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GRADUALLY EXPLODED: CONFRONTATION VS. THE FORMER TESTIMONY RULE

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INTRODUCTION

"It is well-established that 'previously cross-examined prior trial testimony . . . has [been] deemed generally immune from subsequent

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confrontation attack.'"[1] The United States Supreme Court decided over a century ago in *Mattox v. United States*[2] that a transcript of former testimony given by a deceased witness may be read to a jury in a criminal trial without offending a defendant's right to confront the witness, provided that the defendant had been previously afforded an opportunity to cross-examine the witness.[3] The Court recognized that a defendant would be deprived the benefit of having a jury determine credibility by looking a witness in the face and seeing the demeanor and manner in which the witness testified, but it nonetheless held that such benefits "must occasionally give way to considerations of public policy and the necessities" of a case.[4]

The *Mattox* Court reasoned that the Constitution must be interpreted in "light of the law as it existed at the time it was adopted," and the Confrontation Clause was therefore deemed to incorporate preexisting exceptions that may not technically adhere to the letter of the provision but do not violate its spirit since such exceptions "were obviously intended to be respected."[5] The Court favorably compared the use of prior testimony against the accepted practice of admitting dying declarations given outside the presence of an accused and without any cross-examination.[6] It asserted that the unquestionable admissibility of dying declarations provided "equal if not greater reason" for admitting prior testimony because "[t]he substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination."[7]

Mattox involved use of prior testimony given by witnesses who had subsequently died.[8] The former testimony rule has since been applied to allow the use of prior testimony given by a living witness who is no longer available.[9] "In the usual case (including cases where prior cross-

1. Woodfox v. Cain, 609 F.3d 774, 800 (5th Cir. 2010) (quoting Ohio v. Roberts, 448 U.S. 56, 72–73 (1980)).

2. Mattox v. United States, 156 U.S. 237 (1895).

3. *Id.* at 243.

4. *See id.* (explaining that one who is convicted due to the testimony of a witness who has since passed should not "go scot free").

5. *Id.*

6. *See id.* at 243–44 (stating that although dying declarations are "rarely made in the presence of the accused . . . without any opportunity for examination or cross examination," they are still admitted "as an exception to [rules governing admission of testimony], simply from the necessities of the case, and to prevent a manifest failure of justice").

7. *Id.* at 244.

8. *Id.* at 240.

9. *See, e.g.*, Mancusi v. Stubbs, 408 U.S. 204, 209–16 (1972) (finding that the trial judge properly

examination has occurred), the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant."[10] A witness is only unavailable if absent and "prosecutorial authorities have made a good-faith effort to obtain his presence at trial."[11] However, demonstration of unavailability may not always be required.[12]

Mattox dealt with use of prior trial testimony.[13] The former testimony rule has subsequently been expanded to also apply to testimony given at preliminary hearings.[14] However, "preliminary hearing testimony is admissible only if the defendant had an adequate opportunity to cross-examine."[15] Former testimony given by an absent witness may be admitted into evidence in a criminal trial if (1) the witness who gave the testimony is unavailable, and (2) the defendant was afforded sufficient opportunity to cross-examine the witness.[16] The former testimony rule has been codified.[17] It has also survived major shifts in confrontation jurisprudence.[18] The rule is premised on the belief that the primary objects of the Confrontation Clause are preventing the use of ex parte affidavits against persons accused of crimes and providing the accused with an opportunity to cross-examine adverse witnesses.[19] Supreme

allowed a witness's testimony from a previous trial to be read where the witness had since moved to Sweden).

10. Ohio v. Roberts, 448 U.S. 56, 65 (1980), *abrogated by* Crawford v. Washington, 541 U.S. 36 (2004).

11. Barber v. Page, 390 U.S. 719, 724–25 (1968); *see also* Motes v. United States, 178 U.S. 458, 474 (1900) (holding statement of absent witness should not be heard at trial where the witness's absence was due to prosecutorial negligence).

12. *See Roberts*, 448 U.S. at 65 n.7 (giving an example where "the Court found the utility of trial confrontation so remote that it did not require the prosecution to produce a seemingly available witness"); *see also* United States v. Inadi, 475 U.S. 387, 392–400 (1986) (confirming the general applicability of the unavailability requirement, but holding that it does not apply to the admissibility of out-of-court statements made by co-conspirators).

13. *Mattox*, 156 U.S. at 240.

14. *See* California v. Green, 399 U.S. 149, 165 (1970) ("[W]e do not find the instant preliminary hearing significantly different from an actual trial to warrant distinguishing the two cases for purposes of the Confrontation Clause.").

15. Crawford v. Washington, 541 U.S. 36, 57 (2004).

16. *Id.* at 68.

17. FED. R. EVID. 804(b)(1).

18. *See Crawford*, 541 U.S. at 57–59 (pointing to the faithfulness of cases to admit an absent witness's testimonial statement "only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross examine"); Ohio v. Roberts, 448 U.S. 56, 63–66 (1980) (exploring the admissibility of prior testimony and the gradual change in the right to confront); Pointer v. Texas, 380 U.S. 400, 406–08 (1965) (holding that prior exceptions to the right to confront still stand).

19. *See* Mattox v. United States, 156 U.S. 237, 242–43 (1895) (weighing adverse policy

Court precedent converges upon this perceived primary object of the clause.[20] The right to cross-examination is seen to be nearly absolute.[21] Other advantages of live testimony, such as the ability to observe witness demeanor, are deemed to be merely incidental benefits that are constitutionally dispensable if an unavailable witness has been previously cross-examined.[22]

The substitution of cross-examination as a surrogate for confrontation is rooted in a belief popularized by Professor Wigmore that the terms are basically synonymous. In Wigmore's view:

> There never was at common law any recognized right to an indispensable thing called confrontation as distinguished from cross-examination. There *was* a right to cross-examination as indispensable, and that right was involved in and secured by confrontation; it was the same right under different names. This much is clear enough from the history of the Hearsay rule, and from the continuous understanding and exposition of the idea of confrontation. It follows that, if the accused has had the benefit of cross-examination, he has had the very privilege secured to him by the Constitution.[23]

However, Matthew Hale's *The History and Analysis of the Common Law of England*, written centuries earlier, describes a confrontation right derived from the common law jury trial.[24] According to Hale, evidence should be given on oath by witnesses in open court in the presence of the judge, jury, bystanders, the parties, and their attorneys during trials.[25] He explains that a primary reason why testimony must be given personally and not in writing is because:

concerns).

20. *See Crawford*, 541 U.S. at 53 ("[E]ven if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object . . . ."); Douglas v. Alabama, 380 U.S. 415, 418 (1965) ("Our cases construing the clause hold that a primary interest secured by it is the right of cross-examination . . . .").

21. *See, e.g.*, *Crawford*, 541 U.S. at 55–56 ("We do not read the historical sources to say that a prior opportunity to cross-examine was merely a sufficient, rather than a necessary, condition for the admissibility of testimonial statements. They suggest that this requirement was dispositive, and not merely one of several ways to establish reliability.").

22. *See, e.g.*, *Mattox*, 156 U.S. at 243 (1895) (stating that although the accused is "deprived of the advantage of that personal presence of the witness before the jury[,] . . . general rules of law . . . must occasionally give way to consideration of public policy and the necessities of the case").

23. 2 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1397, at 1754 (Little, Brown & Co. 1904) (citations omitted).

24. MATTHEW HALE, THE HISTORY AND ANALYSIS OF THE COMMON LAW OF ENGLAND 258 (London, J. Nutt 1713).

25. *Id.* at 256–57.

> [O]ftentimes, yea too often, a crafty Clerk, Commissioner, or Examiner, will make a Witness speak what he truly never meant, by his dressing of it up in his own Terms, Phrases, and Expressions; whereas on the other Hand, many times the very Manner of a Witness's delivering his Testimony will give a probable Indication whether he speaks truly or falsely; and by this Means also he has Opportunity to correct, amend, or explain his Testimony upon further Questioning with him, which he can never have after a Deposition is set down in Writing.[26]

Hale goes on to write that:

> [B]y this personal Appearance and Testimony of Witnesses, there is Opportunity of confronting the adverse Witnesses, of observing the Contradiction of Witnesses sometimes of the same Side, and by this Means great Opportunities are gained for the true and clear Discovery of the Truth.[27]

Wigmore's hypothesis therefore appears to be an overstatement. While there may not have been a confrontation right independent from cross-examination, the right did not exist solely in that vacuum. Cross-examination was itself mentioned at the time the Constitution was being debated in reference to the right to have a jury trial held in the vicinage where a contested matter occurred.[28] Confrontation was a right adjunct to the common law jury trial that encompassed more than just an opportunity for cross-examination.[29]

Prosecutorial use of prior trial testimony dates back to at least the mid-1600s when the transition from ancient fact-finding methods to the modern jury trial was still taking place.[30] It was a time when ex parte examinations taken by magistrates were admissible as evidence in criminal trials through a generally recognized deposition rule.[31] This Article

26. *Id.* at 257–58.

27. *Id.* at 258.

28. *See* LETTER FROM THE FEDERAL FARMER TO THE REPUBLICAN NO. IV (emphasizing the importance of "oral evidence" to the common people in jury trials and the cross-examination of witnesses "before the triers of the facts in question"), *reprinted in* 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 469, 473 (1971).

29. *See* MATTHEW HALE, THE HISTORY AND ANALYSIS OF THE COMMON LAW OF ENGLAND 258 (London, J. Nutt 1713) (describing common law confrontation as an activity that occurs by the "personal Appearance and Testimony of Witnesses" and the open presentation of evidence to a jury during trial; which carries many benefits beyond just cross-examination).

30. *See* Taylor v. Brown, (1668) 83 Eng. Rep. 90 (K.B.); Raym. T. 170 (reporting a holding in a perjury case against Buckworth and others).

31. *See* Memorandum, (1666) 84 Eng. Rep. 1079 (H.L.) 1080, ¶¶ 4–6; Kel. J. 53 (determining that unaltered coroner examinations given on oath by absent witnesses may be read at trial if the absence of the witness can be attributed to an act of God or the defendant's actions).

explores the adequacy of the current former testimony rule by examining its origins and development. It concludes that the confrontation test for admissibility of former testimony should be more robust than merely witness unavailability and a prior opportunity to cross-examine.

I. THE IMPORTANCE OF HISTORICAL CONTEXT

The meaning of the Confrontation Clause cannot be conclusively ascertained from its bare text, which states that an accused has the right "to be confronted with the witnesses against him."[32] The Supreme Court wrote in *Crawford v. Washington*[33] that the "witnesses against" language could plausibly be interpreted to mean only those persons who actually appear to testify at trial, anyone whose statements are offered at trial, or something in the middle; and it therefore determined that the clause must be viewed in light of its historical background.[34] The *Crawford* Court held that the Sixth Amendment "is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding."[35]

At the time the Bill of Rights was ratified, three principal types of accusatory statements were admissible against defendants in English criminal trials.[36] The most ordinary was testimony given on oath at trial, before the jury, with the accused present, and subject to cross-examination.[37] However, the law also permitted proof of dying declarations made by a decedent after suffering a "fatal blow."[38] It also allowed depositions to be used under certain circumstances.[39] It had long been the rule that depositions regularly taken by a justice of the peace or coroner were admissible in evidence in felony cases if a deponent was

32. U.S. CONST. amend. VI.

33. Crawford v. Washington, 541 U.S. 36 (2004).

34. *Id.* at 42–43. *But see* Dutton v. Evans, 400 U.S. 74, 95 (1970) (Harlan, J., concurring) ("It is common ground that the historical understanding of the clause furnishes no solid guide to adjudication.").

35. *Crawford*, 541 U.S. at 54.

36. *E.g.*, The King v. Woodcock, (1789) 168 Eng. Rep. 352 (K.B.) 352–53; 1 Leach. 500, 501–02 (identifying the three admissible types of accusatory statements as (1) depositions taken under oath at trial, (2) dying declarations, and (3) prisoner and witness statements (under certain circumstances) made before a magistrate acting in an official capacity).

37. *Id.* at 352.

38. *Id.* at 353. *See generally* Tim Donaldson & J. Preston Frederickson, *Dying to Testify? Confrontation v. Declarations* In Extremis, 22 REGENT U. L. REV. 35, 46–58 (2009–2010) (tracing the history of the dying declaration rule).

39. *Woodcock*, 168 Eng. Rep. at 353.

unavailable at the time of trial.[40] It was debatable whether, or to what extent, the deposition rule permitted use of ex parte examinations.[41] However, it was clearly recognized at the time of founding that some depositions properly taken by a coroner or a justice of the peace pursuant to statutory authority could be given in evidence at trial if it was established that the deponent was dead or unavailable for some other qualifying reason.[42]

The *Crawford* majority accepted a part of the deposition rule that allows use of prior testimony given by a witness if a defendant's wrongdoing prevents the witness from appearing at trial,[43] but it simultaneously cited the Marian bailment and committal statutes upon which the deposition rule was purportedly based as an invitation to the principal evil which the Confrontation Clause directs against.[44] The *Crawford* majority commented that a 1695 case settled the common law rule requiring an opportunity for cross-examination of witnesses, and that the only doubt which thereafter remained was "whether the Marian statutes prescribed an exception."[45] It cited the use of depositions during the 1696 political trial of Sir John Fenwick as an instance of abuse, which "must have burned into the general consciousness the vital importance of the rule securing the right of cross-examination."[46]

40. *See* 2 MATTHEW HALE, HISTORIA PLACITORUM CORONAE—THE HISTORY OF THE PLEAS OF THE CROWN 284–85 (London, E. & R. Nutt, & R. Gosling 1736) ("[E]xaminations and informations thus taken and returned may be read in evidence against the prisoner, if the informer be dead, or so sick, that he is not able to travel, and oath thereof made; otherwise not."); *see also* GILES DUNCOMBE, TRYALS PER PAIS: OR, THE LAW OF ENGLAND CONCERNING JURIES BY NISI PRIUS 228 (London, Rich. & Edw. Atknis 4th ed. 1702) (discussing depositions taken by coroners); MATTHEW HALE, PLEAS OF THE CROWN 262–63 (London, Richard & Edward Atkyns 1678) (discussing examinations taken by justices of the peace).

41. *See* 2 WILLIAM O. RUSSELL, A TREATISE ON CRIMES AND INDICTABLE MISDEMEANORS 659–62 (London, Joseph Butterworth & Son 2d ed. 1828) (exploring under what circumstances an examination made outside the presence of the prisoner may be admitted).

42. THOMAS PEAKE, A COMPENDIUM OF THE LAW OF EVIDENCE 61–62 (London, Brooke & Clarke 2d ed. 1804); FRANCIS BULLER, AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS 242 (New York, Hugh Gaine 5th ed. 1788).

43. *See* Crawford v. Washington, 541 U.S. 36, 62 (2004) (accepting the forfeiture by wrongdoing prong of the common law deposition rule); *see also* Giles v. California, 554 U.S. 353, 359–73 (2008) (defining the bounds of the forfeiture by wrongdoing exception); Davis v. Washington, 547 U.S. 813, 833–34 (2006) (reiterating the Supreme Court's acceptance of the exception). *See generally* Tim Donaldson, *Combating Victim/Witness Intimidation in Family Violence Cases: A Response to Critics of the "Forfeiture by Wrongdoing" Confrontation Exception Resurrected by the Supreme Court in* Crawford *and* Davis, 44 IDAHO L. REV. 643, 647–61 (2008) (reviewing the history of the forfeiture by wrongdoing rule accepted by *Crawford*).

44. *Crawford*, 541 U.S. at 50.

45. *Id.* at 46 (citing The King v. Paine, (1695) 87 Eng. Rep. 584 (K.B.) 585; 5 Mod. 163).

46. *Id.* (quoting 3 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM

The *Crawford* majority emphasized that the Confrontation Clause was intended to remedy abuses perpetrated in political trials conducted during the 1600s against Fenwick, Sir Walter Raleigh, and others whose convictions were obtained using confessions and ex parte depositions given by their accusers.[47] The majority in *Melendez-Diaz v. Massachusetts*[48] later clarified the Supreme Court's historical viewpoint.[49] It explained that use of ex parte examinations in the 1603 trial of Sir Walter Raleigh was thought to be a paradigmatic confrontation violation.[50] It opined, however, that the right of confrontation was not invented as a response to that trial.[51] It instead asserted that the use of depositions in Raleigh's trial "provoked such an outcry precisely because it flouted the deeply rooted common-law tradition 'of live testimony in court subject to adversarial testing.'"[52]

The development of the right of confrontation, and the accompanying fall of the deposition rule, cannot be understood by interpreting historical sources using the legal standards of today.[53] From *Mattox* onward, the Supreme Court has repeatedly returned to the origins of the Confrontation Clause to determine its meaning.[54] The history of the deposition rule is particularly important to Confrontation Clause jurisprudence because the Supreme Court has attached significance to selective portions of it.[55] A

OF EVIDENCE IN TRIALS AT COMMON LAW § 1364, at 22 (Little, Brown & Co. 2d ed. 1923)). *See generally* Fenwick's Case, (1696) (H.C.) (reporting the trial of Sir John Fenwick for treason), *reprinted in* 13 T.B. HOWELL, A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, at 538 (London, T.C. Hansard 1816).

47. *Crawford*, 541 U.S. at 43–46, 50.

48. Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009).

49. *Id.*

50. *Id.* at 315 (2009). *See generally* Trial of Sir Walter Raleigh (1603) (reporting the treason trial of Sir Walter Raleigh), *reprinted in* 2 WILLIAM COBBETT, COBBETT'S COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE PRESENT TIME 1 (T.B. Howell ed., London, T.C. Hansard 1809).

51. *Melendez-Diaz*, 557 U.S. at 315.

52. *Id.* (quoting *Crawford*, 541 U.S. at 43).

53. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856–57 (1989) (advocating an originalist interpretation of the Constitution).

54. *See* Williams v. Illinois, 132 S. Ct. 2221, 2242 (2012) ("The Court has thus interpreted the Confrontation Clause as prohibiting modern-day practices that are tantamount to the abuses that gave rise to the recognition of the confrontation right."); *Crawford*, 541 U.S. at 42–56 (looking to the Sixth Amendment's original meaning to determine its applicability); Mattox v. United States, 156 U.S. 237, 243–44 (1895) ("We are bound to interpret the Constitution in the light of the law as it existed at the time it was adopted, . . . securing to every individual such as he already possessed as a British subject . . . .").

55. *See Crawford*, 541 U.S. at 43–47, 50–51, 53–54.

thorough history of the rule reveals that the evolution of the modern jury trial played a greater role than given credit. Its mode of open presentation of evidence in the presence of a jury secured more than just an opportunity for cross-examination.[56] Its influence was as important as rectification of prosecutorial abuses committed during English political trials using ex parte examinations and the rise of cross-examination as an evidentiary testing method in the decline of the deposition rule and recognition of the right to confrontation.

II. ORIGINS OF THE COMMON LAW DEPOSITION RULE

Modern authorities trace the deposition rule to the Marian bailment and committal statutes.[57] Those 1554–1555 statutes required coroners in cases of murder or manslaughter to put in writing the effect of the evidence given at inquisitions before them.[58] They also required justices of the peace, before granting bail, to take and record preliminary examinations of prisoners brought before them on manslaughter or felony charges together with information from those who brought in the prisoner.[59] The statutes were amended in 1555 to additionally require justices of the peace to conduct and record examinations when suspected offenders were detained rather than released.[60] It later became practice that statements regularly taken in accordance with the Marian bailment and committal statutes might be used in criminal trials under certain circumstances, but nothing in the text of the statutes said that the depositions taken under them would be used as trial evidence.[61]

It is debatable whether the witness deposition provisions of the Marian bailment and committal statutes derogated from common law.[62] A portion of the statutes which allowed justices to examine prisoners may have departed from common law.[63] However, coroners and justices of

56. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES *373–74.

57. *E.g.*, *Crawford*, 541 U.S. at 43–47 (describing the development of the deposition rule).

58. An Act Appointing an Order to Justices of Peace for the Bailement of Prisoners, 1554–1555, 1 & 2 Phil. & M., c. 13, ¶ 1 (Eng.).

59. *Id.*

60. An Acte to Take Thexaminacon of Prysoners Suspected of Manslaughter or Felonye, 1555, 2 & 3 Phil. & M., c. 10, ¶ 1 (Eng.).

61. 2 WILLIAM O. RUSSELL, A TREATISE ON CRIMES AND INDICTABLE MISDEMEANORS 659–60 (London, Joseph Butterworth & Son 2d ed. 1828).

62. *See* The King v. The Inhabitants of Eriswell, (1790) 100 Eng. Rep. 815 (K.B.) 817; 3 T.R. 707 (Grose, J.); *id.* at 818–20 (Buller, J.); *id.* at 823–24 (Kenyon, C.J.); *id.* at 822–23 (Ashhurst, J.); Rex v. Pain, (1695) 90 Eng. Rep. 527 (K.B.); Comb. 358 (evidencing disagreement between counsel and among judges regarding the source of inquisition authority for justices of the peace).

