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Notes and Comments

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NOTES AND COMMENTS

HOMICIDE: WHY DEATH IN A YEAR AND A DAY?

Buried in the Criminal Code for the State of Illinois is a brief provision worded as follows: "In order to make the killing either murder or manslaughter, it is requisite that the party die within a year and a day after the stroke received or the cause of death administered. . . ."[1] Of unknown authorship, it dates back to 1827.[2] Throughout the entire history of this legislation it does not appear that a single prosecution involving the application of this statute has ever been instituted, or, if so, has ever reached a court of appeal.[3] Similar statutory provisions in other American jurisdictions are scarce,[4] though many of them have

[1] Ill. Rev. Stat. 1939, Ch. 38, § 365.

[2] The first criminal code in Illinois was twenty-eight sections long. Section two thereof read: "And be it further enacted, That if any person or persons shall, with malice aforethought, kill or slay another person, he, or she, or they offending, shall be deemed guilty of murder, and upon conviction thereof, shall suffer the pains of death." No reference was made to the "year and a day" rule—Laws, 1st General Assembly, 1819, pp. 212-3. About 1825 the judges of the Supreme Court were commissioned to report on the advisability of revising the statutes enacted to that date. Such report was made to the Fifth General Assembly, and went so far as to propose new laws. Among such recommendations was a criminal code of 190 sections including the provision above noted. It was probably drafted by Judge Samuel D. Lockwood; see Crossley, Courts and Lawyers of Illinois, I, 209. The proposed code secured legislative approval on January 29, 1827; see Rev. Laws, 1827, p. 128. Subsequent revisions have carried the section in question unchanged down to modern times; see Rev. Laws, 1833, p. 175, § 30; Rev. Stat. 1845, p. 156, § 30; Rev. Stat. 1874, p. 348, § 147.

[3] The Supreme Court of Illinois has, however, passed on the sufficiency of an allegation in an indictment for homicide relating to the time of death. See People v. Corder, 306 Ill. 264, on 271, 137 N.E. 845, on 848 (1922).

[4] ARIZONA, Rev. Code 1928, § 4587; ARKANSAS, Rev. Stats. Ch. 44, Div. 3, Art. 1, § 6 (Pope's Digest Vol. 1, § 2977); CALIFORNIA, Penal Code 1937, part 1, title 8, ch. 1, § 194; COLORADO, Stats. Anno. 1935, Vol. 2, ch. 48, § 35; IDAHO, Code Anno. 1932, Vol. 1, title 17, § 1108; MONTANA, Rev. Code 1935, Vol. 5, ch. 16, § 10961; NEVADA, Comp. Laws 1929, Vol. 5, ch. 13, § 10074; NORTH DAKOTA, Comp. Laws 1913, Vol. 2, ch. 20, § 9500; UTAH, Rev. Stats. Anno. 1933, Title 103, ch. 28, § 7. The foregoing are so nearly identical in language with the Illinois provision as to raise a presumption that they were copied therefrom. In addition, the following variations may be noted: DELAWARE, Rev. Code 1935, Ch. 149, § 5159, applies a one-year rule to murder in the first or second degree but omits reference to the rule, in § 5161 relating to manslaughter; NORTH DAKOTA, supra, adds: "No prosecution for aiding suicide shall be maintained unless the death of the person aided ensues within *one year* . . . " (italics supplied); SOUTH CAROLINA has not enacted the usual provision, but has provided that: "When the death of any person ensues within one year as a proximate result of injury received by the driving of any vehicle in reckless disregard of the safety of others, the person so operating such vehicle shall be guilty of reckless homicide (sic.)"—So. Car. Stats. at Large, 1937, Act. No. 175, § 29, p. 233; TEXAS, while not adopting the general provision, has enacted that: "If in any duel hereafter fought in this state, either of the combatants be killed or receive a wound from which he dies within three months, the survivor shall be deemed guilty of murder."—Texas, Vernon's Anno. Crim. Stats. 1925, Vol. 2, ch. 17, art. 1260.

judicially adopted what is asserted to be an ancient common law rule to the same effect.[5]

Search for the antecedents of such a rule, like that for many another common law doctrine, runs into the shrouded mystery of untranslated records of earlier days. When the bridge leading to that past is some day crossed, it may then develop that such rule never existed at the suit of the crown, but was borrowed whole from the ancient criminal appeal of homicide.[6] Older even than the Norman innovations, this method of prosecution, Teutonic in its origin,[7] placed the blood feud in the hands of the male nearest in blood to him who had been slain,[8] who prosecuted his appeal before the people of his community[9] and exacted vengeance by trial by battle,[10] ordeal,[11] or else outlawed the slayer.[12] It was, perhaps, appropriate that personal vengeance should be promptly exacted, hence there developed what might today be regarded as a statute of limitations against such appeals.[13] It was significantly worded

[5] See reference to such cases, post, notes 24 to 36. Textual statements of the alleged common law rule appear in: Holdsworth, Hist. of Eng. Law, Vol. 3, 315, citing Fitz. Ab. Corone pl. 303; Blackstone's, Commentaries, Vol. 4, p. 197, citing Hawkins; Hawkins, P. C. I, ch. 13, § 9, citing Dalton's Country Justice, ch. 93; Hale, P. C. II, 179, without citation; and Coke, Inst. III, 52, citing the ancient writers of Bracton, Britton, Fleta, and Mirror, who, as is noted, post note 15, were referring to the appeal of homicide rather than the criminal prosecution as understood today. So much unsupported textual reiteration is obviously poor authority for any rule.

