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THE SCOPE OF CROSS-EXAMINATION IN ILLINOIS

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TRIALS have been conducted for centuries; witnesses have furnished evidence orally since the "memory of man runneth not to the contrary;" and the art of practice, including the examination of witnesses, has flourished during the greater part of two centuries.

Little is to be found in the early civil law, however, regarding the scope of cross-examination. That it was not strictly confined may be surmised, for Quintillian wrote:

> On matters without the cause, also many serviceable matters are often put to a witness; as concerning the character of other witnesses; concerning his own; whether anything dishonorable or mean can be laid to the charge of any of them; whether they have any friendship with the prosecutor, or enmity against the defendant; in replying to which they are likely to say something of which we may take advantage, or may be convicted of falsehood or malevolence.[2]

Although we can hardly admire the tactics of the Roman orator, and his quibbling over the credibility of the witness, it does seem apparent that he was highly skilled, by his method of examination, in making the testimony of an adverse witness as little effective as possible.

In the common law, we find that cross-examination was confined merely to the issues, and that one could prove his whole case by that mode of examination if he so desired.[3] The same was true in this country[4] and in England[5] until 1827, although there is scarcely a citation

[1] Member of Chicago Bar Ass'n.

[2] Quintillian, Institutes of Oratory, B.5, Ch. 7, p. 30.

[3] Wigmore on Evidence, Sec. 1885.

[4] Fulton Bank v. Stafford, 2 Wend. 483.

[5] Fletcher v. Crosbie, 2 M. & Rob. 417.

of authority. This, no doubt, is due to a uniform practice in which no contrary view was known. In 1827, however, a decision by a Pennsylvania court held that cross-examination should be confined to the issues and, by way of *dictum,* that perhaps the proper rule should confine cross-examination to the matter elicited on direct.[6] It was also stated that matter could not be brought out which tended to prove the case of the person doing the cross-examining. No authority is cited in this case.

In 1840, Justice Story held in a decision of the United States Supreme Court that a party has no right to cross-examine any witness except as to facts and circumstances connected with the matters stated in his direct examination.[7] It may have been, as one court suggested,[8] that the justice was merely expounding the law of the state where the trial was had in the particular case; but whatever the source of the law, the rule has since become well established.[9]

Arguments are available for and against the old and the new rule. It is said, on one side, that the new rule leads only to helpless confusion,[10] and, on the other hand, that the old rule deprives the person introducing the witness of the right to impeach the witness testifying for the other side.[11] It is our purpose, however, to state what the Illinois law is, rather than to argue for the merits of either the old or new rule.

The law was early laid down in Illinois in accordance with the rule expounded by the Supreme Court of the United States[12] in the following language:

> Whilst a large discretion is necessary to be exercised by courts, in the manner of disposing of business, still some rules of practice are inflexible. Long experience has demonstrated that

6 Ellmaker v. Buckley, 16 Serg. & R. 72.
7 The Philadelphia and Trenton Railroad Co. v. Simpson, 14 Pet. 448.
8 Rush v. French, 1 Ariz. 99.
9 Wigmore on Evidence, Section 1890.
10 New York Iron Mine v. Negaunee Bank, 39 Mich. 644.
11 Stafford v. Fargo, 35 Ill. 481.
12 Stafford v. Fargo, 35 Ill. 481.

certain rules of practice are indispensable to the attainment of justice, whilst others conduce largely to the attainment of that end. It seems to be the well recognized rule that when a witness is called by one party, the other has only the right to cross-examine upon the facts to which he testified in chief. If he can give evidence beneficial to the other party, he should call him at the proper time, and make him his own witness and examine him in chief, thereby giving the other party the benefit of a cross-examination on such evidence in chief. Otherwise, the party calling the witness would be deprived of a cross-examination as to evidence called out by the other side, and the party against whom the witness was first called would obtain the advantage of getting evidence under the latitude allowed in a cross-examination. It may be that unless the court could see that such an examination had resulted in injury to the opposite party, the judgment would not be reversed for that reason alone; but being calculated to work injury, such a practice should be discouraged. In this case, Lyon was called to prove a single fact, and the cross-examination should have been limited to that fact.

Perhaps the most comprehensive statement by an Illinois court of the general rule of the proper scope of cross-examination is contained in the following quotation from a later decision:[13]

The scope of cross-examination is necessarily largely within the discretion of the trial court, being governed by the direct testimony of the witness and other circumstances attending the giving of his evidence, and it has been held to be erroneous for the trial court to restrict the cross-examination to the extent of preventing the party from going only into the matters connected with the examination in chief, it being the right to elicit suppressed facts which weaken or qualify the case of the party introducing the witness or supporting the case of the party cross-examining. A witness may be cross-examined as to his direct testimony in all of its bearings, and as to whatever goes to explain or modify or discredit what he has stated in his first examination.

[13] Chicago City Ry. Co. v. Creech, 207 Ill. 400.

The fact that the scope of cross-examination is largely within the discretion of the trial court should not be forgotten; "the latitude to be allowed in the cross-examination of witnesses rests largely in the discretion of the trial court, and a cause will not be reversed for alleged improper rulings in that respect unless such discretion has been clearly abused," is the language used by the Supreme Court in one instance.[14] Thus it is generally held that unless injury clearly appears from an abuse of this discretion the cause will not for that reason alone be reversed.[15]

It has already been stated that the early common law rule made it possible for a person to prove his own case without the introduction of a single witness of his own. There have been decisions directly in conflict with this rule in Illinois, and in strict conformity with the rule stated in the Fargo and Creech cases, already cited. Chief among these is the case where the plaintiff testified that she had purchased a sewing machine of the defendant, and the latter attempted to prove his case on cross-examination by introducing an agreement which purported to be a lease of the machine. It was held that proving of defendant's case upon the cross-examination of the plaintiff was properly refused by the court.[16]

Another apt case illustrates that the common law rule does not apply in Illinois.