63. 4 WILLIAM BLACKSTONE, COMMENTARIES *293; *see also* Memorandum, (1662) 84 Eng.

the peace took preliminary depositions from witnesses prior to enactment of the Marian statutes.[64] In addition, it is indisputable that the prosecutorial trial use of depositions predates them.[65]

At common law, a coroner was much more than a medical examiner.[66] Coroners held an ancient office of trust and were charged by common law as conservators of the peace.[67] Magna Charta curtailed authority of coroners to hold pleas of the crown.[68] However, Bracton's treatise from the 1200s on the laws and customs of England states that coroners during that period were still charged with the responsibility of holding inquests into homicides and other cases and binding persons over for trial upon finding sufficient cause.[69] Reports from early cases show that coroners performed such preliminary functions in the prosecution of felonies, and

Rep. 1061 (K.B.) 1062, ¶ 6; Kel. J. 17, 18–19 (memorializing a legal ruling made during the treason trial of Tong and others that justices of the peace were not enabled to examine prisoners before enactment of the first Marian bailment and committal statute). *But see* The King v. Lambe, (1791) 168 Eng. Rep. 379 (K.B.) 379–80, 382–83; 2 Leach. 553 (holding that confessions made during examinations taken under the bailment and committal statutes are admissible as evidence by common law rather than the force of the statutes themselves).

64. James Fitzjames Stephen, *Criminal Procedure from the Thirteenth to the Eighteenth Century*, *in* 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 443, 457–60 (Little, Brown & Co. 1908).

65. *See* Proceedings against Edward Duke of Somerset, (1551) (using depositions during the prosecution of the Duke of Somerset before the passage of the Marian bailment and committal statutes), *reprinted in* 1 T.B. HOWELL, A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, at 515, 520 (London, T.C. Hansard 1816).

66. *See* 1 EDWARD HYDE EAST, A TREATISE OF THE PLEAS OF THE CROWN ch. 6, §§ 6–20, at 380–91 (London, A. Strahan, 1803) (discussing the powers and duties of coroners); EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWES OF ENGLAND: CONTAINING THE EXPOSITION OF MANY ANCIENT, AND OTHER STATUTES 31–32 (London, M. Flesher & R. Young 1642) (detailing power of the coroner). *See generally* SELECT CASES FROM THE CORONERS' ROLLS A.D. 1265–1413 WITH A BRIEF ACCOUNT OF THE HISTORY OF THE OFFICE OF CORONER, 9 SELDEN SOCIETY, at xiv–xix, xxiv–xxx (1896) (describing the office and authority of early coroners).

67. 1 ANONYMOUS, BRITTON ch. 2, ¶ 1, at 8 (Francis Morgan Nichols trans., Oxford, Clarendon Press 1865) (1530); ANDREW HORNE, THE MIRROR OF JUSTICES ch. 1, § 13, at 38 (William Hughes trans., London, His Majesty's Law Printers 1768) (1642), *reprinted in* 7 SELDEN SOCIETY 29 (1895); GILES JACOB, THE COMMON LAW, COMMON-PLACED: CONTAINING, THE SUBSTANCE AND EFFECT OF ALL THE COMMON LAW CASES DISPERSED IN THE BODY OF THE LAW, COLLECTED AS WELL FROM ABRIDGEMENTS AS REPORTS, IN A PERFECT NEW METHOD 130 (London, E. & R. Nutt, & R. Gosling 1726).

68. *See* Magna Charta, ch. 24 (1215) ("No Sheriff, Constable, Coroners, nor other of our Bailiffs shall hold pleas of our crown."), *reprinted in* BOYD C. BARRINGTON, THE MAGNA CHARTA AND OTHER GREAT CHARTERS OF ENGLAND WITH AN HISTORICAL TREATISE AND COPIOUS EXPLANATORY NOTES 236 (William J. Campbell 1900).

69. 2 HENRICI DE BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE bk. 3, treatise 2, chs. 5–8, at 281–99 (Travers Twiss trans., London, Longman & Co. 1879) (1569); *see also* 2 Anonymous, Fleta bk. 1, ch. 25 (describing the functions of coroners circa 1290), *reprinted in* 72 SELDEN SOCIETY 64–66 (1955).

coroner rolls from these proceedings were presented before itinerant justices in eyre of the King.[70]

The authority of coroners to conduct inquests was confirmed by statute in 1275–1276.[71] The statute required a coroner to convene an inquest for certain matters, to make inquiry on oath of those called, and record what was found on the coroner rolls.[72] Records from coroner inquisitions thereafter continued to be presented in cases before the King's Bench.[73] Question remains whether the 1275–1276 statute was based upon Bracton's exposition of the common law, or, whether his treatise relied upon the statute.[74] It appears that coroners were conducting inquests before the passage of the statute.[75] However, resolution of this "what came first: the chicken or the egg?" type question is unimportant when it comes to characterizing the nature of a coroner's inquest authority. Many of the statutes from that period were nothing more than a declaration of common law; thus, by the 1700s, they were considered part of the common law.[76] Therefore, while the precise source of authority may be debated, it cannot be doubted that coroners possessed power at common law to conduct inquests which were recorded and passed along in coroner rolls for further use in criminal proceedings.[77]

Justices of the peace later provided preliminary screening in criminal cases similar to coroners. A 1327 statute recognized the office of justice of the peace.[78] It appears that keepers of the peace were acting in a

70. *See In re* Hundred of Cuttlestone (1203) (looking to the coroner's rolls to determine whether one was outlawed), *reprinted in* 1 SELDEN SOCIETY 28 (1888); *In re* Wapentake of Graffoe (1202) (using the coroner's rolls to back the jury's verdict), *reprinted in* 1 SELDEN SOCIETY 16 (1888).

71. *See* The Office of the Coroner, 1275–1276, 4 Edw. 1 (Eng.) (detailing the broad authority and duty of coroners to investigate injuries, deaths, and other potential felonies).

72. *Id.*

73. *See, e.g.*, Concerning the Release of Henry Basset (1331) (showing how coroners investigated and recorded claims), *reprinted in* 76 SELDEN SOCIETY 57, 57–58 (1958).

74. *See* 2 HENRICI DE BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE lxi–lxii (Travers Twiss trans., London, Longman & Co. et al. 1879) (1569) ("It is difficult to resist the conclusion, that the [1275–76] Statute . . . was framed upon the model of Bracton . . . .").

75. *See* Statute of Marlborough, 1267, 52 Hen. 3, ¶ 24 (Eng.) (providing that townships could not be penalized if a sufficient number of persons reported for coroner inquest panels).

76. *See* MATTHEW HALE, THE HISTORY AND ANALYSIS OF THE COMMON LAW OF ENGLAND 9 (London, J. Nutt 1713) (noting that statutes under Kings Henry III, Edward I, and Edward II reflected the common law).

77. *See* 1 ANONYMOUS, BRITTON ch. 2, ¶¶ 5–6, at 10–11, ch. 3, ¶ 8, at 23 (Francis Morgan Nichols, trans., Oxford, Clarendon Press 1865) (1530) (requiring coroners to make inquiries into felonies, report findings to the sheriff for indictment and apprehension, inventory the belongings of those wanted or detained, record their findings on coroner rolls, and submit those rolls to the court for criminal proceedings).

78. Statute the Second, 1326–1327, 1 Edw. 3, ¶ 16 (Eng.).

manner similar to justices prior to that date, and the statute may have merely codified a position for functions which were already being exercised.[79] While the 1327 statute only generally describes an office "assigned to keep the Peace,"[80] a commission issued on the heels of the enactment of that statute gave authority to make inquiry by sworn inquest.[81]

Preliminary examinations were recorded at common law principally to provide a means by which the King's judges could monitor pre-trial release decisions made by inferior authorities in criminal cases. Bail was generally allowed at common law in all cases except homicide.[82] This common law authority to bail offenders was transferred from sheriffs and constables to justices of the peace.[83] Concern arose that accused persons were being held by sheriffs and constables on light suspicion, and a statute was passed in 1483–1484 which confirmed the discretionary authority of justices to grant bail.[84] That statute was repealed in 1487 and replaced by another which required two justices to allow bail, because discretion had been too often abused by some justices when acting alone under the 1483–1484 statute.[85]

79. *See* Bertha Haven Putnam, *The Transformation of the Keepers of the Peace into the Justices of the Peace 1327–1380* ("The resulting Act, formerly supposed to be the origin of the keepers, merely gives statutory sanction for a system long in use . . . ."), *in* 12 TRANSACTIONS OF THE ROYAL HISTORICAL SOCIETY (FOURTH SERIES) 19, 21–25 (1929); *see also* FRANCIS BACON, *The Maximes of the Law* (discussing the evolution of the role of conservators of the peace), *in* THE ELEMENTS OF THE COMMON LAWES OF ENGLAND 11–12 (London, I. More 1630).

80. Statute the Second, 1326–1327, 1 Edw. 3, ¶ 16 (Eng.); *see also* Statute Made at Westminster, 1368, 42 Edw. 3, ¶ 4 (Eng.) (reforming and consolidating practices for issuance of inquiry commissions, and confirming authority thereunder for justices of the peace to hold inquiries by commission).

81. *See* THE AMES FOUNDATION, PROCEEDINGS BEFORE THE JUSTICES OF THE PEACE IN THE FOURTEENTH AND FIFTEENTH CENTURIES, at xxi–xxii, 1–3 (Theodore F. T. Plucknett & Bertha Haven Putnam eds., 1938) (noting the commission of 1327 includes the authority to "[inquire] by sworn inquest of felons, felonies, trespassers and trespasses"); *see also* Bertha Haven Putnam, *The Transformation of the Keepers of the Peace into the Justices of the Peace 1327–1380*, 12 TRANSACTIONS OF THE ROYAL HISTORICAL SOCIETY (FOURTH SERIES) 19, 25 (1929) (listing the "important clauses" of the 1327 commission).

82. *See* MATTHEW HALE, PLEAS OF THE CROWN 97 (London, Richard & Edward Atkyns 1678) ("At Common Law Bail in all Cases but Homicide . . . ."); *see also* 2 ANONYMOUS, FLETA bk. 1, ch. 25 (detailing when bail is and is not available), *reprinted in* 72 SELDEN SOCIETY 66 (1955); RANULPH DE GLANVILLE, A TREATISE OF THE LAWS AND CUSTOMS OF THE KINGDOM OF ENGLAND, bk. 14, ch. 1, at 281 (John Beams trans., John Byrne & Co. 1900) (1554) ("[I]n all Pleas of Felony, the Accused is generally dismissed on [bail], except in a Plea of Homicide . . . .").

83. MICHAEL DALTON, THE COUNTREY JUSTICE, CONTAINING THE PRACTISE OF THE JUSTICES OF THE PEACE OUT OF THEIR SESSIONS 279 (London, Societie of Stationers 1622).

84. An Act for Baylyng of Psons Suspected of Felony, 1483–1484, 1 Rich. 3, c. 3 (Eng.).

85. An Act that Justice of Peace may Take Bayle, 1487, 3 Hen. 7, c. 3 (Eng.).

The Marian bailment and committal statutes were enacted in 1554 to address abuses that had arisen under the 1487 statute.[86] "The two statutes of Ph. & M. seem to have been passed without any direct intention on the part of the legislature, to use the examinations and depositions as evidence upon the trials of felons."[87] They were instead enacted to require officials to faithfully record the evidentiary basis for determinations made by justices of the peace for many years and by coroners for centuries. By 1602, it was "no question but that a justice of peace, in furtherance of justice for the examination of a felon, may send for any to examine circumstances to prove it."[88] If a justice found sufficient cause to remit an accused offender for trial, the justice would "certifie his Accusation, Examination, and Recognizance taken for the appearances and prosecution of the witnesses, so as the Judges may, when they come, readily proceed with him as the Law requireth."[89] The Marian bailment and committal statutes did not invite evil into the criminal justice process. They were reforms.[90]

III. ORIGINS OF THE COMMON LAW JURY TRIAL

Early coroner inquests practices likely influenced the development of the modern jury trial system. The infant common law jury system used what would now be considered a grand jury to accuse suspected offenders, but it relied principally upon combat or ordeal to adjudicate disputed facts.[91] Combat and ordeal were replaced with trial by what would now be considered a petit jury through a series of statutes enacted between

86. An Act Appointing an Order to Justices of Peace for the Bailement of Prisoners, 1554–1555, 1 & 2 Phil. & M., c. 13, ¶ 1 (Eng.).

87. Rex v. Smith, (1817) 171 Eng. Rep. 622 (K.B.) 623; 2 Stark. 208, 211.

88. Chambers v. Taylor, (1602) 78 Eng. Rep. 1123 (Q.B.) 1124; Cro. Eliz. 900, 901.

89. FRANCIS BACON, *The Maximes of the Law*, *in* THE ELEMENTS OF THE COMMON LAWES OF ENGLAND 15 (London, I. More 1630); *cf.* Scavage v. Tateham, (1601) 78 Eng. Rep. 1056 (C.P.) 1057; Cro. Eliz. 829, 830 (holding that a justice of the peace could only detain a person for three days to make inquiries about a suspected crime without committing him to jail).

90. *See* The King v. Lambe, (1791) 168 Eng. Rep. 379 (K.B.) 380–83; Leach. 553, 554–61 (stating the Marian bailment and committal statutes are intended to facilitate the flow of information between criminal proceedings, not to allow suspects to circumvent a previous verbal confession).

91. *See* RANULPH DE GLANVILLE, A TREATISE OF THE LAWS AND CUSTOMS OF THE KINGDOM OF ENGLAND, bk. 14, ch. 1, at 278–83 (John Beams trans., John Byrne & Co. 1900) (1554) (noting that when there is a single accuser and the accused denies all in Court, it is normal to settle the matter by duel); *see also* GILES DUNCOMBE, TRYALS PER PAIS: OR, THE LAW OF ENGLAND CONCERNING JURIES BY NISI PRIUS 3–4, 24 (London, Rich. & Edw. Atknis 4th ed. 1702) (summarizing the two ordeals, fire or water, by which an accused man could chose to show his innocence).

1164 and 1352.[92] However, older jury trials were not like trials of today. Ancient juries were comprised of jurors chosen from the vicinity of a crime who decided matters based upon communal knowledge and belief rather than proof presented in court.[93] In addition, the roles of the various types of juries were sometimes blurred throughout the system's early history, and there is no clear demarcation before the middle of the 1300s to signify when trial juries became fully separated from indictment juries.[94]

In contrast, early coroner inquest practices more closely resembled the fact-finding method accepted today. Coroner rolls show that testimony was sometimes taken at coroner inquests from persons who were not on the inquest panel.[95] Inquests therefore did not rely solely upon the prior knowledge possessed by jurors and instead additionally considered testimony taken from witnesses. This procedure likely advanced the practice of having juries decide cases after consideration of evidence presented at trial rather than by collective conjecture.[96]

The jury trial system was still evolving into the 1700s. The mode of jury trial for civil cases portrayed in the mid-1400s by Fortescue's *De Laudibus Legum Angliae* bears greater likeness to the modern jury trial.[97] Remnants

92. *See generally* MAXIMUS A. LESSER, THE HISTORICAL DEVELOPMENT OF THE JURY SYSTEM 134–48 (Rochester, Lawyers' Co-Operative Publishing Co. 1894) (tracking the evolution of the two-tier jury system in criminal proceedings at common law); James B. Thayer, *The Jury and Its Development*, 5 HARV. L. REV. 249, 254–73 (1892) (dissecting the development of the common law jury system throughout English history, and explaining why it was necessary to move away from combat and ordeal).

93. WILLIAM FORSYTH, HISTORY OF TRIAL BY JURY 170–72 (James Appleton Morgan ed., Jersey City, Frederick D. Linn & Co. 2d ed. 1875).

94. *See id.* at 165–72 ("I do not think it is possible to determine the exact period when the change took place, whereby a person accused of a crime by the inquest of the hundred was entitled to have the fact tried by another and different jurata."); *see also* Statute the Fifth, 1351–1352, 25 Edw. 3, stat. 5, ¶ 3 (Eng.) (allowing indictment jurors to be stricken from a subsequent jury in the same case).

95. *See* The King v. Pikehorn (1271) (relying on widow's testimony to the coroner as to who was responsible for her husband's death, even though she was outside the inquest panel), *reprinted in* 9 SELDEN SOCIETY 16 (1896); The King v. Richard of Neville (1269) (considering testimony of widow, who prior to dying identified certain individuals to the coroner as those who killed her husband during a burglary), *reprinted in* 9 SELDEN SOCIETY 14 (1896).

96. *See* SELECT CASES FROM THE CORONERS' ROLLS A.D. 1265–1413 WITH A BRIEF ACCOUNT OF THE HISTORY OF THE OFFICE OF CORONER, 9 SELDEN SOCIETY, at xxxiv (1896) ("[T]he coroner's jury . . . [is] a nearer approach to the determination of truth from the evidence of witnesses than in the early petty jury, whose verdict was based on previous knowledge of facts.").

97. *See* JOHN FORTESCUE, DE LAUDIBUS LEGUM ANGLIAE ch. 26, at 83–85 (London, T. Evans 1775) ("The whole of the Evidence being gone through, the *Jurors* shall confer together . . . return into Court and certify the Justices upon the Truth of the Issue so joined, in the Presence of the Parties . . . *Jurors* shall so certify . . . the Verdict.").

of the older system can nonetheless still be seen in Fortescue's description of criminal trials during his time when jurors were chosen from a vicinage to certify rather than determine facts.[98] Traces also remained apparent centuries later. In *Bushell's Case*,[99] the Court of Common Pleas reasoned in 1670 that a judge could not attaint a juror for finding against the evidence, in part, because the judge could never fully know the evidence upon which the jurors decided.[100] A judge knew only the evidence presented in court, but the law still presumed that jurors possessed communal and personal knowledge and could decide a case on that basis despite the evidence produced in court.[101]

A transition was being made to a new form of jury trial, but the King's Bench commented as late as 1702: "If a jury give a verdict on their own knowledge, they ought to tell the Court so, that they may be sworn as witnesses."[102] The origins of some functions now assigned to modern trial juries, such as determining facts on the basis of the evidence presented by witnesses, trace back to early coroner inquisitions. Over the course of many centuries, inquisitorial practices and trial procedures were repeatedly amended and codified to address abuses, and statutory reforms cannot be easily separated or distinguished from what became accepted to be the common law. Evidentiary practices developed which departed from ancient fact finding methods, but, by the early 1700s, there was not a deeply rooted common-law tradition of having cases decided solely on the basis of live testimony that had been subjected to adversarial testing.[103]

IV. DEVELOPMENT OF A MODERN DEPOSITION RULE

A revamped deposition rule developed in civil cases throughout the 1600s.[104] *Sir Francis Fortescue and Coake's Case*[105] from 1612 referenced a

98. *See id.* ch. 27, at 89–93 ("Twenty-four good and lawful Men of the Neighbourhood to the Vill where the Fact was done, who are in no wise allied to the Person accused . . . are to certify to the Judges upon the Truth of the Fact . . . .").

99. Bushell's Case, (1670) 124 Eng. Rep. 1006 (C.P.); Vaugh. 135.

100. *Id.* at 1012, ¶ 2.

101. *See id.* at 1013, ¶ 9 (finding it "absurd" for a judge to punish a jury for its verdict when the judge only knows part of the facts used to decide the verdict).

102. Anonymous, (1702) 91 Eng. Rep. 352 (K.B.); 1 Salk. 405.

103. *See* GILES DUNCOMBE, TRYALS PER PAIS: OR, THE LAW OF ENGLAND CONCERNING JURIES BY NISI PRIUS 333 (London, Rich. & Edw. Atknis 4th ed. 1702) (noting that Judges would be unable to know whether the jury considered their own personal knowledge when coming to a verdict).

104. *See* Tryals. Examination, (1661) 83 Eng. Rep. 796 (K.B.); 1 Keb. 36 ("[T]he Court may as well allow the examination of witnesses before a Judge by depositions, as read the affidavit of a person absent, this is no more than the law alloweth.").

rule allowing use of a deposition if a witness was dead.[106] An untitled case from 1623 reported that:

> [A] deposition in an English Court in a cause betwixt the same parties plaintiffe and defendant may be allowed to be read to the jury, so as the party make oath that he did his endeavour to find his witnesse, but that he could not see him nor hear of him.[107]

Chancery depositions were admitted in a case at law in 1670 where it was shown that the deponent became sick on his way to trial and could not attend.[108] The summary for a 1672 King's Bench case entitled *Green v. Gatewick*[109] reported that the content of testimony given by a witness in a prior proceeding could be used if the witness was "kept away by the Plaintiff's Practice."[110]

Early cases focused upon whether a deposition had official sanction. Judges held in 1641 that depositions taken ecclesiastical court could not be used in the Court of Common Pleas, because "no depositions ought to be allowed which are not taken in a Court of Record."[111] Depositions authorized by order of chancery court were admitted in *Stock v. Denew*,[112] but others taken by a special commissioner were not, because they were *coram non judice* (not authorized by a court with jurisdiction).[113] The use of chancery depositions was similarly disallowed in *Sr. Martyn Nowel's Case*,[114] because it could not be established that they were properly authorized, but "the Court conceived, if depositions were according to the course of the Court they ought to be allowed."[115]

Cases elaborated that it was not enough that a deposition had been taken in a court of record. The authority for taking a deposition also had to be shown. For example, the court explained in *Rushworth v. Countess de Pembroke & Currier*[116] that only a party to a suit could examine or interrogate, therefore a non-party could not use a deposition from

105. Sir Francis Fortescue and Coake's Case, (1612) 78 Eng. Rep. 117 (C.P.); Godb. 193.

106. *Id.*

107. Judgment of King's Bench, (1623) 78 Eng. Rep. 192 (K.B.); Godb. 326, 326–27.

108. Lutterell v. Reynell, (1670) 86 Eng. Rep. 887 (K.B.) 887–88; 1 Mod. 283, 283–84.

109. Green v. Gatewick, (1672) (K.B.), *in* FRANCIS BULLER, AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS 239 (London, W. Strahan & M. Woodfall 1772).

