

Annual Survey of Massachusetts Law

Volume 1954

Article 32

1-1-1954

Chapter 26: Evidence

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Recommended Citation

McDermott, Frederick A. (1954) "Chapter 26: Evidence," *Annual Survey of Massachusetts Law*: Vol. 1954, Article 32.

C H A P T E R 26

Evidence

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§26.1. **Judicial notice of foreign law.** At common law, the law of a foreign state was generally treated as presenting a question of fact. It was held that it required proof and was not susceptible of judicial notice by either the trial court or the appellate court, except in so far as it would be presumed that the common or fundamental law of the foreign state was the same as the common law of the forum.¹

In 1926 a statute² was enacted which provides that the courts shall take judicial notice of foreign law whenever it is material. The language of the statute is extremely broad and uncompromising. If literally construed, without qualification, it would obviously place intolerable burdens upon the courts of the Commonwealth. It was not surprising therefore, that the statute was subjected to a limiting construction. This was done by holding that foreign law remains a question of fact and that therefore neither the trial court nor the Supreme Judicial Court is bound to take judicial notice of it unless it has been called to the attention of the trial court or in some manner has been introduced into the record with adequate particularity.³

A recent case outside the general rule so enunciated by the Court is *Petition of Mazurowski*.⁴ The Consul General of Poland in New York, representing residents of Poland, filed petitions to require payment to them of distributive shares of the estate of a deceased resident of the

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§26.1. ¹ *Miller v. Aldrich*, 202 Mass. 109, 88 N.E. 441 (1909); *Parrott v. Mexican Central Ry. Co.*, 207 Mass. 184, 93 N.E. 590 (1911).

² Acts of 1926, c. 168: "The courts shall take judicial notice of the law of the United States or of any state, territory or dependency thereof or of a foreign country whenever the same shall be material."

³ *Lennon v. Cohen*, 264 Mass. 414, 163 N.E. 63 (1928); *Donahue v. Dal, Inc.*, 314 Mass. 460, 50 N.E.2d 207 (1943). See *Mastrullo v. Ryan*, 328 Mass. 621, 105 N.E.2d 469 (1952). See 24 Mass. L.Q., No. 4, p. 8 (1939).

The Supreme Judicial Court may, however, *in its discretion* judicially notice applicable foreign law even though the record is barren of any reference thereto. *Walker v. Lloyd*, 295 Mass. 507, 4 N.E.2d 306 (1936); *Hiller v. American Telephone & Telegraph Co.*, 324 Mass. 24, 84 N.E.2d 548 (1949). See *Bradbury v. Central Vermont Ry.*, 299 Mass. 230, 12 N.E.2d 732 (1938).

⁴ 331 Mass. 33, 116 N.E.2d 854 (1954).

Commonwealth. The probate judge ruled that inasmuch as there was no adverse party in the proceeding, the responsibility was upon the court to see that the proper parties were entitled to receive the funds at their full value. He then of his own motion sought and received information from the Department of State as to the Polish foreign exchange regulations, and under the provisions of the so-called "Iron Curtain" statute⁵ issued orders requiring the personal appearance of each petitioner "to assist in establishing such claimant's identity, right and opportunity to receive such fund." On appeal, the Supreme Judicial Court approved the ruling of the judge and his action in taking judicial notice of the Polish law.

The case is clearly distinguishable from the usual type of adversary proceeding represented in the earlier cases which construed the statute providing for judicial notice of foreign law. Here, since there was no party adverse to the petitioners, there was no one to introduce evidence or request judicial notice of factual conditions existing in Poland or to call the law of Poland to the attention of the trial court. Nevertheless, the judge was required to discharge the obligation of an informed discretion under the "Iron Curtain" statute. The obvious solution was for the judge, of his own motion, to take judicial notice of the facts and of the foreign law.

Since the case is distinguishable, it will not afford any basis for a conclusion that the general rule requiring that the attention of the trial court be called to foreign law in order to make it available as a matter of right has been changed or weakened. The Supreme Judicial Court has avoided any general statement to the effect that the trial court has even the discretion, to say nothing of the responsibility, of taking judicial notice of foreign law, possibly because of fear that recognition of such discretion to notice foreign law *sua sponte* might easily ripen into the equivalent of a general mandate for research on the part of the trial court.

§26.2. **The new blood test statute.** By an act approved March 23, 1954,¹ the legislature added a new Section 12A to Chapter 273 of the General Laws, as follows:

In any proceeding to determine the question of paternity, the court, on motion of the defendant, shall order the mother, her child and the defendant to submit to one or more blood grouping

⁵ Acts of 1950, c. 265, which added a new Section 27A to G.L., c. 206: "Whenever payment of a legacy or distributive share cannot be made to the person entitled thereto, or such person may not receive or have the opportunity to obtain said legacy or distributive share, the court, on petition of an interested party or in its discretion, may order that the money be deposited in a savings bank or other like institution, or invested in the manner provided in section twenty-eight. When a claimant to such funds resides outside of the United States or its territories, the court in its discretion, in order to assist in establishing such claimant's identity, right and opportunity to receive such fund, may require the appearance in person before the court of such claimant."

