Michigan Law Review

Volume 10 | Issue 5

1912

Note and Comment

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MICHIGAN LAW REVIEW

PUBLISHED MONTHLY DURING THE ACADEMIC YEAR, EXCLUSIVE OF OCTOBER, BY THE
LAW FACULTY OF THE UNIVERSITY OF MICHIGAN

SUBSCRIPTION PRICE $2.50 PER YEAR. 35 CENTS PER NUMBER

NOTE AND COMMENT.

THE RULE OF CERTAINTY IN DAMAGES AND THE VALUE OF A CHANCE.—Although our text-books say that the rule of certainty is "more fundamental than any rule of compensation because compensation is allowed or disallowed subject to it," (cf. SEDGWICK, EL. OF DAMAGES, p. 12) nevertheless the tendency of the courts seems to be to save the equitable principle of compensation at the expense of certainty. A striking illustration of this is found in a recent case in the Court of Appeal, *Chaplin* v. *Hicks*, C. A. [1911] 2 K. B. 786. The defendant, a theatrical manager, agreed to give positions as actresses to persons chosen by the votes of the readers of a newspaper. In response to his advertisement about six thousand photographs were sent in, and from these a committee picked about three hundred. These were published in the paper and from them the readers selected five in each of the ten districts into which the country was divided. From this fifty, twelve were to be selected by a committee before which the candidates were to appear. The plaintiff's name was at the head of the five in her particular section. The defendant failed to give her proper notice of the meeting of the committee and she was thus deprived of her chance of winning a prize. The prizes were of considerable value, being appointments to positions for three years

at salaries ranging from five to three pounds a week for the period named. The jury gave her one hundred guineas damages, and, on judgment being granted for this sum, the defendant appealed. The upper court dismissed the appeal, holding that she was entitled to recover substantial and not merely nominal damages.

The facts in this case fortunately present more clearly than has any previous case the definite question as to whether the value of a chance is too uncertain for the law to estimate, and the discussion squarely announces that "the loss of a chance of winning in a competition is assessable." In previous cases on similar states of fact the question of remoteness of injury has often been confused with this question of the value of a chance. *Watson* v. *Ambergate etc. Ry.*, 15 Jur. 448 (1851). The defendant here argued the question of remoteness, but the court in each of the three opinions said that the loss was the natural and proximate result of the breach and that the damages were within the contemplation of the parties as the possible direct outcome of the breach. We thus reach the conclusion that damages may be "contemplated" though not accurately defined, and that it is the function of the jury in such a case to determine the extent of the sum in contemplation. "The taking away from the plaintiff of the opportunity of competition, as one of a body of fifty, when twelve prizes were to be distributed, deprived the plaintiff of something which had a monetary value."

The question naturally arises, how far may the jury go in this liquidation of a probability? Up to the present time the authorities have considered the question as to whether gains expected from a competition were or were not too uncertain for compensation. SEDGWICK, in the eighth edition of his DAMAGES, § 200, favors the affirmative of this proposition, on the authority of a dictum by ERLE, J., in the case of *Watson* v. *Ambergate etc. Ry., supra.* This opinion was, however, disapproved of in the case of *Adams Express Co.* v. *Egbert,* 36 Pa. 360 (1860). These cases are, however, equally undecisive of the question because the decision in the first, which was a suit for damages for failure to deliver plans for competition at the proper time, went off on another point; and in the second case, which was brought on the same state of facts, it appeared from the testimony of one of the committee that the plans could not have received the prize, if they had been delivered, consequently the plaintiff was held entitled to nominal damages only. MAYNE (See TREATISE ON DAMAGES, 8th Ed., p. 70) agrees with SEDGWICK as to the correct principle of decision, arguing that it would be absurd to claim that if the plans of all the contestants had been delayed by the carrier, each and all would have had a right to recover. But there seems to be no reason why under the facts in our principal case each of the contestants might not have had a right to recover a substantial sum, if she had been deprived of her right to compete.

The case of *Sapwell* v. *Bass,* [1910] 2 K. B. 486, was quoted by the defendant in the principal case in support of his contention. In that case the plaintiff had contracted to send a mare to a farmer's stallion belonging to the defendant and the defendant broke the contract. It was held that the plaintiff was entitled to only nominal damages, but on the ground that there was

no evidence that the right was worth more than the three hundred guineas which the plaintiff would have had to pay for the service, consequently he had lost nothing. The court, however, argued that the damages were not recoverable because they were unassessable, and proved this by piling up the probabilities against the right having any value; that the stallion should be alive and well, that the mare should be a well-bred one, that she should not be barren, that she should not slip the foal, that the foal should be a good one, etc. etc. The court in our principal case did not answer these objections but did say that the contract gave the plaintiff a right for which many people would pay money and therefore the plaintiff might recover even though the final result depended on a contingency.