110. *Id.*

111. Anonymous, (1641) 82 Eng. Rep. 439 (C.P.); March, N.R. 120.

112. Stock v. Denew, (1678) 22 Eng. Rep. 813 (Ch.); 1 Chan. Cas. 305.

113. *Id.* at 813–14.

114. Sr. Martyn Nowel's Case, (1663) 83 Eng. Rep. 1185 (K.B.); 1 Keb. 685.

115. *Id.* at 1186.

116. Rushworth v. Countess de Pembroke & Currier, (1668) 145 Eng. Rep. 553 (Exch.); Hardres 472.

another's case, because "she was not bound by them, . . . nor was she in a capacity of examining any witness in it."[117] *Pawlet's Case*[118] similarly held that depositions taken in Chancery "cannot be given in evidence at a trial at law, unless there be an answer put in and produced."[119] This was because issues were not officially joined to a Chancery case for adjudication until an answer was filed.[120] The court in *Blower v. Ketchmere*[121] presumed that an answer had been filed and that a chancery deposition had been regularly taken when it was shown that court records had been destroyed.[122] However, the reports for *Howard v. Tremain*[123] years later describe a protracted debate and disagreement among the judges about whether chancery depositions taken to perpetuate testimony could be used without it being actually shown that technical requirements had been met.[124] The court held in *Watt's Case*[125] that a premature deposition might be used upon contempt in the court in which it was taken, but it still could not be used in other courts.[126] The report in *Watt's Case* explains that "[t]he reason seems to be, because there was no issue joined, so as there could be a legal examination."[127]

The maturation of the deposition rule in civil cases most likely influenced adoption of a similar evidentiary rule for criminal cases, because as Blackstone's *Commentaries on the Laws of England* later commented: "The doctrine of evidence upon pleas of the crown is, in most respects, the

117. *Id.* *But see* Terwit v. Gresham, (1666) 22 Eng. Rep. 701 (Ch.); 1 Chan. Cas. 73 (holding that depositions taken thirty years earlier in a case between different parties could be admitted in chancery court when the prior witnesses were dead); Coke v. Fountain, (1686) 23 Eng. Rep. 554 (Ch.); 1 Vern. 413 (allowing a legatee to use deposition taken against an executor by a legatee in another case because they were considered to be cases in common).

118. Pawlet's Case, (1679) 83 Eng. Rep. 174 (Exh.); Raym. T. 335.

119. *Id.* at 175.

120. *See* Anonymous v. Brown, (1662) 145 Eng. Rep. 475 (Exch.); Hardres 315 ("[T]he examination of such a witness should not be read in evidence, because it was taken before issue joined in the cause . . . .").

121. Blower v. Ketchmere, (1666) 84 Eng. Rep. 20 (K.B.); 2 Keb. 31.

122. *See id.* ("[T]he Court agreed, that being so old, and the records of the rolls burnt since, it is good evidence, though the bill and answer were not in it . . . .").

123. Howard v. Tremain, (1692) 87 Eng. Rep. 314 (K.B.); 4 Mod. 146.

124. *Tremain* was reported in four different nominative reporters. Howard v. Tremain, (1692) 87 Eng. Rep. 314 (K.B.); 4 Mod. 146; Howard v. Tremaine, (1692) 89 Eng. Rep. 641 (K.B.); 1 Shower, K.B. 363; Howard v. Tremaine, (1692) 90 Eng. Rep. 757 (K.B.); Carth. 265; Howard v. Tremaine, (1692) 91 Eng. Rep. 243 (K.B.); 1 Salk. 278.

125. Watt's Case, (1663) 145 Eng. Rep. 483 (Exch.); Hardres 331.

126. *Id.* ("[I]f witnesses are examined de bene esse before answer, upon a contempt, such depositions cannot be made use of in any other court, but the court only where they were taken."); *see also* Piercy v. Anonymous, (1681) 84 Eng. Rep. 1198 (K.B.); Jones, T. 164 (concluding Courts of Common Law are not bound by Chancery's decision to admit depositions taken prior to an answer).

127. *Watt's Case*, 145 Eng. Rep. at 483.

same as that upon civil actions."[128] The application of this new deposition rule to the Marian bailment and committal statutes is therefore unsurprising. Those statutes supplied official sanction for depositions taken in criminal cases.[129] It would have been customary to expect that examinations properly taken by justices of the peace and coroners in criminal cases stood on the same footing as depositions officially taken in other types of cases, "because they are judges of record, and the informations before them upon oath are authorised and required by act of parliament, and they are judges of the crimes upon which the informations are taken."[130] The admissibility and use of bailment and committal depositions in criminal cases would have been a natural extension of the evidentiary rule for civil cases allowing use of examinations taken "according to the course of the Court."[131]

Civil and criminal trial practices were not identical, and more stringent restrictions developed, which limited the use of depositions in criminal cases. For example, witness unavailability could be satisfactorily shown in civil cases when a party seeking to use a deposition swore on oath that he had unsuccessfully endeavored to find the witness.[132] This was not sufficient in a criminal case, and a stronger showing was required.[133] In addition, it might be presumed in a civil case that a party procured the absence of a witness who had previously testified adversely to that party.[134] In contrast, proof of wrongful procurement was required in a criminal case before a deposition of an allegedly tampered absent witness could be used.[135]

128. 4 WILLIAM BLACKSTONE, COMMENTARIES *350.

129. *See* An Acte to Take Thexaminacon of Prysoners Suspected of Any Manslaughter or Felonye, 1555, 2 & 3 Phil. & M., c. 10, ¶ 1 (Eng.) (directing justices of the peace to examine prisoners suspected of manslaughter or felony and take information from "those that bring him" prior to commitment); An Act Appointing an Order to Justices of Peace for the Bailement of Prisoners, 1554–1555, 1 & 2 Phil. & M., c. 13, ¶ 1 (Eng.) (requiring justices of the peace to examine prisoners and take information of "them that bringes him" before allowing bail and directing coroners to "put in writing" the effect of evidence given to the jury during coroner inquests).

130. 2 MATTHEW HALE, HISTORIA PLACITORUM CORONAE—THE HISTORY OF THE PLEAS OF THE CROWN 285 (London, E. & R. Nutt, & R. Gosling 1736).

131. Sr. Martyn Nowels Case, (1663) 83 Eng. Rep. 1185 (K.B.) 1186; 1 Keb. 685.

132. Judgment of the King's Bench, (1623) 78 Eng. Rep. 192 (K.B.); Godb. 326, 326–27.

133. Memorandum, (1666) 84 Eng. Rep. 1079 (H.L.) 1080, ¶ 6; Kel. J. 53, 55.

134. Green v. Gatewick, (1672) (K.B.), *in* FRANCIS BULLER, AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS 239 (London, W. Strahan & M. Woodfall 1772).

135. *See* Henry Harrison's Case, (1692) (Old Bailey Crim. Ct.) (stating if it is proven that defendant's associates tampered with the witness then "it will no way conduce to [defendant's] advantage"), *reprinted in* 12 T.B. HOWELL, A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, at 834, 835–36, 851–52 (London, T.C. Hansard 1816); Lord

Depositions could sometimes be used in civil cases in proceedings other than the one in which the deposition was taken.[136] They could not in criminal matters. English law during that time allowed both public and private prosecutions.[137] A purely private prosecution was called an appeal.[138] Both might be used as means to prosecute the same crime, but they were considered to be separate proceedings. Therefore, depositions taken before a coroner during an official inquisition of a death for purposes of a public prosecution could not "be given in Evidence upon an Appeal for the same Death, because it is a different Prosecution from that wherein they were taken."[139]

The prerequisites for admissibility were sometimes eased in civil actions depending on the needs of a case.[140] They were not in ordinary criminal prosecutions. For example, a party wishing to use a deposition was usually required to establish that it had been properly authorized and legally taken.[141] In a civil case, it was resolved that a court in Chancery could authorize a perpetuation deposition to be taken, and even if the deposition was legally premature, it could still "be given in evidence; otherwise a bill in equity to perpetuate the testimony of witnesses, would be to very little or no purpose."[142] In contrast, the King's Bench held that it had no

Morley's Case, (1666) (H.L.) (requiring evidence that the defendant tampered with witness prior to allowing witness's deposition to be read), *reprinted in* 6 T.B. HOWELL, A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, at 770, 776–77 (London, T.C. Hansard 1816).

136. *E.g.*, Earl of Bath v. Bathersea, (1694) 87 Eng. Rep. 487 (K.B.); 5 Mod. 9 (allowing use of deposition against a person who was not a party to a prior proceeding if the person "shelters himself under the other's title").

137. *See generally* 4 WILLIAM BLACKSTONE, COMMENTARIES *298–312 (describing various forms of prosecution).

138. *Id.* at 308.

139. 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN, ch. 46, § 8, at 430 (London, Eliz. Nutt & R. Gosling 1721) (citing Sampson v. Tothill, (1667) 82 Eng. Rep. 1134 (K.B.); 1 Sid. 324, and Clement v. Blunt, (1624–1625) 81 Eng. Rep. 916 (K.B.); 2 Rolle. 460); *see also* FRANCIS BULLER, AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS 239 (London, W. Strahan & M. Woodfall 1772) (citing Sampson v. Tothill, (1667) 82 Eng. Rep. 1134 (K.B.); 1 Sid. 324). *But see* Rex v. Smith, (1817) 171 Eng. Rep. 622 (K.B) 623–24; 2 Stark. 208, 210–12 (permitting deposition taken following assault charge to be used at later murder trial of defendant); Taylor v. Brown, (1668) 83 Eng. Rep. 90 (K.B.); Raym. T. 170 (reporting case against Buckworth and others allowing evidence from first trial to be used in subsequent trial to prove perjury).

140. *See* Blower v. Ketchmere, (1666) 84 Eng. Rep. 20 (K.B.); 2 Keb. 31 (allowing unanswered depositions in chancery to be entered as evidence due to unforeseen circumstances).

141. *E.g.*, Watt's Case, (1663) 145 Eng. Rep. 483 (Exch.); Hardres 331 (considering briefly the types of cases in which depositions are permitted).

142. Howard v. Tremaine, (1692) 90 Eng. Rep. 757 (K.B.); Carth. 265.

authority to permit perpetuation depositions to be taken during a criminal prosecution.[143]

Shortly after restoration of Charles II to the throne in the mid-1600s, the English judiciary undertook to restate the law as it related to the administration of justice and the prosecution of trials for treason and other offenses.[144] One of these early memoranda, taken from *Lord Morley's Case*,[145] laid the groundwork for further refinement of the deposition rule in criminal cases.[146]

Thomas Lord Morley was tried before the House of Lords in 1666 for the murder of Hastings.[147] Morley did not deny killing Hastings, but stood on a defense that he had been provoked.[148] Morley objected to the prosecution's request to read the coroner depositions taken from some witnesses who were dead and another who was simply absent.[149] As a consequence, the assembled judges of England were called upon to rule upon the admissibility of coroner depositions, and rendered an opinion as follows on three pertinent questions of law:

> [1.] It was resolved by us all, that in case any of the witnesses which were examined before the coroner, were dead or unable to travel, and oath made thereof, that then the examinations of such witnesses, so dead or unable to travel might be read; the coroner first making oath that such examinations are the same which he took upon oath, without any addition or alteration whatsoever.

143. *See* The Case of Thatcher and Waller, (1676) 84 Eng. Rep. 1143 (K.B.); Jones, T. 53 (denying a motion made by the Chief Justice to permit a judge to examine acquitted defendants for the purpose of preserving their testimony for use against other offenders, because the panel believed their authority was limited to that of justices of the peace).

144. *E.g.*, Directions for Justices of the Peace, (1664) 84 Eng. Rep. 1055 (K.B.); Kel. J. 1 (requiring certification of recognizances and bailments before noon on the first day of sessions); *see also* Memorandum re: High Treason (1664) 84 Eng. Rep. 1056 (K.B.); Kel. J. 7 (discussing administration of treason trials upon the Restoration).

145. Lord Morley's Case, (1666) (H.L.), *reprinted in* 6 T.B. HOWELL, A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, at 770, 778–85 (London, T.C. Hansard 1816).

146. *See* Memorandum, (1666) 84 Eng. Rep. 1079 (H.L.) 1080, ¶¶ 4–6; Kel. J. 53, 55 (resolving that witnesses examined by a coroner who were "dead or unable to travel" could have their depositions read in court upon affirmation by the coroner under oath that the deposition was unaltered).

147. Lord Morley's Case, (1666) (H.L.), *reprinted in* 6 T.B. HOWELL, A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, at 770 (London, T.C. Hansard 1816).

148. *See id.* at 778–85 (summarizing the prosecution's case and Morley's defense).

149. *Id.* at 776.

> [2.] That in case oath should be made that any witness who had been examined by the coroner, and was then absent, was detained by the means or procurement of the prisoner, and the opinion of the Judges asked whether such examination might be read, we should answer, that if their Lordships were satisfied by the evidence they had heard, that the witness was detained by means or procurement of the prisoner, then the examination might be read, but whether he was detained by the means or procurement of the prisoner, was matter of fact, of which we were not judges, but their Lordships.
> [3.] Agreed, that if a witness who was examined by the coroner be absent, and oath is made that they have used all their endeavours to find him and cannot find him, that is not sufficient to authorize the reading of such examination.[150]

In combination, the rulings made clear that depositions were only admissible in a criminal case if a deponent was unavailable at the time of trial for some adequate reason and not merely absent. Depositions could be read if it was proven that a person was wrongfully detained by means or procurement of a defendant.[151] Depositions could also be read of persons who were dead or unable to travel, but inability to find a witness was not enough.[152]

There appears to have been some initial resistance to the rulings by the judiciary in *Lord Morley's Case*. Lord Cornwallis was tried for murder ten years later by the House of Lords.[153] During the course of that trial, the Lord High Steward in his case ruled that coroner depositions taken of witnesses who later died could be read, because it had been allowed in *Lord Morley's Case* and was by then constant practice and experience.[154] The High Steward went on to note, though, that the House of Lords, at first, reacted negatively to the rulings in *Lord Morley's Case*, writing that "in the Lord Morley's case the peers when they were withdrawn murmured at that opinion and were a whole hour debating whether they should not return with a protestation against the Earl of Clarendon, then Lord High Steward,

150. *Memorandum*, 84 Eng. Rep. at 1080, ¶¶ 4–6 (renumbered from original); Lord Morley's Case, (1666) (H.L.), *reprinted in* 6 T.B. HOWELL, A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, at 770, 770–71, ¶¶ 4–6 (London, T.C. Hansard 1816).

151. *See* GEOFFREY GILBERT, THE LAW OF EVIDENCE 141 (London, Henry Lintot 1756) (explaining that the reason for the rule was that a defendant should never have advantage from his own wrong).

152. *But see id.* (allowing use of prior depositions where all attempts to locate the witness have failed).

153. Trial of Lord Cornwallis, (1676) (H.L.), *reprinted in* 73 SELDEN SOCIETY 406 (1957).

154. *Id.* at 413–14.

for it. But here it was not at all contested."[155]

The rulings in *Lord Morley's Case* gained acceptance and were applied in ordinary criminal proceedings. Morley's alleged accomplice was tried in the King's Bench.[156] That court confirmed and applied rulings from *Lord Morley's Case* and allowed depositions of dead witnesses to be read.[157] In addition, two footmen were tried in the King's Bench shortly before the trial of Lord Cornwallis for their part in his alleged crime.[158] The prosecution in that case was allowed to introduce the deposition of a witness who was out of the jurisdiction supposedly by procurement of the defendants, because it was "as if he had been dead."[159]

Henry Harrison was tried in 1692 in the Old Bailey criminal courts for the strangulation murder of Dr. Andrew Clenche.[160] A witness testified at a coroner inquest that he had seen two persons flee from the scene of the crime.[161] In later testimony before the coroner, the witness identified Harrison as one of those persons.[162] The witness went missing by the time of trial, allegedly at the instance of Harrison's friends, but Harrison denied any knowledge about the disappearance.[163] However, the judge in *Henry Harrison's Case* commented upon hearing that Harrison might have been involved in the disappearance of a witness: "That is a very ill thing, and if it be proved, it will no way conduce to Mr. Harrison's advantage."[164] The court further held that the prosecution could use the depositions of the witness against Harrison if it could "prove upon him, that he made him keep away."[165]

155. *Id.* at 414.

156. Bromwich's Case, (1666) 83 Eng. Rep. 358 (K.B.) 358; 1 Lev. 180, 180; The King v. Brumwich, (1666) 84 Eng. Rep. 12 (K.B.) 12–13; 2 Keb. 19.

157. *Bromwich's Case*, 83 Eng. Rep. at 358.

158. The Case of Thatcher and Waller, (1676) 84 Eng. Rep. 1143 (K.B.) 1143; Jones, T. 53, 53.

159. *Id.*

160. Henry Harrison's Case, (1692) (Old Bailey Crim. Ct.), *reprinted in* 12 T.B. HOWELL, A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, at 834 (London, T.C. Hansard 1816).

161. *Id.* at 852–53.

162. *Id.* at 853.

163. *Id.* at 835–36.

164. *Id.*

165. *Id.* at 851. This part of the deposition rule outlived the remainder and was ultimately codified. *See* An Act More Effectually to Suppress Insurrections, and Prevent the Disturbances of the Publick Peace, 1796, 36 Geo. 3, c. 20, § 12 (Ir.) (declaring that if a person testifying against one charged is absent from trial because of an act of the one so charged, information or examination given under oath by the missing person against the one charged shall be admitted at trial), *reprinted in* The Statutes at Large, Passed in the Parliaments Held in Ireland: From the Third Year of Edward the Second, A.D. 1310, to the Thirty-sixth Year of George the Third, A.D. 1796, Inclusive, at 982

The rulings in *Lord Morley's Case* related directly to coroner depositions, but the deposition rule was also applied to examinations taken before justices of the peace.[166] It appears, though, that the use of this type of examination was more restricted. Although the use of a coroner deposition had been allowed in the 1676 *Case of Thatcher and Waller*,[167] the majority of the court simultaneously opined that "a deposition taken before a justice of peace ought not to be allowed in such case" because the powers of a justice of the peace were not as great as those of a coroner in death inquests.[168]

Sir Matthew Hale was one of the judges who participated in *Lord Morley's Case*.[169] Hale's *Pleas of the Crown* enumerated additional general requirements for the deposition rule in felony cases as follows: (1) an examination had to be taken in accordance with the Marian bailment and committal statutes; (2) the examination of persons other than the accused must be upon oath; (3) the examination had to be timely certified for its regular use relating to jail committal; and (4) the examination could only be given in evidence before a petit jury if the party examined was dead or absent.[170] Hale's treatise was relied upon as a primary authority in the late 1600s.[171]

Lord Morley's Case and Hale's contemporaneous restatement of law

(Dublin, George Grierson 1797); *see also* An Act to Regulate Proceedings of Grand Juries in Ireland, upon Bills of Indictment, 1816, 56 Geo. 3, c. 87, § 3 (Eng.) (providing that information and examinations given on oath by persons who are later murdered, maimed, or forcibly prevented from testifying shall be admitted at trial in all courts of justice in Ireland); An Act for the More Effectually Preventing the Administering and Taking of Unlawful Oaths in Ireland; and for the Protection of Magistrates and Witnesses in Criminal Cases, 1810, 50 Geo. 3, c. 102, § 5 (Eng.) (providing for trial use of information given by witnesses who have been murdered to prevent them from testifying).

166. *See* MATTHEW HALE, PLEAS OF THE CROWN 263 (London, Richard & Edward Atkyns 1678) ("Examinations [before the Justice of Peace], if the party be dead or absent, may be given in Evidence.").

167. The Case of Thatcher and Waller, (1676) 84 Eng. Rep. 1143 (K.B.); Jones, T. 53.

168. *Id.*

169. *See* Lord Morley's Case, (1666) (H.L.) (restating the memorandum rulings and identifying Hale as one of the judges in the case), *reprinted in* 6 T.B. HOWELL, A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, at 770, 770 (London, T.C. Hansard 1816).