[6] Blackstone's, Commentaries, Vol. 4, 312; Glanville (Beams trans.) Book XIV, ch. 3; Britton (Nichol's trans.) I, *43b; Mirrour of Justices, ch. 2, § 15.

[7] Laughlin, The Anglo-Saxon Legal Procedure, ch. 6, pp. 262-270, in Essays in Anglo-Saxon Law, Little, Brown & Co., Boston, 1876; Pollock and Maitland Hist. of Eng. Law, vol. 1, 39. The Story of Burnt Njal (Ngala Saga), Dasent trans. ch. 140, gives an Icelandic version of such a proceeding.

[8] In earliest days the appellor was required to be one who had been actually present at the homicide, Glanville, Book XIV, ch. 3. See also, Appeal of Denis (A.D. 1201) in Select Pleas of The Crown (A.D. 1200-1225), Selden Society, vol. 1, p. 1, case 1; and Appeal of Richard (A.D. 1203), op. cit. p. 29, case 67, both of which were nullified by reason of failure to allege "sight and hearing" of the felony.

[9] The proceedings were initiated before the local hundred, or else before the county court. If the slayer appeared, he was bound over to await the royal justices in eyre: Select Coroners' Rolls (A.D. 1265-1413), Selden Society, vol. 9, p. xli.

[10] The battle was really a judicial duel rather than a contest for life. The vanquished appellee was subsequently hanged. See Maitland and Montague, A Sketch of English Legal History, pp. 49-50, and also Appeal of Jordan, Rolls of the Justices in Eyre for Yorkshire (A.D. 1218-19), Selden Society, vol. 56, p. 298, case 823.

[11] When the appellor by reason of age, sex, or other infirmity, could not engage in battle, the ordeal was substituted. See Appeal of Reginald, Select Pleas of The Crown (A.D. 1200-1225), Selden Society, vol. 1, p. 7, case 19.

[12] Appeal of Agnes, Select Coroners' Rolls (A.D. 1265-1413), Selden Society, vol. 9, p. 71, illustrates the process by which outlawry was procured.

[13] Blackstone's, Commentaries, Vol. 4, 315, notes that acquittal on appeal prevented subsequent indictment for the same offense, though the converse was not true, which lead to the practice not to try a person on an indictment until after the year and a day allowed for the appeal. To remedy this inconvenience, he says, the statute 3 Hen. VII, ch. 1 was enacted, permitting immediate prosecution at the King's suit without waiting for an appeal—op. cit. vol. 4, p. 335.

in Briton as follows:

"And their *right of action* shall last a year and a day."[14]

The accused, when so appealed, was, therefore, entitled to aid himself by exceptions by way of abatement not only to the person of the appellor, but also on the ground that the appeal was not commenced in apt time or had been instituted in the wrong county.[15]

Following the development of the criminal jurisdiction of the King's courts and the creation of the concept that criminal offenses were not personal wrongs against the victim but rather were indignities against the King's peace,[16] the appeal died out[17] and a criminal prosecution, in the modern sense, took its place. Such prosecution by the sovereign, however, was not subject to the older limitation upon personal vengeance unless the sovereign saw fit to place limitations on its own right.[18] Many a state has so done, but such statutes relate not to the nature of the offense but to the time of its prosecution. They do not, generally, apply to prosecutions for homicide.[19] The "year and a day" rule of limitation on the right to prosecute an appeal seems, on the other hand, by transition, and probably through ignorance, to have become a substantial element of the definition of criminal homicide.

In such transition some explanation for so illogical a rule became necessary. Attempts to supply one were provided by the argument that since the defendant's conduct must be the proximate cause of the death of the victim, then, if the victim does not die within the prescribed pe-

14 Britton (Nichol's trans.) I, *43b, italics supplied. The rule appears to have received legislative sanction by the Statute of Gloucester, 6 Ed. I, ch. 9 (A.D. 1278). An explanation for the extra day is offered by Coke, Inst., vol. 3, p. 52, as follows: " . . . for regularly the law maketh no fraction of a day: and the day was added, that there might be a whole year at least after the stroke, or poyson, etc. . . . "

15 Britton (Nichol's trans.) I, *44, states: "He may likewise abate the appeal several ways, as where the appeal was not commenced within the year and day, or not in the county where the felony appears to have been committed . . . or if there is any other male nearer of blood who has the better right to bring the appeal . . . " The author of Mirrour of Justices, ch. 3, § 18, notes some of these exceptions but omits any reference to the "year and a day" rule. Appeal of Denis, Select Pleas of the Crown (A.D. 1200-1225), Selden Society, vol. 1, p. 12, case 28, is an actual application of the limitation rule. It reads, in part: "And it was testified that (Denis) had an elder brother, and that nine years are past since (Sigrid) died, and that she lived almost a year after she was wounded, and that Denis never appealed (William) before now. Therefore it is considered that the appeal is null and that Denis be in mercy."