It is well established that "mere difficulty in assessing damages is no reason for denying them." *Nat. Bank of Minneapolis* v. *City of St. Cloud*, 73 Minn. 219 (1898); *Banta* v. *Banta*, 84 N. Y. App. Div. 138 (1903); *Iowa-Minn. Land Co.* v. *Conner*, 136 Iowa 674, 112 N. W. 820 (1907); *Smalling* v. *Jackson*, 133 N. Y. App. Div. 382 (1909); *Swift & Co.* v. *Redhead*, 147 Iowa 94, 122 N. W. 140 (1909). "Difficulty in computing damages does not entitle the party at fault to escape with merely nominal damages." *Goldman* v. *Wolff*, 6 Mo. App. 490 (1879); *Stone* v. *Pentecost* (Mass.) 96 N. E. 335 (1911). "Damages will not be denied because their nature is such that they can not be accurately determined." *Gilbert* v. *Kennedy*, 22 Mich. 117 (1871). "Compensation is not confined to cases capable of accurate estimate as courts and juries may act on probable and inferential proof." *Rugg* v. *Rohrbach*, 110 Ill. App. 532 (1903). In a suit for a breach of an unconditional offer to give the plaintiff the agency in any Mexican town in which he could place fifty machines, it was held that the offending party should not escape liability because the damages are uncertain. All the facts and proper instructions should have been given to the jury. *Wakeman* v. *Wheeler and Wilson Co.*, 110 N. Y. 205 (1886). Even where the exercise of volition of another comes between the competitor and what he hopes to get under the contract, damages may be assessed by a jury. *Richardson* v. *Mellish*, 2 Bing. 229 (1851).

These principles apply *a fortiori* in tort, *Allison* v. *Chandler*, 11 Mich. 542 (1863). Cf. *Smalling* v. *Jackson*, *supra*. The tort cases are, however, sharply differentiated from the contract cases in that the question of remoteness is never confused with the question of assessability because all consideration of contemplation of parties is eliminated in tort.

Our principal case makes a reasonable extension of the law on the subject. It does not, however, answer squarely the question as to what effect the further doubling up of the probabilities would have upon the question of assessability by the jury. Suppose that the plaintiff, as one of the original six thousand, had been deprived of her chance of getting into the first picked class of three hundred? Probably the answer to this would be found in the discussion by this court of the decision in *Sapwell* v. *Bass*, *supra*. Did "the contract give the plaintiff a right of*** value, one for which***people would give money," supposing it were capable of transfer? If so, the jury should then have a right to exercise its discretion in the assessment of the value of the loss J. H. D.

IS A BANK CHECK AN ASSIGNMENT PRO TANTO OF THE FUND ON DEPOSIT?—Before the Negotiable Instruments Law there was a clear conflict of authority as to whether a check for a portion of the account to the credit of the drawer was an assignment *pro tanto* of the fund. The grounds of these decisions have been so well stated and so thoroughly discussed that it would be idle to repeat them here. See ZANE, BANKS AND BANKING, § 146 et seq.; DANIEL, NEGOTIABLE INSTRUMENTS, § 1635 et seq.; MORSE, BANKS AND BANKING, § 490 et seq.; 2 RANDOLPH, COMMERCIAL PAPER, § 643 et seq. In the following cases it was held that the check did not operate as an assignment: *Nat. Com. Bank* v. *Miller*, 77 Ala. 168; *Satterwhite* v. *Melczer*, 3 Ariz. 162, 24 Pac. 184 (semble); *Bank* v. *Boettcher*, 5 Colo. 185; *Reviere* v. *Chambliss*, 120 Ga. 714; *Harrison* v. *Wright*, 100 Ind. 515; *Bank* v. *Bank*, 78 Ind. 577, 585; *Carr* v. *Bank*, 107 Mass. 45; *Sunderlin* v. *Bank*, 116 Mich. 281; *Bush, Redwood & Co.* v. *Foote*, 58 Miss. 5; *Dickinson* v. *Coates*, 79 Mo. 250; *Jones* v. *Jones*, 93 Tenn. 353; *Purcell* v. *Allemong*, 22 Grat. 739 (semble); *Bank* v. 46 N. J. L. 255; *O'Connor* v. *Bank*, 124 N. Y. 324; *Hawes* v. *Blackwell*, 107 N. C. 196; *Bank* v. *Brewing Co.*, 50 Oh. St. 151; *Railroad Co.* v. *Bank*, 54 Oh. St. 60; *Bank* v. *Gill*, 6 Okl. 560; *Maginn* v. *Bank*, 131 Pa. St. 362; *Akin* v. *Jones*, 93 Tenn. 353; *Purcell* v. *Allemong*, 22 Gratt. 739 (semble); *Bank* v. *Chilberg*, 14 Wash. 247, 44 Pac. 264; *Florence Mining Co.* v. *Brown*, 124 U. S. 385; *Fourth Street Bank* v. *Yardley*, 165 U. S. 634; *Hopkinson* v. *Forster*, L. R. 19 Eq. 74; *Schroeder* v. *Bank*, 34 L. T. (N. S.) 735. On the other hand it was held in the following cases that the check operated as an assignment: *Munn* v. *Burch*, 25 Ill. 21; *Brown* v. *Schintz*, 202 Ill. 509; *Kuhnes* v. *Cahill*, 128 Iowa 594, 104 N. W. 1025; *Blades* v. *Bank*, 101 Ky. 163; *Gordon* v. *Müchler*, 34 La. Ann. 604; *Fonner* v. *Smith*, 31 Neb. 107; *Simmons* v. *Bank*, 41 S. C. 177; *Raesser* v. *Bank*, 112 Wis. 591. In Illinois, Iowa, Kentucky, Nebraska and Wisconsin, since the decisions in the above cited cases, the Negotiable Instruments Law has been enacted, by express provision of which a check shall not operate as an assignment of the fund. Thus it seems that until a very short time ago it was only in South Carolina and Louisiana that a check operated as an assignment, and in *Gordon* v. *Müchler*, *supra*, the Louisiana court pointed out that on this point their law differed from the common law.

