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Fraudulent Claims

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FRAUDULENT CLAIMS

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FRAUDULENT claims implies operation by someone schooled in the finer points of deception in the propagation of personal injury claims. The term does not include those claims where the injury is bona fide; those claims where an accident has actually happened and a lawyer is zealous in procuring the largest possible settlement for himself and his client. They do not include frivolous claims, however poorly established they may be by fact. What I am speaking about was quite adequately paragraphed by Westbrook Pegler some years ago in the World Telegram. He wrote: "In deploring the ethics of the legal profession, it is customary to overlook the fact that a large proportion of the citizens have become shyster minded themselves and go through life hoping to be flicked on the flask by a rich man's limousine, disappointed in love, thrown out of a solvent hotel, insulted, libeled, frightened, humiliated, or barked at by a dog whose owner lives in a big house. Quite aside from the small criminal element of professional plaintiffs who are constantly having painful accidents on the common carriers and in department stores and suing for $100,000 a crack, there is a tendency among people to think in terms of damages, evidence and law suits in every conceivable mishap or close call that befalls them. This is no special failing of the poor, being common among people who are middling well to do and is the cause of much of the clutter, delay and perjury in the courts.

"A man crosses a street against a traffic light, leaps to avoid a car, barks his shin against a curb, yells murder with great presence of mind, demands an ambulance and puts in a week's time malingering in a hospital over an injury whose proper treatment would be a dab of iodine and a jolt of Scotch. In due time his attorneys notify the attorneys for the insurance company that he has suffered great pain and will have to go on crutches the rest of his life in addition

to which his little woman has suffered the loss of his services, the whole bill amounting to $100,000.

"A suburban lady comes staggering out of a cocktail bar of a hotel which is making money, begins to yodel and perform the split in the lobby and is firmly but gently shown outside by the house detective in the honest performance of his duty. Two weeks later it develops through the affidavits of friends who were lushing with her at the bar, that the plaintiff drank nothing but nutritious stingers, prescribed by her physician as a remedy for anemia, and that she was not plastered but just suddenly faint, not yodeling but crying for help, not doing the split but swooning. Therefore she has been publicly humiliated to an extent which cannot be compensated for a nickel less than $50,000.

"The vast profusion of lawyers with nothing much to do for eating dollars doubtless accounts for much of this abuse, but the psychology of the citizens themselves is an important factor since the people began to become acutely aware of their legal rights.

"The shyster spirit of the citizens themselves is fouling the courts with many claims for injuries which in people of reasonably decent conscience could be repaired with a nickel's worth of sticking plaster, a rock thrown at the barking dog, or a good hard punch on the house detective's nose."

* * *

Unquestionably the attitude of the people, as noted by Mr. Pegler, plays a large part in the fraudulent claim. It may have been the underlying cause of the creation of those worthless groups of lawyers, doctors and laymen who prey upon the public through their fraudulent claims. Certainly groups, gangs and rings of the trash of the professions did not exist years ago. Their advent has been fairly recent. Of course there was always the petty chiseler capitalizing on an inconsequential happening. But the big business of accidental injuries followed closely upon the era of big business generally. Money seemed easy. Prize fights drew million dollar gates. Money came easy and went easy except for those who did not care to do even the slightest amount of work necessary to get it honestly. So there came upon this

country a curse known as fraudulent claims. Faked injuries. Faked accidents. Crooked lawyers. Lying doctors. Perjured witnesses. Thieving insurance adjusters; and claimants with wholly feigned, pre-existing or self inflicted injuries. The combination of layman, doctor and lawyer is a hard one to whip when operating legitimately but even harder to unravel when each is playing his part in a nefarious scheme to mulct some defendant.

The swindling of insurance companies, railroads and public utilities has kept tempo with the growth and prevalence of racketeering in this country but even as new agencies have been created and have taken their place as "gang busters", so have the insurance companies, railroads and public utilities created agencies to "bust" their cases as I will later show you.

There is no way to determine with the slightest accuracy the extent of the toll exacted by this fraud. Whenever an individual confesses or a gang is convicted there is usually an effort made to estimate the amount which such gang has taken. These figures are hopelessly inaccurate but authorities say that conservatively the cost to legitimate business runs into the millions every year.

Let me give you a few of the more classic examples of how such people operate. One of the first big time operators of the sort came to our attention in Brooklyn in 1930. Here a holder of liability insurance reported that while driving his car on the streets in Brooklyn and in dodging out of the way of a taxi, he ran up onto the sidewalk and injured a pedestrian. The assured was Carmelo Micalizzi. The injured was Frank Brancato. The insurance investigator became suspicious of the case notwithstanding the report of two doctors of unquestionable ability who examined the man and said he had an injury causing complete paralysis which would be permanent. The company involved employed Michael Fiaschetti, a detective, whose reputation may be known to some of you. After several days work Fiaschetti procured a release signed by Brancato for a consideration of $1.00! This followed the procurance of confessions from Brancato's wife and daughter outlining how Brancato would feign the injury after the fake accident, then dope himself to

simulate a condition of paralysis. Fiaschetti learned that this man was being used as a victim by a group of Sicilian members of a large ring. Another company had a few months previously paid this same Frank Brancato $5,000.00 for injuries which were almost an exact duplicate of those simulated in this accident.