§26.2. ¹ Acts of 1954, c. 232.

tests, to be made by a duly qualified physician or other duly qualified person, designated by the court, to determine whether or not the defendant can be excluded as being the father of the child. The results of such tests shall be admissible in evidence only in cases where definite exclusion of the defendant as such father has been established. If one of the parties refuses to comply with the order of the court relative to such tests, such fact shall be admissible in evidence in such proceeding unless the court, for good cause, otherwise orders.

No case involving admissibility of such blood-grouping tests had reached the Supreme Judicial Court before the enactment of the statute.

The statute has several features worthy of note which may be briefly indicated. It requires that on motion of the defendant the court *shall* order such tests, and further requires that the court shall designate the person to make the tests. Determination of the qualifications of the person selected to make the test would appear to be a function of judicial notice and not a question of fact. The statute assumes, and therefore amounts to a legislative determination, that blood-grouping tests are valid to negative paternity in certain cases. It accords with well-settled common law principles in providing that where the tests are consistent with paternity, the results thereof shall not be admissible in evidence, since such evidence would be obviously remote and highly prejudicial to the defendant. The sanction imposed by the legislature is not that of contempt, but that of making the fact that "one of the parties refuses to comply with the order" admissible in evidence in the discretion of the court. The "parties" referred to are obviously the parties to the order, not to the action to determine paternity. This provision for such a contingency, while phrased in apparently neutral terms, is obviously directed at the complainant, since by hypothesis the defendant has moved for the order, and the child, ordinarily at least, is in no position to exercise a choice.

The statute properly goes no further than to provide that the "results of such tests shall be admissible in evidence" where the paternity of the defendant has been definitely negated by the particular tests. This should not be construed as permitting the fact-finder to question the scientific validity of the principle underlying blood-grouping tests. However, the question whether the test has been properly conducted in any given case, particularly under delegated laboratory and clerical procedures, is a question of fact.²

The usual testimonial evidence of the complainant to the effect that the defendant is "the only one" necessarily conflicts with the evidence of nonpaternity found in testimony as to negative results of the test. The fact-finder may believe the complainant and resolve the conflict in the evidence by inferring that there necessarily was some error in the procedure under which the test was conducted.³ It is therefore to be

² See *Prudential Trust Co. v. Hayes*, 247 Mass. 311, 142 N.E. 73 (1924).

³ *Jordan v. Davis*, 143 Me. 185, 57 A.2d 209 (1948).

expected that the fact-finder, particularly a jury, will in some cases find the defendant guilty despite evidence of negative blood-grouping tests.⁴ It is possible that the court will set aside such a verdict.⁵

However, in the majority of the cases thus far reported, the court has refused to set aside the verdict of paternity. These cases have been severely criticized,⁶ but it seems to be impossible, on any basis short of assuming a conclusive presumption of infallible accuracy in the administration and reporting of all blood-grouping tests, to indulge in the sweeping generalities often found in the criticism. When, in a particular fact situation, the court is convinced that a verdict of paternity in the face of testimony of a negative blood test is a miscarriage of justice, a new trial is of course warranted.⁷

The statute contains the provision that the results shall be admissible only "where definite exclusion of the defendant as such father has been established." This, however, obviously should not be construed to require, if indeed a statute could properly require, that the presence of testimony as to negative results of one or more blood-grouping tests, even when ordered by the court, be held to be either conclusive on the issue or necessarily ground for a new trial where the jury finds paternity.⁸ The results of such a test or tests are still to be merely "admissible in evidence."

§26.3. Stipulation versus judicial notice: Municipal legislation. The recent case of *Fairman v. Board of Appeal of Melrose*¹ has raised some interesting questions. In that case the plaintiffs had filed an appeal in the form of a suit in equity in the Superior Court under General Laws, Chapter 40, Section 30, to obtain annulment of a variance of a zoning ordinance granted by the defendants. Sections 25 to 30B of Chapter 40 contained the provisions of the general enabling act permitting municipal zoning legislation. The answer alleged that there had been no acceptance of Chapter 40, Section 30A, by the city, and asserted that the board was governed by a specified ordinance with respect to the matters in Section 30A. (The opinion misconstrues this averment as a denial of acceptance of Chapter 40.) The Superior Court granted the annulment.

On appeal, the defendants' brief stated that the board was established under Chapter 22 of the Acts of 1924 and is not governed by

⁴ The most famous of such cases is undoubtedly *Berry v. Chaplin*, 74 Cal. App. 2d 652, 169 P.2d 442 (1946).

⁵ *Jordan v. Mace*, 144 Me., 351, 69 A.2d 670 (1949).

⁶ See *Britt*, Blood-Grouping Tests and More Cultural Lag, 22 Minn. L. Rev. 836 (1938); *Blood-Grouping Tests and the Law of Evidence*, 19 Rocky Mt. L. Rev. 169 (1947). See also *Maguire*, A Survey of Blood Group Decisions and Legislation in the American Law of Evidence, 16 So. Calif. L. Rev. 161 (1943). Cases are collected in 163 A.L.R. 939-961 (1946).