16 Holdsworth, Hist. of Eng. Law, vol. 2, pp. 256-7.

17 The appeal was finally abolished in England by statute in 1819, see 39 Geo. III, ch. 46. Maitland and Montague, A Sketch of English Legal History, p. 62, note the last attempt at its use. It never existed as a method of trial in the United States.

18 People v. Ross, 325 Ill. 417, 156 N.E. 303 (1927), recognizing that statutes of limitation, where enacted, should be liberally construed as acts of amnesty and grace.

19 For example, Ill. Rev. Stat. 1939, ch. 38, § 628 reads: "An indictment for the crime of murder or manslaughter may be found at any period after the death of the person alleged to have been killed."

riod, his death *must* have resulted from some other cause.[20] While it is true that most homicidal acts produce either sudden or reasonably prompt death, the presumption thus created does violence to modern medical practice and understanding. Even the ancients, with their limited medical knowledge, could discriminate between probable and actual causes of death.[21] Moreover no similar counterpart is found in cases involving civil liability for wrongful death,[22] though attempts have been unsuccessfully made to engraft the "year and a day" rule upon the civil remedy.[23]

Many an American court, with little thought given to either the antecedents or the validity of such a rule, has, however, introduced the doctrine into the criminal law of the several states by judicial decision. Analysis of these decisions, however, discloses that factually the rule was not involved so that such statements were pure dicta,[24] or else that the

[20] Coke, Inst., III, p. 52, says: " . . . for if he die after that time, it cannot be discerned, as the law presumes, whether he died of the stroke, or poyson, etc. . . , or of a natural death; and in case of life the rule of law ought to be certain." See also Miller, Handbook of Criminal Law, West Pub. Co., St. Paul, Minn., 254; extract from opinion in State v. Huff, 11 Nev. 17 (1876), quoted in note 44 post.

[21] See Select Pleas of the Crown (A.D. 1200-1225), Selden Society, vol. 1, p. 119, case 188, as follows: "Mabel, Derwin's daughter, was playing with a stone at Yeovil, and the stone fell on the head of Walter Critell, but he had no harm from the blow, and a month after this he died of an infirmity, and she fled to church for fear, but (the jurors) say positively that he did not die of the blow. . . . " Findings that death occurred from other causes than defendant's violence appear in Select Coroners' Rolls (A.D. 1265-1413), Selden Society, vol. 9, p. 4—fall into pit, died of the flux, i.e. dysentery; p. 8—wound in head, died of ague; p. 24—woman shot in eye with arrow, died from illness due to pregnancy; p. 62—shot with arrow, died from disease called "le flux"; p. 68—accidentally hit by stone in game of quoits, died of paralysis.

[22] Civil actions for wrongful death are, of course, recent in origin. Lord Campbell's Act, St. 9 & 10 Vict. ch. 93, the forerunner of much legislation on the subject was enacted in 1846. Most of such statutes require that the action be commenced within a specified period *after death;* see Ill. Rev. Stat. 1939, ch. 70, § 2. While the defendant is responsible only if his conduct was the proximate cause of death, Mooney v. City of Chicago, 239 Ill. 414, 88 N.E. 194 (1909), still no presumption is indulged in, the inquiry being purely a factual one.

[23] See Louisville, Evansville & St. Louis Railroad Company v. Clarke, Extr., 152 U. S. 230, 14 Sup. Ct. Rep. 579, 38 L. Ed. 422 (1894), death occurred one year, two months, twenty-eight days later; Schlichting v. Wintgen, 25 Hun (N.Y.) 626 (1881), one year, seventeen days elapsed; Sias v. Rochester Railway Co., 36 N. Y. Supp. 378 (1895), death occurred two years, three months, ten days later; Purcell v. Laurer, 43 N. Y. Supp. 988 (1897), one year, four months, eighteen days elapsed; Western & Atlantic Railroad Co. v. Bass, 104 Ga. 390, 30 S. E. 874 (1898), victim lingered for five years, seven months and nine days. The most recent decision appears to be Haas v. New York Post Graduate Medical School and Hospital, 226 N. Y. Supp. 617 (1928), where death did not occur until four years, ten months, and twenty-three days had elapsed.

[24] United States v. Hewecker, 79 Fed. 59 (1896); Howard v. State, 24 Ala. App. 512, 137 So. 532, cert. denied 137 So. 535 (1931); Roberts v. State, 17 Ariz. 159, 149 P. 380 (1915); People v. Steventon, 9 Cal. 273 (1858); State v. Bantley, 44 Conn. 537, 26 Am. Rep. 486 (1877); Commonwealth v. Parker, et al, 19 Mass. (2 Pick.) 550 (1824); Commonwealth v. Macloon, et al, 101 Mass. 1 (1869); Martin v. Copiah

problem primarily concerned the sufficiency of an indictment or information charging the homicide. A welter of confusion has arisen around this point. Thus indictments which were silent on the time of death have been held insufficient,[25] even though the same were returned well within a year and a day from the wounding.[26] On the other hand, such silence has been deemed no fault as (1) the allegation of date of death was regarded as being unnecessary;[27] (2) was considered supplied by intendment from the fact that the indictment was returned within the period covered by the rule;[28] (3) the objection was treated as coming too late after trial;[29] or (4) the rule was regarded merely as one of evidence rather than of pleading.[30]

Where no date of death was specified, a statement that the victim "instantly died," or words of similar import, have been regarded as sufficient compliance by some courts,[31] but not sufficient by others.[32]

County, 71 Miss. 407, 15 So. 73 (1894); Debney v. State, 45 Neb. 856, 64 N. W. 446 (1895); Clark v. Commonwealth, 90 Va. 360, 18 S. E. 440 (1893); and Kee v. State, 28 Ark. 155 (1873).

