1896

Competency of Witnesses in Civil Actions in New York

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COMPETENCY OF WITNESSES

IN CIVIL ACTIONS IN NEW YORK.

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OF

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BY

DANFORTH RUGGLES LEWIS.

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CORNELL UNIVERSITY.

SCHOOL OF LAW.

1896.
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INTRODUCTION.

A witness is a person who has knowledge of an event, and is a means or instrument of evidence, i.e. of unwritten or oral evidence; his function is to inform the tribunal or officer before whom he testifies as to matters of fact. Obviously, in order to exercise this important function, the proposed witness must possess certain qualifications, or in other words, he must not labor under certain disqualifications, which will be considered in the following chapters, or he will be rejected by the court or magistrate as an incompetent witness, and his testimony excluded.

The chief reason for the exclusion of the testimony of a particular witness is, that it would, if admitted, tend to mislead the jury, while in another great class of cases it is to protect the witness. Witnesses in court were always put upon oath and accordingly, were always required to have that amount of maturity, sense, and religious belief which the act of swearing presupposes.

The rule upon this subject is that all persons offered as witnesses are presumed to be competent until the contrary is affirmatively shown to the satisfaction of the presiding judge or magistrate, by whom all questions of competency are to be determined, and who, for the purpose may examine the witness himself, or hear any other legal testimony which may be produced upon the subject. (a)  

(a) Best Ev., Sec. 133; Ste. Dig. Art. 106.
The following is an application of this rule in justice courts which is our most inferior tribunal. "An objection to the competency of a witness must be tried and determined by the justice. Where the ground of objection depends upon a matter of fact, evidence may be given thereupon, as upon any other question of fact; except that, if the witness is examined thereupon by the party objecting, no other testimony shall be received from either party as to his competency". (a)

Objections to the competency of a witness should be made before he is examined in chief, if the disqualification be then known to the party objecting, or if it be not then known, it must be made as soon as the disqualification appears: for a party who, knowing of the fact of incompetency and holds it back until after the witness has been examined, will ordinarily be held to have waived the objection, but if the testimony is in before the fact of incompetency is known, such evidence may be stricken out if the party objecting uses due diligence, and makes his objection promptly upon becoming informed of such incompetency.

(a) Code Civil Pro. 3005.
CHAPTER I.

COMPETENCY OF WITNESSES.

At Common Law.— Upon the competency of witnesses, the common law proceeded in distrust of human nature; it believed a witness, if interested to be incapable of verity, and there consequently grew up under it a system of restriction which rarely, if ever, allowed the facts in a given case to come out fully. It was thought, that in judicial investigations, the motives to prevent the truth and to perpetuate falsehood, and fraud was so generally multiplied, that if statements were received with the same undiscriminating freedom as in private life, the ends of justice could with far less certainty be attained, that the testimony of a witness unworthy of credit might receive as such consideration as that of one worthy of the fullest confidence. If no means were employed to exclude this influence from the fountains of justice this evil would constantly occur, the danger was always felt, and guarded against in all civilized countries. It was thought necessary to the end of justice that certain kinds of evidence should be uniformly excluded.

In determining what evidence should be admitted and weighed by the jury, and what not to be received at all, a principle was applied, based upon the experienced connection between the situation of the witness, and the truth or falsity of his testimony. Thus, the law excluded as incompetent those persons whose evidence in general was found most likely to mislead juries. The question
was not whether any rule of exclusion might not sometimes shut out credible testimony; but whether it is expedient that there should be any rule of exclusion at all. There had to be, to carry out this idea, some rule designating the class of evidence to be excluded, and to this end the common law merely followed the experience of mankind.

Who is disqualified.- At common law the disqualifications which rendered a witness incompetent to give any evidence at all were: (1) the position of the proposed witness as a party to the controversy under investigation; (2) insufficient understanding; (3) insensible to the obligation of an oath; (4) infamy arising from conviction of crime; (5) persons whose pecuniary interest in the event of the matter in issue is directly involved, no matter how trifling. (a)

Modern view.- The common law rules, thus established, was often the occasion of great hardships and injustice, the objections to such a system were too manifest to escape attention. Many though the attainment of truth would be best promoted by opening every source of information in a given case, and that all persons cognizant of any facts bearing upon the case, and especially those ordinarily most conversant with them, the parties themselves, should be permitted to speak. They expressed confidence in man and a belief in the existance in human integrity.

From such a bases of thought there sprang up, about the middle of this century, in many of the states, radical changes in the

admissibility and competency of persons as witnesses. A new system has developed itself, whose foundations are laid in common since, and an enlightened policy; and its superiority over the old is no longer questioned, except by the few who have no confidence in the present, no hope in the future, and who deem our only liberty is in keeping fast anchored to the past. (a)

Statutes have been passed in England, and in nearly all of the United States, which have entirely swept away some of these radical rules of exclusion, and greatly circumscribed and limited the application of those that remain, as a part of our law of evidence. The enabling statutes relate generally to the persons included in classes (1) & (5) of the preceding paragraph, to wit parties to the suit and persons whose pecuniary interest is directly involved in the matter in issue. Persons rendered incompetent at common law by conviction of infamous crime have also been rendered competent by statute in many states, this conviction now going to the credibility of the witness, and not to his competency, still further those who formerly were incompetent from lack of sufficient religious belief are now rendered competent.

As though a piece of work as any is the statute of Massachusetts, which may be taken as a type of the modern view of the subject, it is as follows: No person of sufficient understanding, whether a party or otherwise, shall be excluded from giving evidence as a witness in any proceeding, civil or criminal, in court, or before

(a) Marsh v. Potter, 30 Barb. 506.
a person having authority to receive evidence, except in the following cases:

"First. Neither husband nor wife shall be allowed to testify as to private conversations with each other.

