of justice became more recognized as the object of all judicial investigations, and statutes were enacted in nearly all jurisdictions, giving to courts of law the power of compelling a party to a suit to produce for his adversary whatever documents, or like evidence, he possessed, which might be essential to the prosecution or defense of his opponent's cause. The first of such statutes was the Judiciary Act of 1789, passed by the Federal government, extending to courts of law the power which had hitherto been possessed by the courts of chancery of compelling a discovery by the parties; and similar statutes have been passed in nearly all, if not all the States. Recently, the question has very frequently arisen, as to whether a person can, without his consent, be compelled to submit to a surgical examination for the purpose of furnishing evidence against hinself. In no state, so far as I have been able to

ascertain, has there been any statute passed expressly authorizing such an examination, except in New York where a bill has passed the legislature and is awaiting the action of the Governor, and the right, if it exists at all, exists independent of statute, save those before cited compelling a person to disclose certain facts within his possession.

An order or process compelling an exposure or submission of a person to examination was known at common law in a small number of cases. For example; Blackstone tells us that a trial by inspection or examination might be resorted to by the court without the aid of a jury, in certain cases, "when the fact from its nature must be evident to the court either from ocular demostration or other irrefragible proof." By this method courts might try the question of infancy, idiosy or the identity of a party. So upon an appeal of mayhem, the issue joined was whether there was mayhem or no mayhem, the court might decide upon inspection, and for this purpose they might call in the assistance of surgeons. The writ "de ventre inspeciendo" was another instance where a physical examination would be ordered. This was granted to ascertain, whether a woman convicted of a capital crime was

quick with child, in order to guard against takingthe life of the unborn child for the crime of the mother. This writ was also granted to protect the rightful succession to the property of a deceased person against fraudulent claims of illegitimate children, where a widow was suspected to feign herself pregnant, in order to produce a supposition heir to the estate. In such case the heir or devisee might have a writ de ventre inspeciendo to examine whether she was with child or not, and, if she was to keep her under proper restraint until delivered. So far as I have been able to ascertain these were the only cases in which the right to an examination of the person was granted or had been passed upon by the early common law courts. In proceedings to obtain a decree of nullity to a marriage on the grounds of impotence, the right to compel a party to submit to a surgical examination was recognized at an early day in England, but ecclesiastical courts had jurisdiction of such matters, and they proceeded according to the civil and canon law, and not according to the course of the common law. As we never had any ecclesiastical courts in this country, the jurisdiction in proceedings to annul a marriage was granted, in the various

States, to the courts of law or equity, and the rights, exercised by ecclesiastical courts in regard to ordering surgical examination in such cases, has continued in most states to be exercised by these courts. Such, in brief, has been the historical development of the power and authority exercised by the courts in compelling an exposure or examination of the person, as a means of evidence. We thus see, that in the early days of the common law an inspection or examination of the person was allowed in certain cases, but the harsh rule was applied, that no one could be compelled to give evidence against himself. Later the rule protecting a person from giving evidence against himself was relaxed through the influence of courts of equity, and by the passage of statutes, and now comes the inquiry, can the courts compell a person to submit to an inspection or examination, either in or out of court, for the purpose of furnishing evidence against himself?

At the present time such questions arise usually if not exclusively in actions for divorce, in actions for the recovery of damages for injuries to the person or in criminal prosecutions, which we will discuss in order.

In Divorce Actions.

In proceedings to annul a marriage on grounds of impotency, as before stated, the courts upon a proper showing have almost invariably, exercised the power of orering an examination of either or both parties. "This doctrine," says Bishop in his work on Marriage, Divorce and Separation, "is a product of that supreme power to which all things, whether in law or elsewhere, as of course must yield,----necessity. The parts concerned being concealed fron public observation, if inspection could not be compelled, justice would, in many instances, fail." For this reason, in England, Scotland, France, and in most of the states of this country and probably in other countries where this bar to marriage is acknowledged, the courts have required the parties, when the exigencies of the proofs demanded, to submit their persons to examination. Parties marry for offspring, and for the enjoyment of each others person; and where a party physically incapacitated

from consummating the marriage, with knowledge of such incapacity, enters into the marriage state, a gross fraud and grievous injury is committed. The law has provided a remedy for these cases, and it is the duty of the court to apply it. "It has been said," observes Sir William Scott in an early case on the subject, "that the modes resorted to for proof on these occasions are offensive to natural modesty; but nature has provided no other means; and we must be under the necessity, either of saying that all relief is denied, or of apllying the means within our power. The court must not sacrifice justice to notions of delicacy of its own." However, this doctrine warrants no needless exposure, and the right being no broader than the principle underlying it, ceases, when absolute necessity ends, and the necessity must be made apparent before the examination will be granted. In the same opinion just quoted from, Sir William Scott further says: "If there is just reason either to suspect the truth of the statement, or to think the injury unconsiderable the court will hesitate, before it descends to modes of proof which are painful. The age is entitled to great consideration. The injury is very different from that which may occur

in an earlier period of life at a time of life when the passions are subdued and marriage is contracted only for comfortable society. The exposure also of a person at an advanced stage of life may be felt with greater abhorrence and acquised in with much more reluctance than in the case of a younger person." This was a proceeding by a husband against his wife and the court refused to grant an order for an examination on account of the wife's age and the husband's insincerity.