In *Wasgatt* v. *First National Bank of Blue Earth*, decided January 26, 1912, (134 N. W. 224) the supreme court of Minnesota held that a check on a bank in which the drawer has funds subject to check is an assignment of such funds of the drawer to the amount of the check. The defendant bank on which the check was drawn refused to pay same for the reason that the drawer had died before presentment. The court, by BUNN, J., said: "The record presents squarely the mooted question whether a check on a bank, given for only a part of the funds of the drawer on deposit, is an assignment *pro tanto* as between the drawer and the payee, and as between the payee and the bank when the check is presented for payment. This question is an open one in this state."

The uniform Negotiable Instruments Law, which is not in force in Minnesota, has been adopted in 34 states and territories. For years business men and the bar generally have urged uniformity in the law of commercial paper

in the several states, with the result, as above stated, that in over two-thirds of the states and territories there is now in force the so-called Negotiable Instruments Law. In view of this effort for uniformity the decision in the principal case seems especially unfortunate. The court conceded that the matter was with them an open question and that there were the two lines of authority. As pointed out above the very great weight of authority even in the absence of statutory provision is opposed to the Minnesota court's conclusion. Not only is the numerical weight of authority opposed, but the best reason, it is believed, is with the cases holding the check not an assignment. Here was an opportunity for the court to manifest a broad minded appreciation of the situation and the effort of years for uniformity in this branch of the law. The court's inability to look beyond the borders of its own state is very much to be regretted. R. W. A.

THE "FINGER-PRINT" CASE.—On February 16, 1912, Thomas Jennings was hanged in Chicago for murder. The sustained effort to secure the accused's freedom has resulted in the judicial recognition, for the first time in a court of last resort of one of the United States, of the use of finger prints as a system of identification, of their admissibility in evidence for the purposes of comparison, and of the status as experts of those conversant with the workings of the system. *People* v. *Jennings* (Ill. 1911) 96 N. E. 1077.

Upon the trial it was established that at the time of the murder the back porch of the victim's home had been recently painted. Entrance to the house was gained through a rear window of the kitchen. Near this window was the porch, on the railing of which a person entering the window could support himself. On the railing in the fresh paint was the imprint of four fingers of someone's left hand. This railing was removed in the early morning after the murder by the officers from the identification bureau of the Chicago police force and enlarged photographs were made of the prints. The accused had once been a prisoner in the penitentiary at Joliet, where a print of his fingers was taken, and another print was taken after his arrest on the charge of murder. These impressions were likewise enlarged for the purpose of comparison with the enlarged photographs of the prints on the railing. Four witnesses, over the objection and exception of defendant's counsel, testified as experts that in their opinion the prints on the railing and the prints taken from Jennings' fingers by the identification bureau were made by the same person. Error was assigned on several other grounds, but the ground relied upon by counsel was the admission of the evidence of the finger prints, and the case has been known as the "finger-print" case.

In pronouncing the evidence as to the finger prints admissible, Chief Justice CARTER, speaking for the court, says: "It is further contended that the evidence as to the comparison of photographs of the finger marks on the railing with the enlarged finger prints of plaintiff in error was improperly admitted. No question is raised as to the accuracy of the photographic exhibits, the method of identifying the photographs, the taking of the finger prints of the plaintiff in error or the correctness of the enlargements, as shown by the

exhibits introduced in evidence. It is earnestly insisted, however, that this class of testimony is not admissible under the common law rules of evidence, and as there is no statute in this state authorizing it the court should have refused to permit its introduction. No case in which this question has been raised has been cited in the briefs, and we find no statutes or decisions touching the point in this country. This class of evidence is admitted in Great Britain. In 1909 the Court of Criminal Appeals held that finger prints might be received in evidence, and refused to interfere with a conviction below, though this evidence was the sole ground of identification. *In re Castleton's Case,* 3 Crim. App. 74. While the courts of this country do not appear to have had occasion to pass on the question, standard authorities on scientific subjects discuss the use of finger prints as a system of identification, concluding that experience has shown it to be reliable. 10 ENCY. BRITTANNICA (11th Ed.) 376; 5 NELSON'S ENCY. 28. See also GROSS' CRIM. INVESTIGATION (Adams Transl.) 277; FULD'S POLICE ADMINISTRATION 342; OSBORN'S QUESTIONED DOCUMENTS, 479.*** We are disposed to hold from the evidence of the four witnesses who testified, and from the writings we have referred to on this subject, that there is a scientific basis for the system of finger print identification, and that the courts are justified in admitting this class of evidence; that this method of identification is in such general and common use that the courts cannot refuse to take judicial cognizance of it. Such evidence may or may not be of independent strength, but it is admissible, the same as other proof, as tending to make out a case.***"

