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ADMISSIBILITY OF EVIDENCE AS TO TESTIMONY GIVEN AT A FORMER TRIAL TO SHOW THAT SUCH TESTIMONY WAS INCONSISTENT WITH THAT GIVEN AT A SECOND TRIAL.

In a recent New York case the Court held that a witness who was present at the former trial, and heard the testimony and remembered the substance of it was a competent witness to show that such testimony at the former trial was inconsistent with that given at the second trial. *Mc Rorie v. Monroe,* 203 N. Y., 426.

It appeared that at the trial of the case it became very important for the defendant to show that the plaintiff's testimony varied from the testimony given by him at a former trial of the case, and to show this inconsistency he introduced a witness who was present at the former trial, and heard the testimony which the plaintiff gave and remembered it.

It is a well established rule of evidence that declarations under oath are admissible at a subsequent trial if the person against whom the evidence is to be used has had an opportunity to cross-examine the witness when the testimony was taken, and the question in issue is the same as in the proceeding in which the testimony was taken, in the following cases: Where the witness who testified is dead; or physically or mentally incapable of being present at the trial; or has been kept away from the trial by the adverse party; or, in civil cases, is out of the jurisdiction of the Court, or cannot be found. *Stevens Digest,* Art. 32 and note.

In this class of cases the manner of proof of the previous testimony is not governed by any well defined rule which is applicable in all cases. If the testimony has been written down by a stenographer, or other person, such statements form the bases of proof. If the testimony has not been written down, the evidence of any one who heard it and remembered it is sufficient. *Steward v. Bank,* 43 Mich., 257.

There has been some conflict in the cases in England as well as in the United States as to the exactness required of the witness in repeating the testimony. One line of cases holds that the witness must repeat the testimony with literal exactness, the other and more liberal view, that it is sufficient if the witness can state the whole substance of the former testimony. It is the generally accepted rule that it is not necessary that the precise language of the former testimony should be repeated. This would naturally follow from the rule allowing a person who heard the testimony to be a witness, for it would be impossible for such a person to give the exact language. *Wagers v. Dickey,* 17 Ohio, 439.

This class of cases should be distinguished from the principal case, for in the one case the witness is before the Court, and in the other he is not within its jurisdiction. The purpose for which the testimony of the witness was admitted in the principal case

was to show that the plaintiff's testimony at the former trial was inconsistent with that given at the first trial, and therefore he was capable of making errors in his testimony, which affects his capacity to testify. In other words both statements cannot be correct, and therefore he shows a capacity to err. It is the repugnancy of the two statements that is fatal. The question which is before the Court is what is the proper method of showing this inconsistency?

Statements made at a former trial are matter of record and it is a general rule that the minutes of testimony of the witness taken at a former trial, when properly proved may be read in evidence to impeach the same witness on a second trial. *Smith v. State,* 28 Ga., 19. The most natural method is to place the two contradictory statements side by side, and as both cannot be correct one of the statements must have been spoken erroneously. It is oftentimes hard to attribute this error to any specific fault. It has often been said that a prior Self Contradiction, "shows a defect either in memory or in honesty" of the witness.

Another way of proving testimony given at a former trial is by witnesses who were present and heard the testimony given. This testimony may be in the form of a stenographic report, memorandum, or notes, or may be given by a witness who heard the testimony given and remembered it.

In the case of *Olds v. Powell,* 10 Ala., 393, a witness called to impeach another witness, swore that on a former trial the witness had sworn differently. On cross examination he admitted he had taken a memorandum of what the witness had testified on the former trial, which was correct as far as it went. The Court held that the memorandum might be looked at by the witness himself for the purpose of refreshing his memory of the facts, but that it was not an instrument of evidence and therefore improper to go to the jury. In *Pound v. Georgia,* 43 Ga., 89, the counsel for the plaintiffs offered in evidence testimony in writing of a witness taken down by a person who was present at the former trial. The Court held that such testimony when properly proven could be offered in evidence to discredit the witness' testimony in whole or in part.