Then there are those cases where an arm or leg is actually broken with a rolling pin; legs and backs scraped with a grate; backs and bodies treated with a suction device to create an appearance of bruising, and the victim shoved or caused to fall at the side of a taxicab, bus, train or some other vehicle which the operators know is financially able to respond in damages or preferably, made to appear to have been hit by a friend who is in on the deal and who will admit all liability so as to indicate a prompt settlement by the friend's insurance company.

A rather humorous affair occurred in Chicago in 1937. Two tramway cars collided with a terrific impact and all passengers were injured. George West, then an attorney in Chicago, heard of the accident through his runners. He rounded up 23 people who in addition to 20 others, filed claims for their injuries with the street car company. But imagine the surprise of the company's investigators, to say nothing of Mr. West, when it was discovered that these 23 persons claimed to be passengers on one of the cars which was locked and running empty to the barns because of bad brakes. Mr. West told the story from his residence in the Cook County Jail. But it isn't often that shrewd ambulance chasers make that sort of mistake. I know a couple who have agents in hospitals, in ambulances, in police radio cars, and innumerable other places, who for a commission, notify the lawyer as soon as they hear of an accident if the lawyer has not already gotten chasers out on it as the result of information picked up on their short wave radio.

One lawyer not so shrewd was Edward A. Housman. He studied law at Columbia after forging a doctor of law degree from Princeton. But he did graduate from Columbia and not finding his practice lucrative got himself confined in a New York penitentiary on a charge of Grand Larceny. In 1934 he was convicted of practicing law without a license

but he was a persistent person and was arrested again while found arguing a motion in court. While on bail he opened another law office in New York under a new name which he found convenient to adopt. But the files in his office were seized. There the officers found evidence which resulted in the arrest of Dr. Abraham Benjamin of New York. Apparently Housman and Dr. Benjamin were operating a lucrative fraudulent claim racket, for many claimants, clients of Housman, said they had never seen Dr. Benjamin although Housman's files contained reports on his examination of those clients.

As will be seen from the foregoing examples, the lawyer is not the only important cog in the wheel of fraudulent claims. Without the crooked doctor to help him, the lawyer may encounter much difficulty. The substitution of X-ray plates is one of the oldest rackets yet one of the hardest to discover. On an X-ray plate there is not much to enable a layman to discover whether the X-ray was taken of the particular claimant who suffered no injury, or that of some other person who actually had the injury of which the claimant is complaining. About the only certain way to obviate the possibility of such nefarious practice by certain physicians is to require X-rays made under the supervision of some physician in whom the defendant can be entirely confident. Such substitution is dangerous, for if discovered, as has happened many times, there is not much difficulty in making out a case against the physician.

Speaking of X-rays, I am reminded of an amusing incident which occurred in Chicago early this year. A workmen's compensation case was being tried before the Industrial Commission. The claimant had been X-rayed after his alleged injuries but the plates could not be found by anyone. Each party thought the other had confiscated them. Claimant's counsel was known to have a propensity for demanding records and files from his adversary. Defendant's counsel knew this and felt that this trait might be turned to advantage in the case on trial. So at the trial the defendant's attorney was seen to open his brief case and take therefrom many papers and of all things, an X-ray plate which he casually laid on the counsel table with his other files. The case pro-

ceeded and plaintiff put on a doctor who testified about plaintiff's injuries. Plaintiff's counsel then reached for the defendant's X-ray plate lying on the counsel table and handing it to his witness had his doctor happily identify it as the long lost plate of the plaintiff's ribs. He went on triumphantly to point out to the commission just where, on the plate, the injuries appeared. Defendant waived cross examination and plaintiff rested. The defendant produced only one witness, a doctor. After being sworn he was handed the X-ray plate and asked if he had ever seen it before. He had. Asked then to further identify it, the doctor stated that he had made the plate in his office about ten days ago. He then testified that the subject of the X-ray was not the plaintiff but that the plate was actually a picture of the ribs and chest of the defendant's attorney taken after a minor automobile accident.

Witnesses are also a very necessary part of organized fraudulent claims. A good witness, disinterested and observing, is ofttimes the difference between a good and bad damage suit as you all know. The practice of the claim ring is to plant their witnesses ahead of the accident. This of course has its advantages for ready-made witnesses save a lot of time and trouble.

One interesting outfit which employed this expedient came to be known as the Falling Womacks after the fashion of a circus troupe. They fell from one end of the country to the other, but always in a bus, railroad train, taxicab or store. Nine of these people were found to have made 65 claims for which they collected over $15,000 in a short period. Mrs. Womack had fallen no less than 18 times herself. Her three daughters did about as well. Checking back on their files, these four women were seen to have reported themselves pregnant in nearly every fall. The nine people in this gang took turn about being the "fall guy" and the witnesses. Apparently when one collected a few bruises which became uncomfortable, he would recuperate while doing duty as a witness. These people actually fell so much that they themselves forgot which case was which. One adjuster went to call on Mrs. Kidmore, one of the troupe, who had fallen in a store. But it was Mrs. Kidmore who opened the door for him. She said he probably wanted to see Mrs.