⁷ *Commonwealth v. Gricus*, 317 Mass. 403, 58 N.E.2d 241 (1944).

⁸ See *Commonwealth v. Cox*, 327 Mass. 698, 100 N.E.2d 14 (1951), for illustrations of the somewhat analogous considerations which may arise under the Briggs Law, G.L., c. 123, §100A.

§26.3. ¹ 1954 Mass. Adv. Sh. 173, 117 N.E.2d 829.

Chapter 40, Section 30. That statute was an act creating a board of appeal specifically for the city of Melrose, which was to take effect only upon a vote of acceptance by the Board of Aldermen. The remedy of the plaintiffs, if this statute had been accepted by the city, would lie in certiorari and not in appeal.

The Supreme Judicial Court said that it could not take judicial notice either of the ordinance cited in the defendants' answer or of the vote of acceptance by the city of the enabling statute intimated in their brief. There was no finding in the record that the board had been set up under either Chapter 40, Section 30, of the General Laws or Chapter 22 of the Acts of 1924.

However, the plaintiffs' brief contained the statement: "It is conceded that the city of Melrose has adopted a zoning ordinance pursuant to the enabling statute." Apparently on the basis of this somewhat ambiguous assertion, the Court concluded that "In this court the parties seem to be in agreement that the board is not established under G.L. (Ter. Ed.) Chapter 40, Section 30, as amended," and said, "We understand the statements in the briefs to be the equivalent of a stipulation that St. 1924, Chapter 22 is the enabling statute." The Court dismissed the petition, since the appropriate remedy of the plaintiffs under that statute was a petition for writ of certiorari and not an appeal.

In the background of the decision is the well-settled rule that municipal ordinances (and town by-laws) are not the subject of judicial notice, which was recently reaffirmed in the decision in *Fournier v. Central Taxicab Co.*² The Court there said, referring to a request that the trial judge take judicial notice of certain municipal ordinances: "We need not consider whether these ordinances apply to the case. Neither a trial judge nor this court can consider such alleged ordinances unless they are put in evidence." The Court had also said, in 1952, that it could not take judicial notice on the question whether a town had accepted and thereby brought itself within the operation of an enabling statute.³

The anomalous situation therefore exists in the Commonwealth that while by statute foreign law must be judicially noticed whenever it is material and is called to the attention of the trial court with adequate particularity,⁴ a municipal ordinance or town by-law, or a vote accepting an enabling act, all matters of domestic law, are treated for purposes of trial as if they were matters of fact to be proved by evidence just as any other matter of fact.⁵

² 1954 Mass. Adv. Sh. 275, 118 N.E.2d 767.

³ *Howes v. Town of Essex*, 329 Mass. 381, 108 N.E.2d 684.

⁴ G.L., c. 233, §70; see *Richards v. Richards*, 270 Mass. 113, 169 N.E. 891 (1930), and the cases cited in Section 26.1 *supra*, note 3.

⁵ See *Boyle v. Building Inspector of Malden*, 327 Mass. 564, 99 N.E.2d 925 (1951). The same rule applies with regard to regulations of administrative bodies of the state government. *Finlay v. Eastern Racing Assn., Inc.*, 308 Mass. 20, 30 N.E.2d 859 (1941); *Wolbarscht v. Donnelly*, 291 Mass. 229, 197 N.E. 6 (1925).

It is true, of course, that proof of ordinances, by-laws, and administrative regula-

The implication of the *Fairman* case is that the parties may effectively stipulate as to a municipal ordinance or town by-law, or vote of acceptance of a statute. Such a holding would be consistent with the settled practice of regarding such enactments as matter of fact for the purpose of trial. It would, of course, run counter to the spirit of the generalization that "parties may not stipulate as to the law,"⁶ but in the ordinary case of adversary litigation involving rights and duties between individual litigants, whatever harm is done might be dismissed as due to invited error.

However, the defendants' answer in the *Fairman* case raised the more fundamental question of the jurisdiction of the Superior Court to entertain the appeal. It is the duty of the trial court to settle such a question of jurisdiction even though it is not raised by the parties, since the parties cannot confer jurisdiction on or withhold it from the court.⁷ Thus, that question remains for the court to decide "upon the facts and the law" even though the parties formally "agree" or "stipulate," for example, that mandamus is the proper proceeding to force removal of certain gas pumps located within the limits of a public way,⁸ or to compel reinstatement of a teacher in the public schools.⁹

In the *Fairman* case the jurisdiction of the Superior Court to entertain the appeal, a question of law, depended upon two matters of law: an enabling statute of the Commonwealth and a vote of the city of Melrose accepting the statute. The fiction that an ordinance or by-law or acceptance of a statute is fact for the purpose of trial is stretched until it cracks, if the parties are allowed to stipulate on such matters for the purpose of determining jurisdiction. The fact that the public interest also was involved in the merits of the *Fairman* case, at least to the extent that a public agency was a party and the validity of its official action was the issue, makes the apparent holding of the case even less desirable.