170. MATTHEW HALE, PLEAS OF THE CROWN 262–63 (London, Richard & Edward Atkyns 1678).

171. *See* Fenwick's Case, (1696) (H.C.) (transcribing speeches of Mr. Sloane, Sir Tho. Littleton, and Mr. James Montague, each referencing Hale's treatise), *reprinted in* 13 T.B. HOWELL, A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, at 538, 596–98 (London, T.C. Hansard 1816).

provide the foundation for the modern deposition rule for criminal cases.[172] The use of depositions in criminal trials appears to predate both that case and Hale's restatement.[173] Its lineage may be arguably traced to the earliest foundations of the English common law when inquests were recorded on coroner rolls which were delivered to the King's justices in eyre during further proceedings.[174] However, the rulings in *Lord Morley's Case* and Hale's *Pleas of the Crown* established the first set of clearly delineated requirements for operation of a modern rule in criminal prosecutions.[175] Those rulings and Hale's guidelines thereafter, provided the primary framework for future discussion and application of the rule.[176]

V. THE RISE OF CROSS-EXAMINATION AS AN EVIDENTIARY TESTING METHOD

During the same time the modern deposition rule was developing, concerns arose about usage of out-of-court statements at trial. "Through the [1500s] and down beyond the middle of the [1600s], hearsay statements [were] constantly received, even against opposition."[177] However, there was a growing appreciation regarding the

172. *See generally* 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN, ch. 46, §§ 3, 6–7, at 429–30 (London, Eliz. Nutt & R. Gosling 1721) (citing Hale and Kelyng's summary of *Lord Morley's Case* regarding application of the rule).

173. *See* The Trial of Col. Nathanael Fiennes, (1643) (War Council) (arguing that "even at common law in some cases, depositions taken before the coroner, and examinations upon oath before the chief justice, or other justices, are usually given in evidence even in capital crimes"), *reprinted in* 4 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE PRESENT TIME 186, 215 (London, T.C. Hansard 1809); MICHAEL DALTON, THE COUNTREY JUSTICE, CONTAINING THE PRACTISE OF THE JUSTICES OF THE PEACE OUT OF THEIR SESSIONS 273 (London, Societie of Stationers 1622) (1618) ("[I]f the Informers be examined upon oath, then though it happen they should die before the prisoner have his [trial], yet may their information be given in evidence, as a matter of good credit.").

174. *See* 1 ANONYMOUS, BRITTON ch. 2, ¶¶ 5–6, at 10–11, ch. 3, ¶ 8, at 23 (Francis Morgan Nichols, trans., Oxford, Clarendon Press 1865) (1530) ("[L]et the coroners . . . be commanded to deliver to the Justices their rolls since the last eyre . . . .").

175. *See* Memorandum, (1666) 84 Eng. Rep. 1079 (H.L.) 1080, ¶¶ 4–6; Kel. J. 53, 55 (resolving that a witness statement may be read in the witness's absence if the witness is not merely missing and the absence is due to death, inability to travel, or "by means or procurement of the prisoner"); MATTHEW HALE, PLEAS OF THE CROWN 262–63 (London, Richard & Edward Atkyns 1678) (identifying the circumstances under which a pretrial examination taken of an absent witness may be used at trial).

176. *E.g.*, GEOFFREY GILBERT, THE LAW OF EVIDENCE 140–41 (London, Henry Lintot 1756) (citing Hale's guidelines to describe when a deceased or missing witness's deposition may be read to the jury).

177. John H. Wigmore, *The History of the Hearsay Rule*, 17 HARV. L. REV. 437, 444 (1904).

inappropriateness of using hearsay as proof.[178]

Thomas Earl of Strafford was charged and tried in 1640–1641 on multiple articles of treason.[179] During the presentation of proof, the managers for the prosecution offered the preliminary deposition taken from Lord Morton, because he had taken ill and was unavailable.[180] Lord Strafford objected, because he "observed himself to be debarred, of Cross-examining him."[181] The prosecution responded that Strafford's predicament was no different than the situation regularly faced by prisoners of that day.[182] Strafford nonetheless asked that "[h]e might reserve to himself the Benefit of Cross-examining him, if he should see Cause."[183] The managers of the prosecution replied that "no Prisoner hath benefit of Cross-Examination, where Examinations are read at Tryal[,]" and further explained that "Examinations are taken preparatorily, and it is according to Course of Law; That, if any Witnesses die, or be necessarily absent, their Examinations be used at the Tryal."[184] Strafford admitted that he may be ignorant of the rules of law, "[b]ut he conceived, that if the other Party do examine, it stands with Reason they should give him notice of it, else he cannot possibly Cross-Examine."[185] The Lord High Steward for the case nonetheless allowed use of the deposition given by the Earl of Morton, ruling that witnesses would be examined *viva voce* if they could physically testify in person, but that their prior examinations may be read if they could not.[186]

In 1695, a defendant was charged by information with misdemeanor libel in the case of *The King v. Paine*.[187] The prosecutor sought at trial to use a deposition that had been taken before the Mayor of Bristol in the

178. *See id.* at 445 (recognizing the cautious attitude toward hearsay use twenty years following the Restoration).

179. Trial of Thomas Earl of Strafford, (1640), *reprinted in* 8 JOHN RUSHWORTH, THE TRYAL OF THOMAS EARL OF STRAFFORD, LORD LIEUTENANT OF IRELAND, UPON AN IMPEACHMENT OF HIGH TREASON BY THE COMMONS THEN ASSEMBLED IN PARLIAMENT, IN THE NAME OF THEMSELVES AND OF ALL COMMONS OF ENGLAND 61–77, 101 (London, D. Browne et al. 1721).

180. Trial of Thomas Earl of Strafford, (1641), *reprinted in* 8 JOHN RUSHWORTH, THE TRYAL OF THOMAS EARL OF STRAFFORD, LORD LIEUTENANT OF IRELAND, UPON AN IMPEACHMENT OF HIGH TREASON BY THE COMMONS THEN ASSEMBLED IN PARLIAMENT, IN THE NAME OF THEMSELVES AND OF ALL COMMONS OF ENGLAND 529 (London, D. Browne et al. 1721).

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* at 529–30.

185. *Id.* at 529.

186. *Id.* at 530.

187. The King v. Paine, (1695) 87 Eng. Rep. 584 (K.B.) 584; 5 Mod. 163, 163–64.

absence of Paine.[188] Paine's attorney argued that the deposition could not be used, because the deposition had not been taken in accordance with the statutory authority of the Marian bailment and committal statutes and Paine had lost all opportunity for cross-examination.[189] The prosecution countered that compliance with the statute made no difference, because the justice of the peace's authority to take a deposition was inherent to that office and only enforced by the statute.[190]

The various reports for *Paine* offer different reasons for the court's refusal to allow the depositions into evidence. One report states that it was held that the King's Bench initially ruled per curiam that the depositions could be used in indictments only for felony under the Marian bailment and committal statutes, and, therefore, could not be used in the misdemeanor prosecution of Paine.[191] This report further states that a Puisne (junior) Justice was sent to confer with the Justices of the Common Pleas to see if they agreed and found that they did.[192] Another report states that the Chief Justice declared after the junior judge had returned that "it was the opinion of both Courts that these depositions should not be given in evidence, the defendant not being present when they were taken before the mayor, and so had lost the benefit of a cross-examination."[193] A third report says that the King's Bench would not allow use of the deposition, after conferring with the Justices of Common Pleas, for two reasons: (1) "the defendant was not present when the examination was taken" and could not cross-examine, and (2) depositions may be given in evidence if taken under the Marian bailment and committal statutes in the case of felony, but capital offenses and misdemeanors differ in application.[194] A fourth report states that the opinion of the King's Bench, upon advice from the Justices of Common Pleas, was that depositions may be used in cases of felony by virtue of the Marian bailment and committal statutes, "[b]ut this cannot be extended farther than the particular case of [felony], and therefore not to this case."[195] One of the reports expressly noted that the deposition could have been used if Paine had been indicted for a felony, and could not in

188. *Id.* at 584–85.

189. *Id.* at 585.

190. *Id.*

191. *See* Rex v. Payne, (1695) 91 Eng. Rep. 1387 (K.B.) 1387; 1 Raym. Ld. 729, 729–30 (identifying when depositions of a person who has died are allowed into evidence).

192. *Id.*

193. *Paine*, 87 Eng. Rep. at 585.

194. Rex v. Pain, (1695) 90 Eng. Rep. 527 (K.B.) 527; Comb. 358, 359.

195. Dominus Rex v. Paine, (1695) 91 Eng. Rep. 246 (K.B.) 246; 1 Salk. 281, 281.

that case only because the charge was a misdemeanor.[196] Deprival of cross-examination was a concern, but, in light of the many divergent views about the actual basis for the decision in *Paine* at the time it was decided, it would be a stretch to conclude that *Paine* clearly established any unambiguous common law principle demanding that a defendant be provided with an opportunity for cross-examination of adverse witnesses.

Less than two years after *Paine*, Sir John Fenwick was tried in Parliament for high treason.[197] One of his attorneys was Bartholomew Shower who had argued on behalf of Paine.[198] In the interim, a reform statute had been enacted which applied to treason trials conducted after March 25, 1696.[199] That act restored a previously abandoned two-witness requirement and instituted other procedural protections.[200] However, Fenwick was tried in Parliament under a bill of attainder rather than in an ordinary criminal court.[201]

Fenwick was originally indicted of high treason on May 28, 1696 in the Old Bailey criminal courts upon the oaths of Porter and Goodman, two witnesses to the alleged crime.[202] The prosecution understood that the

196. *See Payne*, 91 Eng. Rep. at 1387 ("[I]n indictments for felony, . . . such informations may be read, . . . [b]ut in indictments or informations for misdemeanors, . . . no such information can be given in evidence . . . .").

197. *See* Fenwick's Case, (1696) (H.C.) ("Mr. Speaker, I [Sir John Fenwick] suppose the House is not ignorant of my circumstances. I am indicted of high-treason, and have been arraigned . . . ."), *reprinted in* 13 T.B. HOWELL, A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, at 538, 539 (London, T.C. Hansard 1816).

198. *See id.* at 538, 543, 553 (asking the House of Commons to have Bartholomew Shower as new representation); *see also Pain*, 90 Eng. Rep. at 527 ("Sir Barth. Shower . . . cited . . . that a justice cannot make a warrant to take a man for felony before indictment, and . . . the justices had no power before those statutes to take examinations, until something were depending.").

199. An Act for Regulateing of Tryals in Cases of Treason and Misprision of Treason, 1695–1696, 7 & 8 Will. 3, c. 3 (Eng.).

200. *See id.* at c. 3, ¶¶ 2–10 (listing the new procedural protections within the reform statute). *See generally* An Acte Whereby Certayne Offences Bee Made Treasons; and Also for the Government of the Kinges and Quenes Majesties Issue, 1554–1555, 1 & 2 Phil. & Mary, c. 10, ¶ 6 (Eng.) (explaining what laws must be followed for trials of any treason); An Acte for the Punyshment of Divse Treasons, 1551–1552, 5 & 6 Edw. 6, c. 11, ¶ 9 (Eng.) (providing that no person could be indicted or convicted of any treason offenses unless there were two witnesses that were willing to be brought before the accused and testify); An Acte for the Repeale of Certaine Statutes Concerninge Treasons, Felonyes &c, 1547, 1 Edw. 6, c. 12, ¶ 22 (Eng.) (requiring two witnesses or a confession before anyone being tried for treason can be convicted and punished).

201. An Act to Attaint Sir John Fenwick Baronett of High Treason, 1696–1697, 8 & 9 Will. 3, c. 4 (Eng.).

202. Fenwick's Case, (1696) (H.C.), *reprinted in* 13 T.B. HOWELL, A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, at 538, 547, 551, 579 (London, T.C. Hansard 1816).

recently passed treason reform statute applied to the proceedings in those criminal courts.[203] The bill of attainder was brought in Parliament, because Fenwick had allegedly delayed his trial in the Old Bailey until Goodman could disappear and was unavailable to testify against him.[204] The primary purposes of the bill of attainder were to respond to Fenwick's alleged tampering and to circumvent the recently reinstated two witness rule.[205]

Porter personally testified in the proceedings in Parliament against Fenwick.[206] The prosecution also offered two forms of prior testimony as proof against Fenwick: (1) the examination of Goodman taken upon Fenwick's indictment in the Old Bailey, and (2) his testimony given at the trial of one of Fenwick's conspirators.[207] Use of Goodman's former testimony was sought on grounds that Fenwick had conspired to tamper with witnesses and wrongfully procured Goodman's absence through his wife and solicitor.[208]

Loss of an opportunity to cross-examine was a central part of the arguments made by Fenwick's counsel.[209] It was not, however, the only argument. Fenwick's counsel, Bartholomew Shower, acknowledged the deposition rule and also argued its technicalities.[210] Shower argued for application of the rule that restricted use of depositions in criminal cases to those proceedings in which the indictment had been made and under which a deposition was taken.[211] Shower also argued for application of the rule requiring proof of the examining officer's authority.[212] In

203. *See id.* at 580 (Speech by prosecutor Serj. Lovel) (noting the Parliament's passage of an act requiring the oaths of two persons to support an indictment).

204. *See id.* at 547–48, 551–52 ("John Fenwick did obtain his majesty's favour to have his trial delayed from time to time, . . . so that the said Cordel Goodman cannot be had to give evidence upon any trial.").

205. *See id.* at 575 (identifying Sir T. Littleton's reasons for why the bill of attainder was brought).

206. *Id.* at 580–81, 588–89.

207. *See id.* at 579, 607–10, 611–12, 622–24 (arguing that Goodman's prior testimony is sufficient to prove the case against Sir John Fenwick in the Parliament).

208. *See id.* at 581–91 (presenting evidence to prove that Sir John Fenwick had conspired to tamper with witnesses).

209. *See id.* at 591–95 (reasoning that not having the opportunity to cross-examine Goodman's prior testimony should bar the evidence from coming into evidence).

210. *Id.* at 592–93.

211. *Id.* at 592. In *Paine*, Shower had successfully argued that the power of justices of the peace to take examinations was limited by their statutory authority. *See* Rex v. Pain, (1695) 90 Eng. Rep. 527 (K.B.) 527; Comb. 358, 359 (arguing the Justices had no statutory authority "to take examinations, until something were depending").

212. *See* Fenwick's Case, (1696) (H.C.) ("[I]t is only an information before a private justice; for if not so, we know not what authority he had to examine him . . . ."), *reprinted in* 13 T.B. HOWELL, A

addition to those arguments, Shower explained:

> Our law requires persons to appear, and give their testimony *viva voce*; and we see that their testimony appears credible, or not, by their very countenances, and the manner of their delivery: and their falsity may sometimes be discovered by questions that the party may ask them, and by examining them to particular circumstances, which may lay open the falsity of a well-laid scheme; which otherwise, as he himself had put it together, might have looked well at first; and this we are deprived of, if this examination should be admitted to be read.[213]

Shower later admitted that "perhaps it might have been reasonable to have an act passed, that Goodman's depositions should be read at the trial, if Goodman was withdrawn."[214] Shower submitted that, in the absence of such a statute, Fenwick either had to be tried by the testimony of two witnesses in accordance with the recently passed treason act or he was otherwise entitled to a normal jury trial under the rules of that day.[215] Shower explained that the reason one witness sufficed in a regular jury trial of that time was because a defendant had "the benefit of a jury, and challenges to them, who the law supposes are privy to the fact, and therefore are to come from the vicinage, from the neighbourhood of the place where the party dwells."[216]

The debates between the Lords show no consensus of opinion on any of the points of law that had been raised.[217] In the end, only the outcome of the debate was made clear. A divided house voted 218 to 145 in favor of allowing the preliminary examination of Goodman to be read.[218] It later voted 180 to 102 to allow use of Goodman's testimony given at an earlier trial against a Fenwick conspirator.[219]

Paine and *Fenwick* indicate a shift towards establishment of a cross-examination requirement, but it is revisionist fiction to suggest that either firmly created an absolute rule or that the proposed use of depositions in those cases dramatically disturbed some common law bedrock. As

COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, at 538, 592–93 (London, T.C. Hansard 1816).

213. *Id.* at 592.

214. *Id.* at 642.

215. *See id.* at 642–43 (explaining that the law requires two witnesses and the only exception for having one witness is when there is a jury present).

216. *Id.* at 643.

217. *See id.* at 595–607, 618–22 (examining the debates over admission of Goodman's preliminary examination and his testimony at the trial of Fenwick's conspirator Cook).

218. *Id.* at 607.

219. *Id.* at 622.

Fenwick's attorney acknowledged, regular criminal jury trials of that time still allowed jurors to decide cases on the basis of communal facts to which the law supposed them to be privy.[220] Inability to cross-examine was an issue in *Paine*, but only the editorial selectivity employed in some case reports identifies it as the central basis for decision.[221] It was an important concern expressed in *Fenwick*, but it was not the dominant point of discussion amongst the Lords, or even a winning argument.[222] *Fenwick* demonstrates the questionable significance of *Paine* around the time it was decided. Despite the presence of a participant from the *Paine* proceedings, the urging of similar arguments by the defense regarding an opportunity for cross-examination, and the citation to numerous precedents during the course of the debates and arguments, *Paine* was not mentioned during *Fenwick's Case*.[223]

There is nothing to indicate a reactionary abandonment of the deposition rule in the wake of *Paine* and *Fenwick*.[224] To the contrary, the deposition rule survived at the time Hawkins published the second volume of his *Treatise of the Pleas of the Crown* in 1721.[225] Hawkins wrote that:

220. *See id.* at 643 ("[A]nd the reason that here one witness is admitted, is, because he hath the benefit of a jury . . . .").

221. *Compare* The King v. Paine, (1695) 87 Eng. Rep. 584 (K.B.) 585; 5 Mod. 163, 165 (identifying loss of cross-examination as the basis for the decision), *and* Dominus Rex v. Paine, (1695) 91 Eng. Rep. 246 (K.B.) 246; 1 Salk. 281, 281 (stating that the deposition was inadmissible since it was a non-felony case, and not mentioning loss of cross-examination as a basis for the decision), *and* Rex v. Payne, (1695) 91 Eng. Rep. 1387 (K.B.) 1387; 1 Raym. Ld. 729, 729–30 (indicating that deposition would have been admissible if the charged crime had been a felony and omitting any reference to loss of cross-examination as being of concern), *with* Rex v. Pain, (1695) 90 Eng. Rep. 527 (K.B.) 527; Comb. 358, 358–59 (mentioning loss of cross-examination as one of two grounds for the decision).

222. *See generally* Fenwick's Case, (1696) (H.C.) (emphasizing that loss of cross-examination was not a focal point of the case), *reprinted in* 13 T.B. HOWELL, A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, at 538, 595–607, 631–51, 659–712, 712–49 (London, T.C. Hansard 1816).

223. *See* 3 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1364, at 22 & n.53 (2d ed. 1923) (finding it odd that Fenwick's counsel did not reference *Paine*). *See generally* Fenwick's Case, (1696) (H.C.) (lacking any citation to *Paine* despite the similarities between the two trials with respect to deprivation of an opportunity for cross examination), *reprinted in* 13 T.B. HOWELL, A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, at 538, 591–749 (London, T.C. Hansard 1816).

224. *Cf.* Breedon v. Gill, (1697) 91 Eng. Rep. 1043 (K.B.) 1044–45; 1 Raym. Ld. 220, 222 (requiring live testimony in a de novo appeal because an act of Parliament appeared to mandate it for that particular type of appeal, but with Lord Chief Justice Holt expressing his opinion that depositions might still be used if witnesses were dead or could not be found).

225. 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN (London, Eliz. Nutt

> It seems settled, That the Examination of an Informer taken upon Oath, and subscribed by him either before a Coroner upon an Inquisition of Death in pursuance of 1 & 2 Ph. & M. 13 or before Justices of Peace in pursuance of 1 & 2 Ph. & M. 13 and 2 & 3 P. & M. 10 upon a Bailment or Commitment for any Felony, may be given in Evidence at the Trial of such Inquisition, or of an Indictment for the same Felony, if it be made out by Oath to the Satisfaction of the Court, that such Informer is dead, or unable to travel, or kept away by the Means or Procurement of the Prisoner, and that the Examination offered in Evidence is the very same that was sworn before the Coroner or Justice, without any Alteration whatsoever.[226]

Judge Henry Bathurst's *Theory of Evidence*[227] from the mid-1700s reveals recent adoption of a cross-examination requirement.[228] Judge Bathurst therein updates many of the rulings from the preceding century that defined the deposition rule. For example, Judge Bathurst explains his belief that the reason behind the rule that premature chancery depositions could not be admitted as evidence in a later proceeding was "because the opposite Party had not the Power of cross Examination."[229] However, this rationale is nowhere to be found in the cases cited in *Theory of Evidence* for that proposition.[230] Judge Bathurst similarly explains his view that premature chancery depositions could be used in situations involving contempt "for then it is the Fault of the Objector that he did not cross examine the Witnesses."[231] That rationale also does not appear in the cases cited.[232] Bathurst interpreted the cases referenced in his *Theory of*

and R. Gosling 1721).