Womack as it was she who had fallen. As a matter of fact, Mrs. Womack was waiting for another adjuster in connection with another fall, and the two women could not keep straightened out as to where they had fallen. And that little discrepancy seemed important to the adjuster when he remembered that he had paid Mrs. Womack $50.00 for a fall in still another store a few weeks previously.

The lawyer, the doctor, the injured and the witness ofttimes find a willing ally in the person of the insurance adjuster. He, like these others, is but human. A few thousand dollars in quick time seems like a bonanza and like others again, he thinks he can get away with it when his predecessors have failed and been caught stealing. We saw a case like that here in Denver a few years ago. This man operated on a slightly different basis than those dipping into the fraudulent claim racket, but just the same he thought he could pad the claims coming to his company and pocket the proceeds. He spent some time in the penitentiary at Canon City. I have seen other cases of a similar nature. In one situation a claim adjuster and an underwriter worked in collusion. The underwriter would report the writing of a wholly fictitious bond and after a while there would be a fictitious claim on the fictitious bond and the underwriter and the claim adjuster would pocket the proceeds of the payment to a fictitious claimant.

In Youngstown, Ohio, a couple of years ago one of the most widespread and versatile of all claim rings was broken up. It involved all the classes of persons I have mentioned. It ran the gamut from faked injuries to real injuries planted in fake accidents. One company investigating the activities of its adjuster found that they had paid $2,250 on a certain claim. The injured woman said she got $677 out of it. The difference, $1,573, would be a little large for even an ambulance chasing fee. So continuing their investigation they found that their own adjuster had pocketed the difference. To accomplish the difficult feat of having the woman sign a release for $1,000 consideration, and have one to send to his Home Office showing a consideration of $2,250 the adjuster merely forged the woman's name to the release for the larger amount and destroyed the other.

Now, what can and what is being done to stop this waste? A waste that causes insurance rates to double and triple, bus companies to go out of business because of prohibitive rates, public service companies to jack up the cost to the consumer to have funds with which to meet this awful, unlawful and vicious drain upon their resources. There frankly was not much done about it until rather recently except for each victim to pass the cost on to his consumer. This practice is all right for a while but soon the cost is heavier than the traffic will bear. This is brought to light by the howls of commercial clubs, Chambers of Commerce, Kiwanis Clubs and others when the Bureau of Casualty Underwriters hike an insurance rate in their locality. Complaint is made to the companies, the Bureau, the insurance commissions. But the companies merely point to their profit and loss statement for that locality in justification. We saw this very thing in Wyoming 2 years ago. Those of you connected with insurance interests know the repercussion which followed this rate increase. You also know what caused it.

But such remedies are not permanent. They take care of the situation for the moment but the Womacks and others keep right on operating. The insurance companies undertook an extensive program a few years ago in an effort to stamp out organized fraudulent claims. It was thought that this might be accomplished if properly approached. The individual fraud case was more difficult. That was a problem which could only be coped with by the victim of the particular fraud and about all that could be done with him was to see that he did not develop into a mob. This program includes careful checking of each individual claimant more thoroughly than was ever done before. His record is compiled and he has the distinction of being assigned a case number, and if he should believe that the game is easy and try it again, his former sin will visit him with cold certainty in the form of his prior record being thrown at him wherever he goes with a claim. For nearly all the insurance, railroad and public service companies, now report all their personal injury claimants to some central reporting bureau. Along with the claimant's record goes the name of his lawyer and his doctor and ofttimes his witnesses. Should he crop up

again somewhere, sometime, his case is easily located and put in the hands of the person handling the pending claim.

To compete with the organized racket, assistance was solicited from the law enforcing agencies, the medical societies and the bar associations. And to the credit of each let it be said that they did cooperate and much of this nefarious business has been removed like the pulling of a leech from its victim whose blood it was sucking.

Frank Brancato and his gang of Sicilians were convicted and sentenced in a Brooklyn Court. George West, the Chicago attorney who had 23 people riding an empty car, was convicted and disbarred. Edward A. Housman, the New York lawyer, was last sentenced to 2½ years in State prison. The troupe of falling Womacks was sentenced in the Federal Court in East St. Louis, Illinois, on February 1, 1938, for terms ranging from two years for the lesser members of the gang, to four years for the leaders on charges of using the mails to defraud.