Although, as the court says, there is no American case to be found holding that an accused may be identified by a comparison of his finger prints with certain other finger prints found upon the scene of the crime, identification by comparison is no new thing in the law, and the authorities are full of analogous cases. One of the oldest methods of establishing the identity of the accused, in cases where pieces of writing are properly offered in evidence, is by a comparison of these pieces of writing with other writing of the accused, the genuineness of which has been established. *Sidney's Case,* 9 How. St. Tr. 818; *Hayes's Case,* 10 How. St. Tr. 307, and *R.* v. *Silverlock,* [1894] 2 Q. B. 766, show the development of English ideas with regard to this method of establishing identity, and while the rulings have not always been harmonious as to what might be used as the standard with which to compare the disputed writing, in what cases such a comparison might be made, and who might make the comparison, the underlying principle has always been the same. In this country the different rulings all recognize the appropriateness of the method. *Stokes* v. *U. S.,* 157 U. S. 187; *Massey* v. *Farmers' Nat. Bank,* 194 Ill. 327; *People* v. *Molineaux,* 168 N. Y. 264. So also a comparison of the spelling in the different specimens of handwriting has been allowed for the purpose of establishing identity. *Brookes* v. *Tichborne,* 5 Exch. 929; *U. S.* v. *Chamberlain,* 12 Blatchf. 390, Fed. Cas. No. 14,778; *Bevan* v. *Atlantic Nat. Bank,* 142 Ill. 302. In *State* v. *Kent,* 83 Vt. 28, decided in 1909, which was a prosecution for murder, the question arose whether the inscriptions, "E. Kent" and "E. K." carved in capitals like print on the door of a barn were carved by the defendant. A lawn mower handle on which was the inscription

"E. Kent." also in capitals like print, done in pencil, and the acknowledged work of the defendant, was admitted in evidence for comparison to establish the defendant's identity as the murderer. Here it was shown that the defendant had slept in the barn on the night of the murder, that he had a habit of whittling, and that fresh whittlings were found on the floor below the place where the inscription was cut.

Comparison of the person, features, characteristics, and peculiarities of the defendant with the person, features, characteristics, and peculiarities of the perpetrator of the crime has always been recognized by the courts as a more or less certain method of establishing the identity of the accused. Wherever evidence of such comparison has been excluded it has not been on the ground that it was incompetent, but because it has been held that in the procurement of the standard for the comparison, the constitutional privilege of the accused against self-crimination was violated. In proceedings in rape, seduction, fornication, and bastardy, a comparison of the child of the complaining witness with the defendant is generally allowed to establish the identity of the defendant as the father of the child. HUBBACK'S EVIDENCE OF SUCCESSION, 276, 277, (*Douglas Cause*, House of Lords, 1769, *Day* v. *Day*, Huntington Ass. 1797), *State* v. *Danforth*, 73 N. H. 215; *Finnegan* v. *Dugan*, 14 Allen 197; *State* v. *Horton*, 100 N. C. 443; *Paulk* v. *State*, 52 Ala. 427; *People* v. *Wing*, 115 Mich. 698. The contrary doctrine has been laid down in the following cases but in many of them appears some special circumstance, such as the extreme infancy of the child, which takes the cases out of the general rule. *Robnett* v. *People*, 16 Ill. App. 299; *Clark* v. *Bradstreet*, 80 Me. 454; *People ex rel. Fuller* v. *Carney*, 29 Hun 47; *State* v. *Neel*, 23 Utah 541. In case of the death of the putative father a photograph, proven to be a good likeness, is admissible in evidence for comparison with the child in court. *In re Jessup's Estate*, 81 Cal. 408; *Shorten* v. *Judd*, 56 Kan. 43; *Farrell* v. *Weitz*, 160 Mass. 288. Inspection of a defendant to determine color or race has been allowed. *Gentry* v. *McMinnis*, 3 Dana 382; *Garvin* v. *State*, 52 Miss. 207; *Warlick* v. *White*, 76 N. C. 175; *Hudgins* v. *Wrights*, 1 Hen. & M. 134. In *Daniel* v. *Guy*, 23 Ark. 50, the plaintiff, in a suit for freedom, was allowed to exhibit her bare feet to the jury, foot formation being evidential of race. If age is relevant, the tribunal may properly observe the person brought before it. *Langley* v. *Mark*, Cary 53; *Jones* v. *State*, 106 Ga. 365; *Com.* v. *Hollis*, 170 Mass. 433. Testimony of witnesses as to marks, scars, and other peculiarities is allowed. *Vaughan's Trial*, 13 How. St. Tr. 486, 517; *R.* v. *Buckworth*, 1 Sid. 377; *State* v. *Ah Chuey*, 14 Nev. 79; *O'Brien* v. *State*, 125 Ind. 38. In *Trulock* v. *State*, 70 Ark. 558, the mode of walking, and in *State* v. *Lytle*, 117 N. C. 799, the chunky build of the perpetrator of the crime was compared with these respective characteristics of the accused to determine the identity of the latter. In *Com.* v. *Sturtevant*, 117 Mass. 122, the deceased having been murdered by a left-handed blow, the fact that the defendant was left-handed was held admissible, and in *Com.* v. *Webster*, 5 Cush. 295, (Bemis' Rep. 89), the knowledge of anatomy as shown in the mode of dissecting the victim's body was admitted to identify the accused, a medical professor. A

