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Charles Raper Jonas, of Lincolnton, N. C., has been selected by the faculty of the Law School as Editor-in-Chief of the North Carolina Law Review for next year. Mr. Jonas has been assistant editor this year and will complete his third year in the Law School next year.

NOTES

NORTH CAROLINA BAR ASSOCIATION MEETING

The twenty-ninth annual meeting of the North Carolina Bar Association was held in Pinehurst on May 5, 6, 7, 1927. It was the largest meeting on record with over four hundred members registered. There were plenty of meetings and discussions and politics to keep everybody busy and also many social affairs for the wives and families of the lawyers. The Moore County Bar entertained at the Country Club on Friday afternoon.

At the opening meeting on Thursday evening, the Bar Association was welcomed by H. F. Seawell of the Moore County Bar and the response was made by Francis O. Clarkson of the Charlotte Bar. Mr. John D. Bellamy then gave the President's address and this was followed by an address by Claude G. Bowers, Editor of the Evening World and author of a recent book on Jefferson and Hamilton, on "Thomas Jefferson and Courts." Both of these addresses were most interesting and were listened to with evident attention.

The next morning was given over to round table conferences. Mr. G. V. Cowper led the discussion on the judicial system, recommending that the rotation of judges be abolished. A spirited debate followed, and the matter was referred to a committee to report at the next annual meeting. The memorial to deceased members was delivered by E. S. Parker, Jr., of Greensboro.

At the evening meeting on Friday, the principal address was by Former Governor Charles S. Whitman of New York, President of the American Bar Association, on "Some tendencies in Modern Law and Law Making." This address was very well received and was followed by the report of the committee on Bar-incorporation, by Ira M. Bailey of Raleigh. This report was brought up again on Saturday morning, but was postponed for further consideration to the next annual meeting. The whole question of incorporating the Bar was new and of great importance and will cause a good fight at the next meeting. The election of officers resulted in the choice of Mark W. Brown of Asheville as President, and Miss Carrie L. McLean of Charlotte, H. F. Seawell of Carthage and A. Wayland Cooke of Greensboro as Vice-Presidents. Henry M. London of Raleigh was re-elected secretary and treasurer, and Judge W. S. Robinson of Goldsboro and I. M. Bailey of Raleigh were named as new members of the executive committee. Those who were present will look forward to the thirtieth annual meeting with pleasure, if the success of this meeting is a good criterion of Bar Association meetings.

ADMISSIBILITY OF NON-TESTIMONIAL EVIDENCE EXTORTED FROM THE ACCUSED BEFORE AND AT THE TRIAL

In a recent South Carolina¹ case the defendant was accused of attempting to commit murder. It appeared that she had gone into her neighbor's garden and sprinkled paris-green on his turnip tops. In doing so she left foot prints leading from her home to the garden. After being arrested she was taken to the garden and compelled to place her foot in the track. In doing it she moved her foot about in a manner calculated to prevent comparison. The officer then made her give up a shoe which he took and compared with the track himself. On trial, witnesses who had been present, were allowed to testify, first that the defendant had tried to prevent the making of a comparison and second that the shoe was taken by the officer and compared with the track.

¹ *State v. Griffin* (1924) 129 S. C. 200, 124 S. E. 81.

On appeal, the Supreme Court held that evidence concerning the comparison made by the sheriff was admissible, but that evidence of his attempt to make the defendant put her foot in the track was not admissible because it was a violation of the accused's constitutional privilege.

The Court distinguished between the acts performed by the sheriff and those performed by the accused, saying that the first did not involve testimonial compulsion and that the second did. In the exact words of the Court, "Evidence gotten by the means and under the circumstances should have been excluded. If the conformity had been perfect, that fact would have appeared from the enforced conduct of the defendant, clearly testimonial compulsion. If otherwise, as appeared, the inference of guilt from the effort to obliterate the track would have been a legitimate basis of comment; it would have been supplied by the defendant, a clear case of testimonial compulsion, as Wigmore aptly terms it."

The case gives rise to the question of how far a sheriff may go in obtaining evidence from an accused, and in forcing him to "make" evidence which may tend to incriminate himself. There are three general rules involved: first, the rule of the Fourth Amendment, providing against illegal seizures, second, the rule excluding involuntary confessions and third, the rule of the Fifth Amendment (and similar provisions in state constitutions), privileging an accused against being forced to incriminate himself. It is in the construction of the latter that we find a conflict in the authorities. On the one hand we have the broad view which permits of a rather free use of the defendant's person in obtaining evidence for identifying him with the crime, on the other hand, we find a small group of courts adhering to the narrow view which holds up a restraining hand in every case where it appears that the accused was made to lend his person to the aid of the state's case.