Under the present rules of the game, there appears to be no way in which to dispel the possibility that the parties might, innocently and by mistake or otherwise, stipulate wrongly as to an ordinance or by-law

tions is facilitated by G.L., c. 233, §75: "The printed copies of all statutes, acts and resolves of the commonwealth, public or private, which are published under its authority, and copies of the ordinances of a city, the by-laws of a town or of the rules and regulations of a board of aldermen, if attested by the clerk of such city or town, shall be admitted as sufficient evidence thereof in all courts of law and on all occasions. Printed copies of rules and regulations purporting to be issued by authority of any department, commission, board or officer of the commonwealth or of any city or town having authority to adopt them, or printed copies of any city ordinances or town by-laws, shall be admitted without certification or attestation, but if their genuineness is questioned, the court may require such certification or attestation as it deems necessary."

⁶ See *Rubenstein v. Rubenstein*, 319 Mass. 568, 66 N.E.2d 793 (1946); *Swift & Co. v. Hocking Valley Ry. Co.*, 243 U.S. 281, 289, 37 Sup. Ct. 287, 289, 290, 61 L. Ed. 722, 725, 726 (1917); *Forbes v. Commissioner*, 82 F.2d 204, 207, 208 (4th Cir. 1936).

⁷ See *Paige v. Sinclair*, 237 Mass. 482, 130 N.E. 177 (1921).

⁸ *Warner v. Mayor of Taunton*, 253 Mass. 116, 148 N.E. 377 (1925).

⁹ *Clifford v. School Committee of Lynn*, 275 Mass. 258, 175 N.E. 634 (1931).

or vote of acceptance and thereby in effect confer a nonexistent jurisdiction upon the court, or deprive it of a jurisdiction it rightfully enjoys.¹⁰

Even if we were to retreat from the apparent holding of the *Fairman* case that the parties may stipulate for such a purpose, and were to require a finding of fact upon evidence, the situation upon analysis is little bettered. The court would still be involved in an absurdity, that of determining its own jurisdiction on what is essentially a pure question of law as if it were a pure question of fact.

The better solution would appear to be an extension of the scope of judicial notice, so as, at the very least, to obviate the implications of the *Fairman* case when a question of jurisdiction is involved. The limitations upon the scope of judicial notice of domestic law are self-imposed by the courts, and may by the same authority be enlarged. An understandable unwillingness on the part of the Supreme Judicial Court to charge itself and the other courts of the Commonwealth at all times with knowledge of all domestic ordinances, by-laws, and votes of acceptance should not have become ossified into the formula that the courts "cannot" judicially notice such matters of domestic law under any circumstances.

The Supreme Judicial Court has by construction worked out at least a *modus vivendi* with the statutory requirement of judicial notice of foreign law.¹¹ There appears to be no reason why an equally happy result might not be achieved with respect to the areas of domestic law thus far not judicially noticeable, under an impetus either self-generated by the Supreme Judicial Court or, if necessary, furnished by the legislature.

§26.4. Stipulations: Validity at subsequent proceedings. In *Household Fuel Corp. v. Hamacher*,¹ an action of contract to recover for fuel allegedly furnished by the plaintiff to the defendant, the question arose whether stipulations entered into at an earlier stage of the trial, an auditor's hearing, continued to have effect at the jury trial. The Court adopted what it termed the better rule, with support in Massachusetts decisions and in accord with the weight of authority, that a stipulation or admission continues in effect at later stages of the trial, unless it is by its terms limited to a particular occasion, or unless the court permits its withdrawal upon proper application.²

¹⁰ Perhaps we may be forgiven if we speculate upon the possibility that in deciding the *Fairman* case the Supreme Judicial Court might have indulged in a bit of peeking outside the record, which was extralegal under the standing rules of judicial notice, and determined that there actually was no jurisdiction in the Superior Court to entertain the appeal. As the record came before the Court, it would seem to have called for the usual ruling to the effect that a final decree within the scope of the proceeding implies the finding of all subsidiary facts necessary to support the decree.

¹¹ See *Walker v. Lloyd*, 295 Mass. 507, 4 N.E.2d 306 (1936); *Bradbury v. Central Vermont Ry.*, 299 Mass. 230, 12 N.E.2d 732 (1938).

§26.4. ¹ 1954 Mass. Adv. Sh. 751, 121 N.E.2d 846.

² The court has inherent power to relieve a party from a stipulation improvidently made. *Malone v. Bianchi*, 318 Mass. 179, 61 N.E.2d 1 (1945). See also Superior Court

The stipulations involved did not fall within either exception to the general rule. They were to the effect that the dealer who had furnished the fuel was a division of the plaintiff corporation, and that the defendant was the real owner of the premises serviced and was the person liable to the plaintiff on the account. They were not by their terms expressly limited to the hearing before the auditor, nor were they of such a character that such a limitation would be implied.³

The defendant did not make "proper application" for relief against the stipulation, for his objection was based on the ground that the auditor's report, by agreement of the parties, had been stricken from the record prior to the jury trial.