The plaintiff testified that the defendant had admitted he was liable in the amount of $1,458.96 as shown by a paper which was produced by the witness, and that if he, the witness, would pay the amount, the defendant would repay him with interest. The defense was a set-off, and upon cross-examination, the defendant sought to bring out evidence through the plaintiff proving this defense. Objection was sustained to this line of ques-

[14] Brennen v. Carterville Coal Co., 241 Ill. 610.

[15] Cooper v. Randall et al., 59 Ill. 317; Hartshorn v. Byrne, 147 Ill. 418.

[16] Wheeler & Wilson Co. v. Barrett, 172 Ill. 610.

tioning and assigned as error. It was held that the ruling of the court was proper.[17]

In another case, the plaintiff testified merely that cattle were those described in a certain chattel mortgage in suit. It was held to constitute error to examine the witness on topics such as the consideration for the mortgage, the state of accounts between the parties, and the admissions of the plaintiff subsequent to the making of the mortgage.[18] The court has also said that cross-examination of the complainant to show a lack of necessary parties where there has been no related testimony on direct examination is in error.[19] Where—after direct examination of the plaintiff's witness on the merits—the defendant sought to show on cross-examination that the complainant was a fictitious person and that the attorney was prosecuting the case without authority, the questioning was properly refused.[20]

Books were sought to be introduced on cross-examination of a witness to rebut his testimony. Regardless of the propriety of this procedure, the court said that at any rate they could not be introduced until the person cross-examining started to prove his case.[21]

In summary of the general rule as laid down by the Illinois courts we have found that while the scope of cross-examination is confined to the matter brought forth in the direct examination, it is wide enough to elicit matters which explain, qualify, weaken, and break down the direct testimony; that the discretion of the trial court as governed by the particular circumstances before it, such as the demeanor of the witness, his prejudice and unwillingness, the matter in issue, and difficulty of proof, governs in the majority of instances, unless some hardship is worked on those involved; that in no event—except with the permission of the parties—may the

17 Rigdon v. Conley, 141 Ill. 565.
18 Bell v. Prewitt, 62 Ill. 361.
19 McKone v. Williams, 37 Ill. App. 591.
20 Emerson v. Fleming, 246 Ill. 353.
21 Peru Coal Co. v. Merrick, 79 Ill. 112.

opposing case be introduced on the cross-examination of a witness.

Let us ascertain at this point the rules which govern the introduction of cross-examination and the manner in which it is conducted. Where there are several parties to the suit on either side and their cases are separate, each has the right to cross-examine the witness individually; but if their defenses, or cases, are common to them all, then there may be no reason for this.[22] A party may not cross-examine his own witness,[23] and it has been held that where the scope of proper cross-examination has been exceeded, then the witness becomes the witness of the party who is so violating the rules of evidence.[24] A co-defendant who has offered no evidence, and has announced his intention of moving for, and abiding by, a directed verdict at the close of the plaintiff's testimony, may be permitted to cross-examine other defendants' witnesses, but in this event the evidence adduced by the other defendant may be considered against him.[25] Where all the evidence of a witness on direct examination has been refused, the trial court commits no error in refusing to permit cross-examination of such witness.[26] It is error to refuse a party who has inadvertently made a remark offensive to the trial judge the right to cross-examine a witness.[27] It is within the discretion of the trial court to permit a witness to be called for re-cross examination.[28]

Abusive and embarrassing questions, as well as bullying and degrading questions, are improper[29], and harshness of bearing and intemperance of language are frowned on in such examination.[30] Questions which are

22 Kerfoot v. Cronin et al., 105 Ill. 609.
23 Singer, etc., Stone Co. v. Hutchinson, 184 Ill. 169.
24 Chicago Ex. Bldg. Co. v. Merchants' Bldg. Co., 83 Ill. App. 241.
25 Postal Telegraph-Cable Co. v. Likes, 225 Ill. 249.
26 Singer v. Hutchinson, 183 Ill. 606.
27 Whiteman v. The People, 83 Ill. App. 369.
28 U. S. Wringer v. Cooney, 214 Ill. 520; Hirsch & Sons Iron Co. v. Coleman, 227 Ill. 149.
29 Toledo, Wabash & Western Ry. Co. v. Williams, 77 Ill. 354.
30 Ochs et al. v. The People, 124 Ill. 399.

not relevant nor proper, put to the witness with the intention of embarrassing him or of creating an unfavorable inference for the jury to draw, are not allowable by the trial court.[31]

A number of exceptions, or apparent exceptions, to the rule that cross-examination must be confined to matters brought out on direct are recognized by the courts. The first of these exceptions occurs in the examination of a hostile witness. It is uniformly held that in the examination of a hostile witness more than ordinary latitude will be allowed by the court.[32] The reason for this is elemental and exists whether the witness is called for direct examination or for cross-examination.[33] However, this exceptional latitude will not be allowed to a cross-examiner who feigns surprise at the testimony of the witness, where there is no basis in the record to show that the witness had changed his course of testimony.[34]

The next of the exceptions to the general rule is that where matters of fraud are in issue, more than ordinary scope is allowable on cross-examination.[35] Even this rule is confined and is left in most cases to the discretion of the court.[36] An example of the way in which the exception is confined is shown by the ruling of the court in the Springer case just cited. There the action was based on fraud and deceit in the sale of certain notes which were but a few of a series. Reference was made on direct examination to other sales of the same series, and the cross-examination was limited to the naming of the parties who purchased these, excluding answers to questions as to whether trouble was experienced with the sale of each of the notes.

[31] Atchison v. McKinnie, 233 Ill. 106.

[32] Consolidated Coal Co. v. Seniger, 179 Ill. 370; North American Restaurant v. McElligott, 227 Ill. 317.