"Second. Neither husband nor wife shall be compelled to be a witness on any trial upon any indictment, complaint, or other criminal proceeding against the other.

"Third. In the trial of all indictments, complaints, and other proceedings against persons charged with the commission of crimes or offences, a person so charged shall, at his own request, but not otherwise, be deemed a competent witness; and his neglect or refusal to testify shall not create any presumption against him."

(a) It will be seen that it wholly abolishes incompetency, unless the protection secured to marital communications be regarded as an exception. In some respects this is a more sweeping change than our own statutes have made, but our code is based upon the same liberal idea, as will be seen by comparing the statutes of the two states.

England took the initiatory step, in effecting the radical change, in the competency and admissibility of witnesses, by the passage of Lord Denmant's act, in 1843, as amended by Lord Boughham's act of 1851. The first change in this state were to remove the disqualification of interest, except in the case of parties and those immediately interested, and to allow a party to be called by an adverse party. (b)

(a) Pub. St. Mass. c. 169, s.18; (b) Code 1848.

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(b) Code 1848.
CHAPTER II.
PARTIES AND PERSONS INTERESTED.

Code Sec. 828.- Except as otherwise specially prescribed in this title, a person shall not be excluded, or excused from being a witness. (1) By reason of his or her interest in the event of an action or special proceeding; or (2) because he or she is a party thereto (3) the husband or wife of a party thereto, (4) of a person in whose behalf an action or special proceeding is brought, prosecuted, opposed or defended.

Its effect and history.— This makes use of the most general and sweeping language. It is a radical change of the common law and abolishes its harsh rules of disqualification in this particular class of cases, and makes the law on the subject statutory. In the cases where the disqualification is still retained they may be classed as exceptions to the general rule which will be discussed in subsequent chapters. This section of the code was put in its present form on 1876, and is a substitute for sec. 398 of the Code of Pro.

It was enacted in 1847 chap. 462, that a party or person in interest might be examined as a witness by his opponent: and the same provision was incorporated in the Code of Procedure. The old code as originally enacted, also provided that, no person offered as a witness shall be excluded by reason of his interest in the event of the action, but parties and persons for whose immediate benefit the action was prosecuted or defended was especially excepted. In 1857 the legislative amended the 398th. sec. of the Code
of Procedure so as to read as follows: A party to an action may be examined in his own behalf, the same as any other witness. The amendment of 1857 did more than simply remove the objection of being a party. It affirmatively and positively makes parties competent witnesses so far as any objection based upon their relation to the action is concerned. The statute not only makes parties witnesses, but put them upon the same footing as other witness subject to the same objections as other witnesses and none other. (a)

A mother in a bastard proceedings is not a competent witness to prove relations with her husband, and is not brought within this section, as she is not the wife of a party to the action or of a person whose behalf the action or special proceeding was brought, prosecuted opposed or defended. (b) The party to the action are those who appear upon the record as such. (c)

By act of 1860 husband and wife were made competent witnesses, the one for the other, or against the other in all cases where they are parties to the action. (d) In such instances, they are subject to the same rules of examination, except they are protected from being required to disclose communications between themselves. (e) But this has been changed by act of 1867 chap. 887 so that either is a competent witness in his or her behalf against the other, except as excluded by secs. 829 & 831 of the code. And the husband and wife can testify to conversations and communications (not confidential) had with each other at any time prior to the taking

(a) Marsh v. Potter, 30 Barb. 506; (b) People ex rel v. Supt. of the poor 9 State Rep. 609; (c) Seeley v. Clark, 78 N.Y. 220; (d) Matterson v. Ry. Co. 62 Barb. 364; (e) Wehrkamp v. Willett, 1 Keyes 250.
effect of the act of 1867. (a) The code does not confer upon the court the power to compel a party to an action to submit his body to an examination by a physician for the purpose of ascertaining his physical condition, and enabling him to testify to the same at the trial. (b) Nor in an action for personal injuries the court has no power to compel the defendant to submit to a surgical examination of his person. (c) 

CHAPTER III.
PERSONAL TRANSACTION WITH
DECEASED PERSONS.

Code Civil Pro. 829.- Analytical statement of the section.

1. Upon
   (a) the trial of an action or
   (b) the hearing upon the merits of a special proceeding.

2. A (a) party or
   (b) person interested in the event,
   (c) or person from, through, or under whom such party or interested person derives his interest or title by assignment or otherwise.

3. Shall not be examined as a witness
   (a) in his own behalf or interest or
   (b) on behalf of the party succeeding to his title or interest.

4. Against.
   (a) the executor, administrator or survivor of a deceased person, or
   (b) the committee of a lunatic, or
   (c) a person deriving his title or interest from, through, or under a deceased person or lunatic by assignment or otherwise.

5. Concerning
   (a) a personal transaction or
   (b) a communication between the witness and the deceased person or lunatic.
6. Except where

(a) the executor, administrator, survivor, committee, or person so deriving title or interest is examined on his own behalf, or

(b) the testimony of the lunatic or deceased person is given in evidence.

Concerning the same transaction or communication:

7. A person shall not be deemed interested for the purpose of this section by reason of being a stockholder or officer of any banking corporation which is a party to the action or proceeding, or interested in the events thereof.

The above analysis is found in "Morrell on the Competency of witnesses where most of the cases under this section, down to 1886 are collected.

Purpose of the section. The purpose of the section is simply to exclude from the operation of section 828 this particular class of evidence, this was intended to meet the problem, how to prevent a surviving party from proving, by his own testimony a personal transaction or communication between himself and a deceased person, which but for the prohibition he might do without fear, or possibility of contradiction. (a) This purpose the statute attempts to effectuate by rendering the survivor incompetent to testify as a witness in such a case. But while the situation has in it the possibility of injustice to the successor or to the estate of the deceased, the disability in like manner has in it the possibility of injustice to the survivor, and the turn of judicial scale is

(a) Penny v. Orth, 88 N.Y. 451.
is made to depend upon the accident of death, an event beyond the control of either party. This section which treats of this delicate subject has been frequently varied in its language, and around it have grown up a large number of reported discussions.