You probably are asking, just how do you go about breaking up a racket like this. I can best answer that by telling you of a case we had here a few years ago. A man and his wife came into Denver from Nebraska. They made claims for falls in McCook, I think it was, in Cheyenne, in Denver, in Manitou Springs. Each was a fall by the man or the alleged running over of his foot while standing on a street corner. He probably was using a grater on his foot but we never could establish that. By the time he had gotten as far as Manitou, we began to get reports back on his history and record and on comparing notes, developed the fact of these several claims. And it wasn't long before he showed up with another claim. But this time an assistant district attorney was sitting back of the desk of the adjuster for the insurance company which covered the property where he last fell. The District Attorney engaged him in conversation about his other accidents; he was identified by each of the others who had paid for his other falls and finally he made a confession, was taken to the West Side Court, pleaded guilty and was sentenced. The information upon which the District Attorney acted was presented to him by the several companies which had been victimized by this crook. But

each company might have made its settlement with him and closed its file as it does in the thousands of cases handled each year had it not been for the fact that after the second accident, each company received from its reporting service, a complete record of each claim made by the man. When that information showed that the man was operating in Denver and vicinity, the Denver office of each company using the facilities of this Bureau was sent a copy of his record. This record contained his picture, side and front view, his finger print data, his aliases, and a record of all his accidents. With that information at hand it was not difficult to identify the claimant wherever he appeared and to arrange a conference where the District Attorney could be present and the other companies' representatives on hand for identification purposes. It has been found that this is the only reasonably complete protection against such practice.

Putting detectives on individual cases often accomplishes the revelation of fraud as it did when Michael Fiaschetti started working on Frank Brancato. Following a person with a moving picture camera is a good way ofttimes to refute claims of complete disability. But these are individual problems for the individual defendant to cope with as he comes to them. Individual fraud cases add greatly to the toll exacted by accident gangs and such cases can only be controlled by individual methods. By making a record of each individual case, that individual is stopped before he starts operations of a fraudulent claim racket. An individual may discover that he is the owner of a hip joint which he can flop in and out of place like the opening and closing of a jack knife, and with about as little trouble, or he may have a vertebrae which is out of place or a portion of his body not sensitive to pin tests. If there is no way to identify this person through a central reporting bureau he can go the length and breadth of the land falling and claiming a dislocated hip, a fractured back, or paralysis. It has been done and even with the modern system of classification of such persons, detection is ofttimes difficult.

Frank Rush, known as James L. Carter and by other names, who is now 32 years of age, has collected heavily from insurance companies during the past years because of his abil-

ity to dislocate his jaw, neck, shoulders, hips, wrists, knuckles, knees, ankles and toes and to simulate concussion by self-hypnosis. In January, 1935, he was living in Oakland, California, and made a claim against a rapid transfer company there for injuries alleged to have been sustained by a fall while a passenger ascending the stairs of a double-decker bus on Christmas, 1934. The next day he telephoned from his bed in an expensive private room in the hospital advising that three of his cervical vertebrae were fractured and his neck dislocated. He demanded $10,000 and declared that if his claim was not settled within 48 hours he would employ counsel.

The hospital surgeon found that two cervical vertebrae were dislocated when Rush entered the hospital. The X-ray failed to reveal any fractures but the two dislocations were positive. He reduced them, harnessed the patient's head to the bedstead and secured it with sandbags so that it could not be moved and intended to encase the neck in a plaster cast in a few days. He regarded the injury as serious and was convinced that it was caused by the accident. Subsequently when the defendant's adjuster talked settlement with Rush the latter accepted $200 but as soon as the adjuster left, Rush got up, discarded the harness and left the hospital.

The ability to so simulate a broken neck appalled the doctors and others to such an extent that inquiries were made of various insurance companies with the result that it was found that this individual had been operating under various aliases for some time past and had collected sizeable amounts. His phenomenal ability to really "break his neck" led to a comment as to this in the Journal of the American Medical Association, Vol. 104, No. 15, dated April 13, 1935.

The people who make a business of defending personal injury actions, i.e. insurance companies, public service companies and railroads, feel that they can cope with the individual layman who thinks he can capitalize on a physical defect or manufacture his injuries and fake his accidents. But their difficulties are multiplied a thousand fold when doctors and lawyers connive with such persons. A doctor's code of ethics prevents him from giving information about a patient without the patient's consent. We do not quarrel with the

doctors on this point. It is a most salutary rule which doctors have established for their own protection and the protection of their patients. But I do not believe that any doctor who discovers that a patient is malingering or feigning injuries or symptoms of injuries should refuse to divulge this state of affairs when questioned about the case by counsel for the defendant whom the patient has sued or contemplates suing. I cannot feel that the doctor owes the duty of secrecy to such patient. Certainly if the doctors would reveal any matters of this sort which they encounter much would be done to put a severe crimp in the ambitions of the patient. And doctors discovered creating symptoms of injury where none exist should be taken to task by the authority under which they practice and disciplined accordingly. Much good has been done by the Medical Societies and Boards in helping to keep their own ranks clean and free from such menaces. Perhaps the medical men have done more than the lawyers on this situation.