[33] Consolidated Coal Co. v. Seniger, 179 Ill. 370; North American Restaurant v. McElligott, 227 Ill. 317.

[34] O'Donnell v. The People, 110 Ill. App. 250.

[35] Fabian v. Traeger, 215 Ill. 220; Strohm v. Hayes, 70 Ill. 41.

[36] Schwitters v. Springer, 236 Ill. 271; Hollenback v. Todd et al., 119 Ill. 543.

The Todd case arose under an issue that the transaction involved was in fraud of creditors. The witness testified on direct that all he had when he went into the warehouse business was a team of horses, two sets of harness, and a buggy—that he had no money. He was asked on cross-examination whether he had the horses, harness, and buggy at the time of the trial, and to what extent Todd and Merrill (the other parties to the allegedly fraudulent transaction) were paid while they worked for the witness in the warehouse. Objection was sustained to the cross-examination. In reviewing the case the Supreme Court said:

> We think these questions should have been admitted. The charge was that the transaction between appellee and Todd and Terrell was one in fraud of creditors, and the rule should be liberal in allowing a full examination of parties to such an alleged fraud, when they appear as witnesses.[37]

Another of the exceptions to the general rule as to the scope of the examination by the adverse side is found in the examination of an expert witness.[38] Because of the very nature of the evidence adduced by an expert witness, the other side is entitled to question it closely, since the facts are solved for the jury by such testimony. All of the facts stated in the hypothetical questions may be altered on cross-examination to correspond to the theory of the case of the one cross-examining,[39] and the qualifications of the witness may be questioned minutely.[40]

Another instance where the courts extend the usual latitude in the scope of cross-examination is that where the party to the case is a witness. Where the plaintiff proved the value of the property, his expense, and the fact that the property had not been returned in a suit for replevin, he was examined by the other side on mat-

[37] Hollenback v. Todd et al., 119 Ill. 543.

[38] West Chicago Street Ry. Co. v. Fishman, 169 Ill. 196; The People v. Sawhill, 299 Ill. 393.

[39] Kenna v. Calumet, Hammond & Southeastern R. R. Co., 284 Ill. 301; City of Aledo v. Honeyman, 208 Ill. 415.

[40] The People v. Sawhill, 299 Ill. 393.

ter that was not included in the direct. It was held that there was more latitude in the cross-examination of a witness where the witness was a party to the suit, "and where the cross-examination has not been confined strictly to the examination in chief, it will not be held error unless it appears that there has been an abuse of the exercise of a sound legal discretion."[41] There is little difference in the scope allowed where the witness is a party when the matter sought to be elicited on cross-examination tends to prove an affirmative defense, and so works injury to the one examined.[42]

In criminal cases it is held that liberal cross-examination must be allowed.[43] But, where a witness is called by the court at the instance of a state's attorney, the cross-examination of the witness by the prosecutor must be closely curtailed,[44] and is seldom to be commended.[45] An example of the scope allowed in this class of cases, where so much is involved, arose in a case in which the charge was murder, the motive was robbery, and the issue was an alibi, the evidence of which was strongly conflicting. The cross-examining counsel asked a question of a state's witness which was objected to because it had been answered in a previous, more general interrogatory. The objection was sustained and the reviewing court in considering the question used the following language:

> The purpose of cross-examination is to test the truthfulness, candor, intelligence, memory, etc., of the witness. We do not understand that counsel may not, for that purpose, assume that any previous answer made by the witness is untrue, either from wilfulness or want of recollection, and put his questions in various forms to show that fact. He does not thereby assume the witness has testified to a fact which he has not testified to.[46]

[41] Hanchett v. Kimbark et al., 118 Ill. 121.

[42] Hansen v. Miller, 145 Ill. 538.

[43] Ritzman v. The People, 110 Ill. 362; Halloway v. The People, 181 Ill. 544; Tracy v. The People, 97 Ill. 101; Davids v. The People, 192 Ill. 176.

[44] The People v. Cleminson, 250 Ill. 135.

[45] The People v. Bernstein, 250 Ill. 63.

[46] Briggs v. The People, 219 Ill. 330.

Application of the rules above set forth seems difficult, because the circumstances of each case are so varied that no two cases appear similar enough possibly to be governed by the same rule, but it is hoped that upon an examination of various cases, we shall be able to foretell the action of the court in a given case.

We first consider the question of insolvency, which is sometimes perplexing to prove. The problem would be simple if it were possible on cross-examination to question the party whose insolvency is sought to be proved, concerning the fact. But the Supreme Court of Illinois has held that where the question of insolvency has been avoided on direct, it is not permissible to question concerning it on cross-examination.[47] However, it may well be that in the particular case the exceptions heretofore discussed might be availed of to introduce the desired testimony.

Will contests have to do in many instances with mental competency. To this class of cases the rules laid down above apply. So where a witness was asked on direct examination to state his opinion as to the soundness of mind of the testator, it was held that cross-examination as to his habits of abusing his family without provocation was improper.[48] And conversely, where direct examination brought out only conversations and actions towards his family, it was held improper to cross-examine concerning his industry and habits of business.[49]

Again, where the witness was asked what the testator had said about a certain suit which had been on trial, it was not error for the trial court to refuse to permit the witness to answer on cross-examination questions concerning conversations of the testator about his heirs and the making of a will, which was matter unrelated to that deduced on direct examination.[50] When a witness was examined on direct concerning the mental condition

[47] Anheuser-Busch Brewing Ass'n v. Hutmacher, 127 Ill. 652.
[48] Petefish v. Becker, 176 Ill. 448.
[49] Petefish v. Becker, 176 Ill. 448.
[50] Compher v. Browning, 219 Ill. 429.

of the testator, it was found improper to cross-examine as to the family relations of the testator.[51] And where, on direct, the testimony concerned the single transaction of the decedent's purchase of horses, evidence introduced to prove testamentary capacity, it was improper to cross-examine the witness as to the temper of the decedent.[52]