The arguments for the narrow view are few indeed, and with one exception, are based on sentiment rather than reason. Several centuries ago a great many abuses were practiced by officers of the courts in extorting evidence from a victim.² Out of the feeling that these abuses aroused grew the idea that the defendant in the case should be protected from the tricks and coercion of the prosecutor. But today arguments based on that feeling have lost much

²4 Wigmore, 2250 (History of the Privilege).

of their force. One eminent writer speaks of the reasons for the rule as the "old woman's" reason and the "fox hunter's" reason, by which he meant, first, the argument that it is unfair and cruel to make a defendant help in his own conviction and, second, that he should be given a sporting chance to escape.³ Among the sound arguments for the privilege is the one of public policy. It would be bad policy, as any one will admit, to encourage careless investigation in officers of the state, by allowing them to depend too much on evidence contributed by the defendant himself, either before or at the trial. If the prosecution is allowed to demand answers to its questions it would not be long before it would assume the right to the answer it expected, clearly an intolerable state of affairs. Harsh police methods need some restraining force, the most effective of which is a rule that makes the results obtained by such methods useless.

From a study of the cases it appears that there are, broadly speaking, two views, the narrow and old fashioned view and the liberal and modern view. They are in direct conflict with each other and, while the conflict appears to be simply a difference in the interpretation of similar constitutional and statutory provisions, the interpretation is based on fundamentals, and it is doubtful if both can be right. Modern decisions expressing the thought of the majority of the courts clearly show that the trend is toward the liberal rule. It is believed that the following classification of the cases will clarify the problem. The classification ranks the methods of securing evidence and applications of the rules thereto, in chronological order, beginning with the period before arrest and running through the several stages up to and including the trial.

*1. Cases in which some tangible evidence is taken, without due process, from the defendant or his premises before arrest.*⁴

These cases involve the rule against illegal seizures as well as the self-incrimination rule. But, in regard to the latter it will suffice to say that there are two widely accepted views of the admissibility of evidence illegally seized. In the majority of the state courts evidence illegally seized is admissible and these courts decline to examine into the methods by which the evidence was secured. In

³ 4 Wigmore, 2251.

⁴ *State v. Wallace* (1913) 162 N. C. 623, 78 S. E. 1; *Adams v. N. Y.* (1903) 192 U. S. 585.

a few state courts and in the Federal Courts,⁶ illegal seizure is good cause for excluding evidence. The rule against illegal seizures is beyond the scope of this article and it is referred to simply to complete the picture.⁷

2. *Cases in which some tangible object was taken from the defendant's person or premises after arrest.*⁸

These cases may be divided into two classes. The first includes those cases in which the arrest of the defendant was illegal. If the arrest was illegal then it would seem that any objects taken from the defendant would be illegally seized and that the rules applicable to illegal seizures, *supra*, apply. The second class includes those cases in which the defendant's arrest was legal. If his arrest was legal, is seizure of real evidence from his person or premises legal? The great weight of authority holds that seizure after legal arrest is legal and that evidence so seized is admissible in court.⁹ Even those states in which the narrow view obtains admit "real" evidence taken from the defendant after legal arrest as exemplified in the topic case, but these states are given to drawing very fine distinctions. In cases, as in the South Carolina case, *supra*, where the object was discovered or taken from the accused by an officer it is admissible, but if the defendant was made to produce or "discover" it, the courts exclude it on the ground that his constitutional privilege has been violated.¹⁰ This is an outstanding example of the fallacious reasoning in the old-fashioned, narrow construction of the privilege. It is clear that when the accused has been made to give up, as in one case, a key to a safe where incriminating evidence was found, that he was forced to give up evidence, but has he been forced to incriminate himself? Clearly not, "Unless" as Wigmore says, "All bodily action were synonymous with testimonial utterances."¹⁰

Suppose, for instance, that the accused has been arrested and officers enter his home under proper search-warrant. In an unlocked closet a bloody knife is found that tends to incriminate the accused. When offered in court this evidence is admitted because the accused

⁶ *Day v. State* (1879) 63 Ga. 667; *Holt v. U. S.* (1910) 218 U. S. 245, accused forced to put on a garment.

⁷ See 5 N. C. Law Rev. 264.

⁸ *State v. Simmons* (1922) 183 N. C. 684, 110 S. E. 591, liquor illegally seized admitted in court.

⁹ *State v. McIntosh* (1913) 94 S. C. 439, 78 S. E. 327, compelling accused to give up shoes not a violation of his privilege.

¹⁰ *Underwood v. State* (1913) 13 Ga. A. 206, 78 S. E. 1103, forcing accused to give up key to a safe is a violation of his privilege.

¹⁰ Wigmore, sec. 2265.

was not forced to produce it. But suppose that under the same circumstances the searchers found the closet locked. They ask for the key, which is given them by the accused. When the knife is found and offered in court it is excluded simply because the accused was forced to give up the key to the closet, which in the eyes of those courts is a violation of his privilege. Is such a distinction justified by sound reasoning? It does not seem so. And such a rule is of little protection to either an innocent or guilty man or his property, for it obviously tends toward ruthless and destructive methods of searching.

3. *Cases in which the defendant was forced to create some "real" evidence after arrest, which is later offered in court.*

Let us suppose that the defendant after his arrest is forced to give a sample of his handwriting²¹ which is to be compared with some incriminating document. Has he been forced to incriminate himself?