[25] People v. Aro, 6 Cal. 207 (1856); People v. Wallace, 9 Cal. 30 (1858); People v. Cox, 9 Cal. 32 (1858); People v. Coleman, 10 Cal. 334 (1858); State v. Orrell, 12 N. Car. 139, 17 Am. Dec. 563 (1826); State v. Edmondson, 41 Tex. 496 (1874); State v. Spadoni, 137 Wash. 684, 243 P. 854 (1926).

[26] Ball v. United States, 140 U. S. 118, 11 Sup. Ct. Rep. 761, 35 L. Ed. 377 (1890).

[27] Jane (a slave) v. Commonwealth, 3 Met. (Ky.) 18 (1860); Fisher v. State, 109 Ark. 456, 160 S. W. 210 (1913); State v. Sly, 11 Ida. 110, 80 P. 1125 (1905), where statute authorized simplified form of indictment; and State v. Powers, 39 Mont. 259, 102 P. 583 (1909), even though common law rule made an element of every homicide by statute quoted in note No. 4 ante. While unnecessary for charge of murder (Jane v. Commonwealth, supra), a precise allegation of date of death, and the further fact that same ensued within six months is required where the indictment charges violation of a statute penalizing killing by stabbing in a specified fashion though without design to kill. On this point see Conner v. Commonwealth, 13 Bush (Ky.) 714 (1878.)

[28] Brassfield v. State, 55 Ark. 556, 18 S. W. 1040 (1892); Glover v. State, 116 Ark. 588, 172 S. W. 876 (1915); Robinson v. State, 177 Ark. 534, 7 S. W. (2d) 5 (1928); State v. Bowen, 1 Ore. 270 (1859).

[29] Smith v. State, 72 Fla. 449, 73 So. 354 (1916); Puckett v. Commonwealth, 134 Va. 574, 113 S. E. 853 (1922). While, apparently, available as ground for demurrer, the point was regarded as insufficient to support a motion in arrest of judgment.

[30] People v. Murphy, 39 Cal. 52 (1870). The court, on p. 55, says: "The requirement that it must appear that the party died within a year and a day, is a rule of evidence merely. Unless the party dies within that time the prosecution will not be permitted to show that he died of the injury received." Earlier cases in the same jurisdiction, listed in note 25 ante, had regarded the allegation as an essential part of the charge. In only one case does it appear that the prosecution failed to prove the date of death at the trial, leading to a reversal of the conviction because the court deemed the common law rule had been violated. See Percer v. State, 118 Tenn. 765, 103 S. W. 780 (1907).

[31] People v. Kelly, 6 Cal. 210 (1856); Commonwealth v. Desmarteau, 82 Mass. 1 (1860); Commonwealth v. Snell, 189 Mass. 12, 75 N. E. 75 (1905); State v. Huff, 11 Nev. 17 (1876); State v. Shepherd, 30 N. Car. 195 (1847); and Hardin v. State, 4 Tex. App. 355 (1878).

[32] Lester v. State, 9 Mo. 666 (1846), probably because no date was specified for the assault which preceded the death; State v. Sides, 64 Mo. 383 (1877); and State v. Testerman, 68 Mo. 408 (1878).

Similarly, expressions tending to show that the victim languished until a given date and died, even though not grammatically precise, have withstood the test of criticism,[33] but in other cases have been considered fatally insufficient, particularly by courts more technical in their viewpoint.[34] However, to allege that the death occurred on an unknown, hence unspecified, date prior to the return of the indictment or filing of the information, the same being well within the period of the rule, has been regarded as enough.[35] More thought given to fundamentals and less to technicalities would have saved courts from many of these absurdities. It might be possible to excuse earlier judges for their failure to be more critical, but to find a court of the present generation incorporating this ancient doctrine into its own jurisprudence is hardly credible, yet it has occurred twice since the turn of the century.[36]

Out of the thousands of homicide prosecutions actually only four cases can be found in Anglo-American jurisprudence in which the old rule could factually operate, the evidence in each disclosing that the victim lingered more than a year and a day from the date of wounding. One arose in England,[37] where the court deemed itself obliged to follow the path of precedent,[38] though condemning the rule with faint praise. Another case occurred in Indiana,[39] where the criminal code of the state was deemed to be a substitute for and not an addition to the common law, yet it was held that legislative silence in not expressly abrogating the rule was an indication that it should persist, consequently the defendant was discharged. More nearly akin to present day views[40] are

[33] Alderson v. State, 196 Ind. 22, 145 N. E. 572 (1924); Rose v. Commonwealth, 156 Ky. 817, 162 S. W. 107 (1914); Milburn v. Commonwealth, 223 Ky. 188, 3 S. W. (2d) 204 (1928); Commonwealth v. Robertson, 162 Mass. 90, 38 N. E. 25 (1894); State v. Anderson, 4 Nev. 265 (1868); State v. Haney, 67 N. Car. 467 (1872); State v. Champoux, 33 Wash. 339, 74 P. 557 (1903); and State v. Phillips, 59 Wash. 252, 109 P. 1047 (1910).

