1-1-1959

Evidence

Maynard Jackson

EVIDENCE

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Prof. Liacos

References

Wigmore, Evidence - good reference (10 Vols. + Student Ed.)
Barbee, Evid.
Leach, Handbook of Mass Evid.

*Assignment:

A. Casebook
✓(1.) CB 1-8
✓(2.) CB 417-438
(3.) CB 438-480
(4.) CB 9-62

B. Hornbook
✓(1.) Chap. 1
Chap. 6.
(2.) Chap. 36 secs. 306-307, 318-322
(3.) Chap. 36, sec. 308-317
(4.) Chap. 37, Jud. Notice

Stages of Litigation:

(1.) Procuring the parties before the Tribunal - service of process establishing juris. & venue.
(2.) Pleadings - complaint, answer, etc.
*(3.) Trial - offering of proof of the various positions, i.e. evidence. Offered to the tribunal whatever may be its makeup.
(4.) Verdict & judgment on the verdict. Here the tribunal makes its decision one way or the other.
(5.) Execution - process whereby the orders or judg. of the ct. are enforced.

We have an adversary system. Therefore, y are certain burdens and obligations on the atty. * The law of evid. deter. the courses of action and the time they can be made. i.e., If there is failure to interpose proof at a certain time, or a failure to make timely objections, they may

be waived. Discretion of Judge J.J.

The Judge is the umpire in the battles over whether the evid. sought to be interposed can be.

We are dealing w/ the method of enforcing the substantive law. Evid. tells you how to estab. or prove your contentions.

Only the relevant & material facts should be presented to the jury. Forever, irrelevant and immaterial facts can be admissable unless y is a timely objection. ie., All evid. is admissable unless a valid and timely objection thereto is made.

Rule of Law

(1) So, we are concerned w/ the rules of exclusion.

(2) Also, y are rules of privilege w/h may exclude evid. despite the relevance & materiality.

HISTORY OF RULES OF EVIDENCE.

In old (12th Cent.) England, y use various methods.

(1.) Trial by Inquisition - elders of town.

(2.) Trial by Compurgation. - people in the community swear to the best of their knowledge re the D's character, etc.

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* Four reasons for need of Rules of Evid.
(1.) To insure orderly presentation of case.
(2.) To avoid waste of time + confusion by confining evid. to the issues.
(3.) To avoid misleading the jurors, by the use of rules of exclusion, + insure quality of evid.
(4.) To promote dictates of public policy by protecting certain rels., e.g., H + W, atty. + client.

NOTE: (CAVEAT)

All of these rules are re admissability, not weight. The ? of admissability is for the trial judge, but the ? of weight or suff. is for the jury.

* Methods of Proving:
(1.) Doctrine of Judicial Notice (done w/o use of evid.). Here, matters are so basic and elemental that even the judge should know them to be facts that are indisputable.
* Ways of proving by evid.:
(2.) Testimonial evid. - witnesses.
(3.) Documentary evid.
(4.) Real evid. - exhibition of actual objects.
(5.) Circumstantial evid - use of

inferences, presumptions or implications.

and then,

(6.) Establishing by pleadings — pleadings are not evid. (150 N.E. 2d 319 [1958]), but only is a plea + a failure (or making of admission) to deny, you are bound thereby. See 317/517, 520. Also, only is a duty to act by denying + only is a failure to act, only is deemed to be an admission + all are thereby bound.

15 NE 2d 319
317/517, 520

Steps in a trial:

(1.) Stmt. by P telling jury:
(a.) what the case is about.
(b.) what P intends to prove.
(c.) How P intends to prove it.
The older + more cautious schol reads the pleadings. This is safest in case, in the newer school, something were to be omitted by P's counsel + D's motion for D.V. at the end of P's opening remarks were granted.
(2.) P's evid.
(3.) P rests.
(4.) D opens.
(5.) D's evid.
(6.) D rests.
(7.) P may bring in evid in rebuttal, ~~Ed~~ limited usually

(8.) D to matters presented by D.
D may rejoin – rebutting P's new matter offered in rebuttal. Usually ltd. thereto unless the judge in his discretion sees otherwise.
(9.) Arguments – D first + Plast.
(10.) Charges to Jury.
(11.) Jury deliberates.
This can be changed, however. It is not hard + fast.

I. ✱Burden of Proof✱

B/P means the obligation of a party to meet the requirements of a rule of law that the fact be proved either by a preponderance of the evid. or by clear + convincing evid. or beyond a reas. doubt, as the case may be. B/P is synonymous w/ "B/persuasion," wh means (B/per. of a fact) the burden wh is discharged when the tribunal wh is to deter. the existence or non-existence of the fact is persuaded by sufficient evid. to find that the fact exists.
(See defs on p. 423)

often looked at in two ways:
(1.) Risk of non-persuasion.
(2.) Duty of producing evid, i.e., burden of going forward. (In Mass, see chap. 106 of the G.L., sec. 1-201, subsec. 8 – the U.C.C. def.).

✱The risk of non-persuasion i.e., the risks of failing to convince the trier of fact that the facts are as alleged when it is a burden of proving them. The party w/ the bur/proof will lose unless he can get the quantum of weight of proof in the minds of the triers. If the trier sets it 50-50,

the one w/ the bur/proof loses.

RULE: The bur/proof never shifts from the party who orig. had it. 117 Ind App. 472, 73 N.E.2d 366.

Burden of Proof v. Burden of Proceeding

Bur/proof sometimes called the bur/proceeding or bur/producing evid. However, this will shift.* The bur/proof is directed to the jury. The bur/proceeding is directed to the Judge. The motion for D.V. goes in hand w/ the bur/producing evid. & both are directed to the Judge since if the Judge is not first satis. of a question of fact for the trier thereof, D.V. will be granted.

*Assuming you are P, you are 2 times when you can be sure you have carried the bur/proof:

(1.) When your D.V. is granted - rare.

(2.) When jury returns verdict for you! - more usual.

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Burden of Proof + Burden of Producing Evidence

B/P is settled by the jury.

It is the risk of failing to persuade the trier of fact that your case is ~~[redacted]~~ as you allege it to be. This B/P never shifts. You know you have carried the burden when one of two things happens:

(1.) J/ you (P)
(2.) D.O. for you (P)

B/PE settled by Judge: Burden of avoiding a D.V.

Hypo: A v. B in K for breach of K. A alleges: B promised to build house for A + that B did not do it. A's counsel rests. B moves for D.V. — Granted: A failed to allege & prove consid. Thus, the jury could not disagree that the D (B) was entitled to judg. due to the failure of proof ~~[redacted]~~ or allegation of an essential element. J/B.

Hypo: A goes hunting + unknown to A, Bobby + Jack are hunting, too. The latter two pll a movement + shoot A unintentionally. A v. Bobby + Jack — A alleges that the Ds simultaneously shot A. A v. the Ds separately (forget joint tort-feasors). — Inferences could be

drawn that (1) Bobby shot A (2) that Jack shot A (3) that ~~A shot~~ both shot A. - Would Jack & Bobby have to go forward to refute the ~~inferences~~? - No.

The burden/PE shifts & the one on whom it falls must go forward. If the P fails to carry this burden, D may move for D.V. on the ground that the P failed to prove a prima facie case (one meritorious of or which warrants a verdict in the P's favor). If P proves a prima facie case, it can & should get to the jury but it does not mean that the P has carried the B/P as this would only be known upon the return of a verdict by the jury for P, or a D.V. for P.

Prima facie Case -

81 F. Supp. 293

On P presents a prima facie case, the B/ going forward shifts to D & failure to carry it may result in J/P by a D.V. for P. See 81 F. Supp. 293 - on P proves a prima facie case, D must present enough proof to create a balance (at least) in the proof of negl. (if it is a balance, P loses or else must

produce more proof). So, the D would have the burden of going forward. Or, the D could carry the B/P E by a preponderance of the evid. But, the latter is not required as D need only create the balance of evid. to make P take the ball again.

Allocation of B/P.

(1.) The P does not always have the B/P.

(2.) There may be several Bs/P.

Test of allocation of B/P — we look at the pleadings to deter. the B/P.

Rule of Law — [He who affirms must prove, and runs the risk of failing to prove to the jury that that wh he has affirmed is true. See 229 N.C. 541 - Johnson v. Johnson. 144/104 - Curley v. ——.

229 N.C. 541

Rule of Law — Whoever affirms a new fact has the B/P on that fact, and he must prove it by a preponderance of the evid. He who has the burden of proof has the B/going forward initially on that point.

State of Mo v. Strawther (P. 423) The State had the B/P & the B/P never shifts. This was a murder case. The "burden of evid." or the necessity of offering evid.

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may shift during the trial. But the B/estab. D's guilt rests w/ the State, does not shift, + when the proof is all in the final question for the jury is, Are all essential averments of the indictment proved beyond a reas. doubt?

Criminal Cases.

The State in a crim. case must allege certain facts to prosecute one, + has the B/P on all the essential elements requisite to prosecution. However, in crim. cases, the accused may be required to "bring up" certain matters like self-defense, insanity or alibi. However, there, the better rule is that D does not have the B/P, but the B/PE on a matter wh can be implied as being a part of State's case.

Re S/F and S/L, in Mass. the B/P remains on the P to show D's non-compliance w/ them although D has the B/PE to show compliance. See 270 Mass. 392; 280 Mass. 222; Mass. G.L. ch 31, sec. 28.

270/392
280/222
ch 31 GL sec. 28

Rule of Law

The B/P re an essential element of a c/a never shifts and is upon the party required by the substan. law to prove the facts.

By stat. in Mass + most juris. the affirm. defense of Contrib. Negl. is required to be proved [redacted] by the D, not the P, and D has the B/P.

As who affirms, whether

Rule of Law

123 U.S. 307

affirmatively or neg., must prove it and has the B/P. Colorado Coal & Iron Co v. U.S., 123 U.S. 307 — U.S. alleged that [redacted] grants of land given to predecessors of P should be cancelled. P produced affadavits showing that the P&L predecessors legally staked & he claims not in reliance on the grants. U.S. alleged that the makers of the affadavits never existed. Ct. ruled that the U.S. had the burden of proving the falsity of the affadavits.

Rule of Law

Another test wh is sometimes relied upon is that the burden rests upon the party who is best able to sustain it because the facts & circums. are peculiarly w/in his knowledge.

Rule of Construction (SPOLIATION)

On a party has peculiar control over or access to certain evid. wh if produced would be favorable for him, & his failure to prod. same is suff circumstance to justify & the jury in interpreting that & the evid on this pt. is against him. — This rule negates

the necessity of shifting the burden as the just prior rule would require, because the case would still be warranted in getting to the jury.

II. Burden of Producing Evidence

(1.) He who has the B/P on a certain matter has the initial B/ going forward on that matter.

(2.) ~~[redacted]~~ The Judge must decide whether y is a question of fact for the jury to consider when one moves for D.V. the Judge does not weigh the evid. nor the credibility of the witnesses but only that, in the light most favorable to the non-moving party, whether there is a question of fact for the jury.

154 N.E.2d 280
152 N.E.2d 708
151 N.E.2d 909

Directed Verdict

Some Sts. follow the "Scintilla Rule" (Ala.) (the weaker rule) - if, by viewing the evid. in the light most favorable to the non-moving

158 N.E.2d 315

party, ∴ is a scintilla of evid. w/h would warrant a verdict for the moving party, D.V. granted.

III. Burden of Persuasion

Anderson v. Chicago Brass Co. (p. 429)

Preponderance of Evidence

Preponderance of evid. = greater convincing power. However, in order to entitle himself to a finding in his favor his evid. must not only be of greater convincing power, but it must be such as to satisfy or convince the minds of the jury of the truth of his contention.

Sullivan v. Nesbit (p. 431)

Fair Preponderance

Fair preponderance - the allegations are more probably true than not.

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Rule of Law

The party w/ the B/P must ord. show it by a fair preponderance of the evidence in ord. civil cases.

First Nat. Bank v. Ford (p. 431)

D alleged that the prom. note on w/h suit had been fraudulently altered from $150 to $450. Judge instructed that D must show (prove) his allegation w/ "clear & convincing" proof. D assigned

Yare 3 burdens:
1.) Burden of Pleading
2.) B/QF
3.) B/P.

Holding

as arros those words "clear + convincing" as bring too strong. The Ct. affirmed the verdict for P on the ground that y is a presumption of innocence and it must be overcome w/ definite, clear and convincing proof — more than a preponderance. The grave charge of fraud requires a grave requirement of more than a mere preponderance. This is true altho' this was a civil case.

It is almost farcical to attempt to define all of the terms used in charges.

Actually, the only real basis of reversible error is on the charge is clearly + obviously erroneous.

In juris. like Mass. who require "greater likelihood" rather than mere bare preponderance in Civil cases, allegations of mutual mistake (in Equity) + fraud require a higher degree of proof than those stated requiring bare preponderance.

If you allege a crime in a civil matter, and the " does not involve moral turpitude, proof need only be by

(204/345)
270/213

Fraud, forgery, or other matters involving moral turpitude must be proved by clear and convincing proof.
(11 A.2d)

fair preponderance. This is the best/authority + Mass. rule. 211/54.

Theories of Proof in Criminal Cases

(CHECK P.E. LAW ON THIS.)

Criminal Case - "Cable theory" says that so long as the evid., taken as a whole, would prove the State's case beyond a reas. doubt, it is sufi. Majority View.

The "Chain theory" says that the State must prove beyond a reas. doubt each + every allegation on the ground that a chain is only as strong as its weakest link. Minority View

* Presumptions *

The presumption will help carry the burden of prod. evid. If the presumption is proper, evid. in support thereof can be intro. So, the presumption will help P w/ the B/P + the B/GF.

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Presumption of Death

One presumption is that of death on one is absent w/o tidings for 7 years.