Though the Court did not refer to the specific ground of the defendant's objection, other than to hold that within the general rule adopted the stipulations were admissible, it seems clear that the striking of the auditor's report from the record would not wipe out the fact that, while they were before the auditor, the parties had stipulated. It is the fact that the stipulation or admission was made that is important, and not the fact that the auditor reports it.⁴

It should be noted, however, that in its holding on this matter the Court asserted: ". . . where a stipulation or admission is made in court by counsel for the purpose of relieving the opposing party from proving some fact such stipulation or admission . . . can be introduced in evidence as proof of the admitted fact at a subsequent trial of the same case . . ." ⁵

Here the Court was referring to the use and effect of a stipulation or admission at the trial of the case. The fact that the trial is at a subsequent stage does not appear to be of any importance to the implications of the language used, which has connotations that may prove to be productive of confusion.

Where a stipulation or admission as to facts in issue is properly brought to the attention of the trial judge, its effect is to establish the facts stipulated or admitted as a matter of law through the operation of judicial notice of the stipulation or admission itself. The stipulation or admission is not itself merely "evidence," nor are the facts stipulated or admitted any longer "in issue." ⁶

No great harm is done if the terms of the stipulation or admission

Rule 57A, where the right is expressly preserved with respect to pretrial admissions or stipulations.

³ That the limitation, where the stipulation is intended to apply to a particular occasion only, need not be expressly stated, but may be implied, is indicated by an earlier Massachusetts decision cited by the Court, where the following language appears: "The agreement does not specifically refer to more than one trial; but it is of such a nature, and upon such a subject matter, that we think it was meant to apply to the final and decisive trial of the issue, and not to the first attempt at a trial only, which might prove to be a mistrial." *Central Bridge Corp. v. City of Lowell*, 15 Gray 106, 129 (Mass. 1860).

⁴ See *Morrissey v. Powell*, 304 Mass. 268, 23 N.E.2d 411 (1939).

⁵ 1954 Mass. Adv. Sh. 751, 754, 121 N.E.2d 846, 849.

⁶ *Rappe v. Metropolitan Life Insurance Co.*, 322 Mass. 438, 77 N.E.2d 641 (1948).

are quoted to the jury, or, where the stipulation is in the form of a writing, if it is marked "for identification" or even as an "exhibit" which goes to the jury room with the papers and exhibits which are properly a part of the evidence in the case.⁷ This is true, provided of course, that the fact of the making and the effect on the issues of the admission or stipulation are stated in clear instructions to the jury, so that the stipulation or admission is not left with the jury to be considered merely as evidence.

However, the language of the Court is not so guarded as to insure that caveat. The possible connotations of the phrase "can be admitted in evidence as proof of the admitted fact" are unfortunate, even if the word "proof" be stressed. That word itself is hopelessly ambiguous, since the purpose of all evidence is the "proof" of facts. The purpose of admission or stipulation as to facts is to dispense with "proof" by evidence.

§26.5. Estoppel: Testimony of a party adverse to his case. The decision in *Reynolds v. Sullivan*,¹ in late 1953, has lessened the confusion which has existed for some time as to estoppel of a party by his own testimony.

It has long been clear that a party is not bound by testimony adverse to his case by a witness other than himself merely because he has put the witness on the stand.² It has also been clear that where the party himself is a witness, either in his own behalf or called by the opponent, and his testimony, adverse to himself, is the only evidence upon a particular issue, he cannot complain if the court takes the position that he is to be believed and therefore binds him on the issue by his own testimony as a matter of law.³

However, it has not been at all clear whether an estoppel also exists where a party testifies adversely to his interest, but there is present other evidence on the same issue conflicting with his testimony and favorable to him. A major source of the confusion on this question, which constantly arises at the trial level, was the decision in *Laffey v. Mullen*,⁴ a case decided in 1930.

In that case, the plaintiff, a guest passenger, was held to be precluded from recovery for personal injury by her assumption of the risk, which defense was held to have been established as a matter of law by her own testimony. The Court used the following language:

Although the credibility of the testimony of the plaintiff with regard to what she knew and felt was so affected by testimony from other witnesses that the jurors would be justified in rejecting her statements, we think she is bound on this issue by what she has

⁷ See *Becker v. Eastern Massachusetts Street Ry. Co.*, 279 Mass. 435, 439-444, 181 N.E. 757, 759, 760 (1932).

§26.5. ¹ 330 Mass. 549, 116 N.E.2d 128.

² *Adams v. Wheeler*, 97 Mass. 67 (1867).

³ *Johnston v. Senecal*, 329 Mass. 556, 109 N.E.2d 467 (1952).