comparison by a witness of the photograph of the accused with his recollection of the appearance of the guilty person is allowed for the purpose of identification. *R.* v. *Tolson*, 4 F. & F. 103; *Beamish* v. *Beamish*, Ir. Rep. 10 Eq. 413; *State* v. *Ellwood*, 17 R. I. 763; *Brooke* v. *Brooke*, 60 Md. 524. The mere opinion of the witness that the accused looks like or is the person who committed the crime is allowed. *State* v. *Powers*, 130 Mo. 475; *Woodward* v. *State*, 4 Baxt. 322; *State* v. *Johnson*, 67 N. C. 55; R. V. Burke, 2 Cox Cr. C. 295. *Contra*, *Murphy* v. *State*, 41 Tex. Crim. Rep. 120.

Identification by means of the comparison of the sound of the voice of the defendant with the sound of the voice of the perpetrator of the crime as remembered by the witness, has always been allowed. *Hulet's Trial*, 5 How. St. Tr. 1186; *Harrison's Trial*, 12 How. St. Tr. 834; *Ogden* v. *People*, 134 Ill. 599; *Com.* v. *Hayes*, 138 Mass. 185; *Price* v. *State*, 35 Tex. Crim. Rep. 501. In *Mack* v. *State*, 54 Fla. 55, the conviction of a negro for rape depended solely upon the recognition of his voice by the prosecuting witness. In *Brown* v. *Com.*, 76 Pa. 319, the previous conversation, which was the witness' basis of comparison, was had through a speaking tube. *Walker* v. *State*, 50 Tex. Crim. Rep. 221, and *Pilcher* v. *U. S.*, 113 Fed. 248, state the contrary doctrine, but there were special circumstances decisive of each of these cases. Conversation through a telephone as a standard for comparison has been allowed, although there is authority both ways on this point. *Vaughan* v. *State*, 130 Ala. 18; *People* v. *McKane*, 113 N. Y. 455. The principal case refers to the identification of an accused by a comparison of the footprints found at the scene of the crime with the footprints of the accused. In *Shaw's Case*, 1 Lew. Cr. C. 116, the court refused to allow such a comparison because the witness had not looked at the feet of the accused, but acknowledged the admissibility of such a comparison if properly made. In *Jones* v. *State*, 63 Ga. 395, the court held that the fact that tracks leading from the house, in which a larceny had been commited during a fire, to the hiding place of the stolen property, corresponded with the tracks made by the shoes of the accused, was admissible on the prisoner's trial for arson. And such a comparison has been quite generally held competent. *Carlton* v. *People*, 150 Ill. 181; *People* v. *Searcey*, 121 Cal. 1; *Johnson* v. *State*, 30 Vroom. 535; *People* v. *Van Wormer*, 175 N. Y. 188; *State* v. *Graham*, 74 N. C. 646; *Pitts* v. *State*, 60 Tex. Crim. Rep. 524; *State* v. *Fuller*, 34 Mont. 12. A comparison of the print of the accused's bare foot with foot prints discovered at the scene of the crime has been held to be competent evidence to establish identity. *Gilmore* v. *State*, 99 Ala. 154; *Mann* v. *State*, 22 Fla. 600. The case of *State* v. *Miller*, 42 Vroom. 527, is the nearest approach to the principal case to be found in the American authorities. In the house where the homicide took place there was found upon the wall of one of the rooms the imprint of a bloody hand. Before accused had been arrested he accompanied some of the peace officers to this house and while there he was asked to place his hand upon the bloody mark, which he did. It was held that as the request to place his hand upon the mark was voluntarily complied with by the accused, the bystanders were competent to express an opinion as to the coincidence between the outline of the hand and the outline of the print. A section of the

wall containing the print was brought before the jury. In England the courts have admitted evidence of the comparison of finger prints. In the case of *Thomas Herbert Castleton*, 3 Crim. App. 74, the only evidence to sustain the conviction of the accused was finger prints corresponding to his own on a candle found in the burglarized house.

When the possibilities of mistake in the methods of identification now allowed by the courts are considered in connection with the known and thoroughly proven infallibility of the system in question, the wonder is not that the courts in this country have accepted the finger print system of identification, but that its judicial recognition has been so long deferred. See "An Afternoon with Bertillon," Vol. 100, No. 8, *The Outlook*, p. 425. The decision of the Illinois court is unquestionably correct.