The presumption helps to carry the B/P but it does not shift it. However, it does shift the the B/PE onto

159 NE2d 58

the one against whom the presumption operates. Failure to rebut the presumption means victory for the other party making the presumption on this point. Upon rebuttal by D, the B/PE shifts back to P.

If the basic facts of the presumption are estab., the conclusion of the presumption will follow as a matter of law.

230/370 (or 37)
285/187

(T.I. Case)

Jefferson Standard Life Ins. Co. v. Clemmer (p. 444)

Action brought by admin. of decedent's estate to collect under the double indemnity clause of decedent's life insurance policy.

When D alleges that death resulted other than accidentally, he has the B/PE in support thereof in order to overcome the presumption that suicide was NOT the cause of death. This is a presumption against suicide. In the absence of evid. of suicide, the presumption operates. However, the presumption is not evid. When some credible evid. of suicide comes in, the presumption vanishes. Even after the presumption vanishes, an inference may linger on.

You must look at the K to determine who has B/P. P has B/P on death + on accidental. D has Burden re suicide.

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*Jefferson Case (cont'd.)

A presumption is not evid. so the Ct. says here.

In Mass. the same holds true, but in some cases it is evid. (Read Uniform Rule, p. 477 cbk.)

U.C.C. definition of Presumption

(U.C.C. sec. 1-201 (Mass.) — a presumption means that the trier/fact must find the existence of the fact presumed unless + until evid. is introduced which would support a finding of its non-existence.

It is not evid but is a rule about evid.

Inference v. Presumption

There are inferences, too. You would prove fact A + from that proof, as a matter of custom or common experience, trier/fact could find that fact B exists. The jury may come to the conclusion of fact B, but they aren't required by law to find fact B.

Fact A = basic fact

In re presumptions, if you prove fact A, the trier/fact must find fact B. They have no choice.

Fact A = basic fact
Fact B = presumed fact

So, jury has no option here.
"Presump." is used rather loosely. There are 3 kinds of presumptions:
(1.) of fact
(2.) of law
(3.) Conclusive or irrebuttable presumption of law.
* The only true presump. is one of law.
(1.) Presump. / fact — sheep in wolf's clothing. Not really a presump. Merely an inference.
The wt. of an inference varies, but does not reach up to a presump. until the law says so.
(2.) Presump / law = that presump. w/ entitles [redacted] a party to a finding in his favor on that fact or issue on wh it operates unless the other party offers some evid. to rebut it. This is a true presump. Sometimes called a prima facie presump. * It also casts upon the party against whom it operates the burden of coming forward w/ rebuttal evid. * If that party does so, the presumption vanishes. i.e., when a party brings

Methods of Effectuating a Vanishing Presumption

in evid. of fact A & no rebuttal is offered, the presumption will operate in favor of fact A. However if some evid. in rebuttal of fact A is offered, the question of whether the fact A has been estab. is raised (decided by deter. who has the B/P on fact A), & the presumption vanishes until the jury finds that the presumption is estab. - That is one method: attack the basic fact. Under this method, if the jury finds that fact A is estab. & it must FIND fact B.

The second method is to attack the [redacted] presumed fact B in certain cases by evid. or by bringing in a conflicting presumption.

Assuming that by use of one of the methods the presumption is rebutted, the presump. is thrown back to the lap of the party in whose favor it orig. operated. This is what is meant by the vanishing presump.

Methods of estab. basic fact:
1) Jud. Not.
2) Admission in pleadings
3) Stipulation
4) Trial evid.

(3) Conclusive Presumption - not really a presump. A rule of

subst. law — not of evid.
A wolf in sheep's clothing.
e.g., A child born during wedlock is conclusively presumed to be legitimate, i.e., the child of the husband.
— This is a policy rule against making these children illegitimate. Even if H had been in Asia for 10 years & returned home to find an 8 mo. old baby, he is nothing he can / say to rebut the presumption that it is his child. C.L. Rule. — Different today.

Can be rebutted today. No longer conclusive. Must show illegitimacy B.A.R.D.

All of these presumptions will get you to the jury. A few / will get you past it.

Presumption v. Prima facie Evid.

P.F.E. — P.F.E. - that amt. of evid or an issue which will get you past the judge to the jury.

Presump. — A presump. will get you to the point of estab. a prima facie case.

P.F.E. v. Presump. — (1.) Once the prima facie evid. is estab., it's in for good, whereas a presump. can be rebutted.

(2.) PFE always gets to the jury. A presump. may if it

(268/587)

150 NE 2d 845 (Sup.)

is not rebutted. 294/298.

Reasons for Presumptions:

(1.) To expedite trial by making unnecessary formal proof upon issues raised by the pleadings but likely not to be seriously disputed.

(2) To give preponderance to the probability when no evid. is available on the issue. e.g. Presumption of death after 7 yrs. + no tidings.

(3.) To give preponderance to the probability that on fact A exists, fact B also exists. These presumptions are based either on logic or on the pragmatic experience of the Ct. based on the teachings of the years.

(4.) On the evid. is difficult to obtain, the presump. is sometimes used to put the B/F on the party w/the best means of having access to the evid. on that point. e.g. Address of a letter should know better that addressor if the letter was rec'd., and if the letter was properly addressed, it's presumed that the letter was rec'd by the addressee.

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(5.) Public Policy - presumps. are used to give weight to avid. attempting to prove what is socially desirable.

In Mass., y is a stat. creating a presump. of due care in favor of P, and puts the burden of proving the lack of due care on D. Policy dictates that Ds usually have Ins. Cos. behind them and the Ins. companies have deeper pockets: spread the wealth around.

(6.) Presumptions which exist for one or more (i.e., a combination) of the preceding reasons.

* Specific Presumptions *

(1.) * of Continuity - when exist. of a person, a personal relation or a state of things is once estab. by proof, the law presumes that the person, rel. or state/things continues to exist as before until the contrary is proved, or until a different presumption is raised from the nature of the subject in question. (w/A in Mass.) * 173 Mass. 335 - P, travelling from Jam. to Boston, had to use 6 Rfs. Upon arrival in Boston, her luggage was handed

to her in a basket. P v. the last RR to handle the baggage. J/P. P proved that the good luggage was put on in Penn. and that, when taken off in Boston, it was in bad condition. P's burden/coming forw. w/ evid. was carried by virtue of the presumption of continuity. The D (terminal carrier) was the last to handle the luggage & had s/in its peculiar power to show other than P's contention. See 137 Mass. 231; 171/146: proof of habitual drinking suff to allow presump. that same continued. - This presumption can operate either back in time or forward in time. 49 Conn. 464 - bankruptcy & D suff to raise presumption that bnkrpcy. would continue for 5 mos; 49 Conn. 464

49 Conn. 464

(2.) Presumption of Sanity = a person once shown to be sane or insane, except re a temp. derangement incident to disease or violence, will be presumed to continue the same until the contrary is shown (Comment: this is presum. / cont. in disguise). There is a presump. that all men are sane wh is suffi prog until

the contrary is shown except that it is sometimes held que in proof of a will must be affirm. proof of testator's sanity. (B/P on the proponent of the will). Most cts. will allow the presanity to carry that burden until the other side produces evid. re the insanity. Then, P will have to prove sanity. The majority rule puts B/P of insanity on D. In Mass., in will cases & crim. cases, the presum/ sanity is weighed along w/ the evid. by the jury. See 292 Mass. 409; 154 N.E. 2d 225. 63 Conn. 493 - B/P of sanity on proponent of will. After proving same, B/P shifts (?) to D to prove insanity. Cf. 99 Conn. 422; 77 Conn. 281.

Proof of Sanity in Wills

(minority) ←

292/409
154 N.E. 2d 225

99/422
77 C. 281

(3.) Presumption of death = absence from one's last known place of residence for more than 7 years w/ a total lack of communication w/ those who would naturally have heard de him if he were alive raises a pre. que he person is dead but not that he died at the end of 7 yrs. or at any particular time.

Absence w/o tidings for more than 7 years.

Ansat: (Comment: this pre. relates to the fact of death, not the time: and if time becomes pertinent, the party relying on the pre. must carry the B/P re the time.) 36 Me. 176; 11 N.H. 191; 12 Allen (Mass.) 133; 2 Dailey 139. — This is T.D. re cases as to survivor suits under ins. policies and bigamy. See Mass. G.L. 200-134.

36 Me 176
11 N.H. 191
12 Allen 133
2 Dailey 139

200-134

(*) Three basic factors: (basic facts)

(1.) Absence from home (cont'd.)

(2.) More than 7 yrs. (some states 5)

(3.) Under unexplained circums., i.e., no tidings.

250/517

(*) 250 Mass. 517 — failure to show that absence was unexplained did not allow the pre. of death to rise.

hypo: After 5 years absence, W re-marries. Next day, H shows up. — Under C.L. rule and the "Said Arden Stats.", after five years ∴ will be no bigamy.

(4.) Specific Peril Doctrine = (when did H die?) if you can show under this doctrine that during the absence a specific peril arose wh prob. would have killed or resulted in the death of H (e.g., storm at sea and H was seaman & all ships at sea went down),

97 U.S. 628

97 U.S. 628

he (H) is presumed dead at that time. *Some states even allow the w to remarry then instead of waiting the remaining years, if any.

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(5) Common Disaster Situations = wh y is a complete absence of evid. re wh one (H or w) died first, y is a ~~pre~~ rule ~~presump.~~: wh y are two or more persons dying in the same calamity y is no presump. that one died before the other or that they died at the same time. That was the C.L. rule. So, y the B/P fell on the one alleging that one died first or that they died simultaneously. — This was a difficult rule.

C.L. Rule

Under the *Civil Law, y is an elaborate set of presumptions: in a common disaster situation,

1. Father survived child of tender years (minor child).
2. H survived w.
3. Of 2 persons between ages of 16 & 60, the elder survives.
4. A person between 16 & 60 survives as against one under 16 or over 60.

Calif. & La. have these Civil Law presumptions.

*Unless y is a stat., under C.L.

y is no presumption.

Mass. S.L. 198.1 - on title to prop. or the devolution thereof depends upon priority of death & y is no sufficient. [illegible] the persons concerned have died otherwise than simultaneously the prop. / each person shall be disposed of as if he had survived ex- cept as otherwise provided in this chapter.

hypo: Suppose H + W owned prop. as J Ts (right / survivorship). — Under Mass. heirs of H take his 1/2, + heirs of W take her 1/2

W / D / SK The remainder of the Mass. chap allows for an alteration of the presump. by a Will, Trust, Deed or Ins. K! (Lapsed Lease (wills) - if an intended legatee predeceases the testator, then the clause auto. lapses + the prop. reverts (back) into the estate.)

(6.) Presump. of Ownership of Prop. = In the ord. suit re Pres. to realty, dam. to real est. or per. prop., Trover, Larceny, Robbery + the like, proof of poss. creates a presump. of ownership

(7.) Presump. of Similarity of Foreign Law = At C.L. y is a presump. que le law of the foreign juris.

is le same as le law of leforum. provided que le for. juris. is a C.L. juris. (comment. this does not extend to stats. of a for. juris nor to civil law juris. 220 U.S. 473.

Proof of what the for. juris. law is was for the jury & was a matter of fact. Juries thus had the "burden" of deciding conflicts. Now by stat in some juris, jud. notice takes over. (M.G.L. $70, ch. 233)

sec. 70 of ch 233

(7.) Pre. of the Receipt of Mail. = Proof of due mailing (properly addressed & post paid) of mailed matter creates a pres. of receipt by the addressee thereof. See 149 N.E. 2d 64; 302 Mass. 508.

149 N.E. 2d 64
302 / 508

(8.) Pre. of Regularity re Pub. Offices = is a pre. que pub. officers perform y duty & don't exceed y lawful author. = Usually applied to routine & incidental affairs of govt. But, on y is a serious matter, proof will take over. See 92 U.S. 281; 158 N.E. 2d 570. — On the thing will be a matter of public record, the pre. will not operate. 5 Pick. 490. 14 Mass. 145 - pre. of legal election.

14 / 145

5 Pick. 490

~~158 N.E. 2d 570~~

~~92 U.S. 281~~

(9.) Crimes of the Wife at C.L. =
A wife who committed a crime in the presence of her H did so under his coercion except that the crime were murder, manst. or treason. 162 Mass. 441

(10.) Pre. of Identity of Person & Name =
Some states hold that identity of name creates a pre. of identity of person. 290 t. 179. — In Crim. cases, you can impeach the credibility of a witness by the use of this pre. in some states. — Not a good rule. 258 N.Y. 89 — need more than mere identity of name. See 213 Mass. 598 (?).

(11.) Pre. of Legitimacy =
A child born during lawful wedlock is pre. to be legitimate (of H).
In many states, neither spouse can testify as to non access rule wh would tend to prove illegitimacy. 237 Mich. 375.

? 37 mid 375

(12.) Pre. of certain Statutes =
(a.) Prop. not claimed w/in 14 yrs of testator's death presumed abandoned. Ch. 231 - 85 Mass. G.L. = is a prima

ch. 231. 35
301/39K 268/587 (t.)

facie case as to the agency of a driver of a car that the owner, if other than driver, is the master & the driver the servant or agent.
307/394; 268/587.

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O'Dea v. Amodeo (p. 452)
Verdict for P. Judge set aside verdict against D-father. P appeals.
It is no set rule re the effect of presumptions that will depend on the purpose for wh the pre. is intended. On the pre. is based upon peculiar knowledge w/in grasp of D, the D must not only present counterveiling evid., but must prove the allegations of D and the facts of the situation. D here had to prove the circums. of the automobile & whether it was not a family auto and that D-son was D-father's agent. D must give substan. counterveiling evid. Even when the pre. vanishes the facts wh gave it rise can still be considered and an inference can be drawn by de triers of fact on the basis of the facts. — This kind of de-

cision by the Ct. is based on policy but it was rather confusing and unnecessarily so. It comes close to shifting the burden/proof.