[34] State v. Kennedy, 8 Rob. (La.) 590 (1845), holding the words "and a few hours after did die" as not precise enough to show when death occurred; Chapman v. People, 39 Mich. 357 (1878); State v. Mayfield, 66 Mo. 125 (1877); and State v. Jamerson, 252 S. W. 682 (Mo. 1923).

[35] State v. Caviness, 40 Ida. 500, 235 P. 890 (1925); State v. Williams, 31 Nev. 360, 102 P. 974 (1909).

[36] State v. Dailey, 191 Ind. 678, 134 N. E. 481 (1922), and State v. Spadoni, 137 Wash. 684, 243 P. 854 (1926). Other recent decisions of first impression, as in Arizona, Arkansas, Idaho, and Montana, are attributable to the presence of statutes rather than judicial recognition of common law doctrines.

[37] King v. Dyson, 2 K. B. (1908) 454.

[38] No precedent was, in fact, cited by either side or the court, perhaps because the critical instruction, which directed a verdict of guilty if the jury found the death was caused by a violent blow inflicted one year, three months, twenty-two days earlier, was admitted to be faulty by the prosecution.

[39] State v. Dailey, 191 Ind. 678, 134 N. E. 481 (1922), in which death occurred one year, two months, three days after injury.

[40] See, for example, Clark and Marshall, A Treatise on the Law of Crimes (4th Ed. by Jas. J. Kearney), p. 286, which reads: "Since the common law rule is one of expediency because of the difficulty of proving the cause of death occurring so long after the act, it follows that with the increasing efficiency of medical science this rule will be discarded." See also note, 4 Brooklyn Law Rev. 86; contra, 19 Cornell Law Quarterly 306.

the other two cases, one from Pennsylvania[41] and the other from New York,[42] in both of which the courts refused to apply the rule and affirmed convictions. In the latter case the court took the opposite side of the argument which had influenced the Indiana court.[43]

Cases may seldom arise in which this rule could operate and this very fact has probably prevented any extended inquiry into the purpose or warrant for such provision. Such fact, however, certainly affords little argument for its retention. If Illinois is to bring its criminal law to accord with the times, some further justification should be established, if there be any,[44] or else the statute should be repealed.

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41 Commonwealth v. Evaul, 5 Pa. Dist. & Co. Rep. 105 (1924), in which case the victim lived for one year and two days. The court inclined to the view that the rule might apply to felonious homicides, but would not apply it to an involuntary manslaughter arising from the negligent operation of an automobile.

42 People v. Brengard, 265 N. Y. 100, 191 N. E. 850 (1934) in which case the victim lingered three years, eleven months, twenty-one days.

43 The State of New York had formerly given statutory recognition to the common law rule, but repealed such statute in 1828 (one year after it was enacted in Illinois), and in place thereof adopted a complete penal code which was silent on this point. In the Brengard case, note 42 ante, the court said: "When the object of the commission (which drafted such code) was so clearly expressed as to demonstrate a fixed intent to construct in detail a complete definition of each crime so that no part of the entire fabric of the law of crimes could be left to judicial reconstruction, the omission by the legislature of any reference to a year and a day from the definition of murder . . . must be deemed to have resulted from a set purpose."—265 N. Y. 100, on 107, 191 N. E. 850, on 852. See also People v. Legeri, 266 N. Y. Supp. 86 (1933).

44 Beatty, J., in State v. Huff, 11 Nev. 17 (1876), on p. 20, says: "The literal import of this language (referring to the statutory enactment of the "year and a day" rule) does lend some countenance to the notion that the law is guilty of the absurdity of saying that a malicious killing shall be deemed a harmless or a guilty act according to the length of time the victim survives after receiving the fatal wound. But knowing what the rule of law which the statute recognizes and affirms has always been, we are able to acquit it of such absurdity. It is a rule of evidence merely. Knowing that the real cause of death must be more or less doubtful in all cases where a wound had not proved speedily fatal, the law has wisely set a limit to that inquiry, and has determined that when a wounded party has survived the wound a year and a day, there shall be a conclusive presumption that he died from some other cause. It does not say: "Notwithstanding you killed him with malice aforethought you are deemed innocent because he lived a year and a day after you stabbed him;" but what it does say is: "He lived so long after you stabbed him, I therefore conclude you did not kill him;" or rather, "It is so doubtful in such cases what was the cause of death, that upon grounds of public policy I have determined never to permit the attempt to show that the wound was the cause." This is the true meaning of the statute, although its more obvious meaning is something different." The court in People v. Brengard, 265 N. Y. 100, 191 N. E. 850 (1934), considering the same argument, said "Even without expert opinion evidence, the jury could decline to entertain any reasonable doubt that it was the bullet wound which caused his death. . . . The question whether the act constitutes murder is necessarily one of fact. An obscure or a merely probable connection between an assault and death will, as in every case of alleged crime, require acquittal of the charge of any degree of homicide. The proximate relationship must, of course, be clearly proved beyond a reasonable doubt." If, as is indicated, the question is only one of proof, should not the determination thereof be left to the jury?