In New York the Revised Statutes of 1830, provided that suits to annul a Marriage should be by bill and conducted in the same manner as other suits prosecuted in courts of equity. Under this Statute, Chancellor Walworth speaking for the court said: "I have no doubt as to the power of this court to compel the parties, in such a suit to submit to a surgical examination, whenever it is necessary to ascertain facts which are essential to the proper decision of the cause. But a lady will not be compelled to submit to a further examination, when it appears that she has already submitted herself to the examination of competent surgeons, whose testimony can be readily obtained. Investigations of

this kind are always indelicate and the modes of proof to which resort must of necessity be had must frequently be very distressing to the feelings of parties. It would therefore in most cases be better that the party complaining should submit to a disappointment, and by an amicable arrangement agree to separate, rather than bring the cause before a court for its decision thereon. This court, however, is not at liberty to decline jurisdiction in such a case, but must proceed to the examination and decision thereof in the manner required by law, if the injured party thinks proper to insist upon his legal rights." In this case the defendant was ordered to submit herself to such surgical examinations and examination by matrons as the master might think proper to direct.for the purpose of ascertaining the fact of the alleged impotence. In Vermont the Supreme Court held, that, although independent of statute, the courts of that state had no jurisdiction over proceedings to annul a marriage, ecclesiastical courts never having been established there, yet, impotence having been made by statute a cause for nullifying a marriage, and the Supreme Court having been vested with jurisdiction of the subject, the court had power to compel a defendant to submit to a med-

ical examination, though the statute made no provision for it. So in New Jersey and Alabama and Canada, the question has arisen and it has been held that the courts had such power.

In a case recently decided in Alabama, where the woman sued for divorce on account of the abnormal development of the man's private parts an examination of both parties was held allowable. Stone C.J. in delivering the opinion says: "The complainant must be required to submit her person to examination by physicians or matrons, skilled in such matters, to be appointed by the chancellor, and proof of such examination, by persons so appointed, showing that the fault is not with her, must be made an indispensable condition of relief. If she refuse to submit to such examination, then let her bill be dismissed. The defendant also should submit to a skillful examination as a condition of his defense, if he contests the complainant's right to relief." If he did not defend the court held that the right of inspection might be exercised in order that they might be satisfied that the proceeding was not consentive and collusive.

In Michigan, however, a different view is taken and Judge Cooley went so far as to hold that evidence obtained

by a compulsory examination of defendant should be stricken from the record. "There was," he says, "a most extraordinary compulsory examination of defendant by physicians who stripped him and subjected him to oral inquisition to compel him to give evidence which they could repeat before the commissioner for use against him. What means they could be supposed to have for compelling him to answer their questions in case he declined, as he ought to have done, we do not know; but we are certain, they could not be means known to the law. We strike from the record all evidence obtained by this inquisition. It should be understood that there are some rights which belong to man as man and to woman as woman, which in civilized communities they can never forfeit by becoming parties to divorce or any other suits, and, that there are limits to the indignities to which parties to legal proceedings may be lawfully subjected."

Another instance where this right of inspection has been denied is reported by the editor of the Western Law Journal, Vol. II., page 131, as having taken place in Ohio. He says: "I have been counsel in a case where the wife complained of impotence in the husband. There being no other

mode of proof. application was made to the Supreme Court on the Circuit for an order of inspection. The question was reserved to the Court in Bank, who decided that they had no power to grant the order, and the petition was dismissed on a account of the impossibility of proof." This, however, is undoubtedly not the rule in Ohio at the present time. We see that the only reason assigned by the court for refusing to order an inspection was, that it had no right to, but the Supreme Court of the state in the case of Turnpike Co. v. Baily, 37 Ohio,St., 104, expressly held that the court had power to require a surgical examination in an action to recover for a personal injury, and, it would seem that the same right might be exercised in divorce cases.

We are therefore forced to admit that it is firmly established both by reason and precedent that the courts have the power, whenever the necessity is made apparent in proceedings for divorce,on ground of impotency, to compal either or both parties to submit to surgical examination. A case of impotence necessarily involves inquiries both of a delicate character and offensive to natural modesty and which would be indecent, if they were not essential to justice, sill the

demands of justice cannot be disregarded, right must not give way to sentiment.

Right in Personal Injury Cases.

In modern times, on account of the numerous suits against Railway and other corporations for personal injury, the question has frequently arisen whether the courts have the power to compel the plaintiff to submit to a surgical examination before trial. Such an examination is not infrequently of great importance to defendant, and is invariably of great value. The method of procedure is by motion, similar to that resorted to for compelling the plaintiff to produce other evidence in his possession, such as books, documants, etc., Independent of any statute authorizing such examination there are two lines of cases, directly opposed to each other; the one denying and the other affirming the power of the court to enforce it.

The first reported decision on this branch of the law was from the special term of the superior court of New York city in 1868, in the case of Walsh v. Sayre, reported in

52 How.Pr., 334, This was an action against a physician for mal-practice, and it was held that the court had power to compel such examination. In Shaw v. Van Rennsselaer, 60 How.Pr., 143, this case was followed, but in 1883, the General Term in the Third Department, in the case of Roberts v. R.R.Co., 29 Hun, 154, refused to follow this rule and announced that the courts had no such power. The question was not passed upon by the Court of Appeals until 1891, when the decision of the General Term was affirmed by the case of Mc McQuigan v. R.R.Co., 129 N.Y., 50.