There is little doubt that this evidence would be excluded in those states which adhere to the narrow view and it is probable that some of the "border-line" states would concur with them, because such compulsion does approach the limit of the liberal rule.²² But, forcing the defendant to give a sample of his handwriting is no more a violation of his privilege than is forcing him to make a finger print or foot print or to submit to Bertillion measurements for the same purpose of identification.²³ The specimen should be admitted in court so long as the content of the writing has no significance. But for the purpose of comparing handwriting and spelling, a sample of handwriting forced from the defendant is not testimonial compulsion and should be admitted in evidence.²⁴

4. *Cases in which the defendant was forced to do some act later described in court.*²⁵

²¹ *Moon v. State* (1921) 22 Ariz. 418, 198 Pac. 288, finger prints admitted

²² Wigmore, sec. 2265.

²³ *Downs v. Swan* (1909) 111 Md. 53, 73 Atl. 653, measuring and photographing proper. See *State v. Cerciello* (1914) 86 N. J. L. 309, 90 Atl. 1112, contra.

²⁴ *Johnson v. Com.* (1887) 115 Pa. 369, 9 Atl. 78, defendant compelled to repeat words.

²⁵ *State v. Neville* (1918) 175 N. C. 731, 95 S. E. 55, putting accused in position before a window not a violation of his privilege; *State v. Thompson* (1912) 161 N. C. 238, 76 S. E. 249, evidence that tracks fitted defendant's shoes admissible; *Dunwoodie v. State* (1903) 118 Ga. 308, 45 S. E. 412, not error to admit evidence that accused was forced to make a track in the earth.

This class of cases, which is exemplified by the South Carolina case described in the first part of this note, includes all acts that the defendant is made to perform after arrest but before trial. It is distinguished from the next preceding class in that no new, real evidence is forced from the defendant as in the third class. Consequently the only rule here involved is that of the Fifth Amendment.

The South Carolina case³⁶ is a good example of the narrow rule and the argument the court advanced is typical of those advocating that view. The court said that "in the interest of justice" evidence that the defendant had been forced to put her foot in track should have been excluded, and that the act was "clearly testimonial compulsion." The first argument is plainly the kind we find in the "old woman's" reason spoken of before—sentiment and not reason at all. The court then cited it as a clear case of testimonial compulsion, but here it seems that the court erred. Bodily action and testimonial utterances are not synonymous and force alone is not the criterion of testimonial compulsion.

There is no sound reason for including acts of this kind in those excluded by the privilege. In forcing the accused to place his foot in a track or his body in various positions his testimonial capacity is not called upon. No coercion, however cruel, and no hope or fear in his breast can change the physical facts obtained by such comparison. Admitting testimony of these facts does not promote carelessness in public officers nor harsh police methods. Excluding such evidence is no protection to an innocent man but does act as a shield for the guilty. If the prisoner is innocent, the comparison will tend to prove his innocence, if he is guilty the state is entitled to the identifying evidence.³⁷ Admitting the evidence is in the interest of justice, excluding it is in the interest of the guilty. Of course, there is a small danger in some cases that the foot of an innocent prisoner will be similar to the track of the guilty man, but this is true of most circumstantial evidence and is not sufficient reason for excluding all evidence of the type.

5. Cases in which the defendant is forced to make a communication.

This is the last class of out-of-court proceedings of which evidence is to be offered in court. Cases in which a verbal communica-

³⁶*Dunwoodie v. State* (1903) 118 Ga. 308, 45 S. E. 412; *Elder v. State* (1915) 143 Ga. 363, 85 S. E. 97, error to admit evidence that defendant's foot fitted a track, he having been forced to place it in the track.

³⁷*State v. Johnson* (1872) 67 N. C. 55.

tion is forced from the defendant, out of court, naturally divide themselves into two classes. First, where the communication is in the nature of a confession offered to show the truth of the matters confessed. Under the familiar rule as to confessions these are uniformly excluded where made under compulsion.¹⁸

But, when the communication was forced from the prisoner for the purpose of identifying his voice or as the basis of judging his sanity, the rule of the Fifth Amendment alone is involved. The case is on the border line and has caused a wide split in the authorities.¹⁹ But, following the modern rule to its logical conclusion, communications should be admitted when the words that are spoken are not incriminating in themselves. Though verbal communications are very close to testimonial utterances when used only for identification of voice they are quite similar to specimens of handwriting, mentioned in class 3, and should be subject to the same rules.

6. *Cases in which the defendant was forced to produce new "real" evidence in court.*²⁰

This class of cases comprises those in which the defendant was forced to give a specimen of his handwriting or make a foot print and corresponds to class 3. The outstanding difference between the two is, that in this class the defendant himself is forced to bring the evidence before the court while in the other class some officer or witness brings the evidence into court. But the distinction is superficial and the reasons and rules involved in class 3 apply here.

7. *Cases in which the defendant is forced to act in court*²¹ *as by rolling up his sleeves, etc.*

Corresponding to class 4, *supra*, in which the question of the admissibility of Evidence concerning acts forced from the defendant out of court, we have the same question involved in court proceedings. In addition to the arguments advanced for admitting evidence in the former class, which are applicable here, we also have the argument that the court, for the sake of an orderly trial, may require the

¹⁸ *Darnell v. State* (1925—Tex.) 274 S. W. 591, admissibility of confessions.