226. *Id.* at ch. 46, § 6, at 429 (London, Eliz. Nutt and R. Gosling 1721); *see also* GEOFFREY GILBERT, THE LAW OF EVIDENCE 140–41 (London, Henry Lintot 1756) (acknowledging that depositions taken from a witness by a coroner could be submitted in evidence at trial if the witness was "dead or so ill that he is not able to travel" provided that the Coroner "first make Oath that such Examinations are the same which were taken before him upon Oath, without any Addition or Alteration").

227. This treatise was published anonymously but is attributed to Bathurst. 1 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 8, at 110 (2d ed. 1923).

228. *See* HENRY BATHURST, THE THEORY OF EVIDENCE 31 (Dublin, Sarah Cotter 1761) ("[I]f the adverse Party had been in Contempt, then the Depositions shall be admitted . . . .").

229. *Id.* at 32.

230. *See* Piercy v. Anonymous, (1681) 84 Eng. Rep. 1198 (K.B.) 1198; Jones, T. 164, 164 (asserting that the Courts of Common Law are not bound by an order from the Chancery Court requiring the adverse party to admit a witness deposition); Anonymous v. Brown, (1662) 145 Eng. Rep. 475 (Exch.) 475; Hardres 315, 315 (holding a deposition should not be admitted in evidence when "it was taken before issue joined in the cause" and when the witness "might have been examined after [the answer]").

231. HENRY BATHURST, THE THEORY OF EVIDENCE 31 (Dublin, Sarah Cotter 1761).

232. *See* Howard v. Tremain, (1692) 87 Eng. Rep. 314 (K.B.) 314; 4 Mod. 146, 147 ("[T]he fault

Evidence using the prevailing legal standards of his time, but they cannot be said to have been deeply rooted, because they appear nowhere in the reports for those cases written less than a century earlier.[233]

It is doubtful that the deposition rule at that time was limited to examinations taken in the presence of an accused or sworn statements that had been cross-examined. In *The King v. Westbeer*,[234] Thomas Westbeer was indicted at the Old Bailey in 1739 for felony theft of a parchment writing.[235] His alleged accomplice, Curteis Lulham, confessed his guilt and gave information on oath against Westbeer before a justice of the peace in accordance with the Marian bailment and committal statutes.[236] The accomplice died in prison before Westbeer could be brought to trial, and the prosecution sought to have his deposition read.[237] The defense objected, arguing that "admitting his deposition to be read in evidence would injure the prisoner, inasmuch as he would lose the benefit which might otherwise have arisen from a cross-examination."[238] The point was argued between counsel, "[b]ut the Court over-ruled the objection, and admitted Lulham's information to be read; though they said it would not be conclusive unless it were strongly corroborated by other testimony."[239]

It appears that ex parte coroner depositions could still be used as evidence. In *Robbins v. Wolseley*,[240] Sir William Wolseley brought suit in 1753 against Ann Whitby in ecclesiastical court for divorce due to adultery.[241] It was alleged during the course of the proceedings that various witnesses had lied and that records had been falsified.[242] Wolseley offered an affidavit of a deceased witness as evidence, which was opposed, and counsel for the parties debated the common law authorities relating to admission of depositions and affidavits.[243] After surveying the arguments, the court allowed the evidence, stating in part: "I was of

is in the plaintiff, for not compelling the defendant to put in his answer in two years after the bill filed."); Pawlet's Case, (1679) 83 Eng. Rep. 174, 174–75 (Exch.); Raym. T. 335, 335–36 (holding that a witness deposition cannot be introduced in evidence unless an answer is submitted).

233. According to Wigmore, "[n]o precise date or ruling stands out as decisive; but it seems to be between 1675 and 1690 that the fixing of the [hearsay] doctrine takes place." John H. Wigmore, *The History of the Hearsay Rule*, 17 HARV. L. REV. 437, 445 (1904).

234. The King v. Westbeer, (1739) 168 Eng. Rep. 108 (K.B.); 1 Leach. 12.

235. *Id.* at 109.

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. Robins v. Wolseley, (1757) 161 Eng. Rep. 391 (Arches Ct.); 2 Lee 421.

241. *Id.*

242. *Id.* at 391–93.

243. *Id.* at 398.

opinion that the judgments upon this point had been various at common law; all the judges resolved that depositions taken ex parte by a coroner, the witnesses being dead, should be received as evidence in a criminal case."[244]

Despite recognition of a person's right to cross-examine adverse witnesses, treatises on evidence from the mid-1700s continued to acknowledge the existence and applicability of a deposition rule in criminal cases.[245] Judge Bathurst explained in his *Theory of Evidence*:

> So where there cannot be a cross Examination, as Depositions taken before Commissioners of Bankrupts, they shall not be read in Evidence, yet if the Witnesses examined on a Coroner's Inquest are dead, or beyond Sea, their Depositions may be read; for the Coroner is an Officer appointed on behalf of the Public, to make Inquiry about the Matters within his Jurisdiction; and therefore the Law will presume the Depositions before him to be fairly and impartially taken.—And by 1 & 2 Ph. & M. C. [13]. and 2 & 3 Ph. & M. c. 10. Justices of the Peace shall examine of Persons brought before them for Felony, and of those who brought them, and certify such Examination to the next Gaol-Delivery; but the Examination of the Prisoner shall be without Oath, and the others upon Oath, and these Examinations shall be read against the Offender upon an Indictment, if the Witnesses be dead.[246]

Bathhurst's *Theory of Evidence* nonetheless demonstrates a complete reversal of evidentiary rules between the 1600s and mid-1700s. Depositions were freely used in the early 1600s even if absent witnesses were available to testify.[247] The *Trial of Thomas Earl of Strafford*[248] marked a turning point, because, in the face of Strafford's objections that he had been deprived an opportunity for cross-examination, the Lord High Steward ruled that prior depositions could only be used if a witness could

244. *Id.* (citations omitted).

245. *See* ANONYMOUS, AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS 228 (London, H. Woodfall & W. Strahan 1767) (acknowledging that depositions taken by Coroners could be admitted when the witness was dead); GEOFFREY GILBERT, THE LAW OF EVIDENCE 140–41 (London, Henry Lintot 1756) (recognizing the admissibility of depositions of witnesses who were dead or too ill to travel).

246. HENRY BATHURST, THE THEORY OF EVIDENCE 34 (Dublin, Sarah Cotter 1761).

247. *See* 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN ch. 46, § 9, at 430 (London, Eliz. Nutt and R. Gosling 1721) ("Depositions of absent Witnesses were allowed as Evidence in Treason and Felony, even where it did not appear but that the Witnesses might have been produced *viva voce*.").

248. Trial of Thomas Earl of Strafford (1641), *reprinted in* 8 JOHN RUSHWORTH, THE TRYAL OF THOMAS EARL OF STRAFFORD, LORD LIEUTENANT OF IRELAND, UPON AN IMPEACHMENT OF HIGH TREASON BY THE COMMONS THEN ASSEMBLED IN PARLIAMENT, IN THE NAME OF THEMSELVES AND OF ALL THE COMMONS OF ENGLAND (London, D. Browne et al. 1721).

not physically attend trial.[249] Cross-examination concerns, at least in part, later caused both the King's Bench and the Court of Common Pleas to rule in *Paine* that the deposition rule was strictly limited to felony cases, because the authority provided by the Marian bailment and committal statutes extended no further.[250] By the time Bathurst wrote his *Theory of Evidence*, cross-examination was a general requirement for admissibility of prior testimony, and the deposition rule survived only through the rules set down by *Lord Morley's Case* and Hale and the official sanction presumably supplied by the Marian bailment and committal statutes.

VI. THE RISE OF MODERN CONFRONTATION

The concept of confrontation has roots dating back to Roman law.[251] Its English origin for practical purposes cannot, however, be accurately dated back much further than the Edwardian treason statute of 1551–1552[252] and a similar more limited proviso contained in a 1554–1555 Marian treason statute.[253] Its pertinent history, therefore, largely overlaps the development of the modern deposition rule and the rise of cross-examination as the preferred method for testing witness testimony.

Various types of high treason and petit treason were recognized at common law.[254] The offenses that constituted treason were clarified and

249. *Id.* at 529–30.

250. The King v. Paine, (1695) 87 Eng. Rep. 584 (K.B.) 584–85; 5 Mod. 163, 163–64; *see also* Dominus Rex v. Paine, (1695) 91 Eng. Rep. 246 (K.B.) 246; 1 Salk. 281, 281 (adhering to precedent establishing that the deposition rule was limited to felony cases); Rex v. Payne, (1695) 91 Eng. Rep. 1387 (K.B.) 1387; 1 Raym. Ld. 729, 729 (recognizing that the deposition rule applies only in felony cases); Rex v. Pain, (1695) 90 Eng. Rep. 527 (K.B.) 527; Comb. 358, 359 ("There is a difference between capital offences and cases of misdemeanour . . . .").

251. 2 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, SPECIALLY APPLIED TO ENGLISH PRACTICE, ch. 19, at 413–24 (London, Hunt & Clarke 1827).

252. An Acte for the Punyshment of Divse Treasons, 1551–1552, 5 & 6 Edw. 6, c. 11, § 9 (Eng.) (requiring that live accusers be brought in person before the party who they have accused to avow and maintain their accusations).

253. *See* An Acte Wherby Certayne Offences Bee Made Tresons; and also for the Governement of the Kinges and Quenes Majesties Issue, 1554–1555, 1 & 2 Phil. & M., c. 10, § 11 (Eng.) (directing that anyone who declares, confesses, or deposes anything against someone accused of treason under that act shall be brought forth in person to the arraignment of the party accused to openly say "in his hearing" what they can against him); *see also* WILLIAM STAUNFORD, LES PLEES DEL CORON: DEVISEES IN PLUSIOURS TITLES & COMMON LIEUX 164 (London, Richardi Tottelli 1557) (commenting that the proviso in the Marian treason statute requiring production of accusers at arraignments for treason under that statute was a method never used at common law).

254. *See* EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN, AND CRIMINAL CAUSES 1–36 (London, A. Crooke et al. 4th ed. 1669) (providing several examples of high treason and petit treason); MATTHEW HALE, PLEAS OF THE CROWN 9–25 (London, Richard & Edward Atkyns 1678)

consolidated by statute in 1350.[255] Due process protections were later adopted during the short reign of Edward VI. A 1547 statute provided that no person could be indicted, arraigned, convicted or condemned for treason unless accused by two lawful witnesses.[256] Another statute enacted in 1551–1552, confirmed the requirement of two lawful accusers and mandated that they "[shall be] brought in [person] before the [party so accused]" at the time of arraignment to "[avow] and [maintain] that that they have to [say] against the [said party] to prove him [guilty of treason]."[257] A 1554–1555 Marian statute included a similar requirement that any living accusers within the country must be brought forth in person before a person accused of treason to make their accusations openly within earshot of the accused.[258]

Sir Nicholas Throckmorton was tried for treason after the enactment of the Edwardian treason statute.[259] Most of the proof at his trial was presented by reading confessions and depositions taken from alleged conspirators.[260] Cutbert Vaughan was the only witness who gave live testimony against the accused.[261] Throckmorton objected that Vaughan

(explaining the types of high treason and petit treason recognized at common law).

255. Statute the Fifth, 1351–1352, 25 Edw. 3, c. 5, ¶ 2 (Eng.).

256. An Acte for the Repeale of Certaine Statutes Concerninge Treasons, Felonyes, &c, 1547, 1 Edw. 6, c. 12, ¶ 22 (Eng.).

257. An Acte for the Punyshment of Divse Treasons, 1551–1552, 5 & 6 Edw. 6, c. 11, ¶ 9 (Eng.). The 1551–1552 Edwardian treason statute may have been adopted in reaction to the use of depositions shortly before its enactment in treason proceedings against the Duke of Somerset over his objection. *See* Fenwick's Case, (1696) (H.L.) (transcribing Bishop Burnet's speech), *reprinted in* 13 T.B. HOWELL, A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, at 538, 751 (London, T.C. Hansard 1816). *See generally* Proceedings against Edward Duke of Somerset, (1551) (detailing the proceeding against Edward Duke of Somerset), *reprinted in* 1 T.B. HOWELL, A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, at 515, 520 (London, T.C. Hansard 1816).

258. An Acte Wherby Certayne Offences Bee Made Tresons; and Also for the Governement of the Kinges and Quenes Majesties Issue, 1554–1555, 1 & 2 Phil. & M., c. 10, ¶ 11 (Eng.).

259. Trial of Nicholas Throckmorton, (1554) (H.L.), *reprinted in* 1 T.B. HOWELL, A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, at 869 (London, T.C. Hansard 1816). The Marian bailment and committal statutes played no part in the April 17, 1554 Throckmorton trial, because they were not enacted until months later after Parliament convened on November 12, 1554. An Act Appointing an Order to Justices of Peace for the Bailement of Prisoners, 1554–1555, 1 & 2 Phil. & M., c. 13, § 1 (Eng.).

260. Trial of Nicholas Throckmorton, (1554) (H.L.), *reprinted in* 1 T.B. HOWELL, A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, at 869, 873, 876–77 (London, T.C. Hansard 1816).

261. *Id.* at 877–78.

was the only witness, and his testimony alone was insufficient to prove treason.[262] Throckmorton quoted the requirements of the Edwardian statutes and argued that "our law doth require two lawful and sufficient Accusers to be brought face to face, and Vaughan is but one, and the same most unlawful and insufficient."[263] The prosecution disregarded the objection and continued to rely on depositions for its proof.[264]

Throckmorton was acquitted, and his jury was imprisoned and punished for the unwanted result in accordance with the draconian traditions of that time.[265] In addition, Parliament passed a Marian treason statute shortly thereafter which provided that treason trials would be "[had] and used [only] according to the due order and course of the Common [laws] of this [realm] and not otherwise."[266] This part of the Marian treason statute was thought to repeal the procedural protections provided by the Edwardian treason statutes.[267]

Sir Walter Raleigh invoked the protection of the Edwardian treason statutes at his 1603 trial.[268] The principal proof presented against Raleigh was a written confession and other ex parte statements made by Lord Cobham.[269] Raleigh argued that the Edwardian treason statutes required two lawful accusers and that those accusers must be brought before the

262. *Id.* at 873.

263. *Id.* at 880.

264. *Id.* at 880–81, 883–84.

265. *Id.* at 899–902.

266. An Acte Whereby Certayn Offences Bee Made Tresons; and Also for the Governement of the Kinges and Quenes Majesties Issue, 1554–1555, 1 & 2 Phil. & M., c. 10, ¶ 6 (Eng.).

267. *See* Trial of Thomas Howard Duke of Norfolk, (1571) (H.L.) (responding to the Duke's demand that his accusers "be brought face to face" as required by law, the prosecutor replied: "The law was so for a time, in some cases of Treason; but, since, the law hath been found too hard and dangerous for the prince, and it hath been repealed"), *reprinted in* 1 T.B. HOWELL, A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, at 957, 992 (London, T.C. Hansard 1816); Memorandum, (1556) 73 Eng. Rep. 287 (K.B.) 287; 2 Dy. 131b, 132a ("[T]he intent of the statute 1. and 2. Ph. and M. c. 10. was to remove the two accusers and two witnesses."); Memorandum re: Prosecutions for Treason, (1556) (Eng.) ("[F]or all treasons upon the statute of 25 Edw. III there need not be any witnesses or accusers personally brought forth upon the arraignment (but only upon the indictment as aforesaid), for that is taken away by . . . 1 & 2 Phil. & Mar., c. 10."), *reprinted in* 109 SELDEN SOCIETY 16, 16–17 (1993).

268. Trial of Sir Walter Raleigh, (1603), *reprinted in* 1 DAVID JARDINE, CRIMINAL TRIALS 400, 418 (London, Charles Knight 1832); *cf.* 2 WILLIAM COBBETT, COBBETT'S COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE PRESENT TIME 1, 15 (London, T.C. Hansard 1809) (paraphrasing the responses of the prosecuting attorney and Lord Chief Justice in the trial of Raleigh).

269. Trial of Sir Walter Raleigh, (1603), *reprinted in* 1 DAVID JARDINE, CRIMINAL TRIALS 400, 410–11, 422–23, 432–33 (London, Charles Knight 1832).

party accused, and he bolstered that argument by reference to the portion of the Marian treason statute, which appeared to say the same.[270] Lord Chief Justice Popham rejected Raleigh's argument; holding that the part of the Marian treason statute cited by Raleigh extended only to the types of treason described therein and that another pertinent part of the Marian treason statute repealed the Edwardian statutes by returning "the trial of treasons to be as before it was at the common law."[271] Popham went on to reject Raleigh's assertion that common law trials are by jury and witnesses by explaining that "the trial at the common law is by examination; if three conspire a treason, and they all confess it, here is never a witness, and yet they may all be condemned of treason."[272]

Sir Walter Raleigh did not decry loss of an opportunity to cross-examine Cobham. He instead insisted that Cobham affirm in person what he had allegedly said in his confession about Raleigh.[273] Raleigh argued: "I beseech you, my Lords, let Cobham be sent for; let him be charged upon his soul, upon his allegiance to the King, and if he will then maintain his accusation to my face, I will confess myself guilty."[274] Raleigh asked for something more fundamental than an ability to cross-examine: the right to face his accuser, and for his accuser to then publicly maintain his accusation on oath before the tribunal.[275]

Later judges never fully agreed upon what the common law had previously demanded before the Edwardian treason statutes.[276] Attempts

270. *Id.* at 418.

271. *Id.* at 420; *see also* 2 WILLIAM COBBETT, COBBETT'S COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE PRESENT TIME 1, 15 (London, T.C. Hansard 1809) (reporting the ruling of the Lord Chief Justice in slightly different words).

272. Trial of Sir Walter Raleigh, (1603), *reprinted in* 1 DAVID JARDINE, CRIMINAL TRIALS 400, 421 (London, Charles Knight 1832); *see also* 2 WILLIAM COBBETT, COBBETT'S COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE PRESENT TIME 1, 18 (London, T.C. Hansard 1809) ("No, by Examination if three conspire a Treason, and they all confess it; here is never a Witness, yet they are condemned.").

273. Trial of Sir Walter Raleigh, (1603), *reprinted in* 1 DAVID JARDINE, CRIMINAL TRIALS 400, 420 (London, Charles Knight 1832).

274. *Id.*

275. *See* Coy v. Iowa, 487 U.S. 1012, 1015–20 (1988) (explaining why human feelings of fairness in our society demand a face-to-face encounter between a defendant and his or her accuser).

276. Lord Coke later concluded that one witness was not sufficient at common law to convict a person of high treason. EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN, AND CRIMINAL CAUSES 26 (London, A. Crooke et al. 4th ed. 1669). Other jurists from Coke's age doubted his conclusion. Memorandum, (1665) 84 Eng. Rep. 1077 (K.B.) 1077; Kel. J. 50; Memorandum, (1662) 84 Eng. Rep. 1061 (K.B.) 1062, ¶ 4; Kel. J. 17, 18.

by some of England's preeminent judges many years afterwards to reconcile the interactions between the statutes and the common law were inconsistent and unsatisfactory.[277] In contrast, the Edwardian treason statutes were unmistakably clear: two lawful witnesses were required, and those accusers had to avow and maintain their accusations in the presence of the party accused.[278] At the time of their apparent repeal by the Marian treason statute, it was contemporaneously believed that the prosecution of treason cases reverted to a common law that was absent both a two-witness requirement[279] and a confrontation requirement.[280]

The treason statute passed in the late 1600s shortly before the proceedings against Sir John Fenwick restored the two-witness requirement of the Edwardian statutes, but it was silent regarding face-to-face production of accusers.[281] No common law right appears to have been settled on the issue, because resort was made to the Edwardian treason statutes to provide it. Sir Michael Foster opined in the mid-1700s that the Edwardian statutes remained in force and were not repealed by the general clause in the 1554 Marian statute that re-established common law procedures.[282] Foster insisted that the Edwardian requirement that treason be "proved by two Lawful Witnesses and those brought face to face at the Trial, a mighty safe-guard against Oppressive Prosecutions, was Never intended to be taken away by this General Clause."[283] Foster went on to explain that the Edwardian treason statutes required accusers to testify at trial unless they were dead.[284] Foster wrote that this proviso in

277. *See* MICHAEL FOSTER, A REPORT OF SOME PROCEEDINGS ON THE COMMISSION OF OYER AND TERMINER AND GOAL DELIVERY FOR THE TRIAL OF REBELS IN THE YEAR 1746 IN THE COUNTY OF SURRY, AND OF OTHER CROWN CASES, discourse 1, ch. 3, § 8, at 232–37 (Oxford, Clarendon Press 1762) (explaining the tension between the common law and statutory construction).

278. An Acte for the Punyshment of Divse Treasons, 1551–1552, 5 & 6 Edw. 6, c. 11, ¶ 9 (Eng.).

279. Memorandum, (1556) 73 Eng. Rep. 287 (K.B.) 287; 2 Dy. 131b, 132a (stating that adoption of the statute meant to remove the two-witness requirement).