**Its application.**—The incompetency only applies upon the trial of an action or the hearing upon the merits of a special proceeding, and has no application to interlocutory proceedings (a) the test of interest of a witness not a party, is that he will either gain or lose by the direct legal operation of the judgment, or that the record be legal evidence for or against him in some other action. (b) A mere interest arising from relationship, or circumstances which might create a presumption that a witness would be favorable towards a party, does not render the witness incompetent. (c)

The next of kin, or heirs who will be benefited if a will is not established, are incompetent witnesses for a contestant (d) but the husbands of legatees under a will are not, disqualified by the mere fact that they may become tenants by the courtesy through their wives. (e)

An important exception, however, in testamentary matters, is found in section 2544, by which the subscribing witnesses to a will are rendered competent to testify in a probate court to its execution, however their interest may be affected. (f) A legatee, however, forfeits the legacy by becoming a subscribing witness. (g)

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(a) Throop's notes; (b) Connelly v. O'Connor, 117 N.Y. 91; Eisinlord v. Clum, 126 N.Y. 552; (c) Nearpass v. Gilman, 104 N.Y. 506; (d) Matter of Lakah, 31 State R.303; (e) Matter of Clark, 40 Hun 233; (f) Matter of Esyaman, 113 N.Y.62; (g) 2 R.S.65 sec.50.
A predecessor in interest, through whom a party, or interested person claims, is disqualified to the same extent as the party himself. This includes a grantor of land, (a) a vendee of chattels (b) the endorser of a note (c) the assignor of a mortgage. (d) Mullins v. Chickering (e) is an interesting case on this point, and shows the application of the statute. The plaintiff delivered to the defendant a piano to be stored for her. The executor of plaintiff's deceased husband claimed it as belonging to the testator's estate, and on demand defendant delivered it to them. In an action for conversion, it was held that the plaintiff as claiming title through her husband, she was prohibited by section 829 from testifying in her own behalf to any personal transaction between herself and her husband, it being proved that the testator purchased the piano and paid for it with his own money.

It is only when a party or person interested in the event, or their predecessor in interest, is offered as a witness on his own behalf or interest against the deceased, that he is disqualified. It is always competent to call such a party, or person, to testify against his interest. (f) A party cannot enable himself to testify in a case otherwise prohibited by examining his adversary, and then claiming that he is thus brought within the exception. (g)

(a) Bookes v. Lansing, 13 Hun 38; (b) 6 Hun 650; (c) Richardson v. Warner, 13 Hun 13; (d) Smith v. Cross, 90 N.Y. 549; (e) 110 N.Y.513; (f) 10 Hun 35; (g) Corning v. Walker, 100 N.Y.547; Miller v. Adkins, 9 Hun 9.
The policy of the statute excludes the evidence of an interested witness, concerning

1st. Any transaction between himself and the deceased person, or in which the witness in any manner participated;

2d. All communications between the person deceased and the witness, including communications in the presence or hearing of the witness, if he in any way was a party thereto, or communications to either one of two or more persons, if all were interested

(a) The evidence which renders the exception applicable must be respecting the same transaction. It does not include written communications between the witness and deceased, but it would preclude the witness from testifying as to the writing, sending or receipt of such communications. (b) But an interested witness may testify to his own opinion as to the handwriting of the deceased. (c)

In the case of May v. Curley (d) which was an action to recover for an alleged loan, plaintiff gave in evidence a check signed by their intestate, payable to defendant and proved that it was delivered to, indorsed by and paid to him: they then called him as a witness and proved by him that at the time of the delivery of the check said intestate did not owe him any thing. As a witness in his own behalf he was asked to state what took place between decedent and himself. This was objected to and excluded as incompetent under this section. It was held error and the court said, that this provision did not abrogate the rule of evidence, that

(a) Holcomb v. Holcomb, 95 N.Y.316; (b) Matter of Budlong, 54 Hun 131; McKenna v. Bolger, 37 Hun 526; (c) Simmons v. Havens, 101 N.Y 437; (d) 113 N.Y.575.
where a party calls a witness and examines him as to part of a communication or transaction, the other party may call out the whole, so far as it bears upon or tends to explain the part called out; that as the testimony of defendant called out by plaintiff tended to rebut the presumption that the transaction was the payment of a debt, and to raise the presumption that it was a loan, this opened the whole transaction and entitled the defendant to testify in his own behalf respecting the same. (a)

(a) Lewis v. Merritt, 98 N.Y. 206.
CHAPTER IV.

TESTIMONY OF PARTY DYING AFTER TRIAL.

Code Civil Pro. 830.- Analytical statement of the section.

1. Where a party has died since the trial of an action, or the hearing upon the merits of a special proceeding,
   (a) the testimony of the decedent or
   (b) of any person who is rendered incompetent by the provisions of section 829, taken or read in evidence at the former trial or hearing, may be given or read in evidence at a new trial or hearing by either party, subject to any,
   (a) other legal objection to the competency of the witness or
   (b) legal objection to his testimony or any question put to him.

2. The testimony of any witness who has died or become insane after a former trial or hearing of a contested proceeding. A special proceeding or an action may be read upon a subsequent trial or hearing, by any party to such action or proceeding, subject to legal objection.

Meaning and construction.— This section renders the evidence so taken, of persons who have become incompetent under section 829, since the previous trial competent to be read in evidence. A strict reading of the section would require the death of the party or interested witness, in order to permit the reading of the previous testimony, but in Morehouse v. Morehouse, (a) where the plaintiff lost his mental powers, after the first trial, the section was held

(a) 41 Hun 146.
applicable. Nor is the section to be limited to the trial immediately preceding; it applies to any former trial. (a) The section mingle, somewhat obscurely, two distinct subjects.