Rule of Construction

* Gen. Rule (A.L.I. Code ckt 475 & 476) — pre. stays operative until the person against whom it operates brings in sufficient evid. of the non-existence of the presumed fact to warrant submission of le issue of le non-existence of le presumed fact to le trier of fact. When this happens, the pre. vanishes.

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What it takes to rebut a presumption

Under A.L.I., to rebut a pre. you need sufficient evid. to "support a finding of its non-exist., or the basic fact of an inconsistent pre. has been estab." The judge must be convinced that an issue of fact has been created & he would merit the jury to (MAY) find on the basis of the facts w/o benefit of pre. whether the B/P has been carried.

PRE/SANITY

Minority View

In certain states (Mass.) — minority — re the pre/sanity) it is to be considered evid.

even when rebuttal evid. is introduced. This is the majority view, however.

Carr v. State (p. 458)

Quaere: Is the pre/Innocence evid. to be considered by the jury?? — No. It's not really a presumption at all, said the Judge.

PRE./Innocence

PRE.

*255 Mass. 304 - pre/Inn. - "Nothing is required beyond a plain stmt. that the pre/Inn. means that D's arraignment, accusation or trial, etc. are not to be taken to imply in any way that D is guilty of the charge against him. 248/9; 195/100. This pre. is not really a presump. at all, but really says to the jury that guilt must be proved beyond a reas. doubt, and that u should be no inferences drawn from the fact that Mr. X is a Defendant and sits accused. And, this "pre.": stays w/ jury until they are convinced beyond a reas. doubt that D is guilty as charged. — This is all a reaction to human nature which will infer that a man accused is guilty. "Ou y's smoke y's fire", etc.

"Pre/Imm." is not a pre. at all because it has no probative value and no evid. value but is merely a policy rule of law.

In Re Jones' Estate (p. 461)

PRs/Legitimacy

Presumption of Legitimacy here. Children claiming that altho' petitioner was ∪ mother's son, the " 's father was not ∪ father. (Lord, look at the values fly in the face of SS!)

Quaere: When a person is born in wedlock & it is claimed that he is illegit., who has the B/P the facts estab. such illegitimacy & what it is the degree of proof required? ?= Ct. said that the party alleging illegitimacy ~~must~~ has the B/P on that matter, and it must be proved beyond a reas. doubt.

Social policy backs up the pre. that it should not be made easy for those alleging illegitimacy.

The party alleging illegit. must prove non-access because that goes to prove illegitimacy beyond a reasonable doubt. Anything wh proves it B.A.R.D. will suffice. e.g., sterility.

(34)
Assignment: after reading to p.62, read from p.167 – p.326.

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In Re Jones's Estate (p.461)

The C.L. pre. of legit. is rebuttable, but the B/P non-access is on D and must be proved beyond a reas. doubt. So, this actually amts. to an affirm. def. and its called and amts. to a substan. rule of law wh is apart from the pre. The substan. rule and the pre. are not necessarily interrelated, and even w/o the pre., the substan. rule would still remain. The substan. rule is that proof of non-access must be beyond a reas. doubt. i.e., This became an affirm. def.; and ∴ B/P is on D.

Even on q is access, illegit. could still be proved by proving impotency, or blood tests (competent to show that X could NOT be daddy, not that Y is the daddy). Today, due to those and things like artificial insemination, even proved non-access does not mean that H is NOT the father.

Sillart v. Standard Screen Co. (p.468)

MAJORITY RULE OF LAW

When q is a conflict between pre. wh are inconsistent, the pre. w/ the stronger reason for its existence and the greater weight behind it will prevail. – MAJ. RULE.

Here, the pre. of validity of C.L. marriage prevailed over

the presumption of continuity due to public policy.

Minority Rule re conflicting Inconsistent Presumptions

MINORITY RULE - (A.L.I.) Only are basic facts wh give rise to 2 or more conflicting presumptions, then neither has greater effect, and the issues must be decided on the facts.

Today, most states do not recognize C.L. marriages (N.J. in accord).

This was a workingmens Comp. case, and the courts usually bend over backwards for a claimant. Quaere whether the result would be the same in a bigamy case?

✱Statutory Presumptions -

MAT. RULE

Some cts. have imposed limitations on the legis. by requiring some rational connection between the basic and the presumed facts. This is the MAT. RULE esp. in Criminal Cases. ✱291 U.S. 35. And, stats. wh arbitrarily create a pre. w/o a rational connection of the above type have been held invalid by courts.

MINORITY RULE - if y is NOT a rational connection between the basic fact + pre. fact, y need not be a pre., and trial on such

situation exists, the legis. can arbitrarily make it a pre. by statute on basis of pub. policy.

Tot v. United States (p. 470)

A person convicted of a violent crime or a fugitive from justice who has a gun or other explosive weapon will be pre. to have gotten it in interstate commerce and in violation of the statute. This was a criminal case and the ct. held that a stat. pre. cannot be sustained if y be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience.

Liac the by dec evi pre

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* Summary of Presumptions *

A pre. is not evid. but a rule about evid. A rule which gives artificial wt. + qual. to certain kinds of evid.

Pre. affect probs. of B/P + B/gF.) While a pre may help a party sustain his B/P, the better rule + may rule is that pre. does not cause B/P to shift.

Re B/coming forward, pre. does

shift that on the issue upon wh it operates to the party against whom it operates.

A pre. is said to vanish & lose its effect once evid. is intro. to rebut the pre. fact. It matters not for the ord. pre whether the rebutting evid. was ultimately ~~credited~~ credible in the eyes of the jury. i.e., The amt. of evid. generally held necessary to rebut was that amt. reqd to raise an issue / fact as to the exist or non-exist of the pre. fact.

Wt. of pre. & amt. of evid. required may vary as to certain kinds of pre. e.g., pre / legit.

Liacos says that actually the presump. does not really vanish until the jury decides that the rebuttal evid. is sufi to actually rebut.

Rule of Law re Inferences

If a pre is based on a probability of some sort & it's rebutted to the pt. of vanishing, then le logical inference wh lies behind le pre. remains, & this inference may be considered & used by le jury to reach le same conclusion even tho' le jury is no longer required to so find. e.g. Pre / receipt of mail - address

substan. countervailing

intro. evid. to show non-receipt. The jury is no longer required to find that the addressee recd. the mail. But, logical inferences based on probabilities that the letter was recd could still be made. Thus, it would be now "may find" & not "must find."

Where a basic fact is in question, a "must find" charge is clearly erroneous. (See McCormack pp. 315-316.)

I. * JUDICIAL NOTICE *

This is another way of estab. facts.

This is not a matter of proof. This is the use of a substan. rule to estab. facts w/o proof.

Cts. accept certain kinds of facts to be true w/o requiring proof thereof.

Certain sociological facts are judicially noticed, esp. on the appellate level.

Briggs v. Elliott (p. 9)

Frankfurter, J. said that he could not accept as true what the alleged sociological experts said,

Thurgood Marshall for Appellants

but that he could jud. notice the fact that those men did have those opinions.

i.e., The ct. here is broadening its powers of jud. notice. The criticism of this was that this was an evasion of the hearsay rule.

Definition

Jud. Notice –

A device wh permits the estab. of a fact as being a true fact w/o le intro. or consid. of evid.

Effect of Judicially Noticed Facts

① Wigmore – doctrine of J. N. presents a dispensation from presenting proof. But, the jud. noticed fact is not conclusive in that the other party can rebut the jud. noticed fact. Under this view, the jury would decide the question of fact. =
Not very good, says Liacos. Defeats very purpose.

② Maj. Rule – a fact wh is jud. noticed should be an indisputable fact even before jud. noticed, & i. when noticed, being indisputable, cannot be disputed. Morgan's view.

* Kinds of facts wh may be J. N.:

(1.) Facts of gen. knowledge wh are indisputable; i.e., those

facts wh are easily ascertained + cannot be disputed.
(2.) Facts of common notoriety. i.e., So well known w/in the area encompassed by the ctb. juris. that no one can dispute them.
(3.) Facts of gen. jud. knowledge. i.e., the law of the forum (?); facts de jud. proceedings, juris, admin. + organ.; + nature + identity of ct. personnel.

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- facts that are of gen. knowl. Y are some facts of wh a ct. must take J. N. w/o request of parties, & than y are some of wh the ct. may, in its discretion, take J. N. w/o request of parties. Under the "must rule," precedent + case law + stat. say what facts must be J.N. / See Uniform Rule 9 (p. 9).

Hoyt v. Russell (p. 15)
Judge said he wouldn't J.N. location of private prop. (trial ct.). Hoyt appealed + Revsd. Things of private concern are not the subj. matter of J.N.

Quaere: But, what const. private? = Held, that this prop. was w/in the juris. of the ct. and the ct should J.N. facts of

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General jud. ~~notice~~ knowledge (#3) including extent of juris.

Jud. Notice goes to fact, not law.

Quaere: why should the ct take jud. notice of the location? = Ct should take J.N. of effect of laws (stats.) w/in its juris. It can be also said that the ct must know what laws are operative.

Proof can be by maps wh ct has.

Here, it was error to require proof of a fact wh should have been J.N. by the ct. had taken J.N., it would be no question of fact for the jury. (Wig-more's rules were not applicable here.)

1.) Facts of gen. know. so univer-sally known that they are indisputable, the ct must take J.N. even w/o request.
2.) Facts of common notoriety w/in the area, the ct may J.N. w/o request;
3.) But if the party requests and supplies the ct. w/aids and notifies the other party, then the ct must notice the fact of common notoriety.
81 Com. 489

148/68

The ct must take J.N. of facts that are clearly certain & indisputable, but all cts. do not hold that failure of a ct. to do so, w/o request to that effect, will constit. reversible error.

Proof v. Evidence

Y is a diff between evid & proof. Evid used to estab. proof; so, since a fact of J.N. displaces proof, it is, i.e., superior

Maynard
Maynard

to quid. See 81 Conn. 489; 148 Mass. 68.

Specific Propositions

Varcoe v. Lee (p. 18)

Was the intersection a "biz dist." w/in the meaning of the law wh set the speed limits for biz dists? Trial judge charged that it was a matter of common gen. & certain knowledge that Mission street was a biz dist in San Fran. The ct. sat in S.F. & Mission St. was in S.F., and that proof by the party thereof is unnecessary. Followed Wigmore's view. This was a diff. approach than that of Doyle v. Russell.

J.N. of a fact of common notoriety in the area.

Questions: (last for com. notor.)

(1.) Is the fact one of common, everyday knowledge w/in the juris. so that one of average intelligence can be presumed to know?

(2.) Is the fact certain & indisputable?

26 Oct. 59

J.N. on Appellate Level

App. ct. can properly take jud. notice of any matter of wh the ct / orig. juris. may properly take notice. See McCormick, p. 711: app. ct. not bound by finding of jud. not. below. Doubtless, per Liacos, if J.N. is properly taken in the first place, app. ct. cannot disagree.

If lower ct. did not J.N. a thing below, app. ct.

On the trial ct. could not J.N., The app. ct. could, but would not.

~~Must~~ can take J. N. of something esp. to avoid reversal.

Request for J.N. (Mdj. Rule

Maj. Rule - if you request J.N. of something on app. level to effect reversal, request denied if issue was not raised below. - 4 are some dissenting views.

State to Fed. Ct. - if matter sought to be noticed on app. level was not w/in power of trial ct to J.N. app ct. will refuse to take J.N. even tho' it has power to do so. 116 U.S.1.

Request for J.N. (Mass.)

Mass. - 227/262, 307/77 - you must ask trial judge to take J.N. If not, app. Ct. will not J.N.

Currier v. Woodlawn Cemetery (p.23)

The dissent here points out matters of jud. record as being J.N. See p. 24. Ct. will J.N. its own domestic law, gen. professional knowledge ('legal profession'); things of his own ct. (calendar, length of term, etc.), (app. Ct. could J.N. those things of their own ct. plus the lower cts. w/in its juris. J.N. of the personnel (sometimes even the allys.)

* Records of Litigation *

* A ct. will take jud. not. of its records in the present litigation, not only the instant trial, but also all previous matters pertaining to the previous trial. / Maj. Rule.

? * Matters of the same case but of a different ct. will not be J.N. Maj. Rule. —

? * However, dissenting Judge in Currier case did take J.N. of matters of a diff. ct. Min. view (makes good sense tho.)

* Gen. Propositions *

Jordan v. Mace (p. 27)

Quere: Is the verdict here manifestly wrong in the light of biological law and of evid. of exclusion of paternity based upon the blood grouping tests taken under the Maine stat.?

Holding — That was the issue before the Me. Sup. Ct. Ct. held that only the issue of competency of the testing scientists should have been put before the jury, but not whether the tests could show that the appellant could not have been the father of the twins.

This was ogniv. to a conclusive pre., i.e., a rule of law, but wh is based on J.N.

Rule

Ct. said that they will take J.N. of indisputable facts, wh, alth' not generally known throughout the community, are proved.

J.N. of Special Knowledge

Today, cts. will take J.N. of facts w/in a given specialty or profession wh are verified, even th' the Ct. may not generally know those facts.

28 Oct. 59

Effect of J.N.

State v. Lawrence (p. 36)

Issue: Could ct. take J.N. of the value of stolen car on value would be determinative of the type of larceny of wh D stood accused, i.e., petty or grand larceny? Ct. held no as under the statute. When a stat. says que the ct. can take J.N. ONLY of the matters enumerated, the ct. is yby bound. However, the stat. here was not that restrictive, but it was found that since value was an essential matter of

the case, and that since it could have been diff. of opinion, the jury should have decided the value of the car as a matter of fact.

Ct. here held that the J.N. point was not conclusive upon the jury and that it could be rebutted by a preponderance of the evid.

— The Wigmore View.