Missouri was the next state in which the question arose, and here the development of the law was just the reverse of what it has been in New York. In the case of Lloyd v. R.R.Co., 53 Mo., 539, decided in 1873, the Supreme Court of the state held that the courts had no power to enforce plaintiff to submit to a surgical examination. The rule laid down in this case was rendered doubtful by the decision in the case of Shepard v. R.R.Co., 83 Mo., 629, handed down in 1885, and in the cases of Sidekin v. R.R.Co., 93 Mo., 400, and Owens v. R.R.Co., 95 Mo., 169, decided in 1887 and 1888, respectively the rule was squarely established the other way,

the court in the Owen's case saying:- "The power of the court to make and enforce an order for the personal examination of the injured party must be taken, as established in this state as it is in many others." These later decisions in Missouri, however, had not been made until after the question had been passed upon by the Supreme Court of Iowa. In 1877 the case of Schroeder v. R.R.Co., 47 Iowa, 347, was handed down by that court and here the power of the courts to compel a person to submit to an examination was distinctly asserted. This, in fact, is the parent case on this side of the question, the earlier case of Walsh v. Hayre, being by an inferior court and not reported until many years after it was decided. This case was considered with such profundity and breadth, that it has remained the leader of its doctrine ever since and, has undoubtedly been instrumental in shaping the subsequent decisions of other courts. Following the decision in Iowa is the Supreme Court of Ohio in Turnpike Co. v. Baily, 37 Ohio St., 104, decided in 1881, and in 1883 Kansas came into line by the decision in the case of R.R.Co. v. Thul, 29 Kan., 466. Following close on these decisions this doctrine was adopted in Wisconsin in 1884, in Georgia in

1889, and in Alabama and Indiana in 1890. In Texas and Nebraska the question as to the power of the court to compel an examination has never been squarely passed upon, but from the decisions it may be reasonably inferred that upon a proper motion the court would order such an examination, by physicians which it should appoint. The cases certainly impliedly hold that courts have power to make such an order. In the case of Parker v. Busloe, 103 Ill., 273, decided in 1882, the Supreme Court of Illinois held that the courts had not the power to make or enforce an order for a surgical examination. This decision seems to be rendered extremely doubtful in that state by two later decisions by the same court in the cases of R.R.Co. v. Holland, 122 Ill., 461, decided in 1887 and in St.Louis Bridge Co. v. Miller, 28 N.E., 1091 decided in 1891. In 1891 the question came before the United States Supreme Court in the case of U.P.R.R.Co. v. Botsford, 141 U.S., 250. Here the authority of the court to compel an examination was squarely denied in an exhaustive opinion by Judge Gray. This case with the New York cases before referred to constitute the principal authorities denying to the courts this power. Such is the state of the law at the present time. If in

determining the weight of authority the number of cases is to be our guide, then according to that weight, the courts have the power to compel an examination. But the courts taking t the opposite view are the leading ones of the country and their opinions are entitled to a careful consideration. Before going into reasons, however, let us first see what the proposition.is that is affirmed on one side and denied on the other.

We must not think for a moment that the cases held that the defendant has, in every action for a personal injury the absolute right to an examination of the person of the plaintiff. On the contrary none of the cases on this side of the question go so far as that. However, a careful examination of them will show that they are not in perfect harmony as to the extent of the right of examination. A few of the cases hold that if a proper case is made, the right of the party asking for an examination is one that cannot be denied, and if denied is reversible error. A very decided majority of the cases, however, hold that the matter is discretionary with the trial court; the proper exercise of this discretion being reviewable on appeal. Judge McClellan in

the case of R.R.Co. v. Hill, 90 Ala., 71, after a careful examination of all the decisions lays down the following propositions which seem to be established by a majority of the cases, outside of United States and New York:-

I. That trial courts have the power to order the surgical examination by experts of the person of a plaintiff who is seeking a recovery for physical injuries.

II. That the defendant has no absolute right to have an order made to that end and executed, but that the motion therefor is addressed to the sound discretion of the court.

III. That the exercise of this discretion will be reviewed on appeal and corrected in case of abuse.

IV. That the examination should be ordered, and had under the direction and control of court, whenever it fairly appears that the ends of justice require the disclosure or more certain ascertainment of facts which can only be brought to light or fully elucidated by such an examination and that the examination may be made without danger to plaintiff's life or health and without the infliction of serious pain." Taking this, then as the extent of the right affirmed on the one side, on the other we have the doctrine that in no case

can the plaintiff be compelled to submit to an examination The reasons given in support of this latter doctrine are that the courts have no legal right or power to enforce such an order, and that the abuse of the power might work injustice.

In regard to the first of these reasons Justice Gray says: "No right is held more sacred or is more carefully guarded by common law than the right of every individual to the possession and control of his own person free from all restraint or interference of others unless by clear and unquestionable authority of law. As well said by Judge Cooley "The right to ones person may be said to be a right of complete immunity; to be let alone." ---- The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel any one, and especially a woman, to lay bare the body or to submit it to the touch of a stranger without lawful authority, is an indignity, an assault and a trespass; and no order or process commanding such an exposure or submission was ever known to the common law in the administration of justice between individuals, except in a very small number of cases, based upon special reasons, etc."