Where a witness was present at the taking of a deposition of a party to the record, such witness may be permitted to testify to the admissions and declarations made by such party, notwithstanding the fact that the declarations and admissions were reduced to writing, and embodied in a deposition. *Deitz v. Regnier,* 27 Kansas, 94. In the case of *Pearce v. Farr,* 10 Miss., 54, the Court held that where a witness has testified to facts, in a case of assault and battery before a justice of the peace, and the witness testifies again at a subsequent trial, it is competent to introduce the justice of the peace before whom the first trial was had, to prove what the witness swore to, in order to impeach his testimony. In the case of *State v. Mc Donald,* 65 Me., 466, the Court held that a witness may be impeached by showing that he testified differently at a former trial, and his testimony may be proved by anyone who heard and recalled it. There is no rule of law which makes the stenographic report the only competent evidence in such a case.

The foregoing decisions seem to establish that the record furnishes the strongest evidence of what a witness testified at a former trial, but it is not the only evidence admissible to impeach his testimony. Testimony taken by counsel or his stenographer may be offered in evidence when properly proven. Former testimony may be proven by witnesses who were present and heard the testimony given. In such cases notes taken by them may be used to refresh their memory by reference to them, although they are not proper evidence for the jury. If the witness is able to repeat the substance of the testimony at a prior trial, he is a competent witness, to show that such testimony was inconsistent with that given at a second trial.

WAIVER OF STATUTORY QUALIFICATIONS OF JUROR IN CAPITAL CASES.

The Court of Appeals of New York held, a few months ago, in *People v. Cosmos,* 98 N. E., 408, that the defendant even in a capital case might be deemed to have waived the fact that one of the jurors did not possess the statutory qualifications of a juror. In this case Cosmos was found guilty of first degree murder, "upon evidence which amply supports the verdict." After the imposition of sentence, counsel for defense moved to set aside

the verdict, on the ground that one juror was disqualified because he did not possess the property qualifications necessary for a juror under Art. 16, Sec. 502, of the Judiciary Law of New York. It appears that in this case the juror told the sheriff who served notice on him that he was not qualified, but he was accepted by both sides without challenge and his disqualification did not appear until after the verdict. The Court, while admitting, as is undoubtedly the well settled rule, that in absence of a statute the defendant's express consent to a trial by less than twelve jurors is void, held that as to a mere technical objection, which it does not appear prejudiced the defendant in the least, there can be no new trial; if a challenge is not interposed the defendant must be deemed to have waived the objection which might have been taken.

The argument in favor of the rule in the principal case was chiefly on the ground of convenience and necessity; any other holding, it is said, "would be no less intolerable than impractical," and would "place a premium upon the neglect to ascertain whether a juror is qualified." While in these days the demand is unquestionably for simplification in criminal trials, and fewer appeals and objections as to mere technical details, yet in a question of life, rules founded on mere "convenience" should never be allowed to prejudice the strict rights of a defendant.

On this point the authorities are by no means agreed, and this is recognized in the principal case. In *Thompson on Trials,* Vol. I, Sec. 116, it is said that " the mass of American authority, grounded upon considerations of convenience and public policy, is opposed to the strict rule"—the principal case representing the liberal rule. In looking up the authorities it will be found, however, that there is quite a strong dissent, and that many of the cases cited as supporting the liberal rule do not support the principal case.

In the principal case it is said that Indiana supports the liberal rule, citing only *Croy v. State,* 32 Ind., 389. That was a case merely of malicious trespass, and a new trial was refused merely because one juror was not a "householder" as required by statute. This case was decided in 1869. But in *Block v. State,* 100 Ind., 351, decided in 1884, a murder case, the Court held directly con-

trary to the principal case, saying, "It may be that the objection to Grayson's want of qualification to sit as a juror in this case worked no actual injury to the appellant, but however that may have been we cannot afford to make the precedent which would be established by our holding that Grayson was a competent juror." The principal case also relies on *People v. Sanford,* 43 Calif., 29. This was a case of murder, and a new trial was not allowed because of incompetency of a juror, but it was distinctly said in this case it was so held because defendant "took his trial before him with a knowledge of the fact" which made him incompetent. This is enough to distinguish it from the principal case and put it within the strict rule.

