Kentucky Law Journal

Volume 30 | Issue 4 Article 6

1942

Lay and Expert Opinion as to Mental Capacity

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STUDENT NOTES

LAY AND EXPERT OPINION AS TO MENTAL CAPACITY

The concept, commonly known as the Opinion Rule, which would exclude all but factual testimony, was developed almost entirely in American courts, and as such has never gained orthodox standing in the courts of England.[1] The writer will attempt to compare the opinion rule in regard to mental capacity of parties not before the court, as followed by the Kentucky court and the rules which are followed generally by other states.

A majority of the courts in this country require that an *expert,* as well as a *layman,* must first state facts, before giving his opinion as to the mental capacity of another.[2] The facts must be stated so that the opponent may rebut the evidence by the opinion of another expert based on the same circumstances, as well as by disputing the facts on which opinion is based.[3] The Kentucky courts do not give expert testimony the weight which it receives in many jurisdictions,[4] but they have taken the same view of mental incompetency as of disease, and have ruled that only a physician (an expert) is qualified to express an opinion.[5] Thus in dealing with insanity, expert opinion must be accepted as a matter of necessity, as it is the only evidence of value.[6]

It is indeed difficult to say what the majority view is in regard to the admissibility of lay opinion but in general, it might be stated that such evidence is admissible, subject to local quirks and eccentricities, on which several courts (Kentucky being one) put much emphasis.[7] Originally lay opinion was admissible in Kentucky but

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[1] Wigmore, *Evidence,* (3d ed., 1940), sec. 1917.

[2] Comment (1917) 26 Yale L. J. 502.

[3] Raub v. Carpenter, 187 U. S. 159 (1902).

[4] Whinery v. Crawford, 273 Ky. 325, 332, 116 S. W. (2d) 631 (1938), "Weakest evidence known to the law", speaking of testimony of handwriting expert; Agsten v. Brown Williamson Tob. Corp., 272 Ky. 20, 24, 113 S. W. (2d) 829 (1938), "Testimony of experts being frequently colored by bias and partisanship is accorded less weight than is given to other types of evidence," in considering testimony as to value of tobacco.

[5] Murphy v. Lester, 280 Ky. 51, 132 S. W. (2d) 542 (1939); McDonald's Ex'r v. Transylvania University, 274 Ky. 168, 118 S. W. (2d) 171 (1937). Both of these cases follow the rule which Commissioner Morris expounded in McCutcheon v. Bichon, 267 Ky. 694, 103 S. W. (2d) 76 (1937), which in effect strengthened the effect of expert testimony in this state.

[6] Dossenbach v. Reidhar's Ex'r, 245 Ky. 449, 53 S. W. (2d) 531 (1932).

[7] Cases from all jurisdictions, Wigmore, *Evidence,* (3d ed., 1940), sec. 1938. It seems that the distinctions made in the three different rules are really only a matter of degree: (1) In Massachusetts a layman may testify to a person's general competency only in regard to

was "entitled to little weight unless accompanied by proof of corroborating and supporting facts".[8] Thereafter, our court ruled:

> "But unless the tangible facts testified to by non-expert witnesses as the basis of their opinions tend to establish unsoundness of mind of testator, then such opinions . . . are insufficient to take to the jury the question of mental incapacity to make a will".[9]

From this statement it would seem that the duty of showing facts upon which the opinion is based lies upon the contestant, and if he fails, the defendant would be entitled to a directed verdict, even though the defendant makes no attempt to show that such opinion is based on little or no real fact.[10]

Then in 1937 in the case of *McCutcheon v. Bichon*[11] where petitioner brought a bill in equity to set aside a deed, Commissioner Morris added another limitation to the existing rule. He said:

> "As to the charge of mental incapacity, we recognize the rule that the evidence of laymen on this question is to be limited to acts and circumstances, which may or may not show a lack of mind sufficient to enable one *to contract.* The question of *quality* of mind is one peculiarly directed to the medical profession." (Italics our's).[12]

It would seem that this is an innovation in Kentucky law, for no such rule was stated in any other case prior to this time. It might be added, that no case was cited by the commissioner as an authority for such a rule, either as to the admissibility of witnesses' opinion as to party's capacity to *contract,* or to the advisability of having

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particular acts or specific conduct, (2) The second group allow the opinions of lay witnesses provided they first state to the jury the facts upon which the opinion is based, (3) The most liberal group permits a non-expert to give his opinion after showing that he has had adequate opportunity to observe the person whose mental capacity is in issue.