But the bar associations and the courts have cooperated. We might suggest that some situations have not been dealt with as severely as they should have been but perhaps the lawyer cannot forget, even when governing his own profession, that there are rules of evidence which must be adhered to. Evidence to show that a lawyer knows the character of his client and the state of his client's mind is often difficult if not impossible to obtain. This is clearly revealed by a review of the disbarment cases in our own courts. But even though the bar still is saddled with this flotsam of the profession in some locations where the tide flows faster than it does here, those of us who are interested in elevating the bar to a position of eminence which it has held until recent years, should turn a mighty cold shoulder upon any client whose case is not well established by his facts. A person who has a desire to commit a fraud upon a defendant by the use of a fictitious injury or accident is not only not entitled to the services of a lawyer but should be reported to the authorities by any lawyer to whom he might offer such a case. I realize that it is sometimes impossible for a lawyer, whether he represents the claimant or the prospective defendant, to judge the claimant accurately. But there will come a time in the

progress of most cases when the plaintiff's lawyer is able to determine to his own satisfaction whether his client's injuries are genuine. And that is the time to act. I believe that the lawyer owes the duty to himself, his profession, and the public, to use all means at his command to satisfy himself whether his client's injuries and other facts are as the client represents.

We believe that this racket is on the wane. That the agencies set up to cope with it are doing a good job and have discovered the method whereby it may be checked if not eliminated entirely. Crime is ever present. Kidnapping continues in spite of the record of the Federal Bureau of Investigation. But who knows what the condition of this country would have been had it not been for the Lindbergh law and the G-men. And who knows what the loss to the nation would have been from fraudulent claims had it not been for the efforts of the agencies set up to combat those claims. It is hoped that the loss caused by fraudulent claims may be reduced to an irreducible minimum some day, so that the cost of insurance will be based upon legitimate loss experience, the use of the facilities of public service companies may be based upon pure cost, the charge for rail travel and shipping will be based upon pure expense and that none will be loaded, as each is now, with a hidden tax to pay for making peace with the crooked lawyers, lying doctors, perjured witnesses and thieving insurance adjusters.

THERE MAY BE SUCH A THING.

TO DICTA:

According to the newspaper report of a recent decision in our Federal Court we have a new crime, viz.: "*conscientious* participation in a gigantic fraud." (See Rocky Mountain News, September 15, 1938, reporting recent decision by Judge Murrah.)

CARLE WHITEHEAD.

JUDICIAL SOLICITUDE FOR ASSASSINS OF AGNOSTICS*

By FRANK SWANCARA, *of the Denver Bar*

COURTS have held inadmissible the dying declarations of persons not believing in supernatural punishments.[1] Since even the Supreme Court of the United States, as if having religious "predilections," solemnly declared that such statements "may be discredited by proof" that the dying declarant "did not believe in a future state of rewards and punishments,"[2] it is still timely to note the actual and possible applications of the surviving mediaeval rule indicated at the outset of this paper, and also of the one last mentioned.

Two thugs were once indicted for the murder of a four-year-old girl. Shortly before dying, the child made a statement to her mother as to the manner in which she had been assaulted by the accused. The declaration was not admitted in evidence. The judicial excuse for the rejection was that the child was too young to have "had any idea of a future state."[3] No other reason was suggested why the infant might not have told the truth as to the identity and conduct of her assailants. The court would have made a like ruling if the victim had been of mature years and had previously expressed a lack of belief in heaven or hell. It was, and still is, immaterial whether the skepticism results from an infant's immaturity or an adult's reasoning.

If it is possible for a distracted mother to witness a judicial farce in which the murderers of her child are freed because the procedure becomes deflected by theological considerations, it is probable that bereaved children may be compelled to see unwarranted acquittals of brutal killers of their elders.

Suppose that a citizen who disbelieves in the doctrine of divine wrath is murdered in cold blood by a fiend who professes orthodox beliefs, and that thereafter a young son of the victim is present at the trial of the assassin. Assume that it is known that the deceased while still alive and conscious of impending death named the defendant as the one who inflicted the lethal blows. The dying declaration is offered in evidence,

*Revision of article in *The Truth Seeker* (N. Y.) as reprinted in *The Lawyer* (Brooklyn, N. Y., June, 1938).

[1]Swancara, *Obstruction of Justice by Religion*, 131-147 (W. H. Courtright Pub. Co., Denver, 1935).

[2]Carver v. United States. 164 U. S. 694, 697.

[3]Rex v. Pike, 3 Carr. & P. 598.

but defense counsel vociferously claims to have proof that the victim did not believe "in God and a future state of rewards and punishments."[4]

Naturally the boy's innumerable memories of his paternal companion are revived, and he recalls every incident prior to the end of the funeral. He thinks of his parent's honesty and truthfulness. He is entirely unprepared to listen to judicial and forensic expressions which assail the character, reputation, or veracity of his father.

After defense counsel shows that a dying declaration occupies the same position as a living witness with respect to admissibility and credibility, a court opinion is then adduced in support of the libel that an unbeliever in hell "is unworthy of any credit in a court of justice."[5] The boy is compelled to hear the same shyster also read that an unbeliever in eternal damnation or in any Deity prescribing it "shows a recklessness of moral character and utter want of moral sensibility, such as very little entitles him to be believed."[6] A church-affiliated trial judge indicates an agreement with, and approval of, such court opinions, and the grieving son concludes that the Christian on the bench is foully caluminating the dead. If the criminal trial takes place in a small and pious town, it is attended by numerous spectators. The judge's remarks are heard with great respect, and gossips proceed to repeat, with additions, such expressions, construing them in a manner tending to blacken the memory of the murderer's unoffending victim. Naturally this circumstance greatly distresses the surviving members of the latter's family.