¹⁹ 3 Wigmore, 2267.

²⁰ *State v. Garrett* (1874) 71 N. C. 85, proper to make defendant take off bandage; *Stokes v. State* (1875) 5 Baxt. 619, 30 Am. Rep. 72.

²¹ *State v. Ah Chuey* (1879) 14 Nev. 79, proper to make defendant expose a tattoo mark; *State v. Coleman* (1924) 96 W. Va. 544, 123 S. E. 580, physical and mental examination during trial not a violation of defendant's privilege; *State v. Ruck* (1906) 194 Mo. 416, 92 S. W. 706; *State v. Johnson* (1872) 67 N. C. 55.

defendant to sit or stand in a convenient place. However, this power is limited to those two acts and other acts must be admitted under the rules in class 4.

8. *Cases in which the defendant is forced to communicate when in court.*

This is the final step in the problem and involves the rule of the Fifth Amendment. That rule is clearly applicable to this class and prevents any coercion in making the defendant give a communication in court.

G. M. SHAW.

IMPEACHMENT BY EVIDENCE OF A WITNESS'S BAD CHARACTER

An attack on a witness's character is one of the usual ways of discrediting his testimony.¹ This attack may be made upon cross examination of the attacked witness² or by bringing in other witnesses to testify as to the character of the attacked witness. This note is devoted to the latter form of attack. The witness offered to make such attack is called the impeaching witness. The sole purpose of producing an impeaching witness is to attack the credibility of the attacked witness and show that the facts about which he has testified are probably other than stated. The testimony of such impeaching witness is not substantive evidence bearing directly on the facts in issue, but is extrinsic evidence aimed only to show that the attacked witness did not tell the truth on the stand.^{2a} Hence the general purpose of impeaching a witness is to lighten the weight of his testimony with the jury.

There is some conflict of authority as to whether in proving character the party is limited to the witness's character for truth and veracity, or whether the general bad moral character of the witness can be shown. It seems to be universally held that character for truth and veracity is always admissible.³ The primary purpose is to attack the witness's credibility, and character for truth and veracity, of course, goes directly to the credit of the witness's testimony. The majority of jurisdictions limit the inquiries to character for truth

¹ The general ways of impeaching witnesses are (1) by proof that his general character or reputation is bad, (2) by proof that he has previously made contradictory or inconsistent statements, or (3) by proof of his bias, interest or hostility. (28 R. C. L. 614)

² See *Cross-Examination to Impeach*, 36 Yale L. J. 384 (comment on Sacco and Vanzetti trial).

^{2a} *Medlin v. County Board of Education* (1914) 167 N. C. 239, 83 S. E. 483.

³ Wigmore, *Evidence* (2nd. ed.), Vol. 2, sec. 922.

and veracity and do not allow inquiries relative to the general moral character of the witness; other jurisdictions allow an extension of the inquiry to the general moral character of the witness.⁴

North Carolina adopts the minority view and holds that the general bad character of the witness may be shown,⁵ the theory being that it is the general experience of mankind that a man of bad moral character will lie, i. e., that moral degeneration shows an inevitable degeneracy as to truth telling. Such theory might seem questionable, for it is obvious that the fact that a man has a bad moral character does not necessarily mean that he will lie. However, it is generally conceded that a man of good moral character is less likely to lie than a man of bad moral character. It may be that this view is a mere tradition which has grown up as a result of the personal hatred with which the public looks on a person of bad morals. Low intelligence is a common factor in false swearing and bad moral character, and it would not seem logically improbable that bad moral character might indicate a probable liar, but psychologists would not support such a view.⁶ As pointed out by Wigmore,⁷ there are objections to allowing the general bad moral character of the witness to be shown. It is not even uncommon that a person of bad moral character is a truthful person, and the estimate of an ordinary witness as to another's general bad character is apt to be loosely formed from uncertain data and to rest in large part on personal prejudice and difference of opinion on points of belief or conduct. In all cases of impeaching the character of a witness the only phase of character which is material is character for veracity, and the only purpose of admitting evidence of a general bad moral character is to throw light on the attacked witness's probable character for truth.

It is universally held that the character of a witness cannot, by extrinsic evidence, be impeached by proof of particular acts,⁸ and it has even been held incompetent to show that the witness lied on a

⁴ Wigmore, *Evidence* (2nd. ed.) Vol. 2, sec. 923; 41 L. R. A. (NS) 877 note; 82 A. S. R. 30 note.

⁵ *State v. Boswell* (1829) 13 N. C. 209; *State v. Steen* (1923) 185 N. C. 768, 117 S. E. 793.

⁶ See Healy, *Pathological Lying, Accusation, and Swindling* Ch. 1; Munsterberg, *On the Witness Stand*, page 231 *et seq.*

⁷ Note 3 *supra*.