From the time when this opinion was handed down until the execution of the court's sentence, no effort was spared to secure Jenning's freedom. At the very hour of execution, lawyers were vainly arguing for a writ of habeas corpus in the Federal court on the plea that when Jennings was compelled to give the Bertillon bureau an imprint of his fingers, he was made to testify against himself, and his constitutional rights were thereby violated. *State* v. *Garrett* (1874), 71 N. C. 85, contains an able discussion of this question. In that case the accused, who claimed that her hand was burned, was compelled by the coroner to exhibit it at the inquest. At the trial in the circuit court the prisoner objected to the admission of the testimony of a doctor who had seen her hand, and relied on the case of *State* v. *Jacobs* (1850), 5 Jones Law 259, which holds that a judge has not the right in a criminal prosecution to compel the defendant to exhibit himself to the jury for the purpose of enabling them to determine his status as a free negro. "The distinction between that and our case," says the court in the Garrett case, "is that in the *Jacobs* case the prisoner himself on trial was compelled to exhibit himself to the jury *** and thus he was forced to become a witness against himself *** In our case not the prisoner, but the witnesses were called to prove what they saw upon inspecting the prisoner's hand, although the inspection was obtained by intimidation. *** The later cases are uniform to the point that a circumstance tending to show guilt may be proved, although it was brought to light by declarations inadmissible *per se*, as having been obtained by improper influence." WIGMORE, EVIDENCE, § 2265, says: "The limit of the privilege is a plain one. From the general principle it results that an inspection of the bodily features by the tribunal or by witnesses cannot violate the privilege because it does not call upon the accused as a witness, *i. e.*, upon his testimonial responsibility. That he may in such cases be required sometimes to exercise muscular action—as when he is required to take off his shoes or roll up his sleeves—is immaterial, unless all bodily action were synonymous with testimonial utterance; for, as already observed, not compulsion alone is the component idea of the privilege, but testimonial compulsion. What is obtained from the accused by such action is not testimony about his body, but his body itself. Unless some attempt is made to secure a communication, written or oral, upon which reliance is to be placed as involving his consciousness

of the facts and the operations of his mind in expressing it, the demand upon him is not a testimonial one."

To compel the accused to use his voice, *Johnson* v. *Com.*, 115 Pa. 369; or to make an inscription of handwriting, *State* v. *Fritz*, 23 La. Ann. 55; or to point out places and articles, have been considered violations of the privilege. The use of accused's utterances for forming a witness' opinion as to his sanity is a dubitable case only when compulsion has been resorted to, *People* v. *Truck*, 170 N. Y. 203. The remaining instances are for the most part outside the privilege, although the different courts have varied much in the strictness of their interpretation. Thus it has been held that it is proper to compel the accused to face the jury, *People* v. *Olivcria*, 127 Cal. 376; *People* v. *Gardner*, 144 N. Y. 119; *State* v. *Reasley*, 100 Iowa 231; *Coles* v. *State*, 23 Ohio C. C. 313. CONTRA, *Blackwell* v. *State*, 67 Ga. 76; *Williams* v. *State*, 98 Ala. 52; to compel him to put on his hat or to remove a veil, *Benson* v. *State*, (Tex. Crim. Rep.) 69 S. W. 165; *Rice* v. *Rice*, 47 N. J. Eq. 559; to force him to place his foot in a track or in a pan of mud for the purpose of comparing the track so made with others, *Walker* v. *State*, 7 Tex. Crim. Rep. 246; *Pitts* v. *State*, 60 Tex. Crim. Rep. 524; *State* v. *Graham*, 74 N. C. 648; *Potter* v. *State*, 92 Ala. 37; *Magee* v. *State*, 92 Miss. 865. But there is respectable authority opposed to this doctrine. *Day* v. *State*, 63 Ga. 667; *Stokes* v. *State*, 64 Tenn. (5 Baxt.) 619. There is also a division of authority upon the question as to the admissibility of evidence secured by a forcible examination of the accused. *State* v. *Ah Chuey*, 14 Nev. 79, 33 Am. Rep. 488; *O'Brien* v. *State*, 125 Ind. 38; *State* v. *Tettaton*, 159 Mo. 354; *State* v. *Garrett*, 71 N. C. 85; *State* v. *Prudhomme*, 25 La. Ann. 522 hold such evidence admissible, while *State* v. *Height*, 117 Iowa 650, 94 Am. St. Rep. 323; *People* v. *McCoy*, 45 How. Pr. 216; *State* v. *Nordstrom*, 7 Wash. 506; *Blackwell* v. *State*, 67 Ga. 76, hold that the admission of such evidence violates the privilege. In England and in Canada by statute, any person in lawful custody must submit to the taking of identifying measurements. 34 and 35 Vict. c. 112, s. 6; St. 1898 c. 54. In *U. S.* v. *Cross*, 20 D. C. 365 the measurements of defendant made in the marshal's office were admitted for the purpose of comparison and identification, and in *State* v. *Nordstrom*, *supra*, measurements of defendant's feet were admitted to contradict testimony that he could not wear certain shoes. *State* v. *Ellwood*, 17 R. I. 763; *Thompson* v. *State*, 45 Tex. Crim. Rep. 190; *Bridges* v. *State*, 86 Miss. 377. In *Matter of Molineux* v. *Collins*, 177 N. Y. 395, the taking of the measurements and the photograph according to the Bertillon system in the state prison of New York under statute was referred to but the question in the case was raised upon a different issue, as the plaintiff did not question the right of the state to require the identifying marks.

A careful examination and comparison of the cases bearing upon this point lead to the conclusion that the Federal court was justified in denying the writ of *habeas corpus*. Upon reason it would seem that a tribunal should be entitled to have before it as well the lines in the hand and fingers as marks, scars or any other bodily peculiarity of the accused, and with no greater violation of his constitutional right. L. H. L.