The direct examination of a witness in one case concerned facts occurring during the years from 1892 to 1895. A will in this case was executed in 1894 by the testator who died in 1898. Similar facts to those elicited on direct, but extending to the year 1898, were sought to be brought out on cross-examination. This was held improper.[53]

Conversations constitute an ample part of the proof offered in evidence in many cases. It has been held that it is improper to bring out, by cross-examination, conversations in which the bad feelings arose, for the purpose of showing that the witness harbors bad feelings towards the party against whom he testifies.[54]

The defendant, on the stand for the cross-examination, was asked if he had written a certain letter, which contained an admission, and whose contents were thus in evidence. It was complained that a letter in reply to which the one in evidence was written, should have been introduced first. It was held that it could have been introduced on re-direct. The court said, "The rule is that the whole of an admission is to be taken together, and that when part of a conversation or statement is put in evidence by one party, the other is entitled to put in the whole, so far as it is relevant, and it makes no difference whether the whole statement comes out upon the direct examination, or part of it is drawn out on cross-examination."[55] The courts have also said that where the conversation is first mentioned on the cross-exami-

[51] Larabee v. Larabee, 240 Ill. 576.
[52] Larabee v. Larabee, 240 Ill. 576.
[53] Entwistle v. Meikle, 180 Ill. 9.
[54] Davison v. The People, 90 Ill. 221.
[55] Barnes v. Northern Trust Co., 169 Ill. 112.

nation, the counsel cross-examining does not become entitled to have all of the conversation brought out.[56] However, the rule is equally well settled that where part of the conversation is brought out on direct examination, the cross-examiner is entitled to have all of the conversation in evidence.[57] A witness may be asked if he ever had a conversation concerning the conversation in question upon cross-examination.[58]

The next topic with which we have to deal is that of expert witnesses. From this discussion testimony concerning handwriting is omitted, since it has its place in another subject.

Value is the first division of expert testimony selected for discussion. The following facts arose in a condemnation case. The witness testified that he was familiar with the property involved, and said that a sale of adjoining land was made the year prior to the suit. He further testified that all he knew of the transaction he had ascertained from the record, and that he found the consideration for the sale from the deed. He based his opinion on his own knowledge, and upon pertinent factors such as transportation. It was contended that cross-examination of the witness was unduly restricted by the trial court. In review the following was said:

> The weight of the testimony of expert witnesses in regard to the value of property depends largely upon the facts and reasons which lie at the basis of their opinions. In other words, the opinions, given by experts, should be based upon facts within their actual knowledge, and which they are prepared to state. "While in the examination in chief, the expert can only be questioned in a general way as to the reasons of his opinion, the cross-examiner is entitled in every instance to demand a free disclosure, minutely and in detail, of all the facts and circumstances upon which the expert's opinion has been grounded." . . . Upon cross-examination great latitude is allowed, so

[56] Hansen v. Miller, 145 Ill. 538.

[57] Black v. Wabash, St. Louis & Pacific Ry. Co., 111 Ill. 351.

[58] Dexter v. Harrison, 146 Ill. 169.

as to enable the jury to see upon what basis the witness has made his estimate of value, and what facts have induced him to form the opinion he has expressed. But a large discretion is necessarily left to the trial judge in determining the range proper to be allowed counsel in cross-examining witnesses. Of course, in such cases, the discretion exercised by the court in regulating or limiting the cross-examination, should be a reasonable discretion, and cross-examination should not be excluded on subjects embraced or included in the examination in chief if such ruling is calculated to prejudice the examining party. In other words, so far as the cross-examination of a witness relates either to facts in issue or facts relevant to the issue, it may be pursued as a matter of right.[59]

Thus it was held that further cross-examination on the subject of the information disclosed by the record was immaterial, and therefore not prejudicial in its refusal.

Where a witness in a condemnation suit said that there was a good well on the land, which a right of way would cut off, objection was properly sustained as to cross-examination concerning other apt places for a well.[60] It was found improper to ask a real estate appraiser, who testified as to the value of property, how his income in the real estate business compared with that of an appraiser.[61] Where a witness was examined as to the value of the property and the benefit of the improvement to it, it was considered improper to ask if the city would be benefited by the improvement.[62]

Upon cross-examination [of an expert who testifies as to physical condition], any fact which, in the sound discretion of the court, is pertinent to the inquiry, whether testified to by anyone or not, may be assumed in a hypothetical question, with the view of testing the skill, learning, or accuracy of the expert, or to ascertain the reasonableness or expose the unreasonableness of the opinion he has expressed to the jury. . . . A ques-

59 Spohr v. City of Chicago, 206 Ill. 441.
60 Chicago, Bloomington & Decatur Ry. Co. v. Kelly, 221 Ill. 498.
61 Gordon v. City of Chicago, 201 Ill. 623.
62 Sheedy v. City of Chicago, 221 Ill. 111.

tion, although it goes beyond the scope of the evidence, may be propounded upon cross-examination, if its office and purpose is to elicit the reason upon which the expert based an opinion expressed by him in his examination in chief, or to ascertain the extent of his learning and knowledge of the particular subject upon which he assumes to be an expert.[63]

Thus, the facts included in the hypothetical question on direct examination may be varied by the cross-examiner to meet the theory of his case.[64]

Where something an expert on direct examination proclaims to be impossible has happened in another case, the expert may be cross-examined with regard to such other case. To illustrate this, a case arose from a train accident. An engineer, qualified as an expert, was asked if it were possible to be hit and thrown 40 feet by a train and live to tell of it. He testified that in his opinion such an accident always brought death. He was permitted to be cross-examined as to his knowledge of a person who was thrown 50 feet by a locomotive and who was still living.[65]

An expert witness testifying to physical conditions may not as a general rule be interrogated on cross-examination as to other cases. To quote the Illinois Supreme Court:

