

time. The direct evidence of the non-payment, is, that of Mr. Williamson himself, and this is excepted to, upon the ground, that as the husband of Mrs. Williamson, he is an incompetent witness.

Authorities have been cited to show, that the general rule, according to which neither the husband or wife, can be witnesses for or against each other, does not apply to a case in which the husband is offered to testify in favor of the wife, in reference to her separate estate. The case of *Richardson vs. Learned*, 10 *Pick. Rep.*, 261 and 22 *Pick. Rep.*, 253, are relied upon in support of this exception to the rule, and certainly do seem to sustain it.

It seems to me, however, to be extremely doubtful, whether any such distinction is warranted by the cases establishing the general rule, or by the policy upon which the decisions have been founded. The case of *Stein vs. Bowman*, 13 *Peters*, 221, affirms the general rule, and states the exception to it, and the only exception which seems then to have been recognized, and that is, where the husband commits an offence against the person of his wife, when *ex necessitate*, the wife may make an affidavit against her husband. And the rule according to the language of Mr. Justice Grose in the case of *The King vs. Cliviger*, 2 *Tenn. Rep.* 268, which the Supreme Court appear to quote with approbation, is founded not on the ground of interest, but of policy; and as asserted by Lord Ellenborough in *Averson vs. Kinnard*, 6 *East*. 192, extends to cases where the wife was afterwards divorced from the husband, upon the principle, that the confidence which subsisted between them at the time, shall not be violated, in consequence of future separation.

I am, therefore, not prepared to say, notwithstanding the weight which is justly due to the high authority of the Supreme Court of Massachusetts, that the husband is a competent witness, when the case involves the separate estate of the wife; and consequently, in examining the question whether Mrs. Williamson did, or did not receive the money, as stated in her receipt to her husband, dated the 7th of October, 1848, I shall disregard the testimony of her husband.