280. Trial of Thomas Howard Duke of Norfolk, (1571) (H.L.), *reprinted in* 1 T.B. HOWELL, A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, at 957, 992 (London, T.C. Hansard 1816).

281. *See* An Act for Regulateing of Tryals in Cases of Treason and Misprision of Treason, 1695–1696, 7 & 8 Will. 3, c. 3 (Eng.) (requiring the testimony of two witness under oath for a conviction on treason, but omitting any right to personally face one's accusers).

282. MICHAEL FOSTER, A REPORT OF SOME PROCEEDINGS ON THE COMMISSION OF OYER AND TERMINER AND GOAL DELIVERY FOR THE TRIAL OF REBELS IN THE YEAR 1746 IN THE COUNTY OF SURRY, AND OF OTHER CROWN CASES, discourse 2, ch. 9, § 10, at 337 (Oxford, Claredon Press 1762).

283. *Id.* discourse 1, ch. 3, § 8, at 238.

284. *Id.* discourse 2, ch. 9, § 10, at 336–37; *see also* An Acte for the Punyshment of Divse

the Edwardian treason statutes made exception for only depositions of witnesses who had died, and depositions therefore would not be sufficient to convict someone of treason if an absent deponent was still living.[285]

Foster's *Crown Cases* illustrates another complete reversal of the rules from a century earlier. In the *Trial of Sir Walter Raleigh*, the Lord Chief Justice ruled that the Edwardian treason statutes had been repealed and Raleigh had no common law right to face his accuser.[286] Although that ruling seems reprehensible by today's standards, it was consistent with the opinion that prevailed immediately after passage of the Marian treason statute.[287] By Foster's time, however, the combination of repeated prosecutorial abuses and legislative reestablishment of some of the previously abandoned Edwardian procedural protections led both Foster and Hawkins to conclude that the Edwardian treason statutes had not been repealed.[288] By the time of founding of the United States Constitution, that became the prevailing view.[289]

VII. THE RISE OF THE MODERN JURY TRIAL

The re-institution of procedural protections for prosecution of treason cases and recognition of cross-examination requirements in the late 1600s and early 1700s accompanied the evolution of the jury trial. Blackstone's *Commentaries on the Laws of England* continued to recognize in the mid-1700s that "evidence in the trial by jury is of two kinds, either that which is given in proof, or that which the jury may receive by their own private

Treasons, 1551–1552, 5 & 6 Edw. 6, c. 11, ¶ 9 (Eng.) (providing no person shall be accused of treason by any living person unless the accuser testifies in person).

285. MICHAEL FOSTER, A REPORT OF SOME PROCEEDINGS ON THE COMMISSION OF OYER AND TERMINER AND GOAL DELIVERY FOR THE TRIAL OF REBELS IN THE YEAR 1746 IN THE COUNTY OF SURRY, AND OF OTHER CROWN CASES, discourse 2, ch. 9, § 10, at 337 (Oxford, Claredon Press 1762).

286. Trial of Sir Walter Raleigh, (1603), *reprinted in* 1 DAVID JARDINE, CRIMINAL TRIALS 400, 420–21 (London, Charles Knight 1832).

287. *See* Trial of Thomas Howard Duke of Norfolk, (1571) (H.L.) (finding that though it once was a right to face one's accuser that right had been repealed), *reprinted in* 1 T.B. HOWELL, A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, at 957, 992 (London, T.C. Hansard 1816); Memorandum, (1556) 73 Eng. Rep. 287 (K.B.) 287; 2 Dy. 131b, 132a (holding that the statute intended to do away with the requirement that accusers be present at trial).

288. *See also* 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN ch. 46, § 2, at 428 (London, Eliz. Nutt & R. Gosling 1721) (arguing procedural protections were not repealed, because the common law still required them).

289. *See* The King v. Radbourne, (1784) 168 Eng. Rep. 330 (K.B.) 332–33; 1 Leach. 457, 461–62 (deciding that no one may be convicted of treason without the sworn testimony of two lawful witnesses).

knowledge."[290] Blackstone explained, though, that the private knowledge method of proof was a carry-over from ancient jury practice which had been gradually replaced by the "*new trials*" of his time.[291]

A central premise behind the "*new trials*" of Blackstone's time was that judgments should be rendered based upon evidence presented in court.[292] Coke had written in the early 1600s that Magna Charta's requirement that persons accused of crimes were entitled to judgment by their peers implied that they "ought to heare no evidence, but in the presence, and hearing of the prisoner."[293] Depositions were still regularly taken and used at trial leading up to Coke's time.[294] However, great changes to the trial process were underway. By the end of the century, a new form of jury trial emerged.

The use of depositions was inapposite to the form of jury trial described by Hale in the late 1600s.[295] Personal and open examination witnesses at trial allowed all concerned, including the parties, their attorneys, the judge, and the jury to ask "occasional questions which beats and bolts out the Truth much better than" receipt of testimony without personal interrogation.[296] It provided an opportunity for witnesses to "correct, amend, or explain" their testimony on further questions which could not be done after a deposition was transcribed.[297] Personal and open

290. 3 WILLIAM BLACKSTONE, COMMENTARIES *368.

291. *Id.* at 374–75; *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES *342–43 (incorporating his earlier discussion of the modern jury trial in the context of criminal cases).

292. 3 WILLIAM BLACKSTONE, COMMENTARIES *374–75.

293. EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWES OF ENGLAND: CONTAINING THE EXPOSITION OF MANY ANCIENT, AND OTHER STATUTES 49 (London, M. Flesher & R. Young 1642) (citing Magna Charta cap. 29). Coke references a section of Magna Charta from a shortened statutory version confirmed in 1225 by Henry III and again in 1297 by Edward I. Magna Charta, 1297, 25 Edw. 1, ¶ 29 (Eng.). This section was renumbered from the original. Magna Charta, ¶ 39 (1215), *reprinted in* BOYD C. BARRINGTON, MAGNA CHARTA AND OTHER GREAT CHARTERS OF ENGLAND WITH AN HISTORICAL TREATISE AND COPIOUS EXPLANATORY NOTES 239 (William J. Campbell 1900).

294. WILLIAM LAMBARD, EIRENARCHA: OR OF THE OFFICE OF THE JUSTICES OF PEACE, IN FOURE BOOKES, bk. 2, ch. 7, at 216 (London, Ralph Newbery 1588) (1581) (explaining that examinations of informants are taken under oath by justices of the peace to permit their usage at trial in the event that an informant dies before trial and stating that the Lambard had heard Justices of the Assise say the same).

295. *See* MATTHEW HALE, THE HISTORY AND ANALYSIS OF THE COMMON LAW OF ENGLAND 257–58 (London, J. Nutt 1713) (describing how a witness's mannerisms and delivery indicate truthfulness unseen when written in a deposition).

296. *Id.* at 258; *see also* 3 WILLIAM BLACKSTONE, COMMENTARIES *373–74 (explaining that the honesty of a witness is more apparent from open examination than writings).

297. MATTHEW HALE, THE HISTORY AND ANALYSIS OF THE COMMON LAW OF ENGLAND 258 (London, J. Nutt 1713); *see also* 3 WILLIAM BLACKSTONE, COMMENTARIES *373–74 (noting the inability of a writing to clarify an idea if it is misunderstood).

examination eliminated the possibility that a crafty examiner might make a witness sound on paper to say things that he never meant.[298] It allowed the judge and jury to have full information from which they could give more or less credit to testimony as they saw fit.[299] Personal appearance of witnesses was important, because the "very Manner of a Witness's delivering his Testimony will give a probable Indication whether he speaks truly or falsly."[300] It also allowed the judge to rule on matters of law that emerge from the evidence as it is presented.[301] In summary, the new jury trial required open testimony by witnesses "in a much more advantageous Way" than proceedings in courts where depositions of witnesses were used.[302] This personal appearance and testimony of witnesses is how the modern jury trial provided an "[o]pportunity of confronting the adverse Witnesses."[303]

In the early 1700s the use of depositions was still justified under a best evidence rationale that prior testimony given by an unavailable witness was "the utmost Evidence that can be procured, the Examinant himself being prevented in coming by the Act of God."[304] Depositions were still sometimes admitted as evidence in the 1700s during Blackstone's time, but the law was unsettled regarding how they could be used.[305] Blackstone leaves little doubt, though, that the law of his time favored live trial testimony. Blackstone wrote that trials by that time were decided on the basis of proof.[306] Certain forms of written proof were allowed, but the principal form of proof was testimony by witnesses at trial.[307] Blackstone

298. MATTHEW HALE, THE HISTORY AND ANALYSIS OF THE COMMON LAW OF ENGLAND 257 (London, J. Nutt 1713).

299. *Id.* at 258–59.

300. *Id.* at 257–58.

301. *See id.* at 259–60, 263 (expressing how a judge can better weigh evidence when it is presented at trial by oral testimony).

302. *Id.* at 262–63; *see also* 3 WILLIAM BLACKSTONE, COMMENTARIES *373–74 (examining the benefits of oral testimony over depositions).

303. MATTHEW HALE, THE HISTORY AND ANALYSIS OF THE COMMON LAW OF ENGLAND 258 (London, J. Nutt 1713).

304. GEOFFREY GILBERT, THE LAW OF EVIDENCE 141 (London, Henry Lintot 1756). This posthumously published treatise was written by Lord Chief Baron Gilbert of the Exchequer prior to his death in 1726. 1 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 8, at 110 (Little, Brown & Co. 2d ed. 1923).

305. *Compare* Dominus Rex v. Baker, (1746) 93 Eng. Rep. 1156 (K.B.); 2 Str. 1240 (holding that in-court reading of a deposition was sufficient despite denial of an opportunity for cross-examination), *with* Rex v. Vipont, (1761) 97 Eng. Rep. 767 (K.B.) 767–68; 2 Burr. 1163 (holding that witness testimony must be actually delivered in court so that it may be judged and cross-examined).

306. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES *374–75 (revealing how proof became necessary with the evolution of trials).

307. *Id.* at 368–73 (expressing that while some written documents were allowed as evidence,

explained that:

> This open examination of witnesses *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination taken down in writing before an officer, or his clerk, in the ecclesiastical courts, and all others that have borrowed their practice from the civil law.[308]

By the late 1700s, the best available evidence rationale for allowing use of depositions of absent witnesses was flatly rejected.[309]

VIII. THE FALL OF THE DEPOSITION RULE

The deposition rule began to decline in the mid to late 1700s. Its fall was the result of a convergence of factors: (1) the re-emergence rules demanding accuser presence in treason cases; (2) technicalities regarding the application of the deposition rule developed throughout the 1600s; (3) the rise of cross-examination as the preferred method of testing witness testimony; and (4) the evolution of the modern jury trial. No one reason appears to have been dominant over the others.

The re-appreciation of Edwardian confrontation decreased the scope of the deposition rule but did not eliminate it. Remembrance of the paradigmatic confrontation abuses perpetrated in the trials of Raleigh, Fenwick, and others clearly had an impact, but it did not overshadow everything else. As Foster noted:

> I do not see that the Case of Sir *Walter Raleigh*, whose Trial having been long since Printed and prefixed to His History hath been more generally Read and Censured than Others, I do not see that That Case, always excepting the extraordinary Behaviour of the King's Attorney, did in point of Hardship differ from Many of the former.[310]

Sir Michael Foster recognized that the Edwardian statutes were a mighty safeguard that prohibited the prosecutorial use of depositions taken from living witnesses in treason cases.[311] However, he also opined that the

oral testimony was the best proof).

308. *Id.* at 373.

309. *See* The King v. Dingler, (1791) 168 Eng. Rep. 383 (K.B.) 384; 2 Leach. 561, 563 (rejecting the argument that an irregularly taken deposition should still be admissible as the best available evidence).

310. MICHAEL FOSTER, A REPORT OF SOME PROCEEDINGS ON THE COMMISSION OF OYER AND TERMINER AND GOAL DELIVERY FOR THE TRIAL OF REBELS IN THE YEAR 1746 IN THE COUNTY OF SURRY, AND OF OTHER CROWN CASES, discourse 1, ch. 3, § 8, at 234–35 (Oxford, Clarendon Press 1762).

311. *Id.* discourse 1, ch. 3, § 8, at 238, discourse 2, ch. 9, § 10, at 337; *see also* JOHN FREDERICK

limitation applied only in treason cases and expressed his "private Opinion" that depositions of living witnesses were "still Admissible Evidence" in a felony murder case (essentially the same crime at petit treason) since the prosecution of felonies did not fall under the Edwardian treason statutes.[312]

Technicalities like those described by Foster helped the deposition rule to survive, but they also limited its reach.[313] Cases reaffirmed that justices of the peace were required to strictly comply with the requirements of the deposition rule as a prerequisite to admissibility. The court in *The King v. Woodcock*[314] confirmed that committal depositions taken by a justice of the peace remained an admissible species of evidence in certain circumstances, but it held that only those examinations taken in accordance with the Marian bailment and committal statutes might qualify under the deposition rule.[315] The court reasoned that accusers are deposed when turning in a person accused of a crime to determine whether to bail or jail the alleged offender, and depositions may therefore only be taken for that purpose at that time.[316] The statutes did not authorize a deposition to be taken any other time, because a prisoner would have "no opportunity of contradicting the facts it contains."[317] A deposition taken outside of a magistrate's committal duties was therefore found to be stripped of any official sanction.[318]

However, technicalities alone were inadequate to conform the deposition rule to changing legal requirements. The restrictions applicable to examinations taken by justices of the peace may not have applied to depositions taken by coroners, because of the different nature of their

ARCHBOLD, A SUMMARY OF THE LAW RELATIVE TO PLEADING AND EVIDENCE IN CRIMINAL CASES 85 (London, 1822) (holding that in the case of treason, witnesses are required to testify in open court if they are living).

312. MICHAEL FOSTER, A REPORT OF SOME PROCEEDINGS ON THE COMMISSION OF OYER AND TERMINER AND GOAL DELIVERY FOR THE TRIAL OF REBELS IN THE YEAR 1746 IN THE COUNTY OF SURRY, AND OF OTHER CROWN CASES, discourse 2, ch. 9, § 4, at 328–29 (Oxford, Clarendon Press 1762).

313. *See* 2 MATTHEW HALE, HISTORIA PLACITORUM CORONAE—THE HISTORY OF THE PLEAS OF THE CROWN 286 (London, E. & R. Nutt, & R. Gosling 1736) (opining that depositions taken by justices of the peace could not be used in treason trials, because such cases were beyond the jurisdiction of a justice of the peace).

314. The King v. Woodcock, (1789) 168 Eng. Rep. 352 (K.B.); 1 Leach. 500.

315. *Id.* at 352–53.

316. *Id.* at 353.

317. *Id.*

318. *See id.* (finding that a deposition taken without oath and outside the presence of an authorized justice cannot be admitted into evidence).

offices.[319] The portion of the Marian bailment and committal statutes applicable to coroners did not contain the timing limitation which permitted justices of the peace to take information from accusers only at the time a prisoner was brought into custody.[320] As a consequence, technicalities concerning when and how an examination was conducted arguably applied only to depositions taken by justices of the peace. Therefore, only that portion of the rule pertaining to examinations conducted by justices of the peace was updated through technicalities to incorporate a cross-examination requirement, and ex parte coroner depositions were still considered admissible by some. As late as 1790, some justices on the King's Bench still believed that an ex parte coroner deposition remained good evidence, "though the person accused be not present when it is taken, nor ever heard of it till the moment it is produced against him."[321]

Technicalities were underscored by the rise of cross-examination as a testing method. Later commentators attributed the requirement of the Marian bailment and committal statutes that a deposition must be taken in the presence of an accused to the principle that the accused must be afforded an opportunity for cross-examination.[322] In *The King v. Dingler*,[323] a magistrate had taken an examination of a prisoner and information from a witness in the prisoner's presence prior to committal.[324] The magistrate then went to an infirmary the following day

319. *See* 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW *587 (Philadelphia, Edward Earle 1819) (opining that the restrictions do not apply to depositions by coroners because they are appointed on behalf of the public and are presumed to have acted properly); SAMUEL M. PHILLIPPS, A TREATISE ON THE LAW OF EVIDENCE 280–81 (London, A. Strahan 2d ed. 1815) (opining that ex parte depositions taken by coroners may be read into evidence at trial).

320. *See* An Act Appointing an Order to Justices of Peace for the Bailement of Prisoners, 1554–1555, 1 & 2 Phil. & Mary, c. 13, ¶ 1 (Eng.) (directing coroners to record evidence given at any inquisition before them whereby a person is indicted for murder or manslaughter without specifying when such inquisitions must be held).

321. The King v. Eriswell, (1790) 100 Eng. Rep. 815 (K.B.) 819; 3 T.R. 707, 713 (Buller, J.); *id.* at 823 (Ashhurst, J.) (concurring with Buller, J.).

322. *See* 2 WILLIAM OLDNALL RUSSELL, A TREATISE ON CRIMES AND INDICTABLE MISDEMEANORS 660–61 (London, Joseph Butterworth & Son 2d ed. 1828) (implying that depositions taken in the presence of the prisoner allow the prisoner an opportunity to cross-examine the witness); 2 THOMAS STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE AND DIGEST OF PROOFS, IN CIVIL AND CRIMINAL PROCEEDINGS *489–92 (Boston, Wells & Lilly 1826) ("The objection is not a want of authority in the case of the magistrate, for the statutes invest him with authority, but upon the principle that the accused has lost the benefit of cross-examination, a defect which cannot be remedied . . . .").

323. The King v. Dingler, (1791) 168 Eng. Rep. 383 (K.B.); 2 Leach. 561.

324. *Id.*

and took a deposition of the victim who subsequently died.[325] Dingler's attorney objected to the use of the victim's deposition at trial by reference to the language of the Marian bailment and committal statutes that authorized a magistrate only to "take an examination of the person brought before him, and of those who bring him."[326] It was therefore argued that a "prisoner may have, as he is entitled to have, the benefit of cross-examination" when the ordinary course of this procedure was followed, because a prisoner would be in the company of those seeking his confinement during their depositions.[327] The prosecutor conceded that the deposition had not been taken strictly in accordance with the statutes, and the court refused to receive the deposition into evidence on authority of *King v. Woodcock*.[328]

As a consequence of increasing concerns that defendants should be given an opportunity to cross-examine adverse witnesses, cases applying technicalities regarding the operation of the deposition rule were understood to have broader meaning. Neither *Dingler*, *Woodcock*, nor *Paine* before them, expressly held that an accused must be given a chance to cross-examine an accuser, but that is how those decisions were later read.[329] Some of the reports for *Paine* mention lost opportunity for cross-examination, however, the reports as a whole make clear that the deposition at issue in that case did not qualify as a bailment examination under the Marian statutes since the crime at issue was not a felony.[330]

325. *Id.*

326. *Id.* at 384. *See generally* An Act Appointing an Order to Justices of Peace for the Bailement of Prisoners, 1554–1555, 1 & 2 Phil. & M., c. 13, ¶ 1 (Eng.) (explaining the duties of the Magistrate when taking depositions for bailment).

327. *Dingler*, 168 Eng. Rep. at 384.

328. *Id.*; *see also* The King v. Woodcock, (1789) 168 Eng. Rep. 352 (K.B.) 353; 1 Leach. 500, 502 ("[W]here the Justice was not authorized to administer an oath, it cannot be admitted before a Jury as evidence; for no evidence can be legal unless it be given upon oath, judicially taken.").

329. *See* 2 WILLIAM OLDNALL RUSSELL, A TREATISE ON CRIMES AND INDICTABLE MISDEMEANORS 660–61 (London, Joseph Butterworth & Son 2d ed. 1828) (referring to *Woodcock* and *Dingler* to exemplify the rule that cross-examination is necessary in validating a deposition); JOHN FREDERICK ARCHBOLD, A SUMMARY OF THE LAW RELATIVE TO PLEADING AND EVIDENCE IN CRIMINAL CASES 85 (London, 1822) (expressing that a prisoner must be given a chance to cross-examine an accuser for a deposition to be valid).

330. *See* The King v. Paine, (1695) 87 Eng. Rep. 584 (K.B.) 584; 5 Mod. 163, 163 (Argument by defendant's counsel) (observing that the depositions in that misdemeanor case were not like information and examinations taken by coroners and justices of the peace in felony cases because those types of information and examinations were authorized by a particular statute); Dominus Rex v. Paine, (1695) 91 Eng. Rep. 246 (K.B.) 246; 1 Salk. 281, 281 (noting that depositions cannot be used as evidence in a non-felony case); Rex v. Payne, (1695) 91 Eng. Rep. 1387 (K.B.) 1387; 1 Raym. Ld. 729, 729 (stating that a deposition cannot be used in a prosecution for misdemeanor); Rex v. Pain, (1695) 90 Eng. Rep. 527 (K.B.) 527; Comb. 358, 359 (describing the difference in using

Woodcock ruled that the Marian bailment and committal statutes permitted a deposition to be taken only at the time of committal of a defendant to thereby give the accused chance to contradict the facts, but it says nothing about a prisoner cross examining his accusers at a committal hearing and instead focuses upon the deposition's loss of official sanction.[331] The defense attorney argued in *Dingler* that the language of the statutes implied a right of cross-examination, however, the sole reported basis for the court's ruling was the application of *Woodcock*.[332] Judges continued to disagree in the late 1700s over whether lack of cross-examination would bar later use of a deposition.[333] The right to cross-examine nonetheless became less dependent upon the technicalities of the deposition rule as its platform, because cross-examination was integrated into the method by which evidence was required to be openly presented in a modern trial.