1. The perpetuation of the testimony until a second trial, of a party who was examined at, and had died since the former trial.
2. The establishment of the competency on the second trial of the testimony of a witness taken at a former trial, who is living at the second trial, but is precluded by section 829 from testifying at the latter by the circumstances of the death, between the trials, of a person against whose successor in interest, his testimony would be offered to a personal transaction or communication with the decedent. (b)

The section is remedial and should be liberally construed. It renders competent.

1. The testimony of a party given upon a former trial, in case such party has since died.
2. The testimony given on the former trial of any person, who since then has become incompetent to be examined on this trial by virtue of section 829. (c)

Its application.—It must not be a different action; thus, where the plaintiff's testator, having been injured while in the employment of defendant, brought an action for damages, in which he was examined as a witness on his own behalf, before the trial. Defendant appeared and cross-examined him. While the action was pending testator died, and therefore this action was brought by

(a) Koehler v. Scheider, 31 State R.54; (b) Matter of Budlong 54 Hun 136; (c) Morehouse v. Morehouse, 41 Hun 146
plaintiff, his executor, to recover the damages occasioned to the widow and next of kin of the deceased by his death. It was held that the deposition of the deceased taken in the first action, could not, against the defendant's objection, be read in evidence upon the trial of this action. (a) The testimony may be read in evidence by the stenographer who took it down at the former trial, (b) but it must appear that what is offered in the whole testimony given. Reading from an appeal book simply which was made from a settlement of the case, is not sufficient. (c)

The rule permitting evidence of a deceased to be read is restricted to cases where the parties were the same, or in privity with those in the action or proceeding in which the witness was sworn and examined. (d) That the first action was by default and the defendant did not cross-examine the witness does not make the evidence of the plaintiff who has died meantime incompetent on a subsequent trial, for the defendant had the power to appear and examine, and his failure to do so was a waiver of that privilege. (e) The deposition of a party taken before trial at the instance of his adversary is admissible upon the trial, notwithstanding the decease of such adversary before the trial. (f) If the jury on the former trial disagree, there has still been a trial within this section. (g)

CHAPTER V.
HUSBAND AND WIFE.

Code Civil Pro. 831.- Analytical statement of the section.

1. A husband or wife is not competent to testify against the other, upon the trial of an action, or the hearing upon the merits of a special proceeding, founded upon an allegation of adultery, except to prove the marriage or disprove the allegation of adultery.

2. A husband or wife shall not be compelled, or without the consent of the other if living, allowed to disclose a confidential communication made by one to the other during marriage.

3. In an action for criminal conversation, the plaintiff's wife is not a competent witness for the plaintiff, but she is a competent witness for the defendant, as to any matter in controversy; except that she cannot, without the plaintiff's consent, disclose any confidential communication had or made between herself and the plaintiff.

History and application of the section.- The first part of this section was taken substantially from sections two and three of the laws of 1867 chap. 887, that last part of the section is similar to chap. 426 of the laws of 1876, and is the same as chap. 416 of the laws of 1877 with the exception that the words, "not a competent witness for the plaintiff," but she was inserted by the amendment of 1880 chap. 149. At common law a husband or wife could not be a witness for or against each other. The reason given for the was the unreliability of the evidence of the witness arising from mutual interest and partiality, and a general policy of pre-
serving the harmony of the domestic relations. (a) The modern tendency here, as elsewhere, is to refer such considerations to the weight and force of the evidence, rather than to its competency. A husband and wife are, under the Code, competent to testify either for or against each other in all civil actions (b) except in the cases mentioned. This section does not apply to persons cohabiting as husband and wife, but not married. (c)

**Adultery.**— The disproof of the adultery is not limited to a mere denial. A husband or wife are competent to give all testimony that may have a material effect in convincing or persuading the mind of a judge or jury, either directly or by necessary inference, that the allegation of adultery is untrue. (d) The parties are not competent to prove the fact of a prior marriage. (e) It does not effect their competency as a witness in the other's favor, either is competent in favor of the others. (f) In the case of DeMali v. DeMali,(g) which was an action by a wife against her husband for illegal and inhuman treatment, the defendant by way of construction, alleged that plaintiff had committed adultery and asked for a divorce. It was held that the action was not founded upon an allegation of adultery within the meaning of this section and her testimony denying the allegations of defendant's counterclaim was admissible that the defendant could not by setting up the counterclaim deprive plaintiff of the right to testify.

(a) Marsh v. Potter, 30 Barb. 506; (b) Southwick v. Southwick, 49 N.Y. 510; (c) Dennis v. Crittenden, 42 N.Y. 542; (d) Irsch v. Irsch 12 Civ. Pro. 181; (f) Bailey v. Bailey, 3 N.Y. St.Rep. 132; (e) Finn v. Finn 12 Hun 339; (g) 120 N.Y. 485.
In an action to recover damages for seducing and debauching of plaintiff's wife, the plaintiff is a competent witness to prove any fact tending to establish the charge of misconduct, although it may implicate her in the transaction, this section applies only when the wife is a party to the action. (a) The Code does not limit the evidence to a denial simply, but gives the right generally "to disprove the allegation of Adultery, "to show that the allegation is not true and that the defendant could not only deny, but could testify to any fact or circumstances within the parties knowledge, competent and material on the question as to whether the act as charged was committed. (b)

Confidential communications.-- The object of this rule is that the most entire confidence may exist between husband and wife, and that there may be no apprehension that such confidence can at any time, or in any event, be violated, so far at least as regards any testimony or disclosure in a court of justice. (c)

The question as to what constitutes a confidential communication, or whether all communications between husband and wife are confidential, was touched upon in Parkhurst v. Berdelli, (d) where Earl, J., expressed the opinion that all communications between husband and wife, when alone, are not confidential, and limits the communication between husband and wife which are privileged by the statute to such "as are expressly made confidential, or such as are of a confidential nature, or induced by the marital relation."