During the trial it is possible that members of the bereaved group may hear court or counsel read from a law book these words:[7]

"I have known a witness rejected, and hissed out of court, who declared that he doubted of the existence of a God and a future state."

If the filial listener is himself, like the late Clarence Darrow, free of belief in divine vengeance, he will observe that the

[4]See Donnelly v. State, 26 N. J. L. 463, affirmed in *id.* 601.
[5]Norton v. Ladd, 4 N. H. 444.
[6]Odell v. Koppee, 5 Heisk. (Tenn.) 88.
[7]Jackson v. Gridley, 18 Johns. (N. Y.) 97, 103; Stanbro v. Hopkins, 28 Barb. (N. Y.) 265, 268.

hisses alluded to were directed against the summoned and disinterested witness, not against the criminal, and he may rightly conclude that if he himself attempts to testify against the killer of his father he, the witness, may be "rejected and hissed out of court," or if he is allowed to remain, hear it said that he "is unworthy of any credit in a court of justice." The judicial expressions are no messages of condolence in his hour of sorrow. Instead, these rules of evidence are more subservient to the cruelty of a Herodias or a Torquemada than to fact finding, and add insult to the injury of children who have had agnostic parents murdered.

When the dying declaration of a citizen is discredited by proof of non-belief in hell, both the declarant and his testimony are discredited in the minds of some fundamentalist jurors, and the result is as if he were shown to have been convicted of some infamous crime. It was an American (not an ancient English) court that said:[8]

"* * * It (meaning unbelief in fundamentalist Christian doctrines) can scarcely fail to deprive him of the esteem of mankind, exclude him from intercourse with men of piety and virtue, and render him odious and detestable."

A jury of fundamentalist believers in a religiously revived community, hearing the so-called impeaching evidence and thereby learning that the victim of the killing was an "infidel," might be disposed to acquit the murderer upon the old ecclesiastical tenet that the destruction of a pagan, an apostate, or an unbeliever is as laudable a service to Christian society as is the extermination of noxious insects and rodents.[9] What jury is anxious to convict a murderer, not known to harbor any heresy, when it believes that his victim, now dead, was, in the chaste language of a Connecticut Christian judge, "Odious and detestable"?[10]

The juridical rule in question, in addition to causing a stigmatization of the victim's family, obviously aids a murderer to escape paying any penalty for the unjustifiable shedding of human blood. Besides affecting the credibility of the dying declaration, the practice of permitting evidence of unbe-

[8]Stow v. Converse, 3 Conn. 325, 342.

[9]"All infidels are, in law, perpetual enemies, for between them, as with the Devil, whose subjects they be, and the Christians, there is perpetual hostility, and can be no peace." Lord Coke, as quoted in Hairn v. Bridalut, 37 Miss. 209, 226 (1859).

[10]Supra note 8.

lief in theological dogmas on the part of the deceased helps the criminal to "prove" self-defense. It is a favorite trick of killers to claim that the deceased was the aggressor. If when such a defense is interposed the prosecution offers in evidence the dying declaration of the victim and the defendant submits testimony, possibly perjured, that the declarant was a non-believer in a "future state," some of the jurors who have had fundamentalist religious training in infancy may be induced to believe that the deceased victim was the aggressor and that the accused murderer did act in self-defense. The juror's reasoning would begin in accord with the following remarks of a contributor to the Scottish Rite publication, *New Age*:[11]

"If the atheist recognizes no God and is, therefore, under no compunctions about obeying Divine law, how much less regard has he for man-made law?"

The juror might assume that because the deceased knew of no "Divine law" he had an antipathy "for man-made law," and probably assaulted the defendant, compelling the latter to act in self-defense.

Most Christian judges are willing, without abhorrence, to permit lack of belief in hell to affect either the competency or the credibility of dying declarations. Recently the highest court in Missouri not only upheld and applied the ancient rule as to the impeachment of dying declarations, without regretting the supposed necessity for so doing, but attempted to justify its ruling by the citation of precedents. So bold and emphatic was the decision that the court saw fit to use italics as follows:[12]

"Dying declarations admitted in evidence *may be discredited by showing that deceased was a disbeliever in a future state of rewards and punishment.*"

It ought not to be difficult for anyone to imagine the feelings of the family and friends of a murdered man when they see in their local newspaper the publication of an official opinion containing such a reference to the deceased. It was not the murderer who was "discredited," nor was it any perjurer or other felon, but the court meant that it was the aged and unoffending man, the victim of a brutal murder, who could be thus stigmatized.

[11]Issue of November, 1928.
[12]State v. Rozell, 225 S. W. 931.