The next error assigned is the ruling of the trial court in the limiting of the cross-examination of a medical witness named McGregor. The evidence shows that he was a practicing physician, and had made an examination of appellee as to her injuries and testified concerning the result of such examination. Upon cross-examination appellant's counsel asked him concerning the manner in which he conducted the examination, and then asked him the following two questions: "Is that the usual way in which you make these examinations as to be so identified as to the time when an injury takes place—is that your usual custom?" "Do you, as a rule, make that inquiry when you

63 West Chicago Street Ry. Co. v. Fishman, 169 Ill. 196.

64 City of Aledo v. Honeyman, 208 Ill. 415.

65 Chicago & Alton R. R. Co. v. Lewandowski, 190 Ill. 301.

make examinations of that kind?" Objections to both of these questions were made by counsel for the plaintiff and the objections sustained. The evidence shows that full cross-examination was permitted by the trial court as to the manner in which the particular examination had been made, and there was no error in refusing to permit counsel for the appellant to cross-examine the witness as to what his usual custom or method was of conducting examinations of that kind.[66]

In a similar case a physician was put on the stand to testify in regard to the plaintiff's injuries. The defendant, in cross-examination, attempted to discredit the witness by questions regarding professional opinions he had given in other suits which had been brought against the same defendant to recover damages for personal injuries. Cross-examination upon independent cases of the same character and about the same time as the principal case was held to be improper.[67]

Examination on motive and payment is proper, however, and no doubt of some use in the examination of a professional witness. The court has said:

It is urged that it was error, on cross-examination, to ask the doctors introduced by appellant by whom they were sent and paid. We do not think so. It is always competent, on cross-examination, to ask a witness if he is in the employ of party, or if at the time he rendered the particular service he was in the employ of such party, for the purpose of showing his relation to the case and his interest in it, as affecting his credibility, and weight of his evidence. It being proper to ask the question, and the evidence being properly in the record, it could be considered on any proposition it tended to establish.[68]

Let us next consider the propriety of examining a physician, or other expert, with regard to texts, recognized as authority on the matter testified to by the

[66] Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. v. Banfill, 206 Ill. 553.

[67] Chicago & Eastern Illinois R. R. Co. v. Schmitz, 211 Ill. 446.

[68] Chicago City Ry. Co. v. Carroll, 206 Ill. 318.

expert. Several cases on the subject clear the proper way to do this. One, in the language of the court, arose in this manner:

On the other point made, no medical books were read to the jury as evidence, or for any other purpose, and it will not be necessary to discuss the admissibility of such evidence. But on cross-examination of the attending physician, who made a diagnosis of the disease of which the assured died, and pronounced it *delirium tremens,* paragraphs from standard authors, that treat of that disease, were read to the witness, and he was asked whether he agreed with the authors, and that is complained of as error hurtful to the cause of defendant. The testimony of this witness was of the utmost importance, and certainly plaintiff was entitled to reasonable latitude in the cross-examination. The witness had given the symptoms of the disease with which the assured was affected and pronounced it *delerium tremens,* and as a matter of right, plaintiff might test the knowledge possessed by the witness, of that disease, by any fair means that promised to elicit the truth. It will be conceded it might be done by asking proper and pertinent questions, and what possible difference could it make whether the questions were read out of a medical book, or framed by counsel for that purpose. Ordinarily, the limits of cross-examination of a witness are within the sound discretion of the court, and, usually, the greatest latitude is allowable that can consistently be given, for the discovery of the truth. The witness in this case stated that he had read textbooks that he might be able to state why he "diagnosed the case as *delerium tremens.*" [If he was] * * * familiar with standard works that treat of *delerium tremens,* it was not unfair to the witness to call his attention to the definitions given in the books of that particular disease and to ask him whether he concurred in the definitions. How could a witness's knowledge of such subjects be more fully tested? That is, in no just sense, reading books to the jury as evidence or, for the purpose of contradicting the witness. The rule announced may be liable to abuse. Great care should always be taken by the court to confine such cross-examination within reasonable limits and to see that the quotations read to the witness are so fairly

selected as to present the author's views on the subject of the examination.[69]

The above case was subsequently approved in a later case[70] and then was qualified in such a manner as to create doubt regarding the proper rule. In this latter case there was no reference made on direct examination to books. On cross-examination the witness was asked if he was acquainted with the standard works on midwifery. He was made to name these works as standard. Counsel read at length from the books and asked the witness if he was in accord with the authors. This was assigned as error, and the court held that it was. The case quoted at length above is distinguished in this manner:

> Where a witness says a thing or a theory is so because a book says that it is so, and the book, on being produced, is discovered to say directly to the contrary, there is a direct contradiction which anybody can understand. But where a witness simply gives his opinion as to the proper treatment of a given disease or injury, and a book is produced recommending a different treatment, at most the repugnance is not of fact, but of theory; and any number of additional books expressing different theories, would obviously be quite as competent as the first. But since books are not admissible as original evidence in such cases, it must follow that they are not admissible on cross-examination, where their introduction is not for the direct contradiction of something asserted by the witness, but simply to prove a contrary theory.[71]

It will be seen that this case illustrates an unfair construction of the first case by the counsel cross-examining and is within the rule as laid down. The attempt here was to discredit the witness's theory and not his testimony.

The next case was sought to be reversed because of alleged error of the court in permitting cross-examina-

[69] Connecticut Mutual Life Insurance Co. v. Ellis, Admr., 89 Ill. 516.
[70] North Chicago Rolling Mill Co. v. Monka, 107 Ill. 340.
[71] City of Bloomington v. Shrock, 110 Ill. 219.

tion in which the witness was asked to name authorities supporting the proposition to which he testified. The higher court said, "An expert witness may be cross-examined as to 'the basis of his opinion, as to whether the authorities do not lay down a different doctrine and the like.' "[72] This case injects a new factor—the permissibility of bringing out for the first time by cross-examination whether the expert's opinion is based on authority.