Judge Andrews in commenting on this question says:- "The power to compel a party to submit to an examination of his person has never been conferred by any statute, The provisions of the Revised Statutes authorizing the court to compel the production of books or papers has been re-enacted in the Codes of procedure. The Statutes also contain specific provisions for the examination of a party on oath before the trial, at the instance of the other party. The omission in these statutes of any reference to the power now under consideration is quite significant. We cannot say that the exercise of the power claimed might not in some cases promote justice and prevent fraud. On the other hand unless carefully guarded it would be subject to grave objections. But we have to deal only with the question of the power of the courts in the absence of legislation. It is very clear that the power is not a part of the recognized and customary jurisdiction of courts of law or equity. The doctrine that courts have a inherent jurisdiction to mould the proceedings to meet new conditions or exigencies, is true, but in a limited sense. They cannot under cover of procedure or to accomplish justice in a particular case invade

recognized rights of person or property.-------- The exercise of the court of the power now invoked as has been shown is not sanctioned by any usage in the courts of England or of this State.------ We think the assumption by the court of this jurisdiction in the absence of statute authority would be an arbitrary extension of its powers."

Another reason assigned by both the New York Supreme Court and the United States Supreme Court why the courts possess no such power is that it would interfere with the constitutional provision of trial by jury, and also with the statutory requirement that all proof in common law trials should be by oral testimony and examination of witnesses in the presence of the jury unless otherwise authorized by statute. In Roberts case referring to this phase of the question, Learned, Judge says: "In a common law action like this, the jury are to pass on the issues of fact. And they are entitled to see and hear for themselves the evidence. It is of the very essence of the common law system that the evidence shall be produced before the ju. jury. Exceptions to this rule (and not desirable exceptions) are those in cases in which evidence is previously reduced to writing, and then read

to the jury. Now if a party is entitled to the compulsory exhibition of the body of his opponent it would seem to follow that he might have such exhibition made before the jury. And the court might require the plaintiff, on the trial and before the jury, to submit to the same examination as is required by this order. It is undoubtedly true that not unfrequently plaintiff's suing for bodily injuries, do exhibit in court the injured part. Nor do we know of any reason why they should not do this; notwithstanding the exhibition may excite sympathy. And, on the other hand, all unreasonable concealment of an injured part (not justified by any dictate of modesty or otherwise) may excite a doubt in the mind of the jury as to the genuineness or extent of the alleged injury. But we cannot admit the principle that, either in the presence of the jury or in the presence of a referee a party can compel his opponent to exhibit his body in order to enable physicians to examine and question and testify." Still another reason assigned by Learned for his holding is, that exercise of the right of a compulsory examination by the courts would lead to harmful results. He says:- "There may be danger that in actions of this nature plaintiffs will

exaggerate the injuries they have received; and that defendants may be at a disadvantage in ascertaining the exact truth. But this evil is far less than the adoption of a system of bodily, and perhaps immodest examinations which might deter many, especially women from ever commencing actions, however, great the injuries they had sustained." Such then are the principal arguements against the right of a compulsory examination. Briefly stated they are want of precedente supplemented by the theory of the inviolability of the person and the fear that exercise of such power by the courts would cause fewer actions for personal injury. While not presuming to criticise the opinions of the highest tribunals in the land let me call the reader's attention to a few of the reasons on the other side. Coming first to the dissenting opinion in the Botsford case written by Justice Brewer and concurred in by Justice Brown. "The silence of common law authorities, upon the question in cases of this kind," says the learned justice, "proves little or nothing." The number of actions to recover damages, in early days was, compared with later times, limited; and very few of those difficult questions as to the nature and extent of the

injuries which now form an important part of such litigations, were then presented to the courts. If an examination was asked doubtless it was conceded without objection as one of those matters the right of which was beyond dispute. Certainly the power of the courts and of the common law courts to compel a personal examination was, in many cases often exercised and unchallenged. "Indeed, whenever the interest of justice seemed to require such an examination it was ordered." In reply to the argument that the exercise of this right would violate the sanctity of the person the learned Justice continues: "It is said there is a sanctity of the person which may not be outraged. We believe that truth and justice are more sacred than any personal consideration; and if in other cases in the interest of justice, or from considerations of mercy, the courts may as they often do, require such personal examination, why shall they not exercise the same power in cases like this, to prevent wrong and injustice?" The end of all litigation should be the administration of justice. It was for this purpose that courts of law have been established and whoever comes into court demanding justice should be willing to do justice to the

opposing party. He who seeks justice, must do justice. Following out this argument Judge Beck in the Schroeder case says:- "Whoever is a party to an action in a court, whether a natural person or a corporation has a right to demand therein the administration of exact justice. This right can only be secured and fully respected by obtaining the exact and full truth touching all matters in issue in the action. If truth be hidden injustice will be done. The right of the suitor, then, to demand the whole truth is unquestioned; it is correlative to the right of exact justice. --------
-----We are often compelled to accept approximate justice as the best that courts can do in the administration of the law. But, while the law is satisfied with approximate justice where exact justice cannot be obtained the courts should recognize no rules which stop at the first when the second is in reach.----------.