* Personal Knowledge of Judge *

is a distinct diff. between per. know. of Judge + the know. of the Ct. allowing J.N. of fact in question is proper for J.N. if he can ascertain indisputability of that fact, judge will J.N. it even tho' the Judge is ignorant on that fact.

(43 Vt. 20) It is improper for Judge to take J.N. simply because the matter was w/in his personal know. if the Ct. cannot J.N. the fact. See 43 Vt. 20; 185 N.Y.S. 154 — but here, couldn't the App. Ct. have construed that J.N. was taken of the fact of the exist. of the hotel by the court? Yes.

* Procedure *

(1) Atty. should request J.N. & furnish reliable info.

about the fact you seek to be J.N. to allow verification, whether on trial or app. level. —

(a.) Request could be made in pleadings, trial or app. level.

(b.) At trial, request may be altered,

(c.) Ord. exclusionary rules don't apply to the documentary info. supplied. e.g. Hearsay Rule doesn't apply.

(2.) If request is made & dispute is raised by opponent re whether fact is proper subj. of J.N. (& whether it's indisputable), Judge (in informal hearing out of earshot of jury) will decide. If he decides negatively, you must prove the fact. Whenever there is the slightest doubt as to whether the fact will be J.N., you should be prepared to prove the fact.

(3.) If J.N. is taken & you oppose, be sure it becomes a matter of record that he took J.N. over your objections, thus preserving right to appeal.

(These are rules to be used in your discretion as counsel.)

(4.) Ct. should, in certain instances, take J.N. of matters on its own initiative. If not, required the ct.

* Knowledge of Jury *

(1.) How much leeway should be given the Jury?

30 Oct. 59

Tenn. Gas Trans. Co. v. Hall (Ct. 33)

D alleged that a danger of fire from the P's underground pipes was present because of sub-soiling processes and chisel plows possibly striking the pipes. Evid. was not intro: re whether the pipes could be struck by a plow, how deep the pipes were laid, how deep the plow would go. The jury took it upon themselves to take notice of those facts. J/D/A. * Dissent held that tho' the jury may have known as a matter of common knowledge how deep a chisel or plow would go, the taking by the jury of J.N. was prejudicial. * However, the answer to the dissent is that the jurors, Judge, & Attys. were from that area, & these matters were of common knowledge in that area. Should a party be penalized

because it's atty. failed to intro. evid. the subj. matter of wh is generally known by all concerned?= Ct. held that the jury in this case was not wrong in noticing those facts.

* Danger here is that a juror may (even innocently) sway the jury in the jury room by stating his personal knowledge. "I know I didn't do it. I saw X do it w/ my own eyes." — the jury in the jury room can take awareness of common knowledge, matters of wh they all know and wh are of common experience to them as a body.

General Rule

2 Grey 514

86 Me. 310 (?)

* 2 Grey 514 — Jury took notice of the fact that Gin was an intoxicating beverage. Judge said that the jury need not be ignorant of matters commonly known to all. See also 86 Me. 310(?).

2 Nov. 59

JUD. NOTICE OF LAW

Lutz Industries, Inc. v. Dixie Home Stores (Okl. 45)

Quaere: Can the App. Ct. take J.N. of the code re fire and preventive methods of its state?? = Viol. of that stat. was negl. per se. D argued that this was a private code because the

1)

Nat'l Bd. of Fire Underwriters.

promulgators were a private orgn. estab. by the Ins. people. The N.C. Bldg. Code Council was created by ~~that~~ ~~estab.~~ to adopt a bldg. code and the Council adopted a
1936 → bldg. code. The Ct. ~~adopt~~ J.N. ~~that~~ 1936 code. The 1936 code incorp. the regulations of the Fire Underwriters. In 1941, the 1936 code was amended and ratified. The one in issue here was the 1951 promulgation Revisions in 1936 Code were made in accordance w/ the 1941 revision.

Quaere: Did the ct. take J.N. of the provisions of the Elec. Code of 1951 (an admin. regulation) or of the statutes prior thereto? The latter. All the ct. knew of the admin. regs. was that they had been enacted. The ct. held that the contents of a statute can be J.N., but admin. regs. can be J.N. only so far as the fact of their enactment and the process thereof, but not of their contents.

J.N. OF ADMINISTRATIVE REGULATIONS — LIMITATIONS

STATE STATUTES

States J.N. stats. of their states & their contents, and works of bodies estab. thereby. Admin. regs. are admissible in evid., i.e. require proof not of their exist (that's J.N.) but of their contents.

* Cts. will take J.N. of:
(1.) C.L. of their juris-
(2.) Public stats & acts of their own juris.

Re J.N. of Law, you are not of that juris. of a fact. Thus, in a sense, it is a misnomer to say this is J.N.

* Private Acts *

Cts. generally will not take J.N. of private stats. or acts. A private stat. is one wh has spec. application and does not apply alike across the board. e.g. "... [redacted] Jones will be given $1,500 per year as gratuity for injuries sustained while digging sewers for the State."
(4) exception of city charters (wh are J.N. today), the above rule stands rule.

* 263 Mass. 51 - private acts must be proved as matter of evid. unless q is a stat. wh spec. recog. the matter as subj. of J.N.

* 316 Mass. 432 - city charters J.N.

* Sec. 74, ch. 233 of Mass. G.L. - estab. what can be J.N. including private acts. 194 Mass. 597.

Some states have outlawed private acts.

* Municipal Ords * absent stat. ja of J. of gen. juris. cannot take J.N.

$74, c. 233
194/597
263/51
316/432

of mun. ords. & town by-laws except on appeal from a municipal or lower tribunal wh properly may take such notice. 289 Ill. 605 — attack on const. of mun. ord., and a state st. required the lower cts. to take J.N. of mun. ord, but said nothing of requiring the app. ct. to J.N. — Held, App. Ct. may, but does not have to. There is tendency not to J.N. mun. ord.

184/598
299/353

Massachusetts (184 Mass. 598; 299 Mass. 353) says that mun. ord. will not be J.N. unless stat. requires. True of app. & lower cts. But see Mass. G.L. Ch 233 secs. 75 & 76.

233
75
76

* Administrative Regulations *

Fed. Ct. must J.N. those admin. regs. published in the Federal Register, 49 Stats. 502 (1935)

(Ad

State level — if State admin. agency is required by stat. to publish its regs., the cts. of that state will gen. take J.N. of those regs. But, they don't J.N. state admin. regs not required to be so published, 308 Mass. 20.

308/20

State cts may take J.N. of fed. regs. published in the Fed. Register 358 Mass. 621 (Ct. also said it was discretionary w/ Ct.)

324/621

* FEDERAL LAW, i.e., FED. STATS. * and Treaties
They are also laws of the various states, so J.N. must be taken. Also, treaties of fed. govt.

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* Foreign Law * at C.L., maj. rule was that JN would not be taken of law of other states of country. Minority: (85 N.H. 126) – JN was taken of foreign juris. w/o author. of statute.

4 is presump. que law of foreign juris. is same as law of forum if it's a C.L. juris. Would presume C.L. to be same but not statute. Ct. will J.N. whether foreign juris. is C.L. juris.

On foreign law is a matter to be proved, it's a fact to be deter. by jury. Tendency now is to have judge decide question. Also, statutes allowing J.N. of foreign law.

(Uniform J.N. of Foreign Law Act) **Mass. Stat.** – ct. shall take J.N. of for. law of state &c. & foreign juris. on such subject is material. Parties must bring the matter to the attention of the ct. Merely call Judge's attn. to the source material. When law is in foreign language, must point to source + also give an authenticated translation.

("sit and judge" test) If it's not certain what foreign juris. would do w/ this matter, judge must deter. what le law 4 would be if the ct. were to decide it.

App. Ct. may always make independent finding on subject of foreign law & reverse finding below if they deem proper.

Judge had always decided what law

applied, but jury formerly decided what the law was. Now, Judge ord. decides what the law is as well as what law applies.

FED. COURTS: On fed. ct. exer. orig. juris., it will J.N. law of each state of U.S. and law of U.S. itself. In an appeal from one of these sts., the fed. ct. of appeal will J.N. the same law.

When U.S. Sup. ct. gets an appeal from a state ct., U.S. Sup. ct. will J.N. foreign law only to the extent it was noticed in the state ct.

Law of Foreign Countries — in fed. ct., it is a matter to be pleaded & proved by pt.

Leary v. Gledhill

P claimed that he loaned D $1500, D contended this was an investment and not a loan. Alleged loan had been made in France.

Trial ct. J.N. that, as to loans, the law of all civilized countries was the same.

App. Ct. said that foreign country's law was a fact to be pleaded & proved by evid. In absence of proof, could engage in the following presumptions:

1. That C.L. prevails in F.J.
2. That law is the same in F.J.
3. That all civilized countries agree on certain basic principles.
4. That in absence of proof, parties acquiesced in law of forum.

App. ct. then said that in the absence of proof, parties acquiesced.

Problem here is that D really didn't acquiesce. D kept contending that French law should be used. But, ct. said that he was deemed to acquiesce unless he pleaded + proved the foreign law. Seems that N.J. is saying that if D does not bring it into issue by intro. evid., then he is presumed to acquiesce. Not putting B/P on D, but does give him B/OF.

Ct. does not say whether trial ct. could have J.N.ed the law of France. Did J.N. the fact that France was not a c.l. juris. but inferred that this law must be pleaded and proved.

Ct. was probably saying that D had the B/OF to rebut the presump. of acquiescence.

Gen. Rule: Acquiescence — In most juris., on the party does not raise the issue of foreign law, he is deemed to acquiesce in the forum law.

Device of J.N. is being extended to simplify the proof of facts.

217 Ala. 236 – ct. J.N. the fact that there is no such thing as a copy of an oral K.

Ill. – J.N. that buzzsaw was dangerous.

R.I. – Refused to notice that beer is intoxicating.

9 Nov. 59

(Chap. 3) II. * Testimonial Proof *

Usually thought of as being the main manner of proof — Witnesses. What about eye-ball witnesses?

* Competency of Witnesses

This is a fundamental problem. Also, are his stmts. accurate + does he mean to say what he says? Is he honest? Can he be honest + inaccurate (difficult because he's hard to shake). Y are also pathological liars (bad news) + half-baked liars. — Does he have any knowledge ~~of that~~ is helpful or harmful to our case? Is that know. 1st hand or second hand? Y are Rules of Exclusion, Priority and Privilege, too.

Hearsay Rule is basically a rule of competency of witnesses.

Disability to Testify

A witness may be under some type of either actual or legal disability to testify.

At C.L., a party to litigation was disqual. to testify because of his vested ~~in~~ interest in the outcome. At C.L., a convicted crim., insane man, infant (under 7), atheist,

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infidel were all incompetent to testify. A W of a party could testify neither against nor for her. At C.L. H & W were one, H was the "one" & H could not testify in his own case due to "vested interest."

Open to the wit., not the party.
Exclusion open to party, not to wit.

Priv. attends only to the area of the privilege.

PRIV. - may be waived by witness.
Competency - may not be waived by anyone.

Priv. not to testify ←

* Privilege

A privilege not to testify is a diff. thing from disqual. due to incomp. Re competency, are certain minimal Rules of qualification for testimony. Ind, comp. of a witness may be raised by parties + not witness.

Rules of Priv. only come into play bec. of is competency. They operate to exclude valid evid. So as to protect certain rights of witnesses, certain rels. or social interests. Available to witness, not to parties. May be waived. But, if a witness is incomp. / that can't be waived by anyone.

* Competency (cont'd)

C.L. rules vastly changed today. Comp. of witness to testify is determ. by trial judge on basis of 3 basic criteria:

(1.) Witness is under some sort of moral or legal compulsion by the taking of an oath or otherwise to

So, an insane person or minor of tender age may be competent if the 2 criteria are met, but those conds. may affect their cred.

tell the truth.

(2.) Witness possesses suff. capacities of obser., recollection & communication to make him worth listening to.

Due to this discretionary power of judge, the C.L. rules have pretty much gone. The C.L. rules have their greatest bearing on the credibility of the witness.

* Mass. G.L. sec. 20, ch. 233 — anyone of suff. understanding can testify in any type of proceeding except:

Seems like rule of exclusion in Mass., but ord. this is a rule of privilege.

(1.) H & W cannot testify re personal and private conversations except on they are adverse parties.

??— (2.) H & W can't (?) testify against each other in crim. case.

Exclusion goes to privilege.

(3.) A crim. defendant shall not testify except at his own ~~behalf~~ request.

212/435
185/324

See 212 Mass 435 & 185 Mass. 324

— * Query whether the stat. relates to comp. or to priv.?

Prior Convictions for Fraud or Forgery

* At C.L., conviction for forgery or fraud would preclude comp. to testify. Not so now by stat. but credibility may be impeached.

A few states still provide

that conviction for perjury or subornation thereof [redacted] will preclude comp.

Vested Interest

Today, vested int. not sufficient reason for finding of incomp. but may be used to impeach / credibility. Exception: one P is attempting to recover, but a "dead man" statute is applicable (infants + insane + dead men). This is one view. See Mass. G.L. ch. 233, sec. 66.

Comm. (+ more liberal) view; hearsay admissable.

(See McCormick, p. 142.) "Dead Man" Statutes

Sec. 66 - Ch 233

P here claims that the "deadman" (infant or insane person) promised him something. - Survivor of deceased (infant or insane) is incompetent to testify: "Better view is to let survivor (interested party) test., but along w/ that, allow any statements of deceased before death + any other documents, etc., to deter. what deceased actually said.

13 Nov. 59

Personnel of Court - are these people competent to be witnesses??

(1.) Judges - not incomp. merely because he is a judge. But, if the case comes to the attn. of the judge and he realizes that it is likely that he may be called to testify, he will disqualify himself from presiding. If he does not so realize until after trial has begun, he has the option to disqualify himself and call in another judge, or declare a mistrial and have another judge preside from start. If the matter is relatively unimportant and will not

cast a cloud over the case, the former option will be used ord. to save the TPs some money.