A witness was called in one case to testify that the disease from which the plaintiff suffered was not the result of the injuries received. The court held that it was improper to contradict an expert by scientific books where there was no reference made thereto on direct, and that this could not be done indirectly, in the manner shown as proper in the preceding cases.[73]

It was left for the court in a later case to explain the rule clearly. On direct examination the witness was asked his opinion. He stated that he based his opinion on experience and on books, although he did not specifically name them. On cross-examination he was asked to name the authorities on which he based his opinion. When he had named them, he was asked if the books did not state an opinion which differed from his. Excerpts from the books were read to illustrate this. This line of questioning was applied to two experts. The following language states the rule ultimately arrived at:

Having expressed an opinion upon matter material to the issue, a medical expert witness may be cross-examined as to whether that opinion is based upon personal experience, or upon books which he has read, and this whether he has stated in his direct examination the basis of his opinion. Should he testify for the first time upon cross-examination that his opinion is based upon what he has read, counsel has the same right to interrogate him as to the authorities upon which he relies, and then contradict him with those authorities, if he can, the same as if he had testified in direct examination that his opinion was based upon such

[72] Chicago Union Traction Co. v. Ertrachter, 228 Ill. 114.

[73] Ullrich v. Chicago City Ry. Co., 265 Ill. 338.

authorities. The mere fact that the witness on direct examination has expressed his opinion generally will not foreclose counsel, upon cross-examination, from eliciting from the witness the basis of his opinion.[74]

Books of account that are voluminous may be proved by a witness who has examined them and has made a summary for the purpose of the suit.[75] The question arises whether the original books may be referred to on cross-examination to impeach the correctness of his summary. In answer to this, the Supreme Court said it was permissible to cross-examine, from the original books, an expert who has prepared a summary from voluminous books to ascertain the correctness of his conclusions.[76]

Opinion evidence in the proof of handwriting is the next topic to review in determining the rules of cross-examination. A witness was called to prove the signature. He said that he had seen the party write and that he knew her handwriting. Counsel showed witness other notes where her name was signed differently. Objection was sustained to this mode of examination. The court said:

The several notes which the witnesses had seen Mrs. Williams execute, upon which they predicated their opinion that the signature to the note in question was genuine, were produced and shown the witnesses. Now if, in the execution of all of these notes, Mrs. Williams wrote her given name "Allie" instead of "Alice," no reason is perceived why it was not competent to establish such fact on cross-examination, for the purpose of testing the soundness of the opinion given by the witnesses that the signature to the note in question was genuine. In many cases, in order to ascertain the truth and arrive at the correct result, it is necessary that considerable latitude be given on the cross-examination of witnesses, in order to test the accuracy of their evidence. The genuineness of the signatures to the several

[74] Wilcox v. International Harvester Co., 278 Ill. 465.
[75] The People v. Sawhill, 299 Ill. 393.
[76] The People v. Sawhill, 299 Ill. 393.

notes to which the attention of the witnesses was called was not in controversy, and the purpose was not to prove a signature by comparison but . . . to test the accuracy of the witness's opinion or judgment, which had, in the direct examination, gone to the jury. If the witnesses, called by the plaintiff to prove that the signature of Mrs. Williams on the note in question was genuine, predicated their judgment, in whole or in part, upon signatures to notes they saw her sign, and the signatures to those notes differed from the signature to the note in question, it seems plain that the defendant had the right to call out that fact on cross-examination, as it was a fact proper for the consideration of the jury in determining what weight they should give to the opinions of the witnesses who gave their opinion that the note was genuine.[77]

In another case in point, the witness who was called to prove the signature was shown the signature of the party attached to the plea. The witness had testified that he had gone to school with the party and had seen him write. It was held that where a signature is admitted, it is proper to cross-examine on this signature to enable the witness to determine how accurate and reliable is the impression of the party's signature as fixed in the memory of the witness—as it confirms or modifies his previous expressed opinion.[78]

We have seen that more than ordinary latitude is allowed, as a general rule in criminal cases. The general rule as to the scope of cross-examination prevails, however, when the examination is prejudicial to the defendant and, on collateral matter, foreign to the issues. So it was held that cross-examination of the witness to show that the defendant had been guilty of loose moral conduct with other women, which examination extended beyond the necessity for proving a motive, that is, loss of love for his wife whom he was alleged to have murdered, was improper.[79]

[77] Bevan v. Atlanta National Bank, 142 Ill. 302.
[78] Melvin et al. v. Hodges, 71 Ill. 422.
[79] The People v. Cleminson, 250 Ill. 135.

Examination prejudicial to the witness is proper, however, where the matter thus elicited is not collateral or foreign to the issues. For example, where there was testimony on direct examination that the occupation of the witness was that of a laundryman, it was held to be proper on cross-examination to ask the witness if, as a matter of fact, he did not run an opium den.[80] So too, it was held proper to ask a witness accused of auto thievery about the operation and driving of an automobile.[81] And in an arson case where it was proved that the fire in question was postponed on account of another fire, it was proper to ask the witness on cross-examination concerning the other fire.[82] Where a witness had testified that neither he nor the defendant was drunk at the time a crime was committed, it was proper to cross-examine him as to what they had been doing up until the time of the crime, how many saloons they had visited, and what they had had to drink.[83] And where the party accused of performing abortion resulting in death was shown to have performed other operations resulting in death, it was proper on cross-examination to ask if visions of those who had died did not come to the accused.[84]

Where one of two joint defendants was placed on the stand as a state's witness, and was asked on cross-examination whether he had spoken to anyone concerning any leniency to be given because of his testimony, the trial judge refused to allow the answer because it was not shown that he had talked with anyone in authority. But this was held to be error, since it was material for the jury to consider whether the witness had any hopes of lessening his punishment, whether he had any cause to believe it or not.[85]

[80] Bow v. The People, 160 Ill. 438.
[81] The People v. Scott, 261 Ill. 165.
[82] The People v. Harris, 263 Ill. 406.
[83] The People v. White, 251 Ill. 67.
[84] The People v. Hagenow, 236 Ill. 514.
[85] Stevens v. The People, 215 Ill. 593.