⁸ Wigmore, *Evidence* (2nd. ed.) Vol. 2, sec. 987; 82 A. S. R. 30 note; *State v. Steen* (1923) 185 N. C. 768, 117 S. E. 793; *Marcom v. Adams* (1898) 122 N. C. 222, 29 S. E. 333; *State v. Killian* (1917) 173 N. C. 792, 92 S. E. 499; *Tillotson v. Currin* (1918) 176 N. C. 479, 97 S. E. 395.

former occasion.⁹ The reason for this rule is that it would take up too much of the court's time to allow inquiries into act after act of the witnesses, and would take the witness by surprise when he would not be prepared to defend himself against fabricated testimony of impeaching witnesses. It would also becloud the main issues in the case causing much confusion and tending to mislead the jury.

This does not mean, however, that records of former convictions of particular offences are not admissible, or that particular acts of misconduct cannot be shown on cross examination.¹⁰ In these two instances the reason for the rule ceases to exist. In admitting records of former convictions there is no danger of confusion of issues, for such records are usually few in number, and the record of conviction being conclusive cannot be reopened to raise new issues. There is no danger of surprise, for the witness knows whether or not he has ever been convicted. In cross examination the matter stops with the question and answer, and there is no danger of confusion. The witness is not taken by unfair surprise for he is not obliged to answer extrinsic testimony of the opponent, for there is none to be answered. The opponent cannot proceed to prove facts by extrinsic testimony, and must take the chance of the witness's own answer. Both the admission of court records and the cross examination are further limited by the principles of relevancy.¹¹

In North Carolina and jurisdictions where general bad character is allowed for purposes of impeachment the record of conviction of any offense will serve to indicate such bad character.¹² In jurisdictions where character for truth and veracity only is admissible, then records of only such specific offences as indicate a lack of veracity are admissible, i. e., records of such offences as perjury, fraud, forgery, and the like.

Inquiry may, of course, extend to the reputation of the witness,¹³ for character is evidenced by general reputation, character being what the person really is and reputation being what a person is supposed or reputed to be. The courts often confuse the terms "char-

⁹ *Commonwealth v. Kennon* (1881) 130 Mass. 39.

¹⁰ Wigmore, *Evidence* (2nd. ed.) Vol. 2, secs. 980 and 981.

¹¹ *State v. Patterson* (1876) 74 N. C. 158.

¹² *Coleman v. R. R.* (1905) 138 N. C. 351, 50 S. E. 690 (admitting evidence to show that witness had been convicted of forcible trespass); *State v. Holder* (1910) 153 N. C. 606, 69 S. E. 66.

¹³ *State v. Spurling* (1896) 118 N. C. 1250, 24 S. E. 533; *State v. Williams* (1914) 168 N. C. 191, 83 S. E. 714.

acter" and "reputation" and use the word "character" for both actual disposition and reputation of it. The two terms, however, are separate and distinct. Character is the inner nature of the person and reputation is only a way of evidencing character. It is not impossible for a man to have a good character and be suffering from a bad reputation.¹⁴ Yet in our present stage of development it would be very difficult to show a witness's character if it could not be done by proof of his reputation. The reputation must be the general reputation of the whole community in which the witness resides, and must not be merely personal opinion.¹⁵ The reputation does not have to be of any particular time provided it is not too remote,¹⁶ for in the eyes of the law a man's character, as evidenced by his reputation, does not change suddenly.

In North Carolina it has been held proper to ask the impeaching witness the conventional question if he would believe the attacked witness on oath,¹⁷ such opinion being based on a knowledge of the attacked witness's general reputation and not on any particular facts. It seems, however, that later authorities would exclude such questions, and prohibit the impeaching witness's opinion testimony just as it would be excluded in cases of substantive evidence.¹⁸ Obviously the opinion of the impeaching witness is a mere conclusion which should be exclusively for the jury.

The evidence of the impeaching witness cannot extend to particular acts or habitual courses of misconduct.¹⁹ Hence it is improper to show solely for the purpose of impeachment that a witness is a bootlegger or a prostitute,²⁰ for these are particular classes of mis-

¹⁴ *Bottoms v. Kent* (1855) 48 N. C. 154.

¹⁵ *State v. Steen* (1923) 185 N. C. 768, 117 S. E. 793; *State v. Mills* (1922) 184 N. C. 694, 114 S. E. 314; *State v. Coley* (1894) 114 N. C. 879, 19 S. E. 705; *State v. Perkins* (1872) 66 N. C. 126; Wigmore, *Evidence* (2nd. ed.) Vol. 3, sec 1615.

¹⁶ *State v. Lanier* (1878) 79 N. C. 622 (held that the evidence was not too remote where the impeaching witness attacked the character of the witness as it existed some two or three years before the trial).

¹⁷ *State v. Boswell* (1829) 13 N. C. 209.

¹⁸ *State v. Caveness* (1878) 78 N. C. 484.

¹⁹ *State v. Bullard* (1888) 100 N. C. 484, 6 S. E. 191 (excluded evidence that there was a prevalent rumor that witness had been guilty of fraud); *Nelson v. Hunter* (1906) 140 N. C. 598, 53 S. E. 439, 40 A. L. R. 131 note.