RIGHT OF HUSBAND TO RECOVER ALIMONY INDEPENDENT OF AN ACTION FOR DIVORCE.—A recent decision which has attracted far more than the customary interest among the laity and has subjected the court rendering it to a considerable amount of criticism, besides furnishing the basis for no end of humor throughout the country, is that handed down by the Supreme Court of North Dakota on November 25, 1911, in the case of *Hagert* v. *Hagert* (N. D. 1911), 133 N. W. 1035. In this case it was held that a husband may properly bring an action, unconnected with divorce, against his wife to compel her to support and maintain him when she is amply able to do so, and has not been deserted or abandoned by him, and when he, because of age and infirmity, is unable to gain his own livelihood.

Briefly the facts in the case are these: Plaintiff, who was married to defendant more than thirty years ago, is a man of fifty-five years, unable to work and feeble beyond his years as the result of paralysis. Defendant, on the other hand, is wealthy, her separate estate being valued at approximately thirty thousand dollars. Besides plaintiff she has dependent upon her only a twelve-year-old son. Plaintiff has not deserted defendant but she refuses him maintenance. Plaintiff in his bill in this action asked money for necessaries, pending the determination of the controversy, money for attorney's fees and monthly payments for his support. He was successful in the District Court of Grand Forks County and defendant appealed.

The Supreme Court based its affirmance of the decision of the lower court on two grounds, either one of which, it stated, was sufficient to support the ruling. First it argued that it is no objection that there is no precedent at Common Law for this action, since the advance of woman has thrown an entirely new light upon the relation of husband and wife; that at the time of the adoption of the Constitution of the State in 1889, it was a well recognized principle of equity that a wife might sue for alimony, independent of an action for divorce, and that the right so to sue is continued to her under the provision of Section 103 of the Constitution, conferring upon the district courts, jurisdiction of all cases "both at law and equity," and that the reasoning which allows a wife to recover alimony applies equally to a husband, when there is considered the comparative equality of husband and wife under modern statutes.

As the basis of its second ground of affirmance the court quotes the following sections of the Code of 1905 of North Dakota:

"§ 4077—A husband must support himself and his wife out of his property or by his labor. A wife must support her husband when he has not deserted her, out of her separate property, when he has no separate property and is unable to support himself.

"§ 4078—Except as mentioned in Section 4077, neither the husband nor the wife has any interest in the property of the other but neither can be excluded from the other's dwelling."

On these statutes it bases the argument that the husband has an inchoate interest, to the extent of his support, in the estate of the wife, and that he therefore has a property interest as an additional matter for equitable cognizance.

One of the indispensable steps by which the North Dakota court supports its first ground of affirmance is its conclusion that, at the time of the adoption of North Dakota's constitution, courts of equity, by the weight of authority, recognized the right of the wife to maintain an action for alimony, independent of divorce proceedings. In this statement the court attempts the decision of one of the most controverted points in equity jurisprudence.

There is no doubt that the earliest rule in England was directly to the effect that such an action was not allowable, but as early as 1632 there was an apparent recognition of a right very closely akin to that contended for in the principal case. *Lasbrook* v. *Tyler* (1632), 1 Ch. Rep. 24. There the plaintiff "sought to be relieved of defendant Tyler, her husband for allowance to be given her for maintenance, for all the time she departed from him." The court allowed her the maintenance. In *Williams* v. *Callow* (1717), 2 Vern. 752 the analogy to our case is more marked. There the court decreed the interest of a trust bond given for the wife's portion, to be paid to the wife for her separate maintenance. *Watkyns* v. *Watkyns* (1740), 2 Atk. 97, which followed very closely, resulted from a bill brought by a wife for "maintenance out of her fortune upon a suggestion of very cruel usage without any provocation on her side." Said HARDWICKE, L. C.: "As it appears to the court that the husband has possessed himself of the greater part of the wife's fortune and is gone out of the kingdom without leaving a provision or maintenance for her, I decree that interest arising from the trust money shall be paid to her until he thinks proper to return and maintain her as he ought." Of these three English cases which have, almost alone, influenced the trend of the American decisions, it is certain that the latter two are independent of divorce actions. In the first, however, it is not certain that the prayer for alimony was not coupled with a prayer for divorce.

The pioneer American case on the subject is *Butler* v. *Butler* (1823), 4 Litt. 202. Said the court in that case, citing the English cases previously mentioned: "We therefore conceive that the chancellor, before the statute and since, in cases not embraced by it, which have strong moral claims, had and has jurisdiction to decree alimony, leaving the matrimonial chain untouched." Other early cases in this country holding the same rule are: *Galland* v. *Galland* 38 Cal. 265; *Garland* v. *Garland*, 50 Miss. 694; *Glover* v. *Glover*, 16 Ala. 440, and *Prather* v. *Prather*, 4 Desaus. (S. C.) 33.