Supreme Court Decisions

DIVORCE—SEPARATE MAINTENANCE—REQUEST TO CHANGE PLEA FOR RELIEF—EVIDENCE—ENTERING FINAL DECREE OVER OBJECTION OF INNOCENT PARTY—No. 14274—*Decided October 3, 1938—Doty vs. Doty—District Court of Denver—Hon. George F. Dunklee, Judge—Affirmed—En Banc.*

FACTS: Wife brought suit for separate maintenance. Defendant filed cross-complaint for divorce. During course of trial, plaintiff amended her plea to one for divorce and alimony and jury returned a verdict in her favor. The Court entered Interlocutory Decree and awarded plaintiff the family home in satisfaction of all claims for alimony. Plaintiff offered proof of her present circumstances to support her plea for alimony, but the Court rejected the proffer. She objected to the signing of the Interlocutory Decree, saying that she had the right to again change her plea to the original one of separate maintenance. This objection was overruled and she moved to dismiss the entire action, which motion also was denied. The final decree of divorce was entered subsequently.

HELD: 1. Evidence leading to the awarding of equity in home in satisfaction of all claims for alimony examined and found to support award.

2. The trial Court is vested with some discretion in matters of the awarding of alimony and such discretion was not abused in the instant case.

3. It was not error for the trial Court to refuse plaintiff's request to again change her cause of action to one for separate maintenance.

4. When emotional instability is the only ground urged in support of plaintiff's motion to again change her cause of action, it is not sufficient reason for compelling trial Court to grant request.

5. While prior to 1933 a motion by the innocent party to dismiss the action for divorce might have been sustained although coming after the Interlocutory Decree was entered, such is not the case today.

6. In 1933, the General Assembly declared that public policy requires that the marital relation and the rights of parties to an action for divorce shall be finally determined within a reasonable time after trial, and that when the Interlocutory Decree is entered, the parties shall be divorced six months after the date thereof, and the same shall only be set aside for good cause shown after a hearing, and that such decree shall be a final order as of the date of its entry.

7. The general rule seems to be that a divorce decree will not set aside at the instance of the successful party.

8. Where it appears that the trial lasted four days, and the Court was fully advised as to the respective economic status of the par-

ties, the offer of proof as to plaintiff's needs at the time of the trial was not improperly rejected, for further testimony on that score would have been merely repetitions.

Opinion by Mr. Justice Bakke. Mr. Justice Hilliard, Mr. Justice Young and Mr. Justice Holland, dissent.

POLICE POWER—MUNICIPAL CORPORATIONS—MANDAMUS—EVIDENCE—No. 14276—*Decided August 31, 1938—Maurer vs. Boggs, Mayor, et al.—District Court of Logan County—Hon. Arlington Taylor, Judge—Reversed—In Department.*

FACTS: Plaintiff brought mandamus action to require City council of Sterling to issue a license to retail 3.2% beer. The City Council refused to issue license on ground that location of plaintiff's business place was on the fringe of the city and out of the regular business district and that made it too difficult to police the business and neighborhood with the city's small police force. The trial court refused the plaintiff relief.

HELD: 1. The action of a city council in refusing a permit to a citizen, otherwise fully qualified to sell 3.2% beer does not rise to the dignity of a policy of legal intendment to prohibit sale of such beer in such neighborhood to all persons for it had not "ordained" in statutory manner, and published to the world, that it elected to deny such privilege under its police power. There was nothing to keep the city from letting someone else have a license, or even letting the plaintiff have a license at a later date.

2. It was error for trial court to admit in evidence protests submitted to City Council against other applicants for such licenses, and an exhibit, containing uncomplimentary references to plaintiff where its signers only asked for an investigation, should have been excluded.

Opinion by Mr. Justice Hilliard. Mr. Justice Young, Mr. Justice Bakke, and Mr. Justice Knous concur.

WORKMEN'S COMPENSATION—No. 14397—*Decided September 19, 1938—Pryor Coal Mining Company et al. vs. Contino et al.—District Court of Denver—Hon. Otto Bock, Judge—Affirmed—In Department.*

HELD: "An injured workman is not to be denied a finding of total and permanent disability because not the victim of 'helpless paralysis reducing bodily functions to the minimum essential for the maintenance of a mere spark of life'. And though 'able to obtain occasional employment under rare conditions and at small remuneration'; * * * one may still 'be totally disabled for all practical purposes of competing for remunerative employment in any general field of human endeavor.' "

Opinion by Mr. Justice Bakke. Mr. Chief Justice Burke, Mr. Justice Hilliard, and Mr. Justice Holland concur.

CRIMINAL LAW — MURDER — ACCESSORY — EVIDENCE — INFORMATION—INSTRUCTIONS—No. 14335—*Decided September 19, 1938—Roberts vs. People—District Court, Weld County—Hon. Claude C. Coffin, Judge—Affirmed—En Banc.*

FACTS: R. and W. were separately tried for murder of B. Each was acquitted. After R's acquittal, but before W's acquittal, the district attorney charged R. with being an accessory after the fact to B's murder by W., but after W's acquittal amended the information charging the homicide to have been committed by a person or persons unknown; and W. was likewise charged as an accessory. R. was tried first and convicted. The case against W. was dismissed. R. assigns error.