⁴ 275 Mass. 277, 175 N.E. 736.

asserted under oath. . . . No other witness could know her knowledge and feelings. . . . It is not open to her to ask that her testimony in that respect should be disbelieved because testimony of others tended to show the non-existence of facts which as she asserted affected her conduct. [The Court then summarized the plaintiff's testimony and, unfortunately, concluded:] This establishes that, knowing the speed, the reckless driving, the questionable headlight and the doubtful brakes, she confided her care solely to the defendant, she accepted the risks of the ride, and she did not do what she might have done to secure her safety.⁵

It could obviously be thought, and, as a matter of fact, was repeatedly argued, that *Laffey v. Mullen* held that the plaintiff was bound as a matter of law by her testimony as to facts of her own "knowledge." Of course, the "knowledge" of any person as to facts he has observed amounts to no more than his subjective reaction to reality. An indiscriminate application of the term "knowledge" under the suggested interpretation of the *Laffey* case would mean that whenever a party testifies adversely to his own interest, the case will be determined, not on the objective facts as they actually were — or as close as a jury could come to the reality on all the evidence — but on the party's subjective reaction to the facts as stated in his testimony.

This drastic and obviously undesirable construction of the *Laffey* case was expressly repudiated in *Reynolds v. Sullivan, supra*. This case, also that of a guest passenger, came up on the defendant's exception to the denial of his motion for a directed verdict on the same issue, assumption of the risk. The plaintiff had testified in substance that despite a protest from another passenger, defendant had continued to operate the car in a manner which was clearly grossly negligent until he stopped to discharge the other passenger, that the plaintiff had failed to leave the car at that time although he could have done so without unreasonable inconvenience, and that the defendant thereupon resumed his grossly negligent driving, resulting in an accident and injury to the plaintiff. The defendant conceded that his operation was grossly negligent at the time of the accident, but sought to invoke an estoppel on the basis of the plaintiff's testimony that though he "knew" that the defendant was continuing his grossly negligent operation of the car, he had elected to remain as a passenger and thus assumed the risk.

There was, however, evidence from other witnesses to the effect that after the admonition of the other passenger the defendant had slowed down and driven carefully up to the time of the stop and of the plaintiff's choice to continue as a passenger. If this evidence could be considered by the jury, it would warrant a finding that the defendant had ceased driving in a grossly negligent manner and that therefore the plaintiff had not assumed the risk of such operation by continuing to ride with him. The Supreme Judicial Court held that no estoppel

⁵ 275 Mass. at 278, 279, 175 N.E. at 736.

operated to prevent the plaintiff from relying on the other evidence more favorable to his cause than his own testimony, and that therefore a question of fact was presented.

The Court obviously felt that the "true construction" of the *Laffey* case was sufficiently in doubt to warrant some clarification. It held that the doctrine of that case was of limited application, and that it established merely that where the testimony of a party relates "solely to such subjective matters" as "his knowledge, motives, purposes, emotion or feelings, he is bound by such testimony and cannot have the benefit of other evidence more favorable to him." The Court went on to say: "In so far as such testimony bore upon physical facts necessary to establish liability, we are of opinion that a plaintiff is not bound by such testimony and to that extent we are not disposed to follow *Laffey v. Mullen*." ⁶ Since the testimony of the plaintiff in *Reynolds v. Sullivan* relied on by the defendant related only to the speed and manner of the defendant's driving, it

. . . described physical facts and objective matters which could have been observed as well by other witnesses as by the plaintiff. It did not relate to facts or matters within the exclusive knowledge of the plaintiff and had no bearing upon his motives, purposes, emotions or feelings. His testimony therefore did not bring him within the true construction of the rule in *Laffey v. Mullen* and he was not bound by it but was entitled to the benefit of evidence from other witnesses more favorable to him.⁷

Intimations that the rule of the *Laffey* case should not receive the broader interpretation had been given in several cases,⁸ but in *Reynolds v. Sullivan* the Court fortunately grasped the nettle firmly and expressly overruled the undesirable connotations.

§26.6. Presumptions: Effect of evidence to the contrary. In the case of *Miniter v. Irwin*,¹ in which probate of a proposed will had been denied, the Court, referring to the presumption of revocation which arises when a will shown to have been duly executed cannot be found after the death of the testator, said: "Whether the presumption is overcome in a given case is a question of fact."²

The implications of any apparently general statement concerning the effect of a presumption warrant careful consideration. Especially

⁶ 330 Mass. 549, 552, 116 N.E.2d 128, 130 (1953).

⁷ 330 Mass. 549, 552, 116 N.E.2d 128, 131 (1953).

⁸ See, for example, in addition to the cases cited in the opinion, *Champlin v. Jackson*, 317 Mass. 461, 58 N.E.2d 757 (1945), and *Bevacqua v. Ryan*, 326 Mass. 137, 93 N.E.2d 270 (1950). And see *McClellan v. University Club*, 327 Mass. 68, 97 N.E.2d 174 (1951).

§26.6. ¹ 331 Mass. 8, 116 N.E.2d 567 (1954).

² For this proposition a single authority is cited, *Aldrich v. Aldrich*, 215 Mass. 164, 170, 102 N.E. 487, 490 (1913), which appears to be mere dictum on the point. A better citation for the Court's purpose would have been *Smith v. Smith*, 244 Mass. 320, 138 N.E. 539 (1923).

is this true when the statement does not appear to represent what seems to be fairly well settled law on this much confused subject.