CIVIL PRACTICE ACT CASES

APPEAL AND ERROR — PARTICULAR FINDINGS IMPLIED — FAILURE TO INCLUDE MATTERS IN ABATEMENT IN MOTION TO DISMISS DOES NOT WAIVE SUCH DEFENSE. —In *Town of Elm Grove* v. *Town of Pekin*,[1] the Appellate Court for the Third District, construing Section 43 (3), of the Civil Practice Act,[2] held that the failure to include matter in abatement in a motion to dismiss a complaint did not constitute a waiver thereof and that the defendant could subsequently raise the question in its answer.[3] The court also held that where evidence on a plea in abatement and on the merits is heard together and judgment is entered for the plaintiff, it is assumed that the court found against the defendant on the plea in abatement.

This section of the Civil Practice Act has changed the former practice on pleas in abatement requiring the presentation thereof before pleading to the merits,[4] and allows the litigants and the court considerable latitude in disposing of such matters. It should be noted that the section in question states that all defenses *may* be pleaded together, and that the court *may* order defenses in abatement tried first. In providing for dismissal on motion for certain defects, Section 48[5] also states that the defendant *may* file a motion to dismiss.

Thus a defendant may raise matters in abatement by motion or he may raise other matters by motion without waiving the matters in abatement which can then be raised later in the answer. The beneficial effects of the Civil Practice Act, liberalizing the harsher rules of common law pleading, are made evident by such decisions.

W. S. McCLANAHAN

APPEAL AND ERROR — RECORD AND PROCEEDINGS NOT IN RECORD — WHO HAS THE BURDEN OF PRESERVING EVIDENCE IN EQUITY. — *In Sauter* v. *Pickrum*,[1] the Supreme Court of Illinois held that the effect of Section 64 (3) of the Civil Practice Act,[2] was to alter the previous rule in chancery regarding the duty of preserving the evidence on which a decree granting relief was based, so that it is no longer necessary that a decree in equity

1 305 Ill. App. 80, 26 N.E. (2d) 995 (1940).

2 Ill. Rev. Stat. 1939, Ch. 110, § 167 (3).

3 Here the plea in abatement concerned the authority of the town to bring the suit, since the action was taken at a special meeting rather than at the regular annual town meeting.

4 Puterbaugh, Common Law Pleading, 10th Ed. (1926), p. 66. Fisher v. Cook, 125 Ill. 280, 17 N.E. 763 (1888).

5 Ill. Rev. Stat. 1939, Ch. 110, § 172.

1 373 Ill. 541, 26 N.E. (2d) 844 (1940). On appeal from an order of the chancellor refusing to confirm the sale of certain parcels of land in a partition proceeding, it appeared that the master had sold the lands and recommended confirmation of the sale, but the chancellor, on his own motion, refused to confirm and ordered a resale, on the grounds that certain bidders desired to submit higher bids. There was no evidence in the transcript or in the decree as to what transpired in court on the hearing to confirm the sale.

2 Ill. Rev. Stat. 1939, Ch. 110, § 188. Subsection 3 reads as follows: "No special findings of fact or certificate of evidence shall be necessary in any case in equity to support the decree."

be supported by preserving the findings of fact or a certificate of evidence. The court further stated, "a finding of fact in a decree is presumed to be supported by evidence, and any one who attacks such a finding has the burden of preserving the evidence."

Prior to January 1, 1934, the rule in chancery required the person in whose favor a decree was entered to preserve the evidence justifying his decree, either by a certificate of evidence, the report of a master in chancery finding the facts, the verdict of a jury, or a sufficient finding of facts contained in the decree.[3] The section of the Civil Practice Act in question has completely reversed the former rule in chancery and adopted the rule of cases at law. This section has been passed upon several times by the Illinois Appellate Courts and the plain language of the statute has been given its full effect.[4] In *Prudence Company, Inc.* v. *Illinois Women's Athletic Club*,[5] the rule seems to have been narrowed, however, and it was held that where a decree shows that no evidence was heard, the decree cannot stand.[6] Since the section in question has now been approved by both the Appellate Court and the Supreme Court, it is apparent that a litigant, whether plaintiff or defendant, must preserve the evidence in chancery proceedings if he wishes to be protected in his right of appeal. W. S. McCLANAHAN

PLEADING — FORM AND ALLEGATIONS IN GENERAL — ARE DEFECTS IN SUBSTANCE WAIVED BY FAILURE TO OBJECT TO THEM IN THE TRIAL COURT.—In *Connet* v. *Winget*[1] an occasion arose for the Supreme Court of Illinois to apply, for the first time, that part of Section 42 (3) of the Illinois Civil Practice Act[2] which deals with the waiver of defects in pleadings. It there held that the failure of the defendant to question the sufficiency of the complaint before verdict was a waiver of his right to do so upon appeal. The complaint, based on negligence, alleged that the plaintiff was a passenger on a business errand with the defendant in the latter's automobile. The answer alleged that the plaintiff was a guest as defined by the Guest Statute.[3] Motions for judgment notwithstanding the verdict

3 Gengler v. Hooper, 324 Ill. 47, 154 N.E. 450 (1926); Van Meter v. Malchef, 276 Ill. 451, 114 N.E. 913 (1917); Akin v. Akin, 268 Ill. 324, 109 N.E. 268 (1915); Ohman v. Ohman, 233 Ill. 632, 84 N.E. 627 (1908).