"To our minds the proposition is plain that a proper examination by learned and skillful physicians and surgeons would have opened a road by which the cause could have been conducted nearer to exact justice than in any other way. The plaintiff, as it were had under his own

control testimony which would have revealed the truth more clearly than any other that could have been introduced, The cause of truth, the right administration of the law, demand that he should have produced it." In reply to the proposition that the court had no power to enforce an order granting an examination this court, says: "It is urged that the court was clothed with no power to enforce obedience of plaintiff had such an order been made. Its power, in our judgment was amply sufficient to coerce obedience. The plaintiff would have been ordered by the court, by submitting his person to examination to permit the introduction of testimony in the case. His refusal would have been an impediment to the administration of justice and contempt of the court's authority. He would have been subject to punishment as a recusant witness who refused to answer proper questions propounded to him." The court also hold that his complaint might have been dismissed if he persisted in his refusal and this was the ground taken also in the dissenting opinion in the United States Supreme Court.

A majority of the text writers also are inclined to the view that the trial court has the right and power to

grant an order for an examination of the plaintiff. Thompson in his work on Trials, Sec. 859, with much force and reason, observes: "This conclusion may be placed upon the higher ground that when a person appeals to the sovereign for justice he impliedly consents to the doing of justice to the other party, and impliedly agrees in advance to make any disclosure which is necessary to be made in order that justice may be done. The conception of the nature and objects of a judicial trial which denies to the defendant, under proper safeguards, the right of such inspection is not higher than that of the older law, which would not even compel a party to produce a deed or private paper in a civil case where it was intended to be used in evidence against him, a rule which the court of Chancery invaded to prevent failures of justice, and which has almost entirely disappeared from modern civil jurisprudence."

The question presented is both interesting and important. We have made an earnest endeavor to find all the reported cases in which it has arisen in this country but may have overlooked some. Space has not permitted us to enter into a careful discussion of all these cases, so we

have been content with giving a brief history, of the development of the law showing on which side of the line the various courts stand that have passed upon the question. We have also stated briefly the main arguments pro and con that have been brought forth by the judicial controversies upon this point. We can add little if any thing more. The majority of cases are in favor of allowing an examination when necessity requires it and they plant themselves firmly and solidly upon the propositions that when a plaintiff asks the judgment of a court he submits himself to its jurisdiction, places his case within, the grasp of its inherent power, which is comprehensive enough to authorize and even to require it to make all reasonable orders necessry for the assertainment of the truth of the issue, whatever that issue may be. We are inclined to this view of the question. As Judge Brewer observes the fact that no precedent can be found at common law proofs little or nothing. Cases are cited at common law where examinations were permitted and this at the instance of the plaintiff, a greater exercise of authority than is asked for here. Again at common law parties could not be compelled to give evidence, and this

undoubtedly acted as a bar to this right. For we see that in the ecclesiastical courts in divorce cases, where parties might give evidence, even the defendant could be brought into court against his will and be compelled to submit to an examination. The abolition of this principle removes the restraint under which common law courts had before acted and leaves them to unfettered action, except in so far as they are curbed by statute. In answer to the argument that the exercise of this right would interfere with the trial in the presence of the jury it may be said that to allow surgeons appointed by the court to examine the person and testify to the jury would be no more an interference with the right, than to allow those selected by the plaintiff himself for this purpose, to testify. Experience has shown that cases of personal injury are frequently simulated. With the plaintiff the slightest accident is apt to result in permanent internal injuries, which, however, are speedily cured after damages have been recovered. Experts hired by the plaintiff are always allowed to testify for him as to the results of an examination and their testimony if not consciously biased in his behalf is very apt to be unconsciously, and the only

remedy for such an evil and to insure that fraud will not be practiced is to cause the plaintiff to submit to a proper surgical examination. Plaintiff has no right to more than exact justice and such an examination can do him no harm, for if he is alleging the truth it will aid him in obtaining his just dues. In answer to the argument that such a power would deter many, especially women from bringing action where they have a meritorious case it will be sifficient to say that such power is to be exercised only at the sound discretion of the judge. In concluding this branch of the subject let us quote from a note in Judge Dillon's brief in the case of U.P.R.R.Co. v. Botsford. He says: "We may be pardoned, we trust, in recalling Milton's noble passage in his his plea for unlicensed printing:

"Let Truth and Falsehood grapple; who ever knew truth to be put to the worse in a free and open encounter? What collusion is this, whereas we are exhorted by the wise Man to use diligence, to seek for wisdom as for hidden treasures early and late, that another Order shall enjoin us, to know nothing but by statute? For who knows not that Truth is strong next to the Almighty; she needs no policies, nor stat-

agems, nor licensings to make her victorious; those are shifts and defenses that Error rises against her power."

The Right in Criminal Cases.

Attention has already been called to the fact that it was the policy of the early common law to protect a person from giving evidence against himself in any case . Although this rule no longer prevails in civil cases, it has become a part of the highest law of the land that "no person shall be compelled in any criminal case to be a witness against himself." This provision of the Fifth Amendment to the National Constitution has been incorporated in substance into the Constitutions of nearly all the States. Hence in criminal cases the right to compel a person charged with a crime to submit to an examination or inspection will depend upon the construction put upon this clause of the Constitution. Of course in those jurisdictions where the right is denied in civil cases no such provision is needed to protect the person of the prisoner from a compulsory stripping or inspection.