The general principles applicable may be briefly stated. The burden of proof is on the party who contends that a will shown to have been duly executed has been revoked.³ He is aided on that issue by the presumption of revocation which arises when the will, last seen in the possession of the testator, cannot be found after his death. In the total absence of evidence to the contrary tending to show that the will was not revoked, the artificial compelling force of the presumption will as a matter of law make a finding of revocation mandatory.⁴

However, when evidence to the contrary of a presumed fact is present, the artificial compelling force of the presumption dissolves as a matter of law. The issue is left to be decided on the evidence like any question of fact, unaided by the presumption.⁵ Whether there is present evidence of revocation is a question of law. If there is no evidence of revocation (apart from the presumption itself, which is not evidence), the party contending for revocation must lose, as a matter of law, since he has the burden of proof.

In *Miniter v. Irwin* the Court appears to have ruled that conflicting evidence on the question of revocation was present. A ruling that the issue of revocation became ultimately a question for the fact-finder would therefore be proper. However, the question of fact is not whether the presumption of revocation was overcome. On the Court's statement of the case, the presumption was overcome as a matter of law, and the question of fact arose upon the conflicting evidence on the issue as if the presumption had never existed.

An equally proper result might have been reached by another approach. When a duly executed will, last known to have been in the possession of the testator, is not found on diligent search after his death, an inference might well be held to arise that the testator himself destroyed it, and further, since he was, so far as appears, a normal person, that such destruction was done with the intent thereby to revoke the will. If this is a tenable position, it would call for a ruling by the Court to the effect that the basic facts of what had commonly been referred to as the "presumption" of revocation do not, upon closer examination, merely create a presumption, but rather constitute prima facie evidence of revocation.⁶

³ First National Bank v. Briggs, 329 Mass. 320, 108 N.E.2d 548 (1952).

⁴ Epstein v. Boston Housing Authority, 317 Mass. 297, 320-323, 58 N.E.2d 135, 138, 139 (1944), and cases cited.

⁵ A presumption is itself not evidence, but merely "a rule about evidence." Duggan v. Bay State Street Ry., 230 Mass. 370, 119 N.E. 757 (1918); Bagnell v. Boston Elevated Ry. Co., 247 Mass. 235, 142 N.E. 749 (1924); Wilson v. Grace, 273 Mass. 146, 173 N.E. 524 (1930); and the cases referred to in the Epstein case cited in the preceding footnote. See also Commonwealth v. Clark, 292 Mass. 409, 415, 416, 198 N.E. 641, 645 (1935), distinguishing what the Court calls the erroneous "form of expression" in earlier cases cited therein.

⁶ See Hobart-Farrell Plumbing & Heating Co. v. Klayman, 302 Mass. 508, 19 N.E.2d 805 (1939). That such a ruling would be not unlikely, upon full deliberation, is indicated by the passage in 9 Wigmore, Evidence §2523(b) (3d ed. 1940): "The revoca-

If such a ruling had been made in the *Minitter* case, though the evidence against revocation found to be present would still, as a matter of law, destroy the artificial compelling force of the prima facie evidence, there would remain what the Court has on occasion referred to as the "likelihood," the "inherent evidential value," the "inherent persuasive weight," or the "rational probability" in the basic facts themselves to warrant a finding of fact that a revocation had occurred.⁷

The distinction between the effect of a presumption and that of prima facie evidence is clear and is deeply imbedded in a host of Massachusetts cases beginning definitively with the landmark opinions in *Duggan v. Bay State Street Ry.*⁸ and *Thomes v. Meyer Store, Inc.*⁹ The *Minitter* case would obviously blur this distinction by according the effect of evidence to what the Court calls a presumption.

A recent law review article¹⁰ advances the proposition that upon thorough examination, nearly all propositions commonly called presumptions will be found to contain basic facts which warrant an inference, or under the Massachusetts definitions will be found to constitute prima facie evidence rather than a true or classic presumption. Whether this will be held to be true in any particular instance is, of course, a question of law for the ultimate determination of the Supreme Judicial Court.

§26.7. Evidence to support a finding. Several cases decided during the survey year brought forth opinions in which the Court discussed the question whether in a particular situation there was "evidence to support a finding." The number and variety of cases involving this question which continue to reach the Supreme Judicial Court indicate that it is a constant source of difficulty. The reason seems to lie in the ambiguity inherent in the question itself, the meaning of which varies greatly in the different situations in which it may occur. The current decisions to be discussed in this section have been concerned with the question as it arises in (1) motions for a directed verdict, (2) review of findings of administrative tribunals, and (3) motions for a new trial.

In jury trials the question is raised by a motion for a directed verdict against the party having the burden of proof, while in nonjury cases

tion of a will by destruction may be inferred . . . from the fact that it once existed but cannot be found at the testator's death. Whether this circumstance, with or without others, should create a rule of presumption, or of sufficiency of evidence, has been much debated."