[8] Hudson v. Adams' Adm'r, 20 Ky. L. Rep. 1267, 1268, 49 S. W. 192, 193 (1899).

[9] Bodine v. Bodine, 241 Ky. 706, 714, 44 S. W. (2d) 840, 844 (1931).

[10] Godman v. Aulick, 261 Ky. 268, 270, 87 S. W. (2d) 612 (1935); Neighbors testified "He did not have sufficient mental capacity at the time the will was executed to know the natural objects of his bounty, his obligations to them, the character or value of his estate, to make a rational survey of it and to dispose of it according to a fixed purpose of his own," there was no other factual evidence; court ruled that this opinion was insufficient to take the question of mental incapacity to the jury.

[11] McCutcheon v. Bichon, 267 Ky. 694, 103 S. W. (2d) 76, 81 (1937); also Murphy v. Lester, 280 Ky. 51, 132 S. W. (2d) 542 (1939), McDonald's Ex'r v. Transylvania University, 274 Ky. 168, 118 S. W. (2d) 171 (1937). But see Clark v. Johnson, 268 Ky. 591, 105 S. W. (2d) 576 (1937) and Hutchins v. Foley, 271 Ky. 104, 111 S. W. (2d) 586 (1937). Former is a will case and latter a deed case, both of which follow the Bodine case, *supra* n. 8, to effect that layman's opinion of mental capacity is admissible if facts on which it is based are disclosed.

[12] *Ibid.,* p. 705.

only experts deal with the question of *quality* of mind. The commissioner does not make himself clear as to what he means by *quality*. By this rule it would seem that the commissioner in effect said that hereafter, a lay witness may state facts from which the jury might infer mental incapacity, but only experts may express their opinion as to the *condition* of the mind. Mr. Wigmore severely criticizes such a rule. He is heartily in accord with the statutory rule in Alabama which allows the opinion of laymen, after it has been shown that witness has made adequate personal observation.[12]

Though the present state of the law as to opinion evidence on mental capacity is unsettled in Kentucky, it seems safe to draw the following conclusions: (a) opinion evidence by both laymen and experts is of no value unless the witness can relate the facts, which he knows to be true, and upon which he bases his opinion; (b) opinion of experts as to mental capacity of a party is good evidence in Kentucky; and (c) prior to 1937 the opinion of a lay witness as to mental competency of another had probative value, but it seems that Kentucky now follows the Massachusetts rule allowing the layman to give his opinion only as to specific conduct, i.e. after stating facts on which the opinion was based, the witness may testify that one was competent to make a contract, or knew the extent of one's property and the natural objects of one's bounty.

It is submitted that the best rule is that opinion evidence as to mental capacity by either expert or layman is admissible, provided it is established that the witness is in such a position that he can form a valid opinion. The duty to show that the opinion is based on little or no fact and thus of no probative value should be on the cross-examiner.

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EFFECT OF PRIMA FACIE EVIDENCE PROVISION IN THE COLD CHECK STATUTE

Defendant appealed from a conviction under the Cold Check Law and set out as error the refusal of the trial judge to give a peremptory instruction to find him not guilty. The evidence was confusing but it appeared that at the time defendant gave a check for $30.50 to the Harlan Hospital he did not have sufficient funds in the bank to satisfy it. However, he did have a check in his pocket which he immediately deposited. After this deposit was made, his bookkeeper withdrew an amount to cover the weekly payroll and left just enough to take care of the Hospital's check. Subsequently, two other checks amounting to fifty ($50.00) dollars from the Federal Reserve Bank were charged to defendant's account before the Hospital's bookkeeper presented the check in question, and consequently it was dishonored. Later in the day when defendant learned of this he again deposited enough to satisfy the check and

[12] Comment (1932) 26 Ill. L. R. 431, Wigmore, *Evidence*, (3d. ed., 1940), sec. 675.