²⁰ *State v. Brodie* (1925) 190 N. C. 554, 130 S. E. 205; *Warlick v. White* (1877) 76 N. C. 175 (holding that a female witness cannot be impeached by an attack upon her reputation for chastity); *State v. Giles* (1889) 103 N. C. 391, 9 S. E. 433 (evidence of illicit intercourse of witness held not admissible); *Tillotson v. Currin* (1918) 176 N. C. 479, 97 S. E. 395 (excluded evidence of a reputation for dealing in whiskey); in *Baker v. Rose*, 18 Wend (N. Y.) 146, Walworth, C. J., after stating that reputation for a particular class

conduct. Particular acts of immorality or wrong doing cannot be shown.²¹

In all cases of impeaching a witness's character the witness must first qualify by stating that he knows the general reputation of the person in question,²² unless no objection is made to his failure to do so. After having properly qualified and given evidence as to the attacked witness's bad character the impeaching witness may of his own volition qualify his testimony and state in what respects the attacked witness's character is bad.²³ The impeaching witness must have knowledge of the reputation of the person in question; mere rumor is not admissible.²⁴

In addition to these ordinary ways of impeachment there may be impeachment by expert testimony to show mental or moral defects, or to show that the witness is a pathological liar. In North Carolina it has been held competent to admit any evidence to show that the mind and memory of the witness have been impaired by disease and are in a feeble condition for the purpose of impeachment.²⁵ Of course, blindness, deafness, and other physical defects may be shown to discredit a witness's testimony where such defects have a direct bearing on the truth of the facts stated by the witness.

It should be remembered that different rules apply where the character of a defendant in a criminal prosecution is being impeached as a party, and not as a witness.²⁶ In such cases the character shown goes as circumstantial evidence to show guilt rather than to affect the credibility of the party. Here the character must first be put in issue,²⁷ and, having been put in issue, character for any trait appro-

of crimes could not be shown, said, "You cannot therefore inquire whether the witness has the reputation of being a thief, prostitute, murderer, gambler, adulterer, swindler, or the like; although each and every of such offenses, to a greater or less degree, impairs the moral character of the witness and tends to impeach his or her veracity."

²¹ *State v. Garland* (1886) 95 N. C. 671 (excluding evidence offered by defendant in a prosecution for seduction that prosecutrix was seen intoxicated on one occasion).

²² *State v. Steen* (1923) 185 N. C. 768, 117 S. E. 793; *State v. Coley* (1894) 114 N. C. 879, 19 S. E. 705.

²³ *State v. Summers* (1917) 173 N. C. 775, 92 S. E. 328; *Edwards v. Price* (1913) 162 N. C. 243, 78 S. E. 145 (qualified by saying that he knew the witness' reputation as a horsetrader was bad in certain localities).

²⁴ *Stae v. Mills* (1922) 184 N. C. 694, 114 S. E. 314; *State v. Bullard* (1888) 100 N. C. 484, 6 S. E. 185.

²⁵ *Isler v. Dewey* (1876) 75 N. C. 466 (evidence of mental condition of witness given by non expert witness); *Lord v. Beard* (1878) 79 N. C. 5 (mental weakness of witness shown by expert witness).

²⁶ Wigmore, *Evidence* (2nd. ed.) Vol. 1, secs. 55 to 59 incl.

²⁷ *Marcon v. Adams* (1898) 122 N. C. 222, 29 S. E. 333.

priate to the crime charged may be used.²⁸ Where a party takes the stand as a witness he may be impeached as any other witness,²⁹ but even here evidence which would ordinarily be admissible for impeachment will sometimes be excluded because of the undue prejudice it might have with the jury.³⁰

C. W. HALL

THE PRESUMPTION OF DEATH FROM SEVEN YEARS
UNEXPLAINED ABSENCE

By judicial legislation in the decided cases and following the analogy of two early English statutes, viz: one which protected from the charge of bigamy any person whose spouse has been absent across the seas for seven continuous years, upon marriage to another, and another which provided that any person in the enjoyment of a lease for life who absents himself from home and remains away for seven years without being heard from shall be presumed dead and his lease at an end,¹ it has become the settled rule of almost universal application that for all legal purposes a presumption of death arises from a continued unexplained absence from home for seven years where the absentee has not been heard from in that period.² This presumption was created as a limitation upon the well established permissible inference of continuing life until death was proved. It is a mere logical terminus for the older rule that a person is presumed to be alive until after such time as he would have died

²⁸ Wigmore, *Evidence* (2nd ed.) Vol. 1, sec. 59; *State v. McKinney* (1918) 175 N. C. 784, 95 S. E. 162 (bad reputation for selling liquor admitted against defendant on a charge of having liquor in possession); *State v. McMillian* (1920) 180 N. C. 741, 105 S. E. 403 (evidence that defendants had bad character for making liquor admitted in prosecution for illegal making of liquor); *Sare v. State* (1907) 50 Tex. Cr. 569, 99 S. W. 551 (defendant's character as a cautious and prudent officer admitted in prosecution for negligent homicide by deputy sheriff); *State v. Snover* (1899) 63 N. J. L. 382, 43 Atl. 1059 (character for "morality, virtue, and honesty in living" admitted in prosecution for carnal knowledge of one under age of consent).