⁷ *Thomes v. Meyer Store, Inc.*, 268 Mass. 587, 168 N.E. 178 (1929); *Cook v. Farm Service Stores, Inc.*, 301 Mass. 564, 17 N.E.2d 890 (1938); *Boyas v. Raymond*, 302 Mass. 519, 20 N.E.2d 411 (1939).

⁸ 230 Mass. 370, 119 N.E. 757 (1918).

⁹ 268 Mass. 587, 168 N.E. 178 (1929).

¹⁰ Laughlin, In Support of the Thayer Theory of Presumptions, 52 Mich. L. Rev. 195 (1953). The article unfortunately contains (p. 199) an inadvertent garbling of the purport of the classic statement of Justice Lummus in *Brown v. Henderson*, 285 Mass. 192, 195, 196, 189 N.E. 41, 43, 44 (1934), where the majority of the Court, without citation of authority therefor, approved a ruling analogous to that in the *Minitter* case.

a request for a ruling that the evidence does not warrant a finding, or its equivalent, has the same effect.

It is, of course, fundamental both in logic and in law that in the total absence of evidence to support a finding on an issue essential to a cause of action, the party with the burden of proof cannot prevail, and therefore no question for the fact-finder is presented. On the other hand, as the Supreme Judicial Court said in *Willis v. Gurry*,¹ ". . . it is clear under our decisions that, if there is any evidence to support contentions essential to the maintenance of the cause of action, it must be submitted to the jury." (Emphasis supplied.)

The simple statement that "any" evidence presents a question for the fact-finder is, however, subject to qualification. Thus, in another 1954 case, *Boyle v. Cambridge Gas Light Co.*,² the caveat was once more expressed that evidence which leaves the fact-finder only to "conjecture" as to the issue is "insufficient to warrant the jury in finding a probability." And, in *Kabatchnick v. Hanover-Elm Building Corp.*,³ decided in the same year, the Court said that evidence the probative value of which amounted to "at most no more than a mere scintilla of evidence . . . fell far short of warranting a finding."

On the other hand, it also appears from the opinion in *Willis v. Gurry*, *supra*, that evidence need be no more than "slight" to avoid a directed verdict. In that case, the trial court had denied the defendant's motions for a directed verdict and for entry of a verdict after leave reserved and had reported the case, reserving decision on the defendant's motion for a new trial.

The defendant's brief conceded that the plaintiff's evidence, "slight as it was, may have been sufficient to sustain the burden of proof and prevent a directed verdict," but contended that "the plaintiff's evidence was slight and the defendant's evidence was overwhelming," and that the judge should have entered a verdict under leave reserved. The Court, accepting for the purpose of the decision the defendant's characterization of the relative weight of the evidence, said, in the language earlier quoted, that where there is "any" evidence to support a finding, a question of fact is presented, and held that the concession in the defendant's brief was enough to dispose of the report.

In this opinion, the Court appeared to use the adjectives "slight" and "overwhelming" as quantitative and not qualitative measures of the evidence. By way of dictum, after having disposed of the case upon the defendant's own terms as above indicated, the Court volunteered the observations that it thought that the evidence, which the defendant termed "slight," was in fact "ample," and upon it the jury could "reasonably find" for the plaintiff on the issue. (These statements undoubtedly in effect doomed as well the defendant's motion for a new trial, still pending in the trial court.)

Current opinions on review of findings of administrative tribunals

§26.7. ¹ 331 Mass. 19, 116 N.E.2d 689 (1954).

² 331 Mass. 56, 117 N.E.2d 150.

³ 1954 Mass. Adv. Sh. 397, 119 N.E.2d 169.

have also discussed the meaning of the phrase “evidence to support a finding.” The Court had earlier held that the words “supported by evidence” in General Laws, Chapter 150A (Labor Relations Commission), Section 6(e),⁴ and the words “supported by any evidence” in Chapter 151A (Division of Employment Security), Section 42,⁵ are to be construed as requiring that findings be supported by “substantial” evidence, which was defined as evidence “such as a reasonable mind might accept as adequate to support a conclusion.”

In 1954, in *Sinclair v. Director of Division of Employment Security*,⁶ the Court held that a finding based solely upon hearsay statements of living persons, which would have been inadmissible in a court of law, could not stand, while in *Stanton's Case*⁷ it affirmed as being supported by “substantive” (substantial?) evidence a finding based upon a statement of a deceased person, which, though also clearly hearsay, is under General Laws, Chapter 233, Section 65, “not inadmissible in evidence as hearsay” in “any action or other civil judicial proceeding.”

The cases are not without precedent in the Massachusetts decisions, and there appears to be no reason to believe that the holdings will not be applied to the findings of all administrative tribunals.⁸ The word “substantial” as used in these cases appears to be addressed to the qualitative and not the quantitative aspects of the evidence.

No cases appear to have held that evidence to support a finding against a motion for a directed verdict in an action at law must be “substantial” in either its quantitative or qualitative connotations. In fact, as was noted above, it was held in *Willis v. Gurry* that “slight” evidence in the quantitative sense, which obviously must be less