4 Eick v. Eick, 277 Ill. App. 329 (1934); First National Bank of Chicago v. 10 West Elm Street Building Corp., 277 Ill. App. 337 (1934); Peoples Gas Light and Coke Co. v. Slattery, 287 Ill. App. 379, 5 N.E. (2d) 285 (1936).

5 284 Ill. App. 210, 1 N.E. (2d) 702 (1936). Note, 14 CHICAGO-KENT LAW REVIEW 367 (1936).

6 The court stated, at p. 217, "The statute relied upon by counsel for the receiver above quoted, and the rule announced in 277 Ill. App. [First National Bank case], apply only where the record shows evidence was heard but not preserved." See also Ruehr v. Continental Illinois National Bank and Trust Co., 296 Ill. App. 293, 16 N.E. (2d) 180 (1938).

1 374 Ill. 531, 30 N.E. (2d) 1 (1940).

2 Ill. Rev. Stat. 1939, Ch. 110, § 166 (3). "All defects in pleadings, either in form or substance, not objected to in the trial court, shall be deemed to be waived."

3 Ibid., Ch. 95½, § 58b.

and for a new trial having been denied, the defendant appealed. The Appellate Court intimated, but did not decide, that the complaint did not state a cause of action because the portion of the complaint which alleged the plaintiff to be a passenger stated a mere conclusion of law being unsupported by facts showing why he was not a guest. The Supreme Court in announcing its disapproval of such an inference, cited the case of *Sargent Co.* v. *Baublis*,[4] which, under the prior law, had held that such defects in substance if not objected to upon trial were cured by verdict and their sufficiency could not be questioned upon appeal. It was then indicated that Section 42 (3) of the Illinois Civil Practice Act, now applicable to such a case, in no way changed the rule existing under the prior law, and that if the defendant desired more specific information his remedy was to seek it by appropriate motion in the trial court. The court further inferred that only those allegations which would be sufficient to withstand a motion in arrest of judgment would be deemed cured by verdict, thus following the prior rule that if a complaint is so defective that it will not sustain the judgment, advantage may be taken of it on appeal.[5]

The position taken by the court is but an affirmance of an earlier principle that the parties are entitled to good pleadings in advance of trial, but if they are content to try cases on bad pleadings, they should be estopped from insisting in an appellate tribunal that the pleadings were insufficient so long as the court had jurisdiction of the subject matter.

R. P. STUDEBAKER

WITNESSES — CROSS-EXAMINATION AND RE-EXAMINATION — THE EFFECT OF THE DEATH OF A WITNESS DURING EXAMINATION-IN-CHIEF.—In the recent case of *Kubin* v. *Chicago Title & Trust Company*,[1] the secretary of the defendant company was called by the plaintiff under Section 60 of the Civil Practice Act and interrogated on various days up to and including December 22, 1938. On the latter day, the case was continued to the morning of December 27; but before the Court convened on that day, the witness died suddenly, his examination by plaintiff's counsel not having been completed. The defendant moved to strike the testimony on the ground that he had no opportunity to cross-examine the witness. The Court stated that in cases of this kind it should be left to the trial judge to admit the direct examination so far as the loss of cross-examination can be shown to him to be not a material loss in that instance. The motion of the defendant was sustained, however, on the grounds that the plaintiff, in his argument on this point in the appellate court, had failed to analyze the testimony of the witness and had made no suggestion that the testimony was vital or essential and that the court ought not to be required to

[4] 215 Ill. 428, 74 N.E. 455 (1905).

[5] Schofield v. Settley, 31 Ill. 515 (1863); Chicago & Eastern Illinois R. R. Co. v. Hines, 132 Ill. 161, 23 N.E. 1021 (1890); Henning v. Sampsell, 236 Ill. 375, 86 N.E. 274 (1908).

[1] 307 Ill. App. 12, 29 N.E. (2d) 859 (1940).

search through the testimony to see whether the ruling of the court prejudicially affected plaintiff.

The general rule is that the testimony of a witness is not admissible unless the other party has had an opportunity to cross-examine the witness.[2] Thus, when a witness refuses to submit to cross-examination, his testimony on direct examination should be stricken out.[3] However, where the failure to cross-examine the witness was due to the cross-examiner's own negligence, the testimony should be admitted. It is not the actual cross-examination that is necessary, but the opportunity to cross-examine.[4]

Where the failure to cross-examine is attributable to an act of God, such as severe illness or death, we encounter a difference of opinion among the various courts as to whether testimony taken on direct examination should be stricken.