Out side of these jurisdictions, however, the ques-

tion is still debatable and a careful examination of the reports will reveal cases on either side. The conflict in the cases arises out of a difference of opinion as to the purpose and meaning of the clause which says no one shall be compelled to be a witness against himself, and the real question arising here is whether or not one is a witness against himself who is compelled by the court to submit his person to the inspection of the jury or other persons authorized by the courts mto make such inspection or examination. In discussing this point some of the courts have made a distinction in the cases in which inspection was had at the command of the court for the purpose of a discovery and those in which winesses have been called to prove facts which they have obtained by a compulsory examination, but not at the command of the court. In the present discussion we are dealing simply with the right of the court to compel an examination, so we will dismiss this latter branch of the subject by simply saying that there is a decided conflict in the authorities in regard to the admissibility of evidence obtained in such a manner, many of the courts holding that the same rule should apply to facts obtained in this way as applies to facts ob-

tained through an involuntary confession; others holding that "it is due to the decent administration of justice that the court should not allow the people in a criminal cause to take advantage of criminal outrages which may have been committed in the discretion of an ordinary sheriff upon the personal liberty of the accused in his custody."

Returning then to the question as to the right of the court to compel an examination we find but few cases on this branch of the subject. However, there are more than could agree on a single proposition so we shall be obliged to discuss them under the headings of those granting the right of ordering an inspection and those denying it.

The leading case in favor of a profert of the person in a criminal prosecution is State of Nevada v. Ah Chuey, 14 Nev., 79. The question raised in this case was one of personal identity. A witness had testified on the trial that the person whom he knew to be Ah Chuey had certain marks on his arm. The prisoner denied being Ah Chuey and claimed that he was Sam Good. On the trial the court compelled him against his objections to exhibit his arm to the jury and the marks testified to by the witness were disclosed. Was this

compelling the prisoner to be a witness against himself?

The Supreme Court of Nevada held it was not saying: "The object of every criminal trial is to ascertain the truth. The Constitution prohibits the state from compelling a defendant to be a witness against himself because it was believed that he might, by the flattery of hope or suspicion of fear be induced to tell a falsehood.

"None of the many reasons urged against the rack or torture or against the rule compelling a man 'to be a witness against himself' can be urged against the act of compelling a defendant, upon a criminal trial, to bare his arm in the presence of the jury so as to enable them to discover whether or not a certain mark could be seen imprinted thereon. Such an examination could not in the very nature of things lead to falsehood. In fact, its only object is to discover the truth; and it would be a sad commentary upon the wisdom of the framers of our Constitution to say that by the adoption of such a clause they have effectually closed the door of investigation tending to establish the truth.

"Confessions of persons accused of crime whenever obtained by hope or fear are excluded because in considering

the motives which actuate the mind of man they might be induced to make a false statement. Yet, notwithstanding the universality of this rule of law, whenever the confession, however, improperly or illegally obtained has lead to the discovery of any given fact, that fact is always admitted in evidence, because the reasons which would have excluded the confession no longer exists. This is the governing and controlling principle of the law.

"The Constitution means just what a fair and reasonable interpretation of its language imports. No person shall be compelled to be a witness, that is to testify against himself. To use the common phrase it "closes the mouth' of the prisoner. A defendant in a criminal case cannot be compelled to give evidence under oath or affirmation or make any statement for the purpose of proving or disproving any question at issue before any tribunal, court, judge or magistrate. This is the shield under which he is protected by the strong arm of the law, and this protection was given not for the purpose of evading the truth, but, as before stated, for the reason that in the sound judgment of the men who framed the Constitution it was thought that, owing to the

weakness of human nature and various motives that actuate mankind a defendant accused of crime might be tempted to give testimony against himself that was not true."

Other cases will be found cited as holding the same as this one but we believe a careful examination will reveal a distinction. Thus State v. Johnson, 67 N.C., 55, cited by the judge in the Ah Chuey case as a precedent was a criminal prosecution for rape and the Supreme Court held that it was no error for the prosecutrix, when asked to look around the room to see if she could see the offender, to point to defendant and say, "That is the black rascal." The court held that this was simply an incident of his right to be present at the trial and also of the right of the state to have him present for purposes of identification and punishment in case of conviction. He was asked to do no act nor uncover no part of his body which according to custom is usually covered. So for the same reason in State v. Woodruff, 67 N.C., 89, it was held no error in a bastardy proceeding for t the prosecuting counsel to call the jury's attention to the resemblance between the child and alleged father both being in the court room before the jury. State v. Garrett, 71

N.C., 85, is also cited as an authority on this side, but in this case the examination was not made at the order of the court and the question arose on the admissibility as evidence of facts obtained by a compulsory examination. State v. Graham, 74 N.C., 646, another case also cited was of the same character as the Garrett case, the question wbeing whether an officer could testify to a resemblance between foot prints made by the person committing the crime and those which he compelled the prisoner to make for the purpose of a comparison. All these North Carolina cases cited, approve of the doctrine laid down in State v. Jacobs, 5 Jones, 259, an eariler case in that state deciding that the defendant in a criminal prosecution could not be compelled to exhibit himself to the inspection of the jury for the purpose of enabling them to determine his status as a free negro, thus showing that the law in North Carolina is against this view and that they recognize the distinction previously laid down. Walker v. State, 7 Tex.Ct.App., 245, another case cited as upholding this view is a case almost identical with the Garrett case both in its facts and in the decision of the court. Thus it would seem that the Ah Chuey case is the only one holding

squarely that the court can compel a prisoner to submit his person to an examination.