(a) Wood v. Glenhill, 56 Hun 220; (b) Stevens v. Stevens, 54 Hun 480; (c) Chamberlain v. The People, 23 N.Y. 89; (d) 110 N.Y. 393.
In that case it was held that it was competent to examine the wife of the defendant as to statements made by him to her, in reference to certain business liabilities sought to be fastened upon him. As the law was prior to 1867 it embraced husband and wife, but by that act it was limited to confidential communications. Such testimony of the wife cannot be used against the husband after the dissolution of the marriage contract, whether by death or divorce.

(a) Though a communication received or facts learned after divorce, may be testified to, and she may also be admitted to testify to facts which came to her knowledge by means equally accessible to any person not standing in that relation. (b)

This subject also belongs to privileged communications, and are therefore protected independently of the ground of interest and identity, which precludes the parties from testifying for or against each other. The happiness of the married state requires that there should be the most unlimited confidence between husband and wife; and this confidence the law secures by providing that it shall be kept forever inviolable; that nothing shall be extracted from the bosom of the wife which was confided there by the husband. (c)

Criminal conversation.—In such an action the wife is not a competent witness for her husband to prove the charge if no divorce has been obtained. (d) Though she is after a divorce a vinculo (e) the section does not apply to actions where a husband seeks to recover damages for alienation of the wife affections. (f)

(a) Southwick v. Southwick, 49 N.Y. 510; (b) O'Conner v. Majoribanks, 5 Scott N.R. 394; (c) 1 Greenleaf sec.264; (d) Carpenter v. White, 46 Barb. 321; (e) Retcliffe v. Wales, 1 Hill 63; (f) Smith v. O'Btine, 24 St. Rep. 708.
CHAPTER VI.
CONVICTION FOR CRIME.

Code Civil Pro. 832.— A person who has been convicted of a crime or misdemeanor is, notwithstanding, a competent witness in a civil or criminal action or special proceeding; but the conviction may be proved for the purpose of affecting the weight of his testimony, either by the record, or by his cross-examination, upon which he must answer any question relevant to that inquiry; and the party cross-examining him is not concluded by his answer to such a question.

Common Law and Code Compared.— This provision of the Code is new and was introduced into it in 1876, chap. 448 sec. 832. It was amended by laws of 1879 chap. 542 by adding the words, "in a civil or criminal action or special proceeding." (a) This section is directly contrary to the law as it stood before, which was in effect, that a person who was sentenced for felony should not be competent to testify in any cause civil or criminal unless he was pardoned by the governor or the legislature. (b) The design and effect of the section is to establish a uniform rule, and permit the conviction for any crime to be proved, and whether it will affect the credibility of the witness is a question for the jury. (c) The exclusion of felons as witnesses at common law was justified by the argument that their testimony was wholly unreliable and unsafe, and that their exclusion as witnesses was a proper punishment for their crimes. (d) A conviction and sentence for a misde-

(a) See Penal Code Sec. 714; (b) People v. McGloin, 28 Hun 150; (c) People v. Burns, 33 Hun 293; (d) Throop's Notes.
meanor never disqualified, but only for a felony. Accordingly a conviction for petit larceny, that not being a felony, did not disqualify.(a) But conviction for a misdemeanor was always, both at common law and under the Revised Statute, and is now, admissible for the purpose of affecting the credibility of the witness. (b)

Application of the section.—The general rule is, that a party who, upon cross-examination, asks questions relating to matters not directly within the issue for the purpose of affecting the credibility of the witness, cannot contradict what the witness says in reply, by other witnesses. The necessity for this rule arises from the confusion which would arise from permitting parties to bring into the trial of one issue, matters which are wholly collateral. But to this salutary rule the law permits an exception in the case of conviction for crime. If the witness on cross-examination denies that he has been convicted of crime, although that is a matter wholly collateral to the issue being tried, it is permissible to prove the conviction under the provisions of this section.

Nothing short of conviction can be proved for the purpose of affecting the witness' testimony. He cannot be asked whether he has been arrested upon a criminal charge,(c) or how many times he has been arrested,(d) or whether he has been indicted. (e) Conviction means the final judgment of the court in passing sentence. (f)

(a) Shay v. People, 22 N.Y. 317; (b) 29 Hun 122, 382; 33 Hun 296; Morrell on Comp. of Wit., p. 31. (c) People v. Crapo, 76 N.Y. 238; (d) People v. Brown, 72 N.Y. 571; (e) Ryan v. People, 79 N.Y. 593; (f) Sacia v. Decker, 10 Daly 204.
A judgment in a civil action to recover a fine, is not a conviction of a crime or misdemeanor, and is not admissible to affect the weight of the testimony of the person against whom it was rendered, given in another action. (a) A person convicted is rendered competent whether sentenced or not. (b)

CHAPTER VII.

PROFESSIONAL COMMUNICATIONS.

I. CLERGYMAN.

Code Civil Pro. 833.— A clergyman, or other minister of any religion, shall not be allowed to disclose a confession made to him, in his professional character, in the course of discipline, enjoined by the rules or practice of the religious body, to which he belongs.

Common Law Rule and Application.— In the common law of evidence there is no distinction between clergyman and layman; but all confessions and other matters not confided to legal counsel, must be disclose when required for the purpose of justice. Neither confessions made to a minister or to a member of the party's own church nor secrets confided to a Roman Catholic priest in the course of confession are regarded as privileged communications, but this was not the rule of the Civil Law nor that of Scotland. (a)

This section is based on the provisions of the Revised Statute, and the instances in which it has been invoked are very rare. Only one reported case is to be found, that of People v. Gates, (b) and in that case, which was of a criminal nature the clergyman testified that the confession was made to him as a clergyman, and not in a professional character, in the course of discipline enjoined by his church, and he was held competent to testify. The provisions of this section apply to any examination of a person as a witness, unless they are expressly waived upon the trial or examination by the person confessing. (c)

(a) Vol. 1 Greenleaf 247; (b) 3 Wend. 312; (c) Code Civ. Pro. 336.
II. PHYSICIANS.