General Rule

A Judge is incomp. to be a witness in a case over wh he presides. Exception: on the Judge is to testify re an expert and formal matter wh is minor (eg, document wh he notarized) and on all parties agree. Fed. Stat. requires disqualif. of Judge here.

(2) Other officers - e.g. bailiff, clerks, all are competent here.

(3) Atty. - is competent, but the problem here is one of legal ethics. Ethics require that an atty. is called upon to testify in a case w/ wh he is connected, he must withdraw [redacted] from the case first. An atty who takes stand has duty to protect interests of his client & has privilege to refuse to answer on the answer will violate the priv. of atty - client rel. - The matter may be not in serious dispute and may be only identification of a document or computation of a fee, & here atty. can testify.

10½ yards

(4) Jury - vast majority rule says

Gen. Rule. that a juror who is called to testify ~~[illegible]~~ must be deleted from the jury. ⊛ Exception: 103 Ga. 125.

Ga. Exception

Definitions
- Veniremen - selected prospects for a jury.
- Voir Dire - exam. of prospective jurors to empanel them.

Gen. Rule
- Juror cannot testify ~~in~~ re any matter that inheres in the verdict. After verdict, cannot testify re.
  1. How evid. was construed.
  2. How they understood charge or that they didn't understand.
  3. Conversations in the jury room.

Gen. Rule
- A juror may testify re any matter during the trial or in the jury room wh does not inhere in the verdict, e.g., bribery, attempt to influence jury unlawfully, relevant & conclusively material admissions of a juror ("I'm really twin brother of D, but my name is changed."), consideration by jurors re matters not in evid, that verdict rendered was rendered by mistake ("meant $1500, not $1560") 16 Grey 634. ~~Can~~ Can testify as to averaging of verdict per the rule except on slate may otherwise provide. Jury supposed

to consider only matters in evid., and this method of averaging verdict was not evidentiary but arbitrary.

Marital Relationship a privilege.

(1.) A priv. by a spouse not to testify re confidential conversations between spouses. Civil & Crim. cases.

(2.) Priv. of spouse in a Crim. case not to testify against spouse. Some sts say that this priv. belongs only to a Spouse (A) On the crime is by one spouse against the other, no priv. 290 U.S. 371 - W can testify FOR her H if she so wants.

(3.) A bar is against either spouse to testify as to non-access or the effect of it is to make illegitimate a child born w/in wedlock. 323 Mass. 66, 135 Me ___. This is the Maj. rule. Y is small minority: 178 Miss. 383, 114 N.J. 242, Y are stat. exceptions: Ch. 273, secs. 1-16 of Mass. G.L.

(A) Some states say the D has the priv. Some states say the State has the privilege. Significance: decides who has the power to exer. the option to have the testimony of the spouse.

Maj. Rule: non-access

237 Mich 375

178 Miss 383

114 N.J. 242

17 Me 323 par. 66

273 1-16

OATH

C.L. - required that the witness be of belief in a supreme being as being a rewarder of truth and avenger of falsehood - C.L.

Today, stats. have abolished a requirement of religious belief. Affs, can affirm if swearing is against your religious belief. (MGL 278) See Mass. G.L. ch 233, secs 14-19. Sec. 16 allows for another way of taking oath if witness feels it would add greater solemnity + obligatory nature to the oath.

sec. 16-19
233

16 Nov. 59

Mass Stat.

A person not a believer in any religion is required to testify under the penalty of perjury, + his credibility may be attacked due to his disbelief in God.

16 Grey 33 - may be no examination, either direct or cross as to a witness's religious belief.

16 Gray. 33
253/152

253 Mass. 152 - credibility may be attacked as to disbelief, but not as to a religious sect or group to wh a witness belongs.

whether Protestant, Catholic, Jewish, etc.

So, can ask, "Do you believe in God?"

You can call witnesses to impeach credibility of other witnesses.

Must be some comprehension of an obligation to tell the truth, plus capacity to observe, recollect and relate.

Is a presump. of capacity of

a witness. When facts were, ~~[redacted]~~ questioning of competency or when competency is challenged, the judge must use his discretion to decide competency as a prelim. question of fact.

I have been ~~[redacted]~~ holdings that ~~[redacted]~~ certain "incompetent" people are competent. 107 U.S. 519 (feeble minded man); 32 (07) 8 Ill. 338 (mentally defective); 145 Ohio St. Rep. 379 (mentally defective). Cf. 104 Conn. 583.

Hill v. Skinner (p. 182)

Competency of child of tender years.

Ohio statute said that the presumption of competency is not applied to children of less than 10 years of age.

Here, child was four years of age. Child was taken into Judge's chambers because a four year old will be frightened by a jury & Ct. room of people & might not be constrained to reveal her honest feelings.

To a child, God is not necessarily the real thing since the parents are most real & usually are the "supreme beings" to the child.

13 Conn. 546 - child comp. if she be sufficiently mature to receive correct impressions by her

107 U.S. 519 - feeble
32 Ill. 338 - mental def
145 Ohio St. Rep 379
145 583
104 Conn.

238/322

senses, to relate the truth, and is aware of a moral responsibility to tell the truth. 238 Mass. 322 - four year old questioned by Judge re God. She had no conception of God. Recess of one day granted. Priest lectured to child, + upon return, she had right answers. Held, comp. Upon appeal, aff. * See also, 146 Fla. 154 (age not as important as maturity); 140 Tex. Crim. Reps. 355 (child must have moral awareness of responsibility to tell truth) - Hard test.

146 Fla. 154
140 Tex. Crim Rep. 355

Ability to Observe

Gladden v. State (p. 186)

*Wt. author. - lay witness may be allowed to testify as to drunkenness.

Q Did Ds have opportunity to observe ?? = Ct. said so long as to some slight ability to observe that makes them comp. to testify on that subject. 1st of all, y must be general comp. 2nd, y must be specific comp. - Does this witness have any knowledge of his own re this matter ?? The witness must have both. 139 F.2d 483.

* The witness must have some first-hand knowledge of

Requirements as to two types of Competency

139 F. 2d 483

38 P.H. 324

Gen. Rule of Law | the matter in addition to comp. to be a witness.

Ability to Remember

Hollaris v. Jankowski (p. 188)

Boy did not really remember independently but was told what to remember by others.

Faint or weak recollection sufficient. Recollection may be refreshed (Present Recollection Revived). But, it must be some basic knowledge + recollection. So, child here held incomp but not because of his age.

Deposition of child while memory was fresh should have been taken, altho' the question of age would have arisen (4 years old); but that age factor could have been argued successfully maybe. Might have been worth the chance.

18 Nov. 59

Ability to Relate

Schneiderman v. Interstate Transit Lines (p. 191)

Competency of witness [redacted] in question because of a cond. caused by D which rendered P unable to relate properly.

Due to medical testimony, it was believed by the ct that

P's answers on cross exam. were attributable to fatigue. So, the jury had two options re coherence + ability of P to relate, and any is an option available to the jury. credibility rather than competency is in question. Competency is for the court and cred. is for the jury.

Wherever possible, there need only be some minimal capacity to relate, and incapacity will go to question of cred. + not competency. This is the modern and major view.

Rex v. Inwin (p. 196)

Rape victim was deaf + dumb. Aunt acted as intermediary, but y was a question as to whether the aunt was relaying the witness's answers. ("Aunt felt left-out.") ha, ha, ha!

* Challenging Comp. of Witness * - at C.L. & today, y is definite time limit for making the challenge. ① On y is indiv swearing-in, challenge must be before witness is sworn? Then, judge or atty. will conduct voir dire to deter. gen. comp. of challenged witness.

② On y is en masse swearing-in, challenge made as soon as wit. called to stand. * If the grounds of incomp. are known before-

288 p. 87

hand, challenge must be made before testimony begins. 288 P. 57. If after beginning testimony it becomes apparent there is incomp., challenge must then be made. 182 S.W. 2d 888.

298 Ky 315
182 S.W. 2d 888

The "burden" of showing incomp. is on challenger except on y is presumed incomp. (kid 4 yrs. old). 107 S.W. 826.

107 S.W. 826

* Specific Comp. — objection to a spec. point made when that point is testified to by the wit. When the challenge is made, the party sponsoring the wit. must show wit.'s comp. i.e.) You should lay a groundwork for special comp. of a wit. If not, you must meet the challenge, & can even use the same wit. to show firsthand knowledge.

Sec 3 * FORM OF EXAMINATION OF WITNESSES *

Seldom are all four stages reached.

(1.) Direct - by sponsoring counsel
(2.) Cross - by opponent
(3.) Re-direct -
(4.) Re-cross -

In Mass., Superior Ct., only one counsel may examine wit., i.e., the same counsel must take it all the way on same witness.

NO CLASS ON 11-20-59.

23 Nov. 59

* Direct Examination *

Probably the most important part because the essential aspects of your case are brought out here. This is on the story comes out. Q. Is it better to have P tell a narrative story or should y be questions & answers? = It is not essential that y be the latter. (1) Many authorities are of opinion that the narrative is better because it is spontaneous & the jury sees that P is not led by the nose by questions. However, y is a danger that irrelevant matter will be spoken by your client and may read the ct. to believe something as fact wh is not. (2) So, many attys. use questions to lead witnesses, and many witnesses need leading. Size up your witness & use your discretion as to [redacted] wh method to use. Sometimes, both can be used. Good idea to let witness narrate on a specific matter about wh he talks.

Strauf v. Reading Co. (p. 200)

Here leading questions are not grounds for reversal. But, gen. rule is that during direct exam. leading questions are objectionable.

Quaere: what a L Q ?! = The old view

198/34
20 Com. 68
353 Pa. 156

was that any question wh could be answered yes or no was a leading Q.

Today, cts. say that a Q wh can be answered yes or no is not necessarily a leading Q. 173 Md. 339. Not is a question in the alternative necessarily a L.Q. 30 N.H. 245.

173 Md. 339

30 N.H. 245

4 Wend

TEST

The true test is that a L.Q. is one wh suggests to the witness the answer desired by the examiner. — There is no hard + fast rule. The Judge must exer. his discretion, and his ruling will not be revsd. on appeal unless it was an abuse of discretion or unless the overall picture of the trial is obviously uncontrolled as in Straus case

Where L. Q. may be Asked: (i.e., EXCEPTIONS TO GEN. RULE)

(1.) On the Q. is prelim. in character (name, connection w/ case, biz or profession), it may be asked in a leading manner. 92 Conn. 58.

(2.) On the Q. suggests to the wit. the next topic to be taken up in testimony, it may be leading. 141 Mich. 312.

(3.) On the wit. has been shown

or is known to be a hostile wit. — The old view was that a party who called a wit. was the sponsor of that wit. & all the rules must be strictly followed. The rule today recog. that all witnesses called are not sponsored by the calling counsel. So, you may use leading Qs. only to refresh recollection & not to ~~co~~ impeach testimony of that wit. (That jurisdiction is peculiar to cross-exam.). Have to ask judge to allow L Q & satis. Judge that wit. is hostile. See 336 Mass. 58.

336 Mass. 54

(4.) By stat. (Mass. Gl. c. 233, sec 22) in some states, you may cross-examine an adverse party (P or D) when you call them, and may use L. Q. 298 Mass. 458. 68 F.2d. 671.

c. 233 sec. 22
(298/458
68 F.2d. 671)

(5.) On the wit. is of insuff. ability (e.g., slow child). 58 S.D. 119. 192 Wis. 379.

58 S.D. 119
192 Wis. 379

(6.) On recollection of witness is entirely exhausted, L.Q. may be used to refresh recollection. 190 Mass. 184 / 76 N.Y. 170.

(7.) Exam. of wit. on voir dire

already testified to that matter.

(8.) One of are formal witnesses in some instances. L.Q. may be asked re ~~minor matters~~ i.e. Notary Public testifying to execution of document. — Mass. does not allow L.Q. here. 238 Mass. 262.

238/262

JUDGE, INQUIRY BY

Judge may use L.Q. but they must not take the form of comments on the evid. (e.g. "You don't mean to say that!!") 270 Mass. 78, 308 Mass. 397.

Judge may also call a witness on his own.

Gen. Rule

L.Q. can be used in the discretion of the trial Judge on they will do no harm & on their use will help reach truth & expedite the trial.

Preparation of Wits.

If you properly prepare your witness before trial, you won't need L.Q. But, you must not either consciously or unconsciously tell wit. to say something untrue.

252/71

ARGUMENTATIVE AND MISLEADING QUESTIONS

Questions wh are argumentative or misleading are objectionable.

(1) Double question — two Qs. in

one.

(2.) Qs. assuming facts not yet proved. ("On was P standing when D hit him?")

(3.) Qs. wh are indefinite ~~& uncertain~~

e.g. of #2- "When did you stop beating your wife?"

e.g. of #3 (Witness says, "I saw D on 11-30-58." Atty. says, "And?"

See. 200 Mass 36, 45 / 105 Iowa 38 (a disputed fact previously to by D is assumed true for purposes of the question); 22 Okla. Crim. Reps.

22 Okla Crim Reps

25 Nov. 59

Answer of Witness (Assume question proper)

Wit. must be responsive or it will be subject to motion to strike. If ans. is relevant, * competent & material but not responsive, it may be allowed to stand. The only person who can object is the person who questions wit. So, if ans. is relevant but not responsive, the questioner may decide to let it in. 14 F.2d 888.

185

*Wigmore says either party should be allowed to object. Wigmore §785.

Wit. entitled to ans. Q. in his own way w/o being browbeat. So long as wit. is responsive.

* OBJECTIONS TO QUESTIONS *

182/93, 99

If object is to the form of question, failure to object before ans. will mean waiver of the objection. 182 Mass. 93, 99.