Regarding the present rule in this country, in 2 AM. AND ENG. ENCYC. OF LAW (Ed. 2) 93-94 is this statement: "It is maintained at present, by the weight of authority that, in the absence of legislation to the contrary, alimony should not be allowed in an independent suit in courts of equity." If one is to measure the weight of authority by sheer number of jurisdictions applying the various rules it is extremely doubtful if the statement just quoted may be accepted as absolutely correct. A careful examination shows the following cases supporting the right of the wife to recover in an independent action: *Brewer* v. *Brewer*, 79 Neb. 726, 113 N. W. 161, 13 L. R. A. (N. S.) 222; *Wood* v. *Wood*, 54 Ark. 172, 15 S. W. 459; *Williams* v. *Williams*, 136 Ky. 71, 123 S. W. 337; *Parker* v. *Parker*, 134 Ga. 316, 67 S. E. 812; *Christopher* v. *Christopher*, 18 S. C. 600; *Graves* v. *Graves*, 36 Iowa 310, 14

Am. Rep. 525; *Clisby* v. *Clisby,* 160 Ala. 572, 49 South. 445, 135 Am. St. Rep. 110; *Milliron* v. *Milliron,* 9 S. D. 181, 68 N. W. 286, 62 Am. St. Rep. 863; *Baier* v. *Baier,* 91 Minn. 165, 97 N. W. 671; *Edgerton* v. *Edgerton,* 12 Mont. 122, 29 Pac. 966, 16 L. R. A. 94, 33 Am. St. Rep. 557; *Dye* v. *Dye,* 9 Colo. App. 320, 48 Pac. 313; *Almond* v. *Almond,* 4 Rand. 662, 15 Am. Dec. 781; *Butler* v. *Butler, supra; Galland* v. *Galland, supra; Garland* v. *Garland, supra; Glover* v. *Glover, supra, and Prather* v. *Prather, supra.*

The following are to the contrary effect: *Chestnut* v. *Chestnut,* 77 Ill. 346; *Moon* v. *Baum,* 58 Ind. 194; *Carroll* v. *Carroll,* 42 La. Ann. 1071; *Littlefield* v. *Paul,* 69 Me. 533; *Adams* v. *Adams,* 100 Mass. 365; *McIntire* v. *McIntire,* 80 Mo. 470; *Parsons* v. *Parsons,* 9 N. H. 309, 32 Am. Dec. 362; *Nichols* v. *Nichols,* 25 N. J. Eq. 60; *Atwater* v. *Atwater,* 53 Barb. 621; *Rees* v. *Waters,* 9 Watts 90; *Prosser* v. *Warner,* 47 Vt. 667.

In North Dakota the precise point had not, previous to this case, been decided. *Bauer* v. *Bauer,* 2 N. D. 108 allowed alimony independent of divorce, but it did so under Chapter 167 of the SESSION LAWS of 1890. Of that statute the plaintiff in this action sought to take advantage, but the court refused to decide whether or not it was in force, preferring to place its decision upon the two points mentioned previously. It seems very possible, however, that, despite its statement regarding the statute, the *Bauer* case may have exerted considerable influence upon the decision of the North Dakota court in our principal case.

It is very probable, then, that the North Dakota court correctly viewed the weight of authority at the time of the adoption of its constitution.

This troublesome point decided, the court proceeds to apply the reasoning, which first led courts of Chancery to recognize the right in a wife to sue for alimony independent of an action for divorce, to the situation in this case, with a husband as suitor. This extension of the doctrine it would justify partially on the authority of *Livingston* v. *Superior Court,* 117 Cal. 633, 49 Pac. 836, 38 L. R. A. 175. That case, however, seems scarcely in point in the North Dakota case. There a husband had sued his wife, and an injunction had issued to restrain her from conveying property to defeat any judgment which might be found against her. She did convey, however, and the court adjudged her guilty of contempt. The appeal was solely on the question as to whether her action justified the court in holding her in contempt, and the expression to the effect that the husband may maintain such action for alimony was mere *dictum.*

In support of its second point, the court attempts the citation of no cases, arguing from the wording of the statutes as set out previously, that the husband acquired a property right in the wife's estate which a court of equity should enforce.

The court, it seems, might well have added strength to its decision by pointing out the analogy to the case where one seeks divorce and alimony, and by calling attention to the well defined rules governing a husband in such cases. In 34 L. R. A. 110 it is said, on this point: "The tendency is to place husband and wife on an equality on this question as the rights and

powers of the wife expand and the respective rights and powers of the husband contract, and alimony has been given the husband in some cases."

In cases where the wife was considered at fault, alimony has been extended to include land bought with the proceeds of property belonging to the husband, *Stewartson* v. *Stewartson,* 15 Ill. 146; an equitable share where, through the wife's misconduct she has got title to all his property and driven him from the premises, *Snodgrass* v. *Snodgrass,* 40 Kan. 494; in cases where the husband has been held to be at fault, alimony has also been given him. *Fitts* v. *Fitts,* 14 Tex. 443.

Statutes have generally, nowadays, given the husband rights in his wife's property upon divorce, and many of these have allowed him alimony and maintenance. Typical statutes are: N. H. Pub. Stat. 1891, Chap. 175, Sec. 17; Batt. (N. C.) Rev., Chap. 37, Sec 9; R. I. Pub. Stat. 1882, Chap. 167, Sec. 4; Vt. Gen. Stat. 1870, Chap. 70, Sec. 36. W. R. M.