The cases taking the other view of the question are also very few in number. In State v. Jacobs, before cited, the Supreme Court of North Carolina took a firm stand against the right of compelling an accused party of making profert of his person. The court says:- "A judge has not the right to compel a defendant in a criminal prosecution to exhibit himself to the inspection of the jury for the purpose of enabling them to determine his status as a free negro." In People v. M'Coy, 45 How.Pr., 216, defendant was charged with having murdered her illegitimate child at birth and the Supreme Court held that the coroner had no right to send two physicians to the jail to examine, to see whether she had been recently delivered of a child. Justice Balcom in announcing the decision of the Court dsaid:- "They might as well have sworn the prisoner and compelled her by threats to testify that she had been pregnant and had been delivered of the child, as to have compelled her by threats, to allow them to look into her person with the aid of a speculum to ascertain whether she had been pregnant, and been recently

delivered of a child." Referring to whether the court would have the right to compel an examination he says farther: "It is not possible that this court has that right; and it is too clear to admit of argument that evidence thus obtained would be inadmissible against the prisoner." In Blackwell v. State, the Supreme Court of Georgia held that it was error for the trial court to require the defendant to make a profert of himself so that a witness could see him and describe his condition to the jury. In this case the prisoner was charged with murder and a material point was the place at which the prisoner's leg was amputated. Judge Speer said: "Better that the vindication of outraged justice be postponed for a season than that a human being, however deeply stained with crime, be convicted and punished contrary to law."

In State v. Stokes, 5 Baxter (Tenn.), 619, the prisoner was asked to put his foot in a pan of soft mud, furnished by the district attorney, in order that a witness might testify as to its resemblance to foot prints observed at the place where the crime was committed. The prisoner refused to and upon appeal the Supreme Court decided that the district attorney was the one who had'put his foot in it'

by bringing the mud into court, and ordered a new trial, holding that the prisoner may have been prejudiced by his refusal to do as requested. So in the Supreme Court of Michigan, Judge Cooley in the case of People v. Mead, 50 Mich., 228, held that a prisoner against his objections could not be compelled to try on a shoe for the purpose of furnishing evidence against himself. In England the same view is taken as shown in the case of Agnew v. Johnson, 19 Moak's Eng.Rep., 612, The decisions likewise holding that facts obtained by a compulsory examination are inadmissible as evidence might be cited as sustaining this side of the proposition as we see that courts which refuse to grant the right of trial courts to compel an examination have held such facts to be admissible evidence.

Such are the principal cases on both sides of the proposition. We see that while many courts permit evidence of facts ascertained by a compulsory examination to be admitted, the Nevada case seems to stand alone in the position it has taken and even in that case the court was divided. The argument of Hawley J. though very ingenious, is more plausible than sound. He is arguing from false premises. He assumes

that the word witness applies only to one who gives oral testimony or evidence, and also that the only reason that lead to the adoption of the provision in question was that it would tend to secure greater certainty in the discovery of the truth. Neither of these assumptions can be substantiated. Webster defines a witness as one who testifies or produces evidence in a judicial proceeding. Evidence is that which produces conviction on the mind as to the existence of a fact. Evidence is whatever tends to prove or disprove matters in issue, or as Greenleaf says: "the word evidence in legal acception includes all means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved. Why should a prisoner be compelled to make a profert of this person, if it was not necessary to prove or disprove some material fact? Would a party be a witness and giving evidence when replying orally to a question asking whether he had a certain scar on his body and not be one when establishing the same fact in the mind of the jury by exhibiting the scar? We fail to see any reason for drawing a distinction.

An examination of the history of criminal prosecutions will show that the purpose of the framers of the

Constitution in enacting this provision was not solely to secure greater certainty in discovering the truth. There is more danger that the accused will speak falsely in his own behalf than against himself, still there is no provision preventing one charged with a crime from being a witness in his own favor. It would also seem that the truth could be more certainly arrived at by subjecting an accused person to a severe examination, than in another way. As observed by Collin J. in writing the decision in the case of State v. Ruloff, in the Cornell University Court of Appeals; The Constitutional provision in question has more direct reference to the protection of the personal liberty of the citizen than to the rejection of a line of evidence which was likely to be misleading, Whatever may have been the reasoning by which the early courts evolved the ancient common law principle that no person should be bound to accuse himself, I am sure that the framers of our Constitution, and the citizens of this country have deemed the chief object and usefulness of this provision to be the protection of the accused citizen from the oppressions, threats, and enticements which officers of the law are tempted to impose upon the citizen they have