²⁹ Wigmore, *Evidence* (2nd ed.) Vol. 2, sec. 980; *State v. Spurling* (1896) 118 N. C. 1250, 24 S. E. 533.

³⁰ Wigmore, *Evidence* (2nd ed.) Vol. 2, sec. 921.

¹ Jac. 1, Ch. 11, Sec. 2; 19 Car. 11, Ch. 6, Sec. 2.

² *Doe v. Jesson*, 6 East 80; *Hopewell v. De Pina*, 2 Campb. 113; *Burr v. Simms*, 4 Wheaton (Pa.) 150; *Davie v. Briggs* (N. C., 1878) 97 U. S. 628; *Tisdale v. Conn. Mut. Life Ins. Co.*, 26 Iowa 170, 96 Am. Dec. 136; *Kennedy v. Modern Woodmen of America* (1909) 243 Ill. 560, 90 N. E. 1084; *Samberg v. Knights of the Modern Maccabees*, 158 Mich. 568, 123 N. W. 25; *Asbury v. Sanders*, 8 Cal. 62, 68 Am. Dec. 300; *University v. Harrison*, 90 N. C. 387; *Sixer v. Severs*, 165 N. C. 500; *Vaughan v. Langford*, 81 S. C. 282, 62 S. E. 316; *Sharon v. McMackin*, 9 Lea (Tenn.) 601; *Sec. Bank of Richmond v. Equi. Life Assur. Soc. of U. S.*, 112 Va. 462, 71 S. E. 647.

of old age or be proved dead.³ The change was effectuated by a process of judicial legislation, advancing from what originally was a mere recognition on the part of the courts of logical reasoning by the juries when they found death from long absence, to the declaration of an affirmative rule of law.⁴

On the trial of a case when the issue is the death of an absentee and seven years absence from home without news is shown, it is then a question of fact for the jury, under proper instructions, what quantity or quality of evidence will be required to outweigh the presumption of death which the law projects into the equation.⁵ The presumption of death, if rebutting evidence is produced, is not absolute.⁶ But from the absence of such rebutting evidence the law will conclude that the absentee is dead. And at this stage of the trial, when no countervailing evidence has been introduced to rebut the prima facie case of the plaintiff, the presumption of death is conclusive and mandatory. Dean Wigmore says: "The judge will

³*In Re Benjamin*, 137 N. Y. Supp. 758; *Hammond's Lessee v. Indoes*, 4 Md. 138; *Hapfensach v. City of N. Y.*, 66 N. E. 11; *Whiting v. Nichols*, 46 Ill. 230; *Stevens v. McNamara*, 36 Me. 176; *Proctor v. McCall*, 2 Bailey (S. C.) 298. The usual rule is that in the absence of contrary proof, a presumption of continuing life to the common age of man exists, and the burden is on the one alleging the death to establish the same: *Asbury v. Sanders*, 8 Cal. 62, 68 Am. Dec. 300; *Stevens v. McNamara*, 36 Me. 176; *Watson v. Tindall*, 24 Ga. 494, 71 Am. Dec. 142; *Hoyt v. Neubold*, 45 N. J. L. 219.

⁴It is a matter purely conjectural just why the specific number seven years was hit upon. One theory and probably as reasonable as any was because the number seven occupied a great part and assumed tremendous force in the lives of the ancients—there were the seven planets, the seven wonders of the world, the seven deadly sins, seven sleepers, etc. constantly before the minds of the superstitious people. There were also many ecclesiastical rules and canons that may have suggested the number seven. In the "Excerptiones" of Egbert, Archbishop of York (A. D. 734-766) occurs this passage (translating freely): "The canon says that if a woman shall have departed from her husband, despising him, and be unwilling to return and be reconciled to him, after five or seven years, with the consent of the Bishop, he may take another wife." Exc. 125: "Likewise, if a man's wife shall have been taken into captivity and she cannot be ransomed, after the seventh year he may take another (wife) and if later his own (wife),—that is, the former woman (first wife) returns from captivity, he may take her (back) and may dismiss the later one. . . ." Thayer, *A Preliminary Treatise on Evidence*, page 320.

⁵*Saunders v. Knights of the Modern Maccabees*, 158 Mich. 568, 123 N. W. 25; *Kennedy v. Modern Woodmen of America*, 243 Ill. 560, 90 N. E. 1084; *Tisdale v. Conn. Mut. Life Ins. Co.*, 26 Iowa 170, 96 Am. Dec. 136; *Sprigg v. Moale*, 28 Md. 497, 92 Am. Dec. 704-708 (extended note on the question); 2 Greenleaf, *Evidence*, Sec. 278.