The deposition rule conflicted with the idea behind the *"new trials"* of the 1700s that believed the optimum method for clearing up the truth of a matter was the open examination of witnesses.[334] Depositions and former trial testimony could still be used as evidence during the early 1700s.[335] Their use was, however, a disfavored practice. Duncombe explained in his treatise on jury trials that whatever problems the jury trial system might have, it was still better than other methods that relied upon depositions.[336] Duncombe contrasted the use of depositions with the type of public confrontation demanded by the jury trials of his time, writing:

examinations as evidence for a felony case versus a misdemeanor case).

331. *See Woodcock*, 168 Eng. Rep. at 353 (ruling that the prisoner be given the opportunity to contradict the facts during a deposition at the time of committal).

332. *See Dingler*, 168 Eng. Rep. at 384 (arguing that the right of the prisoner to cross-examine the witness during deposition was given by statute).

333. *See* The King v. Eriswell, (1790) 100 Eng. Rep. 815 (K.B.) 817; 3 T.R. 707, 711 (Grose, J.) ("[I]t may be said that it is in this case wise and discreet to depart from the general rule of evidence, and in this instance to admit hearsay evidence of a fact, or evidence on oath administered in the absence of the adverse party."); *id.* at 819 (Buller, J.) ("[T]his examination in my judgment is very similar to the case of a deposition before a coroner, which has been long settled to be good evidence . . . though the person accused be not present when it is taken, nor ever heard of it till the moment it is produced against him.") (citation omitted); *id.* at 822–23 (Ashhurst, J.) (concurring with Buller, J.); *id.* at 825 (Kenyon, C.J.) ("I am most clearly of opinion that this examination was not admissible in evidence.").

334. 3 WILLIAM BLACKSTONE, COMMENTARIES *373–75.

335. *See* Coker v. Farewell, (1729) 24 Eng. Rep. 863 (Ch.) 863; 2 P. Wms. 563, 564 (admitting the deposition and testimony of a deceased witness from a previous trial); GILES DUNCOMBE, TRYALS PER PAIS: OR, THE LAW OF ENGLAND CONCERNING JURIES BY NISI PRIUS 167–68, 258 (London, Rich. & Edw. Atknis 4th ed. 1702) ("Depositions in Chancery of Witnesses that are dead may be read at the Assises betwixt the same Parties . . . .").

336. *Id.* at A5.

> I shall praise it more by saying nothing, than all I can: for to say less than a thing deserves, would be, instead of an Encomium, a disparagement. Therefore, I shall content my self, only to say That Tryals in other Laws are by Witnesses only, privately examined; This, by Witnesses publickly examined and confronted; and by Jury also, and so consequently the fact is setled, with the greater certainty of truth, upon which the uprightness of the judgment depends.[337]

Thus, it was clear by the late 1700s that a witness could not simply appear face-to-face at trial and reaffirm a previously given testimony, but had to instead be re-sworn and re-questioned in the defendant's presence.[338]

The deposition rule survived because of longstanding custom and usage. Over the years, more and more technicalities limited its application. It conflicted with Edwardian confrontation principles, but they only applied to charges of treason.[339] It was contrary to cross-examination requirements, but was a recognized exception to them.[340] It could not be reconciled with the idea behind the modern jury trial. All of these factors contributed to its demise, but it was not a sensational fall that can be attributed to a particular event or abuse. To coin a phrase originated by Blackstone, the deposition rule had "gradually exploded" in a manner like other remnants of the ancient trial system.[341]

IX. CONFRONTATION VS. PRIOR CROSS-EXAMINATION.

The flaws in the reasoning behind *Mattox* are its overemphasis of the importance of cross-examination and confrontation as a remedy for historical prosecutorial abuses committed using ex parte affidavits, and its under-emphasis of the open presentation of evidence demanded by the modern form of jury trial. *Mattox* admitted that there may be good reason for compelling all witnesses to face the jury, not only to provide an opportunity to test the recollection and sifting the conscience of a witness, but also so that they may see the witness's demeanor.[342] It recognized,

337. *Id.* at A5–A6.

338. *See* The King v. Crowther, (1786) 99 Eng. Rep. 1009 (K.B.) 1009–10; 1 T.R. 125, 125 (quashing a conviction because a witness was not properly sworn or examined).

339. *See* The King v. Radbourne, (1784) 168 Eng. Rep. 330 (K.B.) 332–33; 1 Leach. 457, 459–463 (admitting a deposition into evidence and finding a defendant not guilty of petit treason but guilty of felony murder).

340. HENRY BATHURST, THE THEORY OF EVIDENCE 34 (Dublin, Sarah Cotter 1761).

341. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES *374–75 (describing the demise of the practice of letting jurors decide cases on the basis of private facts).

342. Mattox v. United States, 156 U.S. 237, 242–43 (1895).

but discounted, some early state cases disallowed the use of testimony given by witnesses who were unavailable but not dead.[343] It understood that important attributes of live testimony are lost when former testimony is allowed, and that:

> There is doubtless reason for saying that the accused should never lose the benefit of any of these safeguards even by the death of the witness, and that, if notes of his testimony are permitted to be read, he is deprived of the advantage of that personal presence of the witness before the jury which the law has designed for his protection.[344]

Mattox nonetheless held that general rules of law must occasionally give way to public policy and necessities of a case, and someone should not go scot-free simply because a witness has died.[345] It acknowledged, but discredited, earlier authority that disallowed the use of cross-examined testimony formerly given by a deceased witness.[346] It decided that the added benefits provided by witness attendance at trial could be forgone if a defendant previously had the advantage of seeing a witness face to face and subjecting the witness to the ordeal of cross-examination.[347] The Court in *Mattox* concluded that "[t]he law, in its wisdom, declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused."[348]

Mattox did not represent the only point of view. Thomas Peake had opined in the early 1800s that testimony given at a prior trial by a subsequently deceased witness could not be used during a subsequent criminal prosecution, writing: "[e]ven the evidence which a witness gave on a former trial between the same parties, has after his death been read in a civil action, a foundation being laid for it by the production of the postea. But this is not allowed in a criminal prosecution."[349] The Supreme Court in *Mattox* rejected Peake's position on the grounds that it was based on a misinterpretation of *Fenwick's Case* and that the rule in

343. *See id.* at 241 (citing Brogy v. Commonwealth, 51 Va. (10 Gratt.) 722 (Va. 1853); Mendum v. Commonwealth, 27 Va. (6 Rand.) 704 (1828); and Finn v. Commonwealth, 26 Va. (5 Rand.) 701 (1827)).

344. *Id.* at 243.

345. *Id.*

346. *See id.* at 241 (1895) (citing State v. Atkins, 1 Tenn. (1 Overt.) 229 (1807)); *see also* Crawford v. Washington, 541 U.S. 36, 50 (2004) (showing that most courts rejected the view that prior testimony was inadmissible when the accused could cross-examine).

347. *Mattox*, 156 U.S. at 242–44.

348. *Id.* at 243.

349. THOMAS PEAKE, A COMPENDIUM OF THE LAW OF EVIDENCE 60 (London, Brooke & Clarke 2d ed. 1804).

England was clearly the other way.[350]

Pre-*Fenwick* cases clearly allowed testimony taken in prior trials to be used in later ones under certain conditions.[351] The court in *The King v. Carpenter*[352] held, "if a witness swear in a cause and die, that, in another trial, one that heard him may, upon oath, repeat his testimony, and it shall be good evidence."[353] These cases were, however, decided at a time when the mode of jury trial was still changing, and it cannot be known whether, or to what extent, such cases considered the modern trial preference for live testimony.[354]

It is arguable whether or not Peake misinterpreted *Fenwick's Case*.[355] It is more likely that Peake was misunderstood. Hawkins reached a similar conclusion in his *Treatise of the Pleas of the Crown* regarding the meaning of *Fenwick's Case*, writing: "[t]hat the Evidence given by a Witness at one Trial, could not in the ordinary Course of Justice be made use of, against a Defendant on the Death of such Witness, at another Trial."[356] Both Hawkins and Peake cited a portion of the debates in *Fenwick's Case* that dealt with whether testimony given by a witness at a previous trial could be used in a later prosecution against a different defendant.[357] In addition,

350. *Mattox*, 156 U.S. at 240–41.

351. *See* Anonymous, (1682) 89 Eng. Rep. 862 (K.B.) 862; 2 Shower, K.B. 163, 163 ("[I]f a witness be to testify what another said at a former trial upon his oath that is now dead, the record of that trial must be produced, or else such evidence is not to be admitted."); Taylor v. Brown, (1668) 83 Eng. Rep. 90 (K.B.) 90; Raym. T. 170, 170 (referred to in *Mattox* as *Buckworth's Case*) (permitting evidence to be given in a perjury trial regarding what a decedent swore at an earlier trial).

352. The King v. Carpenter, (1680) 89 Eng. Rep. 784 (K.B.); 2 Shower, K.B. 47.

353. *Id.*

354. *See generally* MATTHEW HALE, THE HISTORY AND ANALYSIS OF THE COMMON LAW OF ENGLAND 257–63 (London, J. Nutt 1713) (explaining the reasons why introduction of evidence in the presence of a judge, jury, counsel, and adverse witnesses is best).

355. *See* Fenwick's Case, (1696) (H.C.), *reprinted in* 13 T.B. HOWELL, A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, at 538, 593 (London, T.C. Hansard 1816) (offering a post-Peake reprint of *Fenwick's Case* that references Peake's restatement with apparent approval).

356. 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN ch. 46, § 12, at 430 (London, Eliz. Nutt & R. Gosling 1721).

357. *See* THOMAS PEAKE, A COMPENDIUM OF THE LAW OF EVIDENCE 60 (London, Brooke & Clarke 2d ed. 1804) (citing Fenwick's Case, (1696) (H.C.), *reprinted in* 4 THOMAS SALMON, A COMPLEAT COLLECTION OF STATE-TRYALS, AND PROCEEDINGS UPON IMPEACHMENTS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANOURS; FROM THE REIGN OF KING HENRY THE FOURTH TO THE END OF THE REIGN OF QUEEN ANNE 232, 265 (London, Timothy Goodwin et al. 1719)); *see also* 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN ch. 46, § 12, at 430 n.i (London, Eliz. Nutt & R. Gosling 1721) (citing Fenwick's Case, (1696) (H.C.), *reprinted in* 4 THOMAS SALMON, A COMPLEAT COLLECTION OF STATE-TRYALS, AND PROCEEDINGS UPON IMPEACHMENTS FOR HIGH TREASON, AND OTHER CRIMES AND MISDEMEANOURS FROM THE

Hawkins cited another case that he had earlier said prevented use of a deposition in a different prosecution than the one in which it was taken.[358] Peake was therefore misread more broadly than seemingly intended. The common law did not allow former testimony given against one defendant to be used against another in a separate prosecution, and that is probably all that was meant by Peake and Hawkins.[359]

Some early American decisions held that testimony formerly given by a deceased witness could not be used as evidence in a criminal case.[360] In *Dominges v. State*,[361] a prosecutor stipulated to facts about how a witness would have testified, and thereafter impeached the credibility of the absent witness through other witnesses.[362] The High Court of Errors and Appeals for the State of Mississippi rejected such practice, and commented:

> The substitution of depositions for oral testimony belongs to civil trials. In no state of circumstances, under our constitution, can a deposition of a witness be used against the accused in a criminal prosecution, and a similar rule seems to hold as to depositions of witnesses in his favor, unless by his consent. The system of criminal jurisprudence appears to require the

REIGN OF KING HENRY THE FOURTH TO THE END OF THE REIGN OF QUEEN ANNE 232, 265–72 (London, Timothy Goodwin et al. 1719)). *Fenwick's Case* was later reprinted in another collection that was cited in Mattox v. United States, 156 U.S. 237, 240 (1895). The debates cited by Peake and Hawkins may be found in that reprint. 13 T.B. HOWELL, A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, at 537 (London, T.C. Hansard 1816). The debates beginning on page 265 of the report for *Fenwick's Case* appearing in Salmon's edition begin on page 612 of report appearing in Howell's edition.

358. 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN ch. 46, §§ 8, 12, at 430 (London, Eliz. Nutt & R. Gosling 1721) (citing Sampson v. Tothill, (1667) 82 Eng. Rep. 1134 (K.B.); 1 Sid. 324).

359. It should however be noted that *Peake*, *Hawkins*, and *Fenwick's Case* were not the only sources for the view that prior testimony given by a deceased witness was inadmissible in a later criminal prosecution. *See, e.g.*, 2 ROBERT POTHIER, A TREATISE ON THE LAW OF OBLIGATIONS, OR CONTRACTS 229 (William David Evans trans., London, A. Strahan 1806) ("The depositions which have been regularly taken, in a former proceeding, between the same parties, are properly admissible in evidence, where the examination of the witness cannot be had, . . . such evidence is not admissible in a criminal prosecution.").

360. *See* State v. Atkins, 1 Tenn. (1 Overt.) 229 (1807) (finding the sworn statements of a deceased prosecutor from a previous trial inadmissible in a later trial); *cf.* People v. Newman, 5 Hill 295 (N.Y. Sup. Ct. 1843) (prohibiting use of former testimony when an unavailable witness was still alive, but finding it unnecessary to decide whether the rule would be the same if the witness had died); Finn v. Commonwealth, 26 Va. (5 Rand.) 701, 708 (1827) (holding that earlier testimony given by a witness who had left the jurisdiction could not be used and indicating that the prohibition would also apply if the witness was dead).

361. Dominges v. State, 15 Miss. (7 S. & M.) 475 (1846).

362. *Id.* at 476–77.

> presence of the witnesses, both for and against the accused. Very often, in such prosecutions, much depends upon the appearance, manner and mode of testifying of a witness, and it is this that adds the superior character and importance to oral testimony.[363]

These early rulings were largely abandoned by the time *Mattox* was decided.[364] By then, they represented a minority view.[365] This does not, however, resolve whether or not those earlier decisions provide a better indication of original constitutional intent.[366]

It appears that prosecutorial use of former testimony was allowed in some circumstances around the time the Confrontation Clause was established.[367] Early cases unfortunately do not provide a definitive guide for the details of constitutional confrontation requirements. *North Carolina v. Webb*[368] held that a deposition could not be used where a defendant had been denied "the liberty to cross[-]examine."[369] *Webb* does not address whether cross-examination alone would have satisfied admissibility requirements, because denial of such an opportunity in that case obviated the need to do so.[370] In contrast to *Webb*, use of an unsigned deposition was allowed in *Pennsylvania v. Stoops*[371] without any discussion about whether the defendant was present when the deposition was taken.[372] Both of these early cases were decided in states that had adopted confrontation clauses,[373] but neither mentioned constitutional confrontation rights as an issue.[374]

363. *Id.* at 477–78.

364. *E.g.*, Kendrick v. State, 29 Tenn. (10 Hum.) 479 (1850) (overruling *Atkins*).

365. *See* Mattox v. United States, 156 U.S. 237, 241–42 (1895) (echoing the notion that American jurisdictions differ from the rule in England regarding the admissibility of testimony from an absent witness); *see also* Crawford v. Washington, 541 U.S. 36, 50 (2004) (affirming that the Court rejected other decisions that held prior testimony as inadmissible).

366. *But see* State v. Houser, 26 Mo. 431, 435–39 (1858) (examining English and early American authorities and concluding that none would exclude a deposition of a deceased witness who had been cross-examined by a defendant).

367. *See* Pennsylvania v. Stoops, Add. 381, 382–83 (Pa. 1799) (permitting evidence of a wife's deathbed statement); Rex v. Barber, 1 Root 76 (Conn. 1775) (admitting prior testimony of a witness).

368. North Carolina v. Webb, 2 N.C. (1 Hayw.) 103 (1794).

369. *Id.* at 104.

370. *Id.*

371. Pennsylvania v. Stoops, Add. 381, 382–83 (Pa. 1799).

372. *Id.* at 382–83.

373. North Carolina Declaration of Rights art. VII (1776), *reprinted in* 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 286–88 (1971); Pennsylvania Declaration of Rights art. IX (1776), *reprinted in* 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 263–75 (1971).

374. *See Stoops*, Add. at 381–83 (failing to mention a constitutional confrontation clause issue); *Webb*, 2 N.C. at 103 (referring only to common law when determining the admissibility of evidence

The structure and language of the Constitution implies a confrontation right that gives fuller consideration to the ideals of the modern jury trial. The right to a jury trial is constitutionally guaranteed in two different places.[375] Lessons learned from the abuses committed during the political trials from the preceding century are addressed elsewhere. Article III of the Constitution separately secures the witness requirement in treason trials that had been bypassed to convict Raleigh.[376] Article I prevents the Congress from using bills of attainder to circumvent ordinary trial rights in the manner used to convict Fenwick.[377] The Confrontation Clause is embedded in the Sixth Amendment's guaranty that the accused in a criminal prosecution "shall enjoy the right to a speedy and public trial, by an impartial jury."[378] The Sixth Amendment does not ensure simply an opportunity to "cross-examine" witnesses and instead safeguards a right to be "confronted" with them.[379] Both terms were known at common law, and confrontation was a concept associated with the modern jury trial.[380] "[T]he phrase 'be confronted with the witnesses against him' is an exceedingly strange way to express a guarantee of nothing more than cross-examination."[381] The language of the clause and its placement in the Bill of Rights therefore appears to attach significance to confrontation as it exists in the context of the jury trial.

Ross v. Rittenhouse[382] gives some insight into how a jury trial right was understood around the time that the United States Constitution was ratified.[383] In that matter, an admiralty case was tried under a state statute and a federal enabling statute that required a jury trial.[384] A court of appeals re-examined the evidence presented at trial and reversed a jury verdict.[385] Pennsylvania Chief Justice M'Kean explained that jury trial requirements prevented an appellate court from retrying the facts on the

from an absent witness).

375. U.S. CONST. art. III, § 2, para. 3; *id.* amend. VI.

376. *Id.* art. III, § 3.

377. *Id.* art. I, § 9, para. 3.

378. *Id.* amend. VI.

379. *Id.*

380. *Compare* MATTHEW HALE, THE HISTORY AND ANALYSIS OF THE COMMON LAW OF ENGLAND 258 (London, J. Nutt 1713) (discussing confrontation), *with* HENRY BATHURST, THE THEORY OF EVIDENCE 30–31 (Dublin, Sarah Cotter 1761) (discussing cross-examination).

381. Coy v. Iowa, 487 U.S. 1012, 1019 n.2 (1987) (internal quotation marks omitted).

382. Ross v. Rittenhouse, 2 U.S. 160 (Pa. 1792).

383. *See id.* at 163 ("Here is a precedent of an act of Parliament changing the common mode of trial in Europe, and introducing the trial by Jury, which remains in force and practice to this day.").

384. *Id.* at 160–61.

385. *Id.* at 161.

basis of the record, stating:

> The advantage of *viva voce* evidence over written, in the investigation of truth, will hardly be controverted at this day in the *United States*; and the Court of Appeals had not the opportunity of seeing the witnesses on the trial, or of so well knowing the credit due to them, respectively, as the Jury.[386]

Recent cases continue to recognize the Constitutional preference for live testimony and the "opportunity to observe the demeanor of the witness while testifying."[387] Demeanor evidence is important, because all witnesses look the same when their testimony is reduced to writing.[388] Neither tone of voice, visible hostility, nor non-verbal witness defiance are evident on a transcript.[389] Despite the high significance of such evidence, witness demeanor is not seen as an "essential ingredient" to confrontation when it comes to usage of former testimony.[390] It is instead used as a reminder to emphasize the importance of requirements of the current two-part test. Loss of demeanor evidence is deemed relevant when assessing the sufficiency of a defendant's prior opportunity for cross-examination and whether the prosecution has adequately established witness unavailability, but it has not risen to the level of a separate criterion.[391]

Witness unavailability and an opportunity for cross-examination were not the only requirements at common law for admissibility of prior testimony. In addition to those and other requirements for use of a deposition, the prosecution had to show that a deposition was the "very

386. *Id.* at 163.

387. United States v. Yida, 498 F.3d 945, 950 (9th Cir. 2007); *see* Brooks v. United States, 39 A.3d 873, 884–86 (D.C. Cir. 2012) (reflecting a preference for live testimony and the ability to observe witnesses); State v. Tribble, 67 A.3d 210, 219–20 (Vt. 2012) (emphasizing the importance of face-to-face testimony and witness demeanor); *see also* Virgin Islands v. Aquino, 378 F.2d 540, 548 (3d Cir. 1967) (urging that the demeanor of a witness is significant in examining credibility).

388. *Yida*, 498 F.3d at 950.