Massachusetts is considered as holding the strict rule, relying on *Wassum v. Feeney,* 121 Mass., 93 (1876), a case of mere tort. This case was cited with approval and said to be "in accordance with the great weight of American authority" in *Kohl v. Lehlback,* 160 U. S., 293, 301—a case of murder strongly supporting the principal case. But later, in *Rant v. Carpenter,* 187 U. S., 159 (1902), a will case, it was said to be in the discretion of the trial judge.

The English authorities now support the liberal rule, although one old case, in Willes's Rep. 484, a verdict for damages was set aside because of disqualification of juror. The leading cases, *Hill v. Yates,* 12 East, 228, and *In re the Chelsea Waterworks Co.,* 19 Exchcq., 730, were both civil cases, however.

Capital cases which support the principal case are rare. *State v. Bunger,* 14 La. An., 465 (1859) merely says a verdict cures the defect. In *Costly v. State,* 19 Ga., 614 (1856) the opinion says, "It is well settled in Georgia that all objections must be made before swearing in of the jury." But in a later civil case, *Georgia R. R. v. Cole,* 73 Ga., 713 (1884) it was said: "Although the verdict may have been a proper one under the evidence, yet if it was rendered by a jury of which two members were incompetent to act, it was no lawful verdict and properly set aside." *State v. Jackson,* 27 Kan., 581, seems to support the principal case directly. Verdict of first degree murder was refused to be set aside because two of the jurors might have been challenged, but Court said, "There is no provision whatever of either the

Constitution or the statutes that in terms makes such persons incompetent to serve as jurors," while there was in the principal case. *Hite's Case,* 96 Va., 489 (1898), was decided on a statute which expressly forbade exceptions to jurors after they were sworn because of legal disabilities. *State v. Patrick,* 3 Jones L. (N. C.), 443, was a case of murder by a slave. A new trial was not granted, but the thing held waived by the defendant was a mere "privilege" and not a statutory disqualification as in principal case.

The leading case laying down the strict rule *contra* to the principal case is an old Maryland case, decided in 1792. *Shane v. Clarke,* 3 Harris & McH., 101. This was a case of assault and battery, and the entire opinion is, "a non-juror is totally incapacitated to serve on a jury: let there be a new trial." *Quinn v. Halbert,* 52 Vt. 353 (1880) in applying the strict rule, gives strong reasons for it—"The defendant by the Constitution had the right to a trial by jury which means a legal jury, or a jury of those who could lawfully be called to act in that capacity. Defendant not being made aware of the disqualification until after the trial was closed, did not waive it." They say justly that it would be different if he had "knowingly submitted" to this juror. *Eastman v. Wright,* 4 Ohio St., 156, laid down the strict rule, properly limiting it to cases where the defendant was not negligent. Again in *Watts v. Ruth,* 30 Ohio St., 32 (1876). *Territory v. Abeita,* 1 N. Mex., 545 (1873), while denying new trial in this case, says it would be otherwise if "it appeared that the grounds of objection were previously unknown to him" (the defendant). A Maine case, *Lane v. Goodwin,* 47 Me., 593, granted a new trial under like conditions, saying, "These facts have been repeatedly held sufficient to authorize the setting aside of a verdict and ordering a new trial."

The reasons on which the strict rule is based seem to be presented most strongly in *Hill v. People,* 16 Mich., 351. A new trial was granted here in a capital case, *contra* to the principal case. The Court argues: "The law does not recognize him (an alien) as a juror at all, and in legal contemplation the case is to be treated as if he had never been placed upon the jury; if not still worse as an outsider who had no right to participate in their deliberations and may have had an improper influence on the verdict.

It is the duty of the Court to see that the constitutional rights of a defendant in a criminal case shall not be violated, however negligent he may be in raising the objection." They say here—and it is answered in none of the opinions favoring the liberal rule—that it is the duty of the State to furnish a legal tribunal, and this means qualified jurors. In 1873 Judge Cooley supported the case strongly, while limiting the rule to cases of felony, and refusing to apply it in a civil case. *Johr v. People,* 26 Mich., 427 (1873).