HELD: 1. There was no material variance between the charge and the proof and the contention that R. was arraigned on one charge and convicted on another is not sound since the amendment enlarged the charge, making it broad enough to cover a murder by any person, but not eliminating W. as the perpetrator.

2. "Inability to prepare against or even being misled so that one does not prepare to defend against a specific charge is not prejudicial if that charge is not relied upon and withdrawn from the jury."

3. Evidence of defendant when on trial for murder considered and found to be sufficient, if believed by jury, to have sustained verdict of "guilty" on accessory charge since it showed that defendant had full knowledge that a crime had been committed and that he had helped to conceal it.

4. In Colorado, the conviction of the principal is not a condition precedent to the conviction of an accessory, although this may appear to be contrary to the common law.

5. The judgment in the principal felon's case, whether of conviction or acquittal, is not admissible for any purpose against the accessory.

6. It was not error for court to have admitted testimony of W. in presence of defendant R., that R. killed B., and that there was a third party present, for the court properly instructed jury that it must find beyond a reasonable doubt that the crime of murder was committed by some person "other than the defendant himself."

7. Exceptions going to the form of the information must be made before trial.

8. There is no compelling reason for holding that the information must state the means by which a concealment of a murder was committed, particularly when that question is not raised until after trial.

Opinion by Mr. Justice Young. Mr. Justice Hilliard and Mr. Justice Bouck dissent. Mr. Justice Holland not participating.

WILLS—CHARITABLE TRUSTS—INTERPRETATIONS OF CREATIVE PROVISIONS—No. 14374—*Decided October 3, 1938—In re: Estate of Chucovich vs. Jovanovich, etc.—County Court of Denver—Hon. C. E. Kettering, Judge—Affirmed—En Banc.*

FACTS: Plans for a hospital building on the grounds of Denver General Hospital, ornamentation, memorial, lobby, etc., were examined by County Court and it found that it "is a monument of permanent and ornamental nature * * * and within the terms of the will" which appointed trustee to spend not to exceed $100,000.00 as a memorial to former Mayor Speer, and to "construct and establish an ornamental fountain or gate or arch or other suitable monument of a permanent and ornamental nature, on or at an entrance to the Civic Center, or on or at an entrance to some other public park or public grounds in the City * * *". The Attorney General of Colorado assigned error.

HELD: 1. Where a trust of charitable nature is created in which the rights of heirs are not involved, such bequests are favored by the Courts and, in the interpretation of the creative provisions, the application of liberal rules may be indulged.

2. Where the doctrine of *ejusdem generis* is applied, it is generally used in connection with other important rules, not the least of which is a determination of the intent. In no event should the rule be applied within narrower confines than such intention which is to be gathered from the recognized meaning of the words employed.

3. Where the testator clearly states his desire that the monument be "a memorial in honor and memory of the late Mayor Robert W. Speer," and gives the trustee instructions to construct same saying, "an ornamental fountain or gate or arch or *other suitable monument of a permanent and ornamental nature,*" such a hospital fulfills the instructions.

Opinion by Mr. Justice Holland. Mr. Justice Bakke not participating.

TAXATION — CHARITABLE INSTITUTIONS — LABOR UNIONS — No. 14373—*Decided October 3, 1938—Lane, et al. vs. Wilson, etc.—District Court of Denver—Hon. Henry A. Hicks, Judge—Affirmed—En Banc.*

HELD: 1. Real Estate owned by a labor union and used exclusively in furtherance of its objects and purposes is not used for "strictly charitable purposes" within the meaning of Sec. 5 of Article X of Colorado Constitution and therefore, is subject to taxation.

2. An organization which is a "beneficial society whose beneficence is confined to the members, their families, dependents or friends, and depends upon the contributions made," not voluntarily given, but assessed against the members, is "not a charity, but a private institution for the mutual advantage of the members."

Opinion by Mr. Justice Bakke. Mr. Justice Hilliard and Mr. Justice Holland dissent.

ESTATES — ADMINISTRATOR — TRANSFER OF HEIR'S INTEREST — COMPROMISES—No. 14240—*Decided October 3, 1938—In re: Estate of Smith vs. Pueblo Savings and Trust Company—County Court of Pueblo County—Hon. Hubert Glover, Judge—Affirmed —In Department.*

HELD: 1. The Court will not undertake to cancel a deed to property in an estate from one heir to another in an action for accounting brought by the grantor against the administrator (bank) of the estate.

2. Nor will the title of the heir to said real estate be determined in this kind of an action.

3. Assuming that the Warranty Deed to plaintiff's brother did not cover the personal property, since he fails to show that he is entitled to it, he has no cause of action against the bank.

4. An heir may relinquish his rights by an express waiver or release or by estoppel, and as between the parties, the renunciation may be in any form which they adopt.

5. Compromises having for their object the settlement of family difficulties or controversies are favored at law and in equity if at all reasonable.

Opinion by Mr. Justice Bakke. Mr. Chief Justice Burke, Mr. Justice Hilliard and Mr. Justice Holland, concur.