⁶*Mut. Benefit Life Ins. Co. v. Martin*, 108 Ky. 11, 55 S. W. 694 (error to instruct jury to find for the plaintiff if the absentee has been away for seven years and has not been heard from; the court should have told the jury that the presumption of death arising from the facts might be rebutted by the proof of circumstances offering an explanation for the absence).

instruct the jury that if they find the fact of absence from home for seven years unheard from and find no explanatory facts to account for it, then by a rule of law they are to take for true the fact of death."⁷

But if the defendant satisfies his burden of going forward—after the plaintiff has established the absence—by introducing facts and circumstances sufficient to afford an explanation of the absence, which explanation is as consistent with life as with death, the legal presumption of death changes from a conclusive and mandatory one to a purely permissive presumption or inference. Even then, if the jury think the ultimate probability of death overbalances the probability of life, they will be *warranted* in finding the fact in issue for the plaintiff—death.⁸ If, however, under proper instructions and weighing the facts and circumstances, the jury find the probability of life stronger, they would then be *justified* in finding for the defendant—life.⁹ The fact is that the once conclusive and mandatory presumption, with the introduction of countervailing evidence, has changed to a mere permissive inference.¹⁰

If on the trial of a cause the plaintiff has made out a prima facie case of death, with the establishment of seven years of unheard from absence, the burden of going forward with the evidence then shifts to the defendant. He can satisfy that burden, i. e., avoid the danger of having a verdict directed against him, by the use of testimonial or circumstantial evidence. It is clear that any testimonial evidence at his avail, tending to rebut the presumption of death, would be admissible and effective. But if the defendant has no testimonial evidence of such nature he should produce all the circumstantial evidence of life that he can muster. The use of a letter received

⁷Wigmore, *Evidence*, 2490

⁸*Mut. Ben. Life Ins. Co. v. Martin*, 108 Ky. 11, 55 S. W. 694 (mere unexplained absence is enough to warrant the jury finding the fact of death therefrom; but if there are explanatory circumstances the jury should be told to consider them).

⁹*Thetford v. Modern Woodmen of America*, 273 S. W. 666 (Texas)

¹⁰*Cogdell v. Wilmington & W. Ry.*, 132 N. C. 852, 44 S. E. 618. "A presumption has a technical force or value and the jury, in the absence of sufficient proof to overcome it, should find according to the presumption; but in case of a mere inference, there is no technical force attached to it. The jury, in case of an inference are at liberty to find the ultimate fact one way or the other as they may be impressed by the testimony. In the one case the law draws a conclusion from the state of the pleadings and the evidence, and in the other case the jury draws it. An inference is nothing more than a permissive deduction from the evidence, while a presumption is compulsory and cannot be disregarded by the jury."

by any person from the absent one during the seven years would be such a circumstance and would not be barred by the rule against hearsay.¹¹ This is on the theory that the hearsay rule imposes no objection to the use of letters, oral informations, etc., offered as circumstantial evidence that another person is insane, is incompetent, has a violent character, is dead or alive.¹²

Evidence showing a motive for the disappearance is admissible to rebut the presumption of death.¹³ The question whether the abscondee was a refugee from justice would be such a circumstance.¹⁴ The fact that he was in financial or domestic difficulties, and the same caused him fear of disgrace, poverty, or imprisonment would be such a circumstance that the jury would consider.¹⁵ Many such questions might arise. What sent the absentee away? What were his domestic relations? What his financial standing? What was his physical condition, his mental attitude, when last seen? These questions are all relevant and require weighing by the jury. The answers are circumstances which must be taken into consideration by the jury in arriving at the question: is the absentee dead?¹⁶ None of these facts will prevent a finding of death; but each is a circumstance which should have proper consideration by the jury in determining whether the original presumption has been rebutted.¹⁷

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¹¹*Dowd v. Watson*, 105 N. C. 476, 11 S. E. 589 (a presumption of death arises from the absence of a person for seven years without having been heard from. To rebut the presumption, it is not necessary to produce the testimony of persons who have seen him, or to produce letters from him. It is sufficient to produce evidence which will satisfy the jury that he has been heard from within the seven years. "Such evidence is usually and almost necessarily hearsay." The court then held that it was error to exclude from the jury evidence of information that he was alive, merely because it was hearsay information. *Wilson v. Brownlee*, 24 Ark. 586, 91 Am. Dec. 523 and note.

¹²*Wigmore, Evidence*, Sec. 1789; *Thetford v. Modern Woodman of America*, 273 S. W. 671 (Texas).

¹³*Bonslett v. N. Y. Life Ins. Co.*, 190 S. W. 870 (Texas); *Hoyt v. Newbold*, 45 N. J. L. 219; 8 R. C. L. 713; and see the comprehensive note, "circumstances justifying inference of death of insured before the lapse of seven years from his disappearance," 34 A. L. R. 1389.

¹⁴*Mut. Ben. Life Ins. Co. v. Martin*, 55 S. W. 694, 104 A. S. R. 202 (it is a question for the jury upon all the circumstances whether the absentee is dead—the fact that he is a fugitive from justice is such a circumstance).

¹⁵*Sensenderfen v. Pacific Mut. Life Ins. Co.*, 19 Fed. 68 (evidence that the one supposed to be dead was in a financial condition which might have induced him to abscond, or that he was a speculator or visionary in business, is admissible to overcome the presumption of death from seven years absence).

¹⁶*Fuller v. N. Y. Life Ins. Co.*, 199 Fed. 897.

¹⁷*Winter v. Supreme Lodge K. P. of the World*, 69 S. W. 662; *Duff v. Duff*, 137 S. W. 909; *Magness v. Modern Woodmen of America*, 124 S. W. 69.