If the form of the Q. is OK. but the ans. is objectionable, the object. to the ans. must be made immediately. Any counsel can object to any Q that is irrelevant, immaterial or incompetent. The objection must be made promptly and you should make motion to strike. 233 Mass. 573.

(1) GENERAL OBJECTIONS: Objection should be specific. But, it may be gen., i.e., w/o assigning grounds for objection.

If gen. objection made & its overruled, you have had it unless you except to the overruling. * The consequence of a gen. objection is that upon appeal, the appellate ct. will sustain the overruling unless the evid. is inadmissable for each & every purpose (best evid., hearsay, etc.), unless the testimony is barred not by exclusionary rule but a rule of law (Parol Evid. Rule only one).

Note:
objection - goes to admission of evid.
exception - to ruling of judge.

Appeal from overruled general objection

Appeal from sustained general objection

If judge sustains gen. object. & other party appeals, sustained upon appeal. App. Cts. want to sustain trial judge at all

possible terms re matters of evid.

(2.) SPECIFIC OBJECTIONS

Here, reason(s) for objection is (are) assigned.

The Judge must be right in his ruling or it will be revd. on appeal, assuming the objet. to have been proper anyway.

OFFER OF PROOF

On objection is made & sustained, questioner can make "offer of proof" - enuf in record to show app. ct. what would have come into the record had not the objection been sustained.

* How to make "offer of proof" - ask Judge to allow you (questioner) to state what would have come in had the ~~[illegible]~~ evid. not been excluded. Should be made out of hearing of ~~[illegible]~~ JURY, but not improper if Jury hears so long as Jury is told to disregard. (ha!) - If document is the evid. excluded, offer of proof would be to have ct. number ~~[illegible]~~ it for identification & attached to record so that app. ct. can see what would have been admitted.

* If can be an objection made to a line of interrelated Qs. at the end of the line, but better to object at

* PRESENT KNOWLEDGE — REFRESHING *

Clark.

U. S. v. Riccardi (p. 203)

Refreshing of memory of larceny victim re the things stolen. Used list from indictment to refresh recollection. Opposition claimed that she was not refreshing her memory because she had not written the list herself. However, Judge asked her if she had a memory & she ans. yes. So, Ct. held that this was not past recollection recorded, but was Present recollection revived (the two doctrines).

30 Nov., 59

The two doctrines - Past R.R. and Present R.R. - are well treated here. Here, we had Present Recollection Revived to help the memory of the two witnesses. The indictment was not prepared by the wits., yet the Ct. allowed the lists to be used. The lists themselves, however, are not evid. The trial Judge determines for himself that the wits. had a personal, independent memory and knowledge of the items, and that the lists were speaking from

their own memory and not from the lists.

Qucere: Could memory be refreshed by leading questions? Yes, even on direct.

* Present Recollection Revived. *

(1.) Wit. has memory of the matter sought to be proved, but that memory is so weak as to require revival. Any proper method may be used to ~~re~~ strengthen that memory (always in discretion of Judge):
- (a.) Leading questions.
- (b.) Refreshing memoranda.
- (c.) Scent.
- (d.) Sound, etc.

The reason for anything being allowed (even a false stmt.) is that the thing used is not itself evid. The testimony of the wit. is the evid. The wit. may be cross-examined not only as to truth of what he said, but also the accuracy of his memory and whether the object used actually does refresh his memory as he, the wit., claims.

Cross-Examination

316 Mass. 307. 118 Conn. 54(2).

(2.) Thing used need not be one prepared by wit. nor any which he

120/64
85 W #4.3

is familiar. 130 Mass. 64, 85 N.H. 463.

(3.) Need not use the orig. of the writing w/in best evid. rule. Can use copy. 280 Mass. 83, 112 Fla. 483.

280/83

112 Fla 483

(4.) Time of preparation need not correspond w/ the time of incident wh is subj. matter of wit. 255 Mass. 575.

255/575

(5.) Must lay foundation.

(a.) Must show wit has some first hand knowledge and some memory.

(b.) That wit. has memory wh needs refreshing.

(c.) That the document refreshes the memory and allows wit. to testify from independent knowledge.

15 F.2d 955

49 N.D. 867

The above things are documents and must be shown to Judge as a prelim. finding of fact so that he can decide if the document can be used. 15 F.2d 955. 49 N.D. 867.

* Past Recollection Recorded *

Wit has no memory at all or one wh cannot be refreshed. In this case, (documents or writings only) documents may

be used. The evid is the writing, and not the testimony. [Note: These writings may be hearsay, but come in under an exception to the Hearsay Rule.]

Requirements:

(1.) The Best evid. Rule applies: the orig. must be produced or a satis. explanation of failure to do so. 11 Gray 242.

(2.) The writing must have been made at the time or shortly after the events recorded therein occurred. 162 U.S. 686.

(3.) Tho the writ. need not have been the author, he must have seen and approved of it as being accurate shortly after its preparation. 137 Md. 362.

(4.) Wit. must have had personal, first-hand know. of the events recorded. 319 Ill. 186.

(5.) Wit must be able to testify that tho' he has no recoll. now of the event, that he does know that the writing contains an accurate stmt. of the event. 196 N.Y. Supp. 801.

These things must be estab. as a prelim. fact before Judge

will allow the document.

119 U.S. 99

Under Fed. law, wit. must have a completely exhausted memory before this doctrine (Past R.R.) can be used. 119 U.S. 99.

239 N.Y. 307

Most of the states:

(1.) Wit's recoll. need not be completely exhausted but must satis. judge that he has no adequate memory, since the document was the evid. 239 N.Y. 307.

(2.) Wit. must read the document verbatim, but the document is the evid.

Present Recoll. Revived — the writings cannot be shown to jury during direct exam. nor can it be used by the wit. himself. 366 Pa. 336.

366 Pa. 336

49 F. 123

Right to Examine Document

If the document is to be used, before wit. sees it the opposition has right to examine it, and failure to allow examination const. reversible error. 49 Fed. 123.

183 Mass. 461

Use of Document by Opposition

Opposition can use the document upon cross-examination. 183 Mass. 461. And the opposition can have the document introduced into evid.

to impeach the wit's stmt.

2 DEC. 59

291/314

The Judge decides whether the cross-examiner can attack the cred. of the wit. on matters not brought up in direct examination. 291 Mass. 314

Memory Refreshed out of Court

315/580

20 F2d 190

Wigmore §762

Wt. of author. says that a document used to refresh the wit's memory out of ct. need not be shown to opposition. 315 Mass. 580; 20 F. 2d 190. Contra: Wigmore §762.

* OPINIONS *

Another rule re comp. of wit.

Quaere: Can wit. give ct. the conclusion he has drawn from the facts of wh he has 1st hand knowledge??= Previously the wit. of author held No. This is the old theory wh says "leave it to the jury to draw conclusions." Did not apply:

(1.) On Jury was not equipped to draw conclusion. This is on the expert wit. comes into the picture.

Gen. Rule: if the subj. matter concerning wh the wit. proposes to testify involves no particular learning training or experience

but is a matter lying w/in the knowledge of men in gen., then the wit may testify only as to facts that he observed or knows and may not give his opinion, inferences or conclusions, even tho he be an expert in the field.

If, on the other hand, the matter isn't w/in gen. knowl. of men, then a lay wit. may not give his opinion but an expert may do so.

whether the subj. matter is one w/in the gen knowl. of men is a prelim. ?? of fact for the Judge.

Note: y are areas in wh neither an expert nor a lay wit. can give opinion. 139 Pa. 149.

Quere: How do you decide whether the stmt is one of fact or opinion?? = Judge's discretion.

Hypo: "I saw the P and he was lying on the ground and was conscious." — Is the "consciousness" opinion? 210 Ala. 308 - allowed.

Hypo: D's agent operated truck wh was involved in accident wh injured P. W't said he saw the truck coming around

the curve and it appeared to be out of control. – Held, allowed. Query? 244 Mass. 327.
What is fact and what is opinion will be decided by the Judge. 110 Fed. 947.

110 Fed. 947

Lay Witnesses

COLLECTIVE FACTS DOCTRINE

Today, it is a rule of preference i.e., wit may relate in concrete terms what he knows, ~~but~~ and ~~whether~~ he will be allowed to give his ~~in~~ sum total impression ~~of it~~ of what happened. Called the Collective Facts Doctrine (eg., "The light was red." Intoxication, distance, size, color, wt., identity, age, and other similar matters may be testified to by the wit.) The sum total of his impressions is that D was 35 yrs. old, or was drunk. The wit. can give a shorthand rendition of what his impression was and need not give each little fact. Same goes for testimony re conversations. Of course, cred. of wit. ~~can~~ can be attacked on cross-examination.

(CFD)

197 Mass. 522 – ? of whether one is intoxicated is not an opinion but a stmt. of fact.

197/522

43 Conn. 9
117/122

Re smells, testimony may be by analogy. "Like a skunk." "Like burnt dynamite." 43 Conn. 9; 117 Mass. 122

Quaere: Is an opinion formed after the incident allowed?? e.g., hypo. "The train was going between 40 and 45 miles p.h." It was formed after event of crossing (R.R.) accident. Held, allowed. Aff. on appeal. So, on the impression is vivid and can be recounted, allowed. 309/363.

309/363

State v. Garver (p. 215)

Mother said her son was "in bad shape" mentally and physically. Later she said that her son was insane. - Allowed: altho' the gen. rule is that a lay wit. may testify only to facts and not to opinions or conclusions, lay wits. are frequently permitted to use so-called "short hand" descriptions, in reality opinions, in presenting to the ct. their impression of the gen. phy. cond. of a person.

HOLDING AND RULE OF LAW

4 DEC. 59

Lay Opinions re Sanity
May. Rule

A lay wit. may give opinion re sanity under this case and under the wit. of author.
Min. Rule: no opinion re sanity but inferences may be drawn from the wit's testimony.
225 Mass 521.

Min. Rule

Subscribing witness in Mass. may testify re sanity of T at time of execution of will. 127 Mass. 414. But a relative or close friend cannot. However, Mass. is moving toward the wit. of author. 320 Mass. 547: wit of intelligence may testify re sanity of T at time of will even if close friend, but that should not be an opinion, rather a stat. of fact.

127/414

Sanity of a Testator

320/547

307

Specific Areas

(1.) Gen. Rule and wit. of author. re speed - may give opinion. 274 Mass. 428, Sachs v. Horn

274/428

(2.) Re identification - lay wit. may give his opinion re a third person's identity. Mostly criminal. 105/62.

(3.) Handwriting - on lay wit. is familiar w/ handwriting or signatures of author, he may testify thereto. Many juris. say, "Even if wit has

224/125

seen handwriting or signature only once, may give opinion re genuineness." 225 Mass. 125

(4.) Value - lay wit. may testify as to value of goods or services if he has knowledge of that type of goods or service. 137 U.S. 348; 146 N.E. 2d (Mass.) 895 - opinion allowed by owner re value of his car before and after accident re F.M.V., even tho' he did not see car afterward.

137 U.S. 348
146 N.E. 2d 895

232 Ind. 328

RULE OF LAW: No opinion re ultimate issue of fact allowed, because the opinion will be mixed law and fact, e.g., "Did T have testamentary capacity?" "Did D commit murder?" 232 Ind. 328.

NOTE. Re value of services, lawyer who sues for fees due him must prove their FMV and can testify thereto. (one view.)

Esu v. Consolidated Freightways (p. 222)
Deputy sheriff of much experience in investigating accidents (auto) testified that the collision had occurred on D's side of the highway. D's objection was a "birdshot" one but still missed

the real one; competency of wit. to give expert testimony.

Jury does not have to accept the expert ~~testimony~~ wit.'s testimony.

EXPERT WITNESSES (AND EXPERT TESTIMONY)

The jury is unable or incompetent to draw inferences from the facts in the area of expert wits.

Must show 2 things to have expert wit.

(1.) Must show need for expert testimony — matter is beyond ord. and usual knowledge of mankind.

(2.) That this wit. possesses the goods and can help the jury in drawing a conclusion.

348 Mo. 501

More Libral Views

Wherever the testimony will be of aid to jury, lets have the testimony. This is the newer and more liberal view. Even says that on the matter is not entirely out of knowledge of jurors nor beyond scope of men of common experience, wit may give expert testimony.

2 S.W. 2d 421
146 A.L.R. 636

Many states (old view) +

Mass. – if matter is somewhat within the know. and experience of men of common knowledge and "expert" is merely poss. of greater sagacity, expert testimony not allowed. Only allowed on jury has no know. of the matter. 229 Mass. 421; 140 N.E. 2d 636. But, 282 Mass. 540 – liberalized the rule a bit – maybe.

28 Mass 540

[Tech. matters (lie detectors, etc., blood tests). 53 Har. L. Rev. 385.

53 HLR 385

Qualifications for experts:

(1.) Need not have formal education. May be self-taught or learned from experience in the particular area.

(2.) Need only show that the wit is of superior know. for Judge to allow.

(3.) But, on a medical opinion is required, must have the effective education of a doctor. All doctors are experts in all areas of medicine, for. e.g., Eye, ear and nose Dr. may testify re sanity. See: 94 A. 2d 680; 298 Ky. 783.

298 Ky 783

94 A.2d 680 (Md)

7 Dec. 59

State v. David (p. 225)

Hypothetical questions –
(1.) Can only use facts in the hypo upon wh evid. has actually been rec'd, or the Judge can allow use of facts to be estab.; but if the facts are not later estab., Judge may ~~[illegible]~~ strike the whole hypo.

The wit. (toxicologist) testified that death was due to carbon monoxide poisoning; relying on what he had examined and on what another wit. had opined. The wit. here was asked via a hypothetical question and opposition (D) said that it was error to allow a hypo. query wh did not allude to the other wit's. (physiologist) opinion on wh toxicologist wit. partially relied.