Code Civil Pro. 834.—A person, duly authorized to practice physic or surgery, shall not be allowed to disclose any information which he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity.

Common Law.—At common law there is no protection extended to medical persons, in regard to information which they have acquired confidentially, by attending in their professional character, but in a number of the states the rule has been changed by statute to protect a patient in regard to information which his physician has acquired from him confidentially, in the course of the treatment of his illness. (a)

Purpose of the section.—This provision of the Code is a substantial re-enactment of a similar provision contained in the Revised Statute. It places the information of the physician obtained from his patient in a professional way, substantially on the same footing with the information obtained by an attorney, professionally of his client’s affairs. Its plain purpose seems to be, to enable the patient to make known his condition to his physician, without the danger of any disclosure by him which would annoy the feelings, damage the character, or impair the standing of the patient while living or disgrace his memory when dead,(a) that the person may feel sure that whatever they disclose to a physician in his professional capacity, in regard to their bodily condition, whether it be by word or by allowing a physical examination, shall

(a) Pierson v. People, 79 N.Y. 424.
be held sacred, whenever the relation of physician and patient exists. (a)

**Interpretation.**— The words "in a professional capacity", have reference to the relation between the parties and whether the physician in employed or not it makes no difference if he acts in that capacity and the relation is shown to exist. It is immaterial how the physician obtained that information, whether by observations or word of mouth it is alike privileged to the extent to which it bears upon the professional relation and to that only. (b)

A recent review of the question presented by this section and of the authorities, by Mr. Austin Abbott, will be found in the Columbia Law Times. (c)

Where a party seeks to exclude the testimony of a physician, the burden is upon such party to bring the case within the provision; he must make it appear not only that the information which he seeks to exclude was acquired by the witness in attending the patient in a professional capacity, but also that it was necessary to enable him to act in that capacity. (d)

**Waiver of the Privilege.**— This section applies to any examination of a person as a witness unless the provisions thereof are expressly waived upon the trial or examination by the patient. (e)

The seal of confidence impressed by the statute, is for the benefit of the patient and may be removed by him or with his consent, but no one but the patient can waive the privilege (f) the

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seal remains after the death of the patient, and the personal representatives could make objection to evidence forbidden by the statute and even an assignee may exercise it. (a) If the patient waives the privilege the physician cannot object to being examined as the privilege is that of the patient and not of the physician. It does not prevent a physician from testifying upon a trial for murder as to the condition of the person injured whom he attended before death ensued. (b)

A physician or surgeon may upon a trial or examination disclose any information as to the mental or physical condition of a patient who is deceased, which he acquired in attending such patients professionally, except confidential communications and such facts as would tend to disgrace the memory of the patient, when the privilege has been expressly waived on such trial or examination by the personal representatives of the deceased patient, or if the validity of the last will and testament of such deceased patient is in question, by the executor or executors named in said will, or the surviving husband, widow or any heir-at-law or any of the next of kin, of such deceased or any other party in interest. (c) This provision was enacted to remedy the decision in the case of Westover v. A. L. Ins. Co., (d) in which it was held, that upon the death of the patient the privilege of waiver ceased, and his executors or administrators could not exercise it, this additional provision was made in 1891. A decedent expressly waives the privilege,

if he requests a physician to become a witness to his will, as he
is legal effect, requests the physician to testify to the whole
truth within his knowledge touching the matter material to be in-
quired of in order to establish the probate of the will. (a)

It is provided by the amendment of 1893 to the Code section
836, that in an action to recover for personal injury the testimony
of a physician or surgeon attached to any hospital, dispensary or
other charitable institution as to information which he acquired in
attending a patient in a professional capacity, at such hospital,
dispensary, or other charitable institution shall be taken before
a referee appointed by a judge of the court in which such action is
pending; provided, however, that any judge of such court at any
time in his discretion may notwithstanding such deposition, order
that a subpoena issue for the attendance and examination of such
physician or surgeon upon the trial of the action. The courts have
not construed this part of the section. It seems to be plain upon
its face, and simply provides a method of taking this particular
class of testimony in this particular class of cases, which is nec-
essarily very limited in its application.

(a) Matter of Freeman, 12 St Rep. 175.
III. ATTORNEY AND COUNSELLOR.

At Common Law.— Professional communications between attorney and client was privileged to its fullest extent at common law, the rule was based upon public policy and the confidential counsellor, solicitor, or attorney of the party could not be compelled to disclose papers delivered or communications made to him, or letters or entries made by him in that capacity, or other matters which they knew only through their professional relation to the client, they were not only justified in withholding such matters, but were bound to withhold them, and would not be compelled to disclose the information, or produce the papers in any court of law or equity, either as a party or as witness. (a) The earliest reported case on this subject is that of Bird v. Lovelace, (b) which firmly establishes this rule. Chancellor Brougham in the case of Greenough v. Gaskell, said "the foundation of this rule is not on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection. But it is out of regard to the to the interests of justice, which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations, which form the subject of all judicial proceedings. If such communications were not protected, no man, as the same learned judge remarked in another case, would dare to consult a professional adviser, with a view to his defense, or to the enforcement of his rights; and no man could safely come

(b) 19 Eliz. in Chancery Cary's Rep. 38.
into a court, either to obtain redress, or to defend himself. (a)

**Code Civil Pro. 835.**—An attorney or counsellor-at-law shall not be allowed to disclose a communication, made by his client to him, or his advise given thereon, in the course of his professional employment.