Where the reputation of the accused was testified to on direct, it was quite proper to show that the witnesses did not know of the reputation of the accused prior to the murder which had occurred some time before the trial.[86]

The accused was shown on direct to have called the deceased a name, and the deceased went to the office of the accused in response thereto. It was held proper to bring out on cross-examination the fact that deceased had gone to the office of the accused many times. It was also held that it was proper in the examination of a witness introducing the dying declaration of the deceased, to show that profane language was used by the deceased when he made it.[87] So where the witness said that the accused had called the deceased a vile name, it was held error to exclude cross-examination of the witness as to the fact that he had not said the same on a former examination.[88]

In a trial for assault with intent to commit murder, there had been considerable feeling in the community against the defendant. A witness was cross-examined on the feeling expressed by those present towards the defendant at the time the offense was committed. It was held error to refuse this line of questioning.[89] It is improper to refuse to allow cross-examination by questions which assume that a previous answer of the witness is untrue.[90] Where the accused was indicted for murder as the result of an altercation over cards, and it was not shown that the habits of the accused were bad, it was held error to permit cross-examination showing that the accused had at other times visited saloons and billiard parlors, where he drank and played cards.[91]

On the question of reputation of the plaintiff in a civil case, there is an interesting case in Illinois. The plain-

86 Halloway v. The People, 181 Ill. 544.
87 Tracy v. The People, 97 Ill. 101.
88 Ritzman v. The People, 110 Ill. 362.
89 Davids v. The People, 192 Ill. 176.
90 Briggs v. The People, 219 Ill. 330.
91 Hayward v. The People, 96 Ill. 492.

tiff brought suit against an attorney, alleging that she had employed him to procure a divorce for her, that she had supposed that he had done so, and that in consequence she had married again, claiming damages for the loss and injury to her reputation. No testimony as to her character was brought out in her direct examination, but on cross the defendant sought to show that she had been a lewd woman, and had met the second husband in a bawdy house in Danville, evidence about the admissibility of which there could be no question, had it been introduced in the proper way. It was held that this was improper cross-examination, where there was no corresponding evidence called for on direct.[92]

Whether examination of a witness by the court may be assigned as error in a civil case has been emphatically decided in the negative. The Supreme Court said, "The right of the court to examine a witness, after he has been examined by the parties, cannot be questioned, and it was a matter of discretion to permit a cross-examination. It cannot be assigned as error."[93]

It has repeatedly been held that in a bastardy case it is proper to cross-examine the complaining witness on her conduct with other men at about the time of the gestation.[94]

Cross-examination on custom or habit is the next topic to consider. There was testimony on the direct examination that section men were in the habit of clearing the track when a locomotive was approaching. The witness was asked on cross-examination whether it was not the custom of the defendant company and of all companies to have a foreman and a section man warn the workingmen. The witness replied that the foreman could not always be with the men, but that he should be unless his

[92] Hill v. Montgomery, 184 Ill. 220.

[93] Foreman v. Baldwin, 24 Ill. 298.

[94] Robnett v. The People, 16 Ill. App. 299; The People v. Moore, 188 Ill. App. 418; The People, ex rel. Guy v. Janos, 157 Ill. App. 307.

work calls him away, and that when he is present it is customary for him to look out for passing engines and to warn the laborers.[95]

In a suit against a carrier for negligence in the carriage of goods, it was held proper to ask the witness if the rate testified to on direct had ever been made to any other person for carriage between the same two points.[96] And in an action for the recovery of money lost in the hands of a carrier, after direct examination on the habit of drivers in making delivery of parcels and taking receipts, it was held proper to ask if it was not the habit of the driver in question to steal money parcels, and if he had not been arrested and given up money and jewelry and escaped.[97]

But it was held that where questions as to the carelessness of an elevator operator in a mine had no basis on direct, questions concerning such carelessness were improper on cross-examination.[98]

Where a witness has offered merely formal proof, the question arises as to the latitude to be given in cross-examining him. As a general rule, where a witness is called to prove handwriting, his cross-examination is to be confined to that subject.[99] And where an affidavit only has been introduced to prove a deed in compliance with the statute, it is improper to allow cross-examination of the witness,[100] although where the same matter is introduced orally, the witness is subject to cross-examination.[101]

The physical condition of witnesses is often material. It has been held that it is error to permit a witness to be asked to submit to examination by the opposing parties to test the extent of the injuries.[102] But this is not

[95] Pittsburgh, Cincinnati & St. Louis Ry. Co. v. McGrath, 115 Ill. 172.

[96] Black v. Wabash, St. Louis & Pacific Ry. Co., 111 Ill. 351.

[97] American Express Co. v. Haggard, 37 Ill. 465.

[98] Staunton Coal Co. v. Bub, 218 Ill. 125.

[99] Hurlbut, use, etc. v. Meeker, Ex'r., 104 Ill. 541.

[100] Glos v. Garrett, 219 Ill. 208.

[101] Scott v. Bassett, 174 Ill. 390.