An English Court has held that the testimony should be allowed.[5] In Ireland, in *Rex* v. *Doolin*,[6] the court stated that this was one exception to the general rule that the witness should be subjected to cross-examination; that the cross-examination being prevented not by any fault of the parties, but by the act of God, the evidence which had been properly taken could not be expunged from the record, but that the case properly went to the jury with such observations as the learned judge might see fit to make as to the weight to be given such evidence. This rule has also been followed in Canada in the case of *Randall* v. *Atkinson*.[7]

The majority of courts in the country have not followed the Continental rule.[8] Thus, the Supreme Court of Iowa has stated that "where the cross-examination of a witness has been prevented either by sudden death or otherwise without fault of the adverse party, the direct evidence already taken must be excluded for want of cross-examination or the opportunity thereof."[9] This principle has been criticized. Wigmore states, "But, where the death or illness prevents cross-examination under such

2 Jackson v. Crilly 16 Colo. 103, 26 P. 331 (1891); In the matter of John T. Mason, 9 Rob. 105 (La., 1844).

3 Aluminum Industries, Inc. v. Egan, 61 Ohio App. 111, 22 N.E. (2d)459 (1938); Lowry v. Chicago & North Western Ry. Co. 248 Ill. App. 306 (1928); Cumberland R. Co. v. Girdner, 174 Ky. 761, 192 S.W. 873 (1917); Thomas v. Dower, 162 Wash. 54, 297 P. 1094 (1931).

4 Gale v. State, 135 Ga. 351, 69 S. E. 537 (1910); State v. Harris, 181 N.C. 600, 107 S.E. 466 (1921); People v. Pope, 108 Mich. 361, 66 N.W. 213 (1896); Bradley v. Mirick, 91 N.Y. 293 (1883), reversing 25 Hun. 272 (1881); Deming v. Chase, 48 Vt. 382 (1876); Forrest v. Kissam, 7 Hill (N.Y.) 463 (1844); State v. Riddel, 38 N.M. 550, 37 P. (2d) 802 (1934).

5 Jones v. Fort, 1 M & M 196, 173 Eng. Rep. 1129 (1828).

6 1 Jebbs Crown & Pr. Cases 123 (1832). See also, R. v. Hagan, 1 Jebb Cr. C. 127 (1837) and O'Callaghan v. Murphy, 28 Schoales & Lefr. 158 (1804).

7 30 Ont. 242 (1899).

8 Pringle v. Pringle, 59 Pa. 281 (1868); State v. Bigham, 133 S.C. 491, 131 S.E. 603 (1926); Wray v. State, 154 Ala. 36, 45 So. 697 (1908); Henderson v. Twin Falls County, 59 Ida. 97, 80 P. (2d) 801 (1938); Sperry v. Estate of Moore, 42 Mich. 353, 4 N.W. 13 (1880); People v. Cole, 43 N.Y. 508 (1871). But see case cited in note 13.

9 Kemble v. Lyons, 184 Ia. 804, 169 N.W. 117, 118 (1918).

circumstances that *no responsibility* of any sort can be attributed to either the witness or his party, it seems harsh measure to strike out all that has been obtained on the direct examination. Nevertheless, principle requires in strictness nothing less. But the true solution would be to avoid any inflexible rule, and to leave it to the trial judge to admit the direct examination so far as the loss of cross-examination can be shown to him to be not in that instance a material loss."[10]

Possibly the earliest forerunner of the Wigmore rule in this country was the case of *Gass* v. *Stinson*,[11] in which a federal court, while not ruling directly on that point, stated that the tendency was towards the rule of the Continental courts. This was followed shortly thereafter by two Massachusetts decisions.[12] Later, a New York court held in *Sturm* v. *Atlantic Mutual Insurance Company*[13] that "It may be taken as a rule, that where a party is deprived of the benefit of cross-examination. . . by any means, other than the act of God . . . that the testimony given on the examination-in-chief may not be read." The decision of the Sturm case was, however, criticized in a later New York case.[14]

The court in the instant case cited the Wigmore rule and also the Maryland case of *Scott* v. *McCann*,[15] in which the plaintiff had already testified as to certain payments made by the defendant to him; and the defendant, having testified on his own behalf, suddenly died before cross-examination could be had. The Supreme Court of Maryland, in refusing to strike the evidence of the defendant, stated, "In the case we are considering there is very strong reason for receiving the testimony objected to, because of our statute on the subject, which puts parties to a contract on a plane of mutuality in cases of death . . . so that the rule of mutuality would require the consideration of the testimony of the witness thus dying, or the striking out of the testimony given by the plaintiff. . . ."

A review of the cases supporting the principle of the instant case reveals that they are mostly chancery cases and that the testimony was permitted to stand in order to put the parties on a plane of mutuality or because the loss of cross-examination was immaterial to the other party; and at least one court[16] has stated that the rule is not binding on common law courts. However, Wigmore apparently did not intend that the rule be so restricted. In the instant case, the Illinois court, in unconditionally following the Wigmore principle, apparently intended that it shall apply equally to both law and chancery courts. This decision, then, marks another step forward in the liberalizing of the rules of evidence.

GEORGE KLOEK

10 Wigmore on Evidence, Vol. III, § 1390, 2nd Ed.

11 10 Fed. Cas. 72, Case No. 5262; 3 Sumn. 98 (1837).

12 Fuller v. Rice, 4 Gray 343 (1855); Lewis v. Eagle Ins. Co., 10 Gray 508 (1858). In this case witness suffered a failure of memory due to illness after his direct examination.

13 63 N.Y. 77, 87 (1875).

14 In re Mezger's Estate, 154 Misc. 633, 278 N.Y. S. 669 (1935).

15 76 Md. 47, 24 A. 536, 538 (1892).

16 Kissam v. Forrest, 25 Wend. (N.Y.) 651 (1941).