Issues: Is an opinion of an expert based on the opinion of another expert allowable and non-objectionable ??= If not, will the inclusion of the other experts opinion in a hypo query correct the objectionability of the testifying wits. opinion? =

Holding
Re Opinion based on other testimony

A wit. is not allowed to give an opinion based on the factual testimony of another wit. on that testimony is not incorp. in a hypothetical question. Quaere: What was the dictum here ??= The preceding was the holding, i.e., ratio decedendi.

When dealing w/ facts, you are generally dealing w/ something wh exists in the objective sense

FACTS V. OPINION

(altho it may be subjectively reported); when dealing w/ opinion you are dealing w/ [illegible] a subjective [illegible] the formulation or adding - up process of the mind giving significance and meaning to objective matters.

*a Jury is not bound by expert opinion. 284 Mass. 402

(An expert may testify either on the basis of his own first-hand knowl., or, upon 1st hand knowl. on avid of case, or kind of the case via a hypothetical query.

*Some juris. say that an expert upon 1st hand knowl. must give the facts first and then his opinion. Maj. Rule. *Some sts. say that the expert who has 1st hand knowl. need only give his opinion. Min. View. — See 15 N.Y. 210 . 188 Mass. 282.

Majority Rule

On expert has first-hand knowledge

Minority Rule

15 N.Y. 210
188/282

(An expert need not give the reasons for his reaching the opinion. The expert "expert wit." usually answers very generally in giving, if at all, the reasons for his opinion.

HYPOTHETICAL QUESTIONS On the expert wit. has no knowl. himself of the case, the hypo. query is often used. Can be based only on facts in the case as to which some evid. has been presented.

If the ct. finds that all of the facts used in the hypo are true, the opinion may well be allowed. But, if any one of the facts is found to be untrue, the opinion must be disallowed. 2 Allen 295. You may pick and choose the facts used in the hypo. — See also 59 F.2d 648.

2 Allen 295

59 F.2d 648

* Opinion based on other ~~[illegible]~~ testimony has been allowed. 182 / 503, 128 Md. 665. Cannot be based on all of the ~~[illegible]~~ case. Must specify the testimony relied upon.

182 / 503

128 Md. 665

* Opinion based on opinion — many cts. have said no, even on a hypo is used. But, the better view allows it on a hypo is used. See 82 F.2d 106.

82 F.2d 106

288 F 402

9 Dec. 59

* Cross-Examination of Expert Witnesses *

Done the same way as any other wit., but when conflicts arise, the problems also arise.

Ruth v. Fenchel (p. 239)

Expert opinions for P and D were in conflict. One said that the symptoms could not be manifested after a few hours (D). P's expert said the symptoms appeared much later.

RULE OF LAW (Majority)

Or an expert has not relied on an authoritative work as the basis of his opinion, but admits it to be author., then that work may be used in cross-exam. to impeach his cred. even tho it cannot be offered in evid. for the truth of the stmts. contained therein.

— See 267 Mass. 259, 271 Comm. v. Jordan (Mass. view).

The Fenchel case states the majority view.

§ 79(c) of ch. 233 of Mass. G.L. - statute allowing the authoritative work into evid. on expert opinions conflict., i.e., a stat. exception to Hearsay Rule. - Other states have this type of statute.

* Examination of Witnesses *

* Cross-Examination (generally) *

28 Wd. 568

(1) Leading questions allowed.

(2.) A matter of right, not merely privilege. 282 U.S. 687.

(3.) Usually follows direct. By stat. in some states (Mass.) the adverse party (P or D) can be called by other side before has been directly examined.

(4.) If the wit. is very friendly or too friendly, the judge may bar the use of leading questions. 17 Picker. 490.

17 Pick. 490

(5.) If no opportunity for cross is allowed, the entire testimony of wit. on direct may be stricken. 43 N.Y. 508. But that striking may be waived by opposing counsel, and cross can be waived.

43 N.Y. 508

*Scope of Cross Examination

Gen. Rule — much liberality. Judge should be liberal, and over-strictness is grounds for reversal. 125 Conn. 44. Discretionary.

125 Conn 44

133 S.C. 491

(1.) If wit. dies or becomes ill (e.g.) before he can be cross examined, testimony can be stricken. 133 S.C. 491.

Inability of Witnesss to carry on:

4 Grey 343
10 " 508

(2.) If wit. can't go on after cross begins, and can't finish after it begins, the judge is to decide if the testimony on cross has been substantially fulfilled, cross may be allowed. So long as it is substantial tho' not necessarily complete, the

cross examiner can't have direct stricken. 4 Grey 343. 10 Grey 508.

275 Mo. 607

RECESS OR ADJOURNMENT

7 Hill 463 (N.Y.)

(3.) If wit. dies before cross during recess or adjournment called by other counsel or Judge, direct may be stricken, 275 Mo. 607.

(4.) If recess called or assented to by cross examiner, direct testimony may not be stricken if wit. dies. 7 Hill (N.Y.) 463

Purposes of Cross Examination

(1.) To effect retraction, contradiction or change in the stmts. or story given on direct.

(2.) To compel disclosure of unfavorable elements in direct examiner's case.

(3.) To obtain disclosure of favorable elements in cross examiners case.

(4.) To discredit the wit. by impeaching his cred.

Finch v. Weiner (p. 249)

Ee of D testified as to elements of the accident. On direct, Skinner (Ee) had not been questioned re anything about the accident. Ee was again called by D and "repeated" in substance what he

had already said.

GEN. RULE OF LAW — The general rule is that u can be no cross-examination re matters not touched upon in direct. So, the testimony of 5th on cross was not allowed.

Kline v. Kachmar (p. 252) Same type stat. as Mass. statute. Here, P called D. (See 259 Mass. 46 re the problem of whether the calling immediately of your own party is direct or cross-examination.)

SCOPE OF CROSS EXAMINATION

MINORITY RULE — Cross exam allowable for any of the four purposes. Anything goes. The "Happy hunting" rule. 63 Me. 44. — Wisc. Rule. Mass. rule.

63 Me. 44
7 Pick.

MAJORITY RULE — Fed. Rule — the scope of cross is ltd. to matters brought out or touched upon in direct. Maj. view. (Vt., Pa., R.I.). Question as to on N.H. stands. See 100 Vt. 345 & 77 R.I. 55.

100 Vt. 345
77 R.I. 55

11 Dec. 59

In every state, cross-exam is proper in any sense when bearing on credibility.

All of this basically up to discretion of judge even under the Restrictive Fed. Rule. 142 F. 2d 388. 154 N.E. 2d 105 (Ill.)

Wigmore + McCormick = follow Minority rule.

 "Get Diogenes + snuff out the lamp."

* How to Effectively Cross Examine a Wit. *

Read: The Art of Cross Exam., Francis Wellman.

(1.) Must have intuition.
(2.) On-the-feet thinking
(3.) Talent required.

The tough-handed approach has faded today along w/ oratory in the court. If you tackle a witness too severely, you may not only destroy the wit. but also yourself. The jury may resent it. However, in some cases, it may be necessary.

Velvet Glove approach - throws wit. off guard and gets him agreeable.

(*) Gen. rule - never ask a question on cross the answer to wh you don't know. But, cases are won in the office:

(1.) Thorough law preparation
(2.) Thorough fact acquaintance - must know the facts altogether. Never believe your client.

Avoid "why" questions: Don't give the wit a chance to explain why on it might hurt. Don't assume that wits. and juries are dumb merely due to lack of formal education.

Don't lose your cool in court !!! You would lose your rational state + blunder if you would become angry.

* Re-Direct and Re-Cross *

[I.] Re-Direct

SCOPE — All juris. agree that scope of re-dir. is ltd. to answering new matter brought out on cross or to rehabilitation of discredited wit.

This is not a second chance of right to bring out something wh you forgot on direct. But, the opportunity for re-dir. is of right. The only times that it's not of right:

97 N.J.L. 423
310 Mass. 733

(1.) On cross was waived.
(2.) On cross was merely perfunctory and brought out nothing new.
97 N.J. Law 423 . 310 Mass. 733

[II.] Re-Cross

SCOPE — All states agree That the scope is ltd. to matters brought out on re-direct. It is NOT a matter of right, i.e., must ask judge.

Johnson v. Minihan (p. 259)
Failure to show the Jury a full picture of the situation, and that the Judge abused his discretion by disallowing re-direct because the purpose of re-direct is to rehabilitate the wit. and rebut what was given on cross - Maj. view

SETTLEMENT — Evid. of settlement of one potential P not allowed to show liab. of another P.

Because Judge failed to allow the P's counsel

a chance to rehabilitate his witness and rebut ~~the~~ ~~said~~ what was given on cross examination, error.

Although P did not open the question of the purported release, when D's counsel cross-examined and touched upon the validity and import of the writing, he opened up the subject, thereby entitling the P to the opportunity (of right) to re-directly examine witness

I The Majority View

14 DEC. 59

State v. McSloy (p. 265)

Cross-exam. of State's wit. — he said that he identified D by the blue shirt he wore. On re-direct, State estab. that though D was identified by his blue shirt, that was not the only means of identification. Ct. did not allow re-cross (not a matter of right) because ct. felt that nothing new was brought out.

Rule of Law

A wit. once examined cannot be re-examined as to the same matter w/o leave of the ct., but he may be re-examined as to any new matter upon wh he has been examined by the adverse party.

Liacos: Q. wasn't the "black hair" first brought out in the question? — Yes. And, leading questions are not allowed on re-direct nor direct. Q And, wasn't "black hair" new matter?

The trial Judge could have gone either way here, and would probably have been upheld upon appeal.
Altho' leading questions were asked, D did not object.

* CREDIBILITY *

[I.] Accrediting —

Q. Can you bolster the cred. of your own wit. before any attack has been made on his cred.? = No.
You can't show a prior consistent stmt., honest reputation. 170 F.2d 583.
* Exception: re identification in crim. cases, due to its importance, a prior consistent identification of D before ct. A by your witness can be shown before impeachment.

[II.] Discrediting —

* Purposes: (A) to weaken effectiveness of story of wit. by attacking the wit. himself and not the story directly. want the Jury to see that the wit. should not be believed either across the board or on certain matters.

(B.) To avoid a D.V. on the wit. is the key wit. When you have a wit. who gives clear, positive ~~direct and undisputed~~ testimony which is not improbable and believable and that wit. is not ~~impeached~~ impeached, D.V. so on this type of

175 Minn. 287

wit., impeach him to avoid a D.V.
* The minority view says that even here, no D.V., but a matter for jury. 221 Mass. 103. Even here, impeach the wit. for safety.

→ 221/103

* Methods of Impeachment:
(1.) Show self-contradiction of wit. — using prior (i.e., before trial) inconsistent stmts. or inconsistent stmts. made on the stand.
(2.) Bias, interest or corruption can be shown.
(3.) Attack character of wit. by showing crim. convictions, dishonesty, and the like.
(4.) By showing a defect in witness's capacity to observe, ~~fail or remember~~ recollect or recount.

Another method wh may be called impeachment by some is by producing contradictory evid. — Not really impeachment. Merely contradictory stmts. or evid. wh the jury has the option to believe or not believe.

May impeach by examination of that wit. or by use of other wits.

Johnson v. Balt. and O. R.R. (p. 269)
Can you impeach your own wit.? Jury did not believe the wit.

At C.L. — (1) you could not impeach

a wit. you called, and (2) you were bound by what he said.

Majority Rule

Today, you are not bound by the testimony of the wit. you call. But, re the first part of the C.L. rule, in the major. of juris. apart from statute, the C.L. rule still stands. (Re not being bound, 200 Minn. 530). Some States you can attack your own wit. by showing prior inconsistent stmts. provided (1) that the wit. becomes hostile after taking the stand (2) that the judge declares the wit. to be hostile, and (3) provided that the hostility is a surprise to examining counsel. 102 Pac. 57 (Okla.). Mass. has a stat. wh dispenses w/ the requirement of surprise as to hostility, but you must give wit. a chance to explain the prior inconsistent stmt. before you can impeach the wit.'s credibility.

200 Minn 530

Hostility of wit.

102 Pac. 57 (Okla.)
Ill. Soc. 1743

121/433; 304/379 – inconsist. stmts. not probative. Only for purpose of impeach.

Evidentiary effect of impeaching evid. and testimony:

The evid. or testimony used to impeach the wit. has no probative value as support for your case. It's only effect is to impeach. So, when wit. B gives testimony the effect of which is to impeach wit. A, the testimony of wit. B cannot be considered as evid. in support of any party's case. 121 Mass. 433; 304 Mass. 379.

16 DEC. 59

* Prior inconsistent stmts. have no probative force. If such a stmt. is brought in for impeachment or cred. purposes, opposing counsel must ask the Judge to instruct the jury that they cannot consider the stmts. as evid. If he doesn't, the jury may take the stmts. as true.

* Suppose both parties call the wit.
(1) One view is that one can impeach by using prior incon. stmts. 238 N.Y. 194.
(2) Another view – both can impeach by using prior incon. stmts. 414 Ill. 251.
(3) Third view – no one can. 100 Vt. 395.

238 N.Y. 194
414 Ill. 251
100 Vt. 395

* Collateral Issues Rule *

This deals w/ contradiction of wit. by attacking an irrelevant matter of his testimony.

A wit. may not be impeached by extrinsic evid. about collateral matters. 307 Ill. 51; 73 N.H. 138.

Quaere: The question is what is collateral? The facts will vary the result. Criterion of materiality deter. what is collateral. (What is immaterial is inadmissable.)

* Any facts wh would be independently admissable if not brought out on cross are not collateral. So, collateral issues are those which usually bear solely on credibility.

Any facts wh are relevant to the substantive issues in the

133
D 29

case (i.e., material) are not collateral.

On a collateral issue, once the answer of the wit. has been given, you are bound thereby.

All facts wh would be independ. provable to impeach a wit. on cross, are not collateral. Any of the four methods of impeachment would be such facts. So, on the wit. denies being biased, he may be rebutted by counsel.