charged with crime and whom they are naturally trying to convict. No one familiar with the workings of the machinery of our criminal law, with its ambitious detectives aspiring to be policemen, and policemen and court attendants aspiring to be sheriffs and assistant district attorneys aspiring to be district attorneys, all naturally working together to secure the conviction of the person whom they have caused to be arrested: no one familiar with the ordinary unscrupulousness and zeal of this small army of pursuers, will for a moment hesitate to say that this constitutional provision has not yet outlived its usefulness, and that its protection of the liberty of the accused overshadows by far its value in facilitating the discovery of truth." That this provision is for the protection of the accused would also appear from writers on the Constitution. Story in speaking of this provision says that it is simply an enactment of the principles of the Common law, and when we look at the Common law reports, way back in the early part of the 18th century during the reign of Queen Anne, we find in the cases of Rex v. Worsenham I.Lord Raymond's Rep., 705 and Regina v. Mead, II. Lord Raymond's Rep., 927, instances where the

courts applied this provision holding that persons charged with crime could not be compelled to produce certain books in their possession to furnish evidence to support a criminal prosecution against them. In these cases there would have been no more chance perverting the truth than in compelling an exhibit of a scar on the body. Justice Leonard in the dissenting opinion in the Ah Chuey case, after reviewing the various decisions pertaining to this clause of the Constitution gives his conclusions as follows:- I am satisfied that the framers of that instrument and the people who adopted it did not intend that a principle which has so long excited the admiration of the most enlightened nations and been regarded as one of the grandest monuments of liberty, should be disregarded or forgotten in the administration of criminal law. I am also unwilling to admit that the people of this state have embodied in their fundamental law a principle against which, in darker periods, less enlightened people have hurled their righteous anathemas. I think that the framers of the Constitution intended that at criminal trials the accused, if such should be his wish, should not only have the right to close his mouth; but that he might fold his arms

as well, and refuse to be a witness against himself in any sense or to any extent by furnishing or giving evidence against himself, whether testimony under oath or affirmation, or confessions or admissions without either, or proof of a physical nature."

Table of Cases.

Divorce Cases.

Physical Injury Cases.

Elfers v. Wasley, 116 N.Y., 294, (1889).

McQuigan v. D.L.& W.R.R.Co., 129 N.Y., 50, (1891).

Lloyd v. R.R.Co., 53 Mo., 509, (1873).

Shepard v. R.R.Co., 93 Mo., 406, (1887).

Sidekum v. R.R.Co., 85 Mo., 629, (1885).

Owens v. R.R.Co., 95 Mo., 169, (1888).

Kinney v. City of Springfield, 35 Mo.App., 97, (

Schroeder v. R.R.Co., 47 Iowa, 375, (1877).

Turnpike Co. v. Bailey, 37 O.St., 104, (1881).

R.R.Co. v. Thul, 29 Kan., 466, (1883).

R.R.Co. v. Finlayson, 16 Neb., 578, (1884).

Stuart v. Havens, 17 Neb., 211, (1885).

White v. R.R.Co., 33 Minn., 180, (1885).

Hatfield v. R.R.Co., 61 Wis., 536, (1884).

R.R.Co., v. Underhill, 64 Tex., 463, (1885).

R.R.Co., v. Johnson, 72 Tex., 95, (1888).

R.R.Co. v. Norfleet, 78 Tex., 421, (1890).

Sibley v. Smith, 46 Ark., 275, (1885).

R.R.Co. v. Childress, 82 Ga., 719, (1889).

R.R.Co. v. Hill, 90 Ala., 71, (1890).

Hess v. Lowery, 122 Ind., 225, (1890).

R.R.Co. v. Braunker, 26 N.C., 178, (1890).

Parker v. Bustoe, 102 Ill., 272, (1887).

R.R.Co. v. Holland, 122 Ill., 461,

Bridge Co. v. Miller, 28 N.E., 1091.

R.R.Co. v. Botsford, 141 U.S., 250, (1891).

Mitchells Case, 12 Abb.Pr., 249.

----------57 Miss., 308.

Criminal Cases.

State v. Ah Chuey, 14 Nev., 79.

Walker v. State, 7 Tex.Ct.App., 245.

State v. Graham, 74 N.C., 646.

Day v. State, 63 Ga., 667.

Stoke v. State, 30 Am.Rep., 72.

People v. McCoy, 45 How.Pr., 216.

State v. Garrett, 71 N.C., 85.

People v. Mead, 50 Mich., 228.

State v. Johnson, 67 N.C., 55.

McGuff v. State, 83 Ala., 40.

Barnett v. State, 83 Ala., 147.

Counselman v. Hitchcox, 142 U.S., 547.

Boyd v. U.S., 116 U.S.,

Rex v. Worsenham, 1 Lord Raymond's Rep., 705.

Regina v. Mead, 3 Lord Raymond's Rep., 927.

Cimery's Case, 107 Mass., 181.

Witkins v. Malone, 14 Ind., 158.

Commonwealth v. Dana, 2 Metc., 337.

Thompson on Trials, Secs. 852-860.

Rogers on Expert Testimony, Secs. 72-80.

15 Central Law Journal, 2-208.

34 " " " , 442, 490.

24 Am.Law Reg., (N.S.) 527, 532, 535.

44 A.L.J., 493.

I Yale Law Journal, 57.

6 Criminal Law, May, 805.