**Extent and Application.**—This section is taken substantially from the Code of Civil Pro. of 1850, which incorporated the common law rule upon the subject into the statute. It was a mere re-enactment of the common law and not intended to change or enlarge that rule as it has been expounded by the courts. The protection afforded to a client by this rule does not cease with his death, but may be invoked by his personal representatives. The object is to enable and encourage persons needing professional advise to disclose freely the facts to which they seek advise without fear that such facts will be made public to their disgrace or detriment by their attorney. It is plain that the privilege secured by this rule of law does not apply to a case where two or more persons consult an attorney for their mutual benefit, that it cannot be invoked in any litigation which may thereafter arise between such persons or their representatives, but can be in a litigation between them and a stranger. (b)

One who objects to the testimony must prove that the communication was made to the attorney in the course of professional employment. (c) A communication made after the relation has ceased is not protected. (d) Before the section will apply a contract

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relation between attorney and client must exist based upon an employment by the client. (a) The fact that the advice is gratuitous makes no difference, the advice need not relate to a suit pending or contemplated. The privilege is that of the client and not of the attorney. It cannot be admitted in a litigation between third parties, and the party against whom it is offered may object on ground of public policy. (b)

A request by testator to an attorney to draw his will, and sign it as an attesting witness, is a waiver of the obligation of secrecy, and hence such attorney is competent to testify to the execution of the will when it is propounded for probate. (c) When the probate of a will is contested on the ground of fraud, forgery, or mistake, instructions for the making of the will, received by an attorney, are not privileged communications within any just and proper construction or understanding of the rule of law relating to them. (d)

An attorney cannot be compelled to produce a deed or other instrument intrusted to him by his client, nor to disclose its date or contents, but he may be called to prove its existence, and that it is in his possession, (e) this privilege extends to both counsel and client. (f) The attorney may testify as to the client's handwriting, the privilege does not extend to information derived

from third persons or other sources, although they are obtained while acting as such attorney, (a)

This rule of law does not shield a crime, thus if an attorney is consulted as to the communication of a crime which is malum in se it is not privileged. (b) A complete analysis of the law on this subject in a nut shell may be found in Art. 155 of Chases Stephens on Evidence.

Clerks and Others.— Communications made by a client or by any third person acting as his agent or friend, with the view of establishing the relation and securing professional advise or assistance, made to the clerk or agent of the attorney to be communicated to him are privileged, but will not be extended to communications made by a defendant to the clerk of a law firm, who, being asked if he was a lawyer, replied that he was not and to whom the communications were made without further inquiry or suggestion. In other words an interpreter, intermediary, agent or clerk of an attorney through whom communications are made stands upon the same footing as his principal, and will not be allowed to divulge any fact coming to his knowledge as the conduct of information between the attorney and his client, but the rule extends no further than this. It is confined to communications between the attorney and his client and extends to the necessary organs by which such communications are made, but no further. (c)

A communication made to the attorney's clerk to enable him to draw a complaint in the client's action is privileged. (a)

**Waiver and Limitation.** - But nothing herein contained shall be construed to disqualify an attorney in the probate of a will heretofore executed or offered for probate or hereafter to be executed or offered for probate from becoming a witness, as to its preparation and execution in case such attorney is one of the subscribing witnesses there to. (b)

The section applies to any examination of a person as a witness unless the provisions thereof are expressly waived upon the trial or examination by the client. Prior to 1877 the law did not require the privilege to be expressly waived. An examination of the attorney as to such communications by the party himself is to be considered a sufficient waiver, this privilege cannot be waived by the personal representatives as in the case of communications made to a physician, but this express waiver may be inferred from conduct. (c) The seal of confidence is not the seal of the attorney, but of the client, it remains forever unless removed by the party himself in whose favor it has been placed, and where the privilege belongs to several clients, any one of them, or a majority cannot waive the protection. (d)

(b) Code Civil Pro. 836. (c) Matter of Coleman, 111 N.Y. 220. 
(d) Bank of Utica v. Mersereau, 3 Barb. Ch. 596.
CHAPTER VIII.

SANCTION OF AN OATH.

At Common Law.- One of the main provisions of the law for securing the purity and truth of oral evidence is that it be delivered under the sanction of an oath. Persons not believing in the existence of a God who will punish false swearing are incompetent witnesses by the common law. (a) Atheists, therefore, and all infidels, that is, those who profess no religion that can bind their consciences to speak truth are rejected as incompetent to testify. (b) The administration of an oath supposes that a moral and religious accountability is felt to a Supreme Being, and this is the sanction which the law requires upon the conscience, before it admits him to testify! The design of the oath is not to call the attention of God to man; but the attention of man to God; not to call on Him to punish the wrong-doer; but on man to remember that He will. Accordingly, an oath has been well defined, to be "an outward pledge given by the witness or person taking it, that his attestation or promise is made under an immediate sense of his responsibility to God". A security to this extent, for the truth of testimony, is all that the law seems to have deemed necessary; and with less security than this, is believed that the purposes of justice cannot be accomplished. (c)

Manner of Administering an Oath.- All witnesses are to be sworn according to the peculiar ceremonies of their own religion, or in such a manner as they may deem binding on their own conscience

(a) Blair v. Seaver, 26 Pa. S. 274. (b) 1 Stark Ev. 22. (c) Greenleaf Vol. 1 sec. 328.
If the witness is not of the Christian religion, the court will inquire as to the form in which an oath is administered in his own country, or among those of his own faith, and will impose it in that form. And if, being a Christian, he has conscientious scruples against taking an oath in the usual form, he will be allowed to make a solemn religious asseveration, involving a like appeal to God for the truth of his testimony, in any mode which he shall declare to be binding on his conscience. (a)

Code Civil Pro. 845-51.- The usual mode of administering an oath, now practiced, by the person who swears laying his hand upon and kissing the gospels, must be observed, where an oath is administered, except as otherwise specially prescribed in this article.