See 28 9 N.Y. 482 for another nice area.

* Bias, Interest and Corruption *

State v. Elijah (p. 280)

The wit. here was jealous a bit because his interest extended beyond the mere intercourse relationship, and D had had relations w/ the prosecutrix.

It is not immaterial to show, collaterally, bias.

MAJORITY VIEW

The majority of states require that before the wit. can be impeached by calling other wits. to show bias, interest and/or Corruption, you must first ask the wit if he is biased, etc. (i.e., lay a foundation). 133 Ark. 16.

133 Ark. 16
229 N.Y. 325

Minority view — the wit. need not first be asked of his bias, etc. before another wit. can be called to show the bias, etc. 229 N.Y. 325. Mass., Me., N.H. are minority.

* Prior Convictions *

People v. Buford (p. 289)
Crim. D'ft cred. can be impeached like any other wit.'s cred. can be impeached.

Conviction of a crim. not a bar to competency (except perjury), but it does go to credibility.
The reasoning is that a conviction of crime shows less reliability. Because of fallacies in that, many States have stats. limiting the rule to felonies (Calif) or felonies and crimes involving moral turpitude.
143 Me. 380

Statutory Limitations

18 DEC. 59

STATUTE OF LIMITATIONS ON USE OF CRIM. RECORDS:

In Mass., both misdemeanors and felonies can be used. Mass. Gl. c. 233, sec. 21 –
(1) 5 year time limit from date of sentence, unless wit. has been subsequently convicted of a crime w/in 5 years of his testifying.
(2.) A felony of conviction resulting in ~~a~~ sentence, suspended sentence or (~~some~~ other sanction not involving imprisonment in a State, fed. or county jail) will permit a 10 year limit on usability.
(3.) On a state prison sentence, was

record of
imposed, the prior conviction cannot be used ~~later~~ if not w/in 10 years from the date of the expiration of the minimum sentence.

You can impeach a crim. D if he takes the stand just like any other wit. so long as you follow the rules of that state by the use of his crim. record.

Records of conviction cannot be used to show guilt. The only purpose: attack credibility

!! Caveat !! It is dangerous to put your D-wit. on the stand. Only do so when you feel you're going to lose the case anyway!

Gen. rule: you can't show prior crime to prove guilt.

Exception: only if a common scheme of activity (crim.). e.g.,

Hypo: On 9-1-59, X steals hit, chisel, crow bar, dynamite caps from a hardware store. On 9-3-59 X is caught holding up 1st Natl. Bank. The 9-1-59 crime can be shown even tho' there was no conviction.

240/264, 3-F-311 Read
263 Fed 832
62 Ark 203

Rule of law: Record of Conviction can only be used.

Definition: Conviction = verdict of guilty, Judg. of guilty and sentence. See 240 Mass 264,

310-311 ; 263 Fed. 832 ; 62 Ark. 203.

Oral testimony re prior convictions no good. But, you could have wit. read the record. If wit. denies being the same John Jones as on the record pertains, call a person who was in ct. the day of the prior conviction, and have him authenticate the record.

The conviction speaks for itself. 304 Mass. 268

You need lay no foundation before you present the record.

Prior Bad Acts

People v. Sorge

One act (out of four) of abortion had resulted in conviction, not for abortion but for practicing medicine w/o a license. Wit denied all. The question was whether the matter was collateral, and if so, was he bound by her orig. answer which denied the former bad act.

GENERAL RULE OF LAW

a) like any other wit., may be interrogated upon cross in regard to any vicious or criminal act of his life that has a bearing on his credibility as a wit.

You are never bound by the first answer of the wit. Even on direct

Fed. Rule 33 - must have conviction /46/$12

examination. It is not improper for a dist. atty. to continue his cross about a specific crime after a D has denied committing it. As long as he acts in good faith in the hope of inducing the wit. to abandon his negative answers, the prosecutor may question further.

4 JAN. 60

* Impeachment by Use of Prior Inconsistent Stmts. *
Denver City Tramway v. Lamont

Wit. said he never made stmts. prior to trial that the motorman ought to be lynched. Two other wit's. said he did make such stmts.

Ct. discusses from legal pt. of view: before you show wit. making prior incon. stmts., in some juris. you must first lay a foundation by asking wit. if he made such stmts.; gives wit. a chance to admit, deny or explain any such stmt. Cannot bring in evid by + to wit. unless you first lay foundation.

Here, wit. said y was no negl. on part of motorman. If this had been collateral issue, cannot bring in other wit's.

Here, Wit. on stand testifying that motorman was a very careful person.

Opt Evid. to show wit. once said que motorman should be lynched. This is inconsistent. If the D's wit. had not taken the stand, could his prior stmt. be admitted into evid.? And, if so, could it be admitted for truth it contained (re negl.)?

Mass. does not follow formulation rule except on you impeach your own wit.

Implication that collateral issue may be used in such situation.

Reputation for Veracity

State v. Teman

D called as his own wit. 2 wits. said D not known in community for honesty. Judge instructed jury that this latter evid. is admissable solely for deter. credibility of W. Once D subjects himself as wit., this can be done.

Here, D was a crim. D. Ord., the character of D may not be attacked initially to show guilt. But, on D / takes stand, the veracity may be attacked. When D or any other wit. takes the stand, this may be attacked — reputation. This is wt. of author.

Quaere: Question then arises, suppose attack of this type is made, can you bring his evid. of good reputation to rebut contra evid.? = Yes. But, you cannot

bring in evid. of a good reputation until the reputation has been attacked.

If a wit. is impeached by a method other than an attack on his reputation, you cannot bring in rebuttal evid. to show that he has a good reputation.

Gen. Rule

A wit. is not allowed to be shown of good character + reputation for truthfulness + veracity simply because he has been impeached, but only when reputation has been attacked.

This impeachment will come in cross. Rehabilitation will come in redirect, or bringing in another wit. for direct on reputation matters.

W_2, who is called to impeach W_1, must be able to say he is familiar w/ general "truth and veracity reputation" of W_1 who is being impeached, in the community in wh W_1 resides. — C.L. Rule. So, of course W_2 must know who W_1 is. Then you question:

(1.) Whether W_2 knows W_1.
(2.) Reputation of W_1
(Some states) (3.) Whether or not W_2 would believe W_1. Mass. + majority allow this third quaere.

Under C.L. only important rep. was one in community on W_1 lived. Today + prof

may be taken from community on W, I resides, works and/or associates.

6 JAN. 60

Newton v. State (p. 315)

Counsel asked wit. how he testified in his prior trial and whether he was convicted. -Ct. held this improper impeachment methodology: "If the purpose of examiner was to impeach he cred. of the wit. by showing that he had been convicted of crime, he should have asked him that question directly, or if he had intended to show that he had in some other case sworn to stmts. contrary to his testimony in the instant case, he could have been asked whether he had made such conflicting stmts.

W.t. of author. here – improper method of impeachment here.

Another way would be to show lack of capacity to observe, recollect, relate or communicate the facts. Lack of capacity could be phy. or mental, or could be factual. (eg., wit. was drunk or doped up or asleep or unconscious at the time of the incident, or, that a big bldg. blocked the line of vision. 222 Iowa 391; 139 N.Y. 73) Or, senility of old person (but be cautious here w/ jury).

* REHABILITATION *

Restoration of cred. of impeached wit. is the purpose.

People v. Singer (p. 318)

Rule of Law

When the veracity of a wit. is subject to challenge because of motive to fabricate, it is competent to put into evid. stmts. made by him consistent w/ what he says on the stand, made before the motive arose.

Methods:

(1.) If wit is impeached by impeaching wit (IW), you may rehabilitate the impeached wit. by impeaching the IW.

(2.) Deny impeaching facts by use of wit. to the contrary.

Suppo: A = primary wit.
I = IW
B = rehabilitating wit.
I says A has bad rep. B brought in by A's counsel + says A has good rep.

(3.) Confession and avoidance - made A say on redirect that he did make the stmt. but that, e.g., he did not have all of the facts at the time. [Don't ask why on cross.]

Use of Prior Consistent Stmts. To Rehabilitate

Gen. Rule - you cannot use prior consistent stmts. to rehabilitate. Mere consistency does not indicate greater degree of veracity or cred. 34 Tex. Crim. Rep. 89(?); 155 Mass. 60.

Bias or Lack of Capacity

If a wit. is attacked for bias or lack of capacity, prior consist. stmts. cannot be used to rehabilitate unless you can show the statement was made before the bias or

, 220 Ga. 407

incapacity arose. 122 Va. 407.

Prior Inconsistent Stmts.
230/222

Maj. view & Mass. (230/222) — on impeachment has been by prior inconsist stmts., prior consist. stmts. cannot be used.

Three areas on prior consist. stmts. can be used to rehabilitate:

(1.) On a charge of bias or recent incapacity, allowed ~~when~~ on stmts. were made before bias or incap. arose. 23 Wendell (N.Y.) 50.

23 Wend. 50

(2.) In crim. case on accomplice testifies & it's inferred that he's motivated by promise of immunity, allowed on made prior to rise of hope of immunity. Singer Case.

(3.) Recent Fabrication Rule — on it is charged that stmt. on stand is recent fabrication, allowed so long as prior to time alleged that the fabrication was constructed. 145 Fed. 22 73.

On prior consist. stmts. used for purpose other than

299 Mass 55
94 NH 52

rehabilitation (e.g., corroboration), [redacted] allowed.
In sex cases, prior const. complaints made shortly after the act may be shown at trial. 94 N.H. 52. Degrees of allowability vary. 299 Mass. 55 (allocks many details of prior consist. / statts.).

III * CIRCUMSTANTIAL PROOF *

Another method of proof.

C. Evid. can be, in many areas stronger than direct evid. These things involved are inferences: conclusions of fact, wh may be reached from proof of other facts.

Def. of Inference

Inductive reasoning (rather than deductive) used in law.

Direct evid. - evid. to the precise pt. at issue. May be testimonial or non-testimonial in nature.

DEFINITION

Cir. Evid: evid. relating to series of facts other than those at issue wh tends to estab. a fact in issue. May be test. or non-test.

Wigmore - says evid. is either testimonial or circumstantial.

8 JAN. 60

Two Classifications of Evid.

Source
(1.) Test
(2.) Non-test

Nature or type
(1.) Direct - evid. to the precise pt. at issue.
(2.) Circumstantial

Evidence v. Proof

* Evid. that submitted to triers of fact for deter. of issues submitted.
* Proof - that amt. of evid. which will estab. the fact to the satis. of the Tribunal.

All evid. is admissible unless some rule of evid. excludes its.

* Three basic objections to the subj. matter offered, any one of which is sufi to exclude:
(1.) Immaterial,
(2.) Irrelevant, or (not and)
(3.) Incompetent
These deal w/ admissibility of evid., not competency.

Evid. must be relevant. If not, inadmissible because it lacks * probative worth (i.e., doesn't help the ct in any way because it doesn't tend to estab. the proposition for wh it's offered.)

If evid. is logically probative, it is admiss. unless excluded by some other rule of exclusion. Logically probative = inherent value from pt. of view of common sense or gen. experience. If proof of A tends to prove B, then A is relevant + has inherent probative worth.

Relevancy v. Materiality — Materiality — re the issues of the case, and this is deter. by the pleadings wh in turn reflect the pertinent substan. law.

hypo: P v. D in b/k. K alleged to be breached on 1-5-59. P has B/P certain things in the K action. D takes stand and says that he wants to show by P b/p a K w/ D in 1958. — Objection on grounds of immat. would stand.

hypo: P v. D on P/N. D alleges payment in pleadings. At trial, D tries to allege fraud. Unless the pleadings can be amended, the allegation of fraud is immat.

Competency — wit. not the proper person to testify (hearsay rule. basically one of comp. or incomp. of wit.) on this point.

So, problems of comp. relate to the source of the evid.

"Inadmissable" - encompasses any reason for exclusion.

Relevancy - whether evid. tends to prove the issue. Must be legally relevant.

Logical Relevance

Not same as logical relevance - fact A is logically rel. to fact B when it is so related in the common course of events either taken by itself or in connection w/ other facts and it proves or renders probable the past, present or future exist. of fact B.

Legal Relevance

Legal relevance - blends probative value w/ materiality. 72 Me. 531, 537: "Relevancy is that wh reduces to proof of a pertinent hypothesis. Hence, its relevant to put into evid. any circumst. wh. tend to make the proposition more or less probable. i.e., must bear on the issues (be material). — A third factor upon wh evid. may be excluded as being legally irrelevant: public policy. This is used by cts. as part of the safeguards

to protect the parties from the human beings on the jury, or vice versa.
Expressions of this policy: (Reasons)
(1.) Risk of prejudicing the jury.
(2.) " " confusion of issues.
(3.) Danger of unfair surprise to opponent.
Sometimes a fourth reason:
(4.) Risk of use of undue amt. of time wh would not be worthwhile. 145 Mass. 23.

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(1.) Risk of undue prejudice — Can't let the jury be swayed by their emotions too much. Ou the evid. has relatively small or ltd. probative value, it will be excluded on it will unduly prejudice the jury. Not the mere fact of arousing prejudice or hostility, but a balancing of the danger of the value. If the " outweighs the ", it will be excluded.

(2.) Risk of confusing issues - again if evid. offered is logically relevant but of ltd. probative value and would tend to confuse and befuddle the issues, excluded. A balancing process again up in the discretion of Judge. This is broad enuf to cover reason #4.

(3.) Unfair surprise — a cynic's policy.

Attempt to prevent fraud + chicanery. If a party is offering evid. wh is so devised that it not only surprises the other party but also makes it clear the other party has no chance to refute it y, then whether true or not, it will be excluded. y must NOT be unfair surprise!

Precedent helps also to decide what will or will not be legally relevant.

future of hearsay impeaching yourself