389. *See Aquino*, 378 F.2d at 548 ("[I]t is not infrequently that he leads a hostile witness to reveal by his demeanor—his tone of voice, the evidence of fear which grips him at the height of cross-examination, or even his defiance—that his evidence is not to be accepted as true . . . .").

390. *See id.* (arguing that demeanor evidence is not an "essential ingredient" of confrontation privilege).

391. *Yida*, 498 F.3d at 952–57 (arguing that the defendant's Confrontation Clause protection hinges on the government's burden to prove unavailability of a witness); Cook v. McKune, 323 F.3d 825, 832 (10th Cir. 2003) ("Despite the loss of these important aspects of confrontation, where the government is able to prove the unavailability of a witness, the Sixth Amendment includes a 'rule of necessity' permitting use of prior testimony."); *see also Aquino*, 378 F.2d at 548 (finding that despite the lack of demeanor evidence, privilege is maintained if defendant receives an opportunity to cross-examine); *Brooks*, 39 A.3d at 884–89 (determining that prior testimony could have been admitted had the court found the prosecution employed reasonable and good faith efforts to demonstrate unavailability); *Tribble*, 67 A.3d at 219–22 (disallowing prior testimony due to the government's inability to prove unavailability of a witness).

same" as the examination that was taken.[392] The requirement dates back to the rules enunciated in *Lord Morley's Case* which required a coroner to first state on oath before a deposition could be used that the examinations were the same that he had taken without any addition or alteration.[393] Hale indicated in his *Pleas of the Crown* that the requirement also applied to depositions taken by a Justice of the Peace, because it was a matter of "[p]rudence to have the Justice or his Clerk sworn to the truth of the Examinations."[394]

In *The King v. Jolliffe*,[395] Chief Justice Lord Kenyon confirmed the rule that "evidence which a witness gave on a former trial may be used on a subsequent one, if he die in the interim."[396] He also recalled that in an earlier case involving former testimony given by Lord Palmerston, it was not enough to outline what a witness had said, stating "as the person who wished to give Lord Palmerston's evidence could not undertake to give his words, but merely swear to the effect of them, he was rejected."[397] Kenyon explained the reason behind the requirement in another case, commenting that a witness testifying about what a deceased witness had sworn at an early trial ought "to recollect the very words; for the jury alone can judge of the effect of words."[398]

The rule with respect to depositions was even stricter. The courts in *King v. Jacobs*[399] and *King v. Fearshire*[400] both held that the Marian bailment

392. 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN ch. 46, § 6, at 429 (London, Eliz. Nutt & R. Gosling 1721) (believing it settled law that a pretrial deposition can be allowed in evidence if a court is satisfied that it meets the proper requirements and is the same deposition sworn before a Justice or Coroner without any alteration whatsoever).

393. Memorandum, (1666) 84 Eng. Rep. 1079 (H.L.), 1080, ¶ 4; Kel. J. 53, 55. The requirement appears to have been less strict in civil cases where any person who had heard a witness at a former trial could testify about what was said. *See* Mayor of Doncaster v. Day, (1810) 128 Eng. Rep. 104 (C.P.); 3 Taunt. 262 (explaining that testimony of a deceased witness could be given into evidence if its accuracy was sworn to); Strutt v. Bovingdon, (1803) 170 Eng. Rep. 736 (N.P.) 736–37; 5 Esp. 56, 57–58 (allowing a witness to give parol evidence about the former testimony of a deceased witness); Coker v. Farewell, 24 Eng. Rep. 863 (Ch.); 2 P. Wms. 563 (allowing the sworn testimony of a deceased witness at a previous trial between the same two parties); Pyke v. Crouch, (1696) 91 Eng. Rep. 1387 (K.B.) 1388; 1 Raym. Ld. 730 ("If a man was sworn a witness at a former trial and gave evidence and died; the matter that he deposed at the former trial may be given in evidence at another trial, by any person who heard him swear it at the former trial." (citation omitted)).

394. MATTHEW HALE, PLEAS OF THE CROWN 263 (London, Richard & Edward Atkyns 1678).

395. The King v. Jolliffe, (1791) 100 Eng. Rep. 1022 (K.B.); 4 T.R. 285.

396. *Id.* at 1025.

397. *Id.*

398. SAMUEL M. PHILLIPPS, A TREATISE ON THE LAW OF EVIDENCE 200 (London, A. Strahan 2d ed. 1815) (citing Ennis v. Donisthorn, (1789)).

399. The King v. Jacobs, (1784) 168 Eng. Rep. 257 (K.B.); 1 Leach. 309.

400. The King v. Fearshire, (1779) 168 Eng. Rep. 203, (K.B.) 203–04; 1 Leach. 202, 202–03.

and committal statutes required magistrates to reduce their examinations to writing.[401] They held that this was an indispensable duty that was not left to the discretion of magistrates taking depositions.[402] Both courts therefore held that the content of committal depositions could not be proven by parole evidence.[403]

In an early federal case, the court held testimony given by a subsequently deceased witness was admissible provided that a witness could repeat the prior testimony "and not merely what he conceives to be the substance and effect of it, of which the jury ought alone to judge."[404] A leading state court case held the same.[405] In *Commonwealth v. Richards*,[406] the court reasoned that precise narration of the very words used by a deceased witness was required, because even exact repetition of prior testimony was greatly flawed:

> To be worth any thing the whole of what the deceased witness said upon the matter should be stated; and if you get the whole, it is very defective; for you cannot have a true representation of the countenance, manner and expression of the deceased witness, which either confirmed or denied the truth of the testimony. The false witness cannot endure the stings of his wounded conscience, his countenance and his deportment will, in spite of his endeavours to the contrary, by signs as clear and intelligible as they are inexpressible, declare, that the story which he has just sworn to, is a lie.
> These considerations induce us to require full proof of all that the deceased witness swore to. His words, and not the synonymous words of him who states his testimony, are to be recited.[407]

As explained by the court in *Richards*, the requirement for reproduction accuracy was therefore intended to mitigate the loss of demeanor evidence.

401. *Jacobs*, 168 Eng. Rep. at 257; *Fearshire*, 168 Eng. Rep. at 203–04.

402. *See Jacobs*, 168 Eng. Rep. at 257 (explaining that "[t]he statutes do not leave this matter to the option of the Magistrate, but they say that he shall" reduce examinations into writing); *Fearshire*, 168 Eng. Rep. at 204 ("[I]t is the indispensable duty of every Justice of Peace to take the information in writing in all cases . . . .").

403. *See* King v. Jacobs, (1784) 168 Eng. Rep. 257 (K.B.); 1 Leach. 309 (requiring examinations be reduced into writing to be admitted); King v. Fearshire, (1779) 168 Eng. Rep. 203 (K.B.) 204; 1 Leach. 202, 203 ("[T]herefore the parole evidence now offered ought not to be received.").

404. United States v. Wood, 28 F. Cas. 754, 754–55 (C.C.E.D. Pa. 1818) (No. 16,756).

405. *See* Commonwealth v. Richards, 35 Mass. (18 Pick.) 434, 437–40 (1836) (approving of the use of exact testimony previously given in a trial between the same parties); *see also* Ephraims v. Murdock, 7 Blackf. 10, 11 (Ind. 1843) (holding that the general substance of testimony previously given by a deceased witness is not admissible in the absence of proof of the precise words spoken), *overruled by* Horne v. Williams, 23 Ind. 37, 39–40 (1864) (altering precedent to allow the substance of prior testimony by a decedent to be given).

406. Commonwealth v. Richards, 35 Mass. (18 Pick.) 434 (1836).

407. *Id.* at 439.

At a minimum, the very words used by a missing witness had to be reproduced to permit a jury to at least determine the effect of the words.[408]

Less demanding reproduction of former testimony was sometimes tolerated in early civil cases for reasons of practicality.[409] Some later criminal cases relied upon those authorities and adopted a more relaxed standard.[410] They expressed a belief that evidentiary rules for civil and criminal cases should be the same,[411] concerns that an exact repetition standard was too demanding,[412] or similar functional concerns.[413] Over time, the means improved by which testimony could be memorialized, but *Mattox* later avoided the issue, writing only that:

> We do not wish to be understood as expressing an opinion upon this point, but all the authorities hold that a copy of the stenographic report of his entire former testimony, supported by the oath of the stenographer that it is a correct transcript of his notes and of the testimony of the deceased witness, such as was produced in this case, is competent evidence of what he said.[414]

Recording devices available today were unknown in 1700s and 1800s, but recent authority demonstrates that confrontation requirements are not frozen in time by the practices of the past. In *Davis v. Washington*,[415] the

408. *See* SAMUEL M. PHILLIPPS, A TREATISE ON THE LAW OF EVIDENCE 200 (London, A. Strahan 2d ed. 1815) (citing Ennis v. Donisthorn, (1789)) (expressing that the precise words used by a deceased witness must be recollected to allow the jury to decide their effect).

409. *See* Young v. Dearborn, 22 N.H. 372, 377–79 (1851) ("An exact recital, if it can be had, is doubtless preferable to any statement of the substance."); Cornell v. Green, 10 Serg. & Rawle 14, 15–17 (Pa. 1823) (recognizing that a more lenient rule was allowed in some instances); Caton v. Lenox, 26 Va. (5 Rand.) 31, 36–40 (Carr, J.), 49 (Green, J.) (1827) (contending that practicality plays a role in determining the requirements of the rule).

410. *See, e.g.*, United States v. White, 28 F. Cas. 572, 573 (C.C.D.D.C. 1838) (No. 16,679) (holding that a less stringent rule was also allowed in criminal cases); *see also* Summons v. State, 5 Ohio St. 325, 345–53 (1856) (explaining that exceptions were also allowed in criminal proceedings).

411. *E.g.*, People v. Murphy, 45 Cal. 137, 143–44 (1872) (recognizing evidence rules as the same for criminal and civil cases); *see also* Summons v. State, 5 Ohio St. 325, 352–53 (1856) ("[I]t appears to be well settled, that the rules of evidence, in civil and in criminal cases, are the same.").

412. *E.g.*, United States v. Macomb, 26 F. Cas. 1132, 1135–37 (C.C.D. Ill. 1851) (No. 15,702) (arguing that a strict standard is too demanding).

413. *See* Davis v. State, 17 Ala. 354, 357–58 (1850) (allowing a witness to testify about the content of testimony previously given by a deceased witness even though the witness did not remember the deceased witness's precise answer to an interrogatory, but remembered the substance of the testimony); Kendrick v. State, 29 Tenn. (10 Hum.) 479, 490 (1850) (requiring "not the words, but the substance" of the testimony); State v. Hooker, 17 Vt. 658, 669–70 (1845) (reiterating that strict compliance with the rule would make it nearly impossible to use).

414. Mattox v. United States, 156 U.S. 237, 244 (1895).

415. Davis v. Washington, 647 U.S. 813 (2006).

majority held that the demands of the Confrontation Clause may be applied to a recording of a 911 call.[416] The majority rejected an approach proposed by Justice Thomas that the clause is directed only against formalized statements like those known at the time of founding of the Constitution.[417] The majority disagreed, writing that confrontation requirements applied to less formalized statements like 911 recordings, because although "we no longer have examining Marian magistrates; and we do have, as our 18th-century forbears did not, examining police officers . . . who perform investigative and testimonial functions once performed by examining Marian magistrates."[418] The Court similarly intimated previously in *Crawford v. Washington*, that constitutional considerations reach the functional equivalents of today that bear striking resemblance to earlier practices.[419]

Few tools existed at the time of founding to exhibit evidence that would assist a jury in determining the credibility of former testimony. The optimal method at that time was to precisely repeat the words used by a witness. Due to technological advances, much better means exist today.[420] Audio and video recordings can both be made. While still imperfect, audio recordings better preserve demeanor evidence bearing upon witness credibility. Tone of voice may be heard. Gaps during delivery of testimony are identifiable that may indicate witness hesitation when giving an answer to a difficult question. Video recordings additionally reveal body language and other visual clues to credibility. A literal reading of the authorities from the 1600s and 1700s would not demand presentation of former testimony by audio or video means, but the principle underlying those authorities is to provide accurate information, because "the jury alone can judge of the effect of words."[421]

In *California v. Green*,[422] the Supreme Court wrote that confrontation (1) ensures that witnesses give testimony under oath and are therefore impressed with its seriousness, (2) forces witnesses to submit to cross-

416. *Id.* at 823–30.

417. *Id.* at 830–31 n.5.

418. *Id.* (citation omitted).

419. *See* Crawford v. Washington, 541 U.S. 36, 52 (2004) ("Police interrogations bear a striking resemblance to examinations by justices of the peace in England.").

420. *See* United States v. McGowan, 590 F.3d 446, 456 (7th Cir. 2009) ("[V]ideotapes allowed the jury to fully experience LaMie's testimony, to view her demeanor, to hear her voice and to determine her credibility.").

421. SAMUEL M. PHILLIPPS, A TREATISE ON THE LAW OF EVIDENCE 200 (London, A. Strahan 2d ed. 1815) (quoting Kenyon from Ennis v. Donisthorn, (1789)).

422. California v. Green, 399 U.S. 149 (1969).

examination, and (3) "permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility."[423] It nonetheless adhered to *Mattox* which downplays the importance of demeanor evidence with respect to the admissibility of former testimony given by an unavailable witness.[424] The Supreme Court has not, however, given a similar discount when a witness testifies in court. In *Coy v. Iowa*,[425] the Court expressly rejected Wigmore's hypothesis that the ability to cross-examine by itself satisfied confrontation requirements when a witness testified in court but was screened from the view of the defendant.[426] The Supreme Court retreated somewhat from *Coy* in *Maryland v. Craig*,[427] where it upheld a procedure which allowed child victims of sexual abuse to testify via closed circuit video outside the physical presence of a defendant.[428] The court wrote that:

> We find it significant, however, that Maryland's procedure preserves all of the other elements of the confrontation right: The child witness must be competent to testify and must testify under oath; the defendant retains full opportunity for contemporaneous cross-examination; and the judge, jury and defendant are able to view (albeit by video monitor) the demeanor (and body) of the witness as he or she testifies.[429]

These cases appear to prefer some level of juror access to demeanor evidence when considering the constitutional sufficiency of special procedures utilized in some situations for taking testimony at trial.

It would be logistically challenging to equip courtrooms across the country with cameras and likely cost prohibitive at this time to preserve all witness testimony by video recording in the off chance that it might be later needed as proof of former testimony at a later trial. However, the proliferation of phones with audio and video recording capabilities and amateur YouTube videos demonstrates that technology is now readily

423. *Id.* at 158.

424. *Id.* at 165–66. *See generally* Mattox v. United States, 156 U.S. 237, 242–43 (1895) (balancing constitutional protections with considerations of public policy and the necessities of the case).

425. Coy v. Iowa, 487 U.S. 1012 (1988).

426. *Id.* at 1018–19 n.2.

427. Maryland v. Craig, 497 U.S. 836 (1990).

428. *Id.* at 852.

429. *Id.* at 851. The Ninth Circuit Court of Appeals recently held that a witness could be allowed to wear a disguise in court for witness safety reasons commenting that "despite his disguise, the jury was able to hear his voice, see his entire face including his eyes and facial reactions to questions, and observe his body language. These are all key elements of one's demeanor that shed light on credibility." United States v. De Jesus-Casteneda, 705 F.3d 1117, 1121 (9th Cir. 2013).

available to do so if required. There are fewer reasons today to justify discounting the constitutional importance of demeanor evidence when a witness is absent while emphasizing its significance when evaluating how a witness might be allowed to testify live in court. "[A]s a constitutional matter, it is untenable to construe the Confrontation Clause to permit the use of prior testimony to prove the State's case where the declarant never appears, but to bar that testimony where the declarant is present at the trial, exposed to the defendant and the trier of fact, and subject to cross-examination."[430]

The form of delivery of prior testimony was an independent consideration near the time of founding of the Constitution upon which admissibility depended.[431] There was disagreement about the extent to which accuracy was required.[432] However, loss of witness demeanor evidence was a core concern.[433] Trials by that time were decided on the basis of proof presented in court.[434] Juries decided what weight should be given to particular evidence, and authorities adopting an exacting standard did so to provide the best available evidence to jurors upon which to make such determinations.[435] Times have changed, and demeanor evidence may now be better recorded and presented. It is arguable whether or not the Confrontation Clause requires use of the best available means to preserve witness testimony, but it is apparent that demeanor evidence was not given a wholesale discount around the time of founding simply because an unavailable witness had been previously cross-examined.

430. California v. Green, 399 U.S. 149, 166–67 (1969). *But see* White v. Illinois, 502 U.S. 346, 357–58 (1992) (differentiating between the confrontation requirements applicable to admission of in-court testimony and out-of-court statements).

431. *See* The King v. Jolliffe, (1791) 100 Eng. Rep. 1022 (K.B.) 1025; 4 T.R. 285, 291 (commenting that use of prior testimony was rejected in a case involving Lord Palmerston where only the effect of the testimony could be sworn rather than the actual words used by a witness who had subsequently died); The King v. Fearshire, (1779) 168 Eng. Rep. 203 (K.B.) 203–04; 1 Leach. 201 (holding that parol evidence could not be used to prove information a witness had allegedly given to a justice of the peace, because the law presumed that such information would have been reduced to writing).

432. *Compare* United States v. Wood, 28 F. Cas. 754, 754–55 (C.C.E.D. Pa. 1818) (No. 16,756) (requiring precise repetition), *with* United States v. White, 28 F. Cas. 572, 573 (C.C.D.D.C. 1838) (No. 16,679) (finding substance adequate).

433. *See* Commonwealth v. Richards, 35 Mass. (18 Pick.) 434, 439 (1836) ("Some part which was said and not recollected, might certainly limit and qualify the meaning of the words which are recollected.").

434. 3 WILLIAM BLACKSTONE, COMMENTARIES *374–75.

435. SAMUEL M. PHILLIPPS, A TREATISE ON THE LAW OF EVIDENCE 200 (London, A. Strahan 2d ed. 1815) (citing Ennis v. Donisthorn, (1789)).

CONCLUSION

The longevity of the former testimony rule exposes its greatest defect. It is derived from an antiquated deposition rule that predates the hearsay rule. Its origins predate modern confrontation requirements that accusers must appear in court in the presence of the accused. They predate the modern jury trial. The roots of the former testimony rule date back to a time when facts were still tried by combat and ordeal. Its ancestor adapted to changes in the law and survived, but became less fitted to it.

The jury trial system under which the deposition rule flourished still allowed juries to decide cases based upon private facts known by the jurors which may, or may not, have been revealed to the court and the parties. There was less sensitivity to the manner in which credibility evidence was presented. Jurors might "have Evidence from their own personal knowledge, that the Witnesses speak false, which the Judge knows not of; they may know the Witnesses to be stigmatized and infamous, which may be unknown to the Parties or Court."[436] A transition was, however, being made away from that system, and it was replaced by the time of founding with a *"new trial"* system in which cases were intended to be decided solely on the basis of evidence openly presented in court.[437]

The current test for admission of former testimony addresses unavailability and cross-examination.[438] However, it only addresses the manner of presentation of former testimony insofar as it relates to conveying the words used by an unavailable witness. Loss of demeanor evidence is discounted when dealing with the admissibility of former testimony as long as a defendant had a prior opportunity to cross-examine.[439] Loss of demeanor evidence is used to heighten sensitivity about the constitutional demands of unavailability and an opportunity for cross-examination, but it is still treated as a non-essential component to confrontation when it comes to use of former testimony.

The evolution of the jury trial was a contributory factor to the development of the right of confrontation that was no less important than the lessons learned from abuses committed in English political trials and the rise of cross-examination as the preferred method for testing testimonial evidence. The very manner by which a witness delivered his

436. GILES DUNCOMBE, TRYALS PER PAIS: OR, THE LAW OF ENGLAND CONCERNING JURIES BY NISI PRIUS 333 (London, Rich. & Edw. Atknis 4th ed. 1702).

437. 3 WILLIAM BLACKSTONE, COMMENTARIES *374–75.

438. *See* Crawford v. Washington, 541 U.S. 36, 68 (2004) ("[T]he Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.").

439. Mattox v. United States, 156 U.S. 237, 242–43 (1895).

testimony in a modern jury trial was thought to "give a probable Indication whether he speaks truly or falsely."[440] The loss of demeanor evidence was addressed and mitigated in some early cases by requiring use of the best means available at that time: exact reproduction of former testimony.[441] The technology for preserving testimony has greatly advanced, and the adequacy of the current two-part test for use of former testimony should be re-evaluated. The right of confrontation was more robust, and it gave independent consideration to reproduction accuracy. Demeanor evidence can be preserved, and jurors can much better judge the effect of the words used by a witness by hearing or seeing how they were delivered than from mere lines on a page.

440. MATTHEW HALE, THE HISTORY AND ANALYSIS OF THE COMMON LAW OF ENGLAND 257–58 (London, J. Nutt 1713).

441. *See, e.g.*, Commonwealth v. Richards, 35 Mass. (18 Pick.) 434, 439 (1836) (commenting that "the words of the deceased witness should be given, and not the substance of them").