The oath must be administered in the following form, to a person who so desires, the laying of the hand upon and kissing the gospels being omitted. "You do swear, in the presence of the everlasting God". While so swearing, he may or may not hold up his hands, at his option.

A solemn declaration or affirmation, in the following form, must be administered to a person who declares that he was conscientious scruples against taking an oath, or swearing in any form: "You do solemnly, sincerely, and truly, declare and affirm".

If the court or officer, before which or whom a person is offered as a witness, is satisfied, that any peculiar mode of swearing, in lieu of, or in addition to laying the hand upon and kissing the gospels, is, in his opinion, more solemn and obliga-

(a) Omichand v. Baker, 1 Atk. 21, 46.
tory, the court or officer may, in its or his discretion, adopt that mode of swearing the witness.

A person believing in a religion, other than the Christian, may be sworn according to the peculiar ceremonies, if any, of his religion, instead of as prescribed above.

The court or officer may examine an infant, or a person apparently of weak intellect, produced before it or him, as a witness, to ascertain his capacity and the extent of his knowledge; and may inquire of a person, produced as a witness, what peculiar ceremonies in swearing he deems most obligatory.

A person swearing, affirming or declaring, in any form, where an oath is authorized by law, is lawfully sworn, and is guilty of perjury, in a case where he would be guilty of the same crime, if he had sworn by laying his hand upon and kissing the gospels.

Effect and Application.—These sections are taken substantially from sections 84-90 of II Revised Statute 407-8, with a very few slight modifications, the majority of these provisions, it will be seen is simply declaratory of the common law, in so far as they apply to the manner of swearing those who believe in the Christian faith, therefore the decisions which have been based upon common law principles, are applicable to that extent to these sections of the Code. But the statute removes the common law disqualification of those who do not so believe, and allows them to take a solemn declaration, or affirmation as a substitute for an oath upon the gospels.
It is a general rule that the witness must not be examined as to his religious belief, the want of such belief must be established by other means, as declarations previously made to others etc.

(a) But in this state where atheism no longer disqualifies, it may nevertheless be shown to affect the witness's credit. (b) To constitute a valid oath for the falsity of which perjury will lie, these must be a present unequivocal act in the presence of an authorized officer to administer the same, by which the affiant consciously takes upon himself the obligation, therefore the mere delivery of an affidavit, signed by the person presenting it, to an officer for his certificate, is not such an act. Nor where the delivery is affected through the agency of the third party. (c) It is held to be complied with, when the oath is administered either upon the Evangelists, the New Testament, or the Scriptures or Bible. (d) An oath administered upon a book supposed by the parties to have been the Bible is a valid oath, and a person is as amenable to an indictment for perjury as if he had sworn on the gospels. If the party taking the oath makes no objection to the mode of administering it at the time he is deemed to have assented to the particular form adopted. (e)

Where a witness called to testify is of tender years, the party against whom he is called may require that he shall be examined as to his understanding of the nature and obligation of an oath. (f)

(a) Com. v. Smith, 2 Gray 516. (b) Stanbro v. Hopkins, 28 Barb. 265. (c) O'Reilly v. People, 86 N.Y. 115. (d) Tuttle v. People, 36 N.Y. 436. (e) People v. Cook, 8 N.Y. 84. (f) People v. McNair, 21 Wend. 808.
In the case of People v. Frindal, (a) where the defendant was indicted for assault in the first degree. A child of eight years was called by the defendant as a witness, and he showed from his testimony that he had no apprehension of the nature of an oath. The court held on appeal that the rejection of receiving the unsworn statement of the witness for what it was worth, at the trial court was proper. And the court said; the law requires the testimony of witnesses to be given under the sanctity of an oath: and where a child is of such tender years as not to be able to comprehend the nature of an oath, it seems to us that the safeguards which the law has placed around human testimony would be entirely overthrown, were such statements permitted to be given. (a)

(a) 58 Hun 482.
CHAPTER IX.
MENTAL DISQUALIFICATION.

General Principles. - Upon the subject of insufficient understanding the Code is silent, therefore the common law rules on the subject must govern. It makes no difference from what cause this defect of understanding may have arisen; nor whether it be temporary and curable, or permanent; whether the party be hopelessly an idiot, or maniac, or only occasionally insane, as a lunatic; or be intoxicated; or whether the defect arises from mere immaturity of intellect, as in the case of children. While the deficiency of understanding exist, be the cause of what nature soever, the person is not admissible to be sworn as a witness. But if the cause be temporary, and a lucid interval should occur, or a cure be affected, the competency also is restored. (a)

The Test. - That a witness is a lunatic, it is not enough per se to exclude him, but he must at the time of his examination be so under the influence of his malady as to be deprived of that "share of understanding" which is necessary to enable him to retain in memory the events of which he has been witness, and gives him a knowledge of right and wrong. If at the time of his examination he has this share of understanding, he is competent. That is the test of competency and of such competency the court is the judge: whilst the weight of the testimony—the credit to be attached to it—is left to the jury. (b)

(a) Greenleaf sec. 365; Livingston v. Kiersted, 10 John 362.
(b) Coleman v. Com. 25 Grat. (Va) 885.
Deaf Mutes.—Persons who could neither hear or talk, at early common law was classed as idiots and held to be incompetent as witnesses. (a) In view, of the fact that modern science has discovered a way of educating these unfortunate persons, who have been found to be of much greater intelligence than was anciently supposed the rule has been changed. Sufficient understanding being shown, such persons may be sworn and give his testimony through an interpreter, or in writing if he is able to do so. (b) 

(a) Hale P. C. 34. (b) Rapalje on Witnesses sec. 6.
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