[102] Kusturin v. Chicago & Alton R. R. Co., 287 Ill. 306.

necessarily error when asked and refused by the court before a jury.[103] Where the plaintiff produced evidence to show that Bright's disease of the kidneys had been occasioned by the fall which was the basis of the suit, and offered proofs based upon urine tests, it was proper to ask on cross-examination whether upon a former trial he had offered any such proof. He was also asked to furnish urine for a chemical examination, to which question an objection was sustained. It was held error to deny this cross-examination, on the ground that there was a right to show the jury this lack of proof on the former trial, to let them determine whether it was fictitious or well founded, evidence having already been admitted which tended to show that a microscopic examination of the urine would verify the plaintiff's claim.[104]

The plaintiff's disabilities were disputed and she was cross-examined on work she had done after the accident in caring for an invalid. She had already answered that she had not helped to care for the patient. She was further interrogated as to whether she had not carried food up to the invalid from the basement. The court refused to allow the answer on the ground that the previous answer had included it. This ruling was held improper. "Where the extent of plaintiff's disabilities is in dispute and they are of such character as they may be feigned, wide latitude should be allowed counsel in cross-examining."[105]

Examination concerning the general question of value next draws our attention. Where a suit is brought to recover a specific contract price and there is no evidence on direct as to the cost of construction, it is improper on cross-examination to question concerning such cost.[106] The amount of compensation to be paid for a tank was in dispute, and cross-examination was permitted as to the cost of construction, although this had not been men-

[103] City of Chicago v. McNally, 227 Ill. 14.

[104] City of Freeport v. Isbell, 93 Ill. 381.

[105] Chicago Union Traction Co. v. Miller, 212 Ill. 49.

[106] Streator Telephone Co. v. Construction Co., 217 Ill. 577.

tioned on direct. This was held to be improper.[107] Where value of land condemned was alleged of greater value on direct because of contemplated building for which plans had been made, it was not improper to ask if the ones so planning were not insolvent, and if the plans had not been prepared for several years.[108] Where a witness says that stock is worth par, it is proper to ask if it has ever paid a dividend.[109] Where the direct examination was on services performed and amount paid, it was improper to cross-examine as to the value of the services.[110]

A witness in proving her damages in a personal injury case testified that she had received fifty cents a day, but that she had made arrangements to go into business for herself where $2.60 daily would be the results of her efforts. The examination was carried on along the same line on cross-examination which was improper under the pleadings, but it was held that since counsel for the defendant examined on it, he waived his objection.[111]

The next topic we have to consider is the physical condition surrounding the scene of the accident and the cause of the same. Where the issue under the pleadings was as to the condition of certain railroad ties, and evidence was called on direct to prove that they were in good condition at the time of the accident, it was proper to show on cross-examination that the ties were removed a week after the accident and that they were then rotten.[112] So in a similar case it is said, "Appellant showed by another witness that switchstands like the one in question had been in general use for the last twenty years. Appellee was properly permitted to show, on cross-examination, that they were now being replaced by others of a later pattern. This was germane to the examination in chief."[113]

[107] Chicago & Rock Island R. Co. v. Northern Illinois Coal & Iron Co., 36 Ill. 60.
[108] Bradley Mfg. Co. v. Traction Co., 229 Ill. 170.
[109] Hughes v. Ferriman, 119 Ill. App. 169.
[110] Morse v. Goetz, 51 Ill. App. 485.
[111] City of Beardstown v. Smith, 150 Ill. 169.
[112] Hayes v. Wabash R. R. Co., 180 Ill. App. 511.
[113] Chicago & Alton R. R. Co. v. Howell, 208 Ill. 155.

A witness testified that there was no way to tell whether a stay bolt was cracked or defective other than to take the engine apart. Upon cross-examination he was asked whether, if there were a hollow stay bolt, it would not show by the leakage that it was cracked. This was proper.[114]

Where the action was based on a single act of negligence in allowing a pile of cinders to remain near the track in the yards, it was held proper on cross-examination to show knowledge on the part of the defendant by examining as to other such piles located similarly.[115]

And where a mine examiner testified in chief that he had examined the room in which deceased met his death on the same morning, it was proper to show on cross-examination that the examiner could not have examined as many rooms as he said that he did properly in that length of time.[116] Where the father of the deceased testified that he had heard that there were others present at the time when his son met his death, and that he had learned the name of one, it is improper to ask the witness to name that one.[117]

It is held that objection may not be made by the party cross-examining to the competence of the evidence that has been elicited by him.[118] And where collateral matters are so brought out, they are not the basis for impeachment of the witness.[119] Even where the incompetent matter was brought out on direct, it is not error to refuse cross-examination as to that matter.[120] But it has been held that rulings on collateral matters are within the

114 Illinois Central R. R. Co. v. Prickett, 210 Ill. 140.

115 Chicago, Rock Island & Pacific Ry. Co. v. Rathburn, 190 Ill. 572.

116 Mertens v. Southern Coal Co., 235 Ill. 540.

117 Chicago City Ry. Co. v. Strong, 230 Ill. 58.

118 Board of Trade Tel. Co. v. Blume, 176 Ill. 247; Emerick v. Hileman, 177 Ill. 368.

119 Chicago, Rock Island & Pacific R. R. Co. v. Bell, Admr., 70 Ill. 102; Chicago, Burlington & Quincy R. R. Co. v. Lee, 60 Ill. 501.

120 Mueller v. Phelps, 252 Ill. 630.

discretion of the trial court.[121] Personal feelings of the witness are not collateral to the direct examinations.[122]

To the reader who examines the cases herein cited, it will appear that there is no practical rule to govern the conduct of all cross-examination, except the rule "that cross-examination is confined to the matters brought forth on direct examination." It is difficult to formulate a more specific rule. A study of the different classes of cases will be of great assistance in devising means of introducing important evidence not otherwise admissible on direct examination. If, however, a case arises, where, upon the particular facts, the latitude to be permitted has not previously been decided, one might formulate as a guiding principle the statement that, as the eliciting of truth from the witness on cross-examination appears to the court more difficult because of the issue involved or the prejudice of the witness, the scope of cross-examination proportionately grows wider.

121 City of Spring Valley v. Gavin, 182 Ill. 232.

122 Phenix v. Castner, 108 Ill. 207; Aneals et al. v. The People, 134 Ill. 401.