The case of *Guykowski v. People,* 2 Ill., 476, while being practically overruled in the later case of *Chase v. People,* 40 Ill., 352, contains reasons for the strict rule which the later case did not attempt to answer. It is said in this case: "Accused in capital case stands on all his rights, and waives nothing that is irregular." A juror "cannot be rendered competent to serve by the presumed assent of the accused because the law has not admitted him to act in such capacity. It may also be fairly presumed that it is incumbent on the prosecution to take care that the jurors were competent and legally qualified. The verdict is a nullity, not having been obtained as the law required." The Indiana Court in *Rice v. State,* 16 Ind., 298, takes the same view. "An accused person has a right to presume that the jurors called to try him are competent, and he need not anticipate possible objections unless he has notice that they exist or some reason to suppose that they exist. He is guilty of no negligence in relying upon the statements of the juror and trusting to the state to put him on trial before an impartial and competent jury."

While probably the weight of authority, taking all classes of cases together, is in favor of the principal case, and it has "convenience" on its side, it is believed that the strict rule as applied to capital cases, when the defendant has not been negligent, and has not learned of the positive statutory disqualification of a juror until after verdict, has reason and justice in its favor, and is supported by creditable authority.

LIABILITY OF INSURER WHEN INSURED IS EXECUTED FOR A CRIME.

The authorities are not uniform as to the liability of the insurer in the event of the death of the insured in consequence of the

known violation of the law when the life insurance policy contains no clause exempting the insurer from such liability. *Vance on Insurance,* Sec. 200, states that "Most policies of insurance contain a clause exempting the insurer from liability for the death of the insured in consequence of the known violation of the law or at the hands of justice." Of course, no question arises when the policy contains such a clause.

In the recent case of *Northwestern Ins. Co. v. McCue,* 223 U. S., 234, the life insurance policy did not contain any clause exempting the company from liability under such circumstances, and it was held that death at the hands of the law in execution of a conviction and sentence for murder was not covered by a policy of life insurance, though such manner of death was not excepted from the policy, there being no question of the justice of the sentence.

The decision in the principal case is in accordance with the judgment rendered in *Burt v. Union Central Life Ins. Co.,* 187 U. S., 362. The decision of the Federal Court was not based upon the theory that the question as to the guilt of insured was *res adjudicata,* but said that to hold otherwise would be against public policy. The Court in construing the contract states that the policy did not insure against his legal execution, and if death was the result of a legal execution, then the condition in the policy of natural death, upon which it was to become payable, had not occurred. The Alabama Court in *Supreme Commandery K. of G. v. Ainsworth,* 71 Ala., 436, declared that risk is the material element of the contract of life insurance, and that "it cannot be in the contemplation of the parties that the assured by his own criminal act shall deprive the contract of its material element; shall vary and enlarge the risk, and hasten the day of payment of the insurance money." Accordingly in that case suicide was implied as an exception to the liability of the insurer. Upon the same ground of reasoning, McKenna, J., delivering the opinion in the principal case, said that the interest of the insured in the company was fixed by the amount of his insurance. Continuing the argument the learned judge observed, "But what constitutes his title or right? Necessarily his policy. What entitles him to a realization of the benefits of his membership? Necessarily, again, his policy, if the manner of his death be not a violation of it."

The English court in *Amicable Society v. Bolland,* decided by the House of Lords in 1830, and reported in 4 Bligh's N. R. 194, enunciates the doctrine laid down in the principal case. In that case one Fountleroy insured his life with the Amicable Insurance Society and soon afterwards committed a forgery on the Bank of England. For nine years he continued to pay the premiums, but was finally apprehended and declared a bankrupt, respondents being his assignees. The question presented to the Court was whether the assignees could recover under the circumstances. The Court declared that no liability rested upon the insurer. The Lord Chancellor said that if the policy itself had stated "that in the event of his committing a capital felony, and being tried, convicted and executed for that felony, the assignees shall receive a certain sum of money," such stipulation would be absolutely void upon "the plainest principles of public policy." Such a provision, if valid, would encourage crime and remove a restraint which continually operates upon the minds of persons who contemplate crime. Where an express provision of this description would be void the Court will not by implication read into the contract a stipulation which is contrary to public policy. "Death at the hands of public justice works a forfeiture of all right to indemnity under a policy, whether it does or does not contain such stipulation." *May on Insurance,* Sec. 326.

In the case of *Bix v. Lanier,* 112 Tenn., 393, the liability of the insurer was not involved. The question was as to who would be entitled to the insurance money after it was paid over by the insurer. In this case the husband insured his life, making his wife beneficiary under his policy in case she should survive him. He killed his wife and then committed suicide. The administrators of the husband and the administrators of the wife both claimed the insurance money. The Court held that the incapacity of a man's administrators to receive the proceeds of a policy on his life which had been assigned to his wife, because he wilfully took her life, does not cause their escheat to the state, but they will pass to her distributees as if the husband had never been in existence. The Court states, "The property never vested in the husband. Therefore he had nothing to forfeit. It is clearly not in conflict with that section of the Constitution which states that no convicion shall work corruption of blood or forfeiture of estate."

But the Illinois Court in *Collins v. Metropolitan Life Ins. Co.*, 232 Ill., 37, after a careful consideration of the opinion in *Amicable Society v. Bolland, supra,* declared that it was no defense to an action on a policy of life insurance that the accused was executed after a conviction for crime unless the policy contained a provision relieving the company in express terms from liability under the contract in case of such contingency. Vickers, J., delivering the opinion of the Court, observed that at the time *Amicable Society v. Bolland* was decided the doctrine of forfeiture was still in operation in England. However, the Lord Chancellor in that case made no reference to the doctrine of forfeiture for conviction of felony, but based his entire opinion upon the grounds of public policy. From the Constitution of Illinois Vickers, J., in *Collins v. Metropolitan Life Ins. Co., supra,* quoted the following section: "All penalties shall be apportioned to the nature of the offense, and no conviction shall work corruption of blood or forfeiture of estate." "If," continued the learned judge, "a man who is executed for crime has at his death $1,000 in real estate, $1,000 in chattels and $1,000 in life insurance payable to his estate, his real estate descended to his heirs, and his personal estate to his administrators, but the $1,000 life insurance must be left in the hands of the company who has received the premiums, because it is said to be contrary to public policy to require the company to pay, lest by doing so it lend encouragement to other policy-holders to seek murder, and execution therefor, in order that their estates or heirs might profit thereby. We know of no rule of public policy in this state which will enforce this species of forfeiture." It was held further that the insured had complied with all the contractual obligations since premiums had been promptly paid, and that justice required the insurance company to fulfill its obligations by paying over the money to the proper beneficiaries. It is evident that the Illinois Court considered the doctrine of forfeitures the true doctrine upon which the English Court in *Amicable Society v. Bolland* reached its conclusion.

A further exception to the foregoing doctrines is stated in *Lang v. Ins. Co.*, 110 N. W. (Nebr.), 1110, where it is stated that suicide will not defeat a recovery upon a contract of insurance not procured by the insured with the intention of committing suicide, unless the contract so provides in express terms. But if it was procured with such intent it is a fraud on the insurer and will defeat a recovery.

"Where death at the hands of justice is not expressly excepted in the policy the vested rights of third parties, innocent beneficiaries, designated as payees, would seem to be left undisturbed by the legal sentence and execution of the insured for crime, many courts considering that any question of public policy on the one side is more than offset by the injustice of depriving innocent survivors of their natural means of subsistence, and of leaving with the insurance company both the premiums and the insurance money." *Richards on Insurance,* 521.

The general weight of authority, however, would appear to be in accord with the rule adopted by the Federal Court in the principal case, that death at the hands of justice or by suicide is not a risk which has been assumed by the insurer, and that the insurer is relieved of all liability to any class of beneficiaries, although the policy contains no express provision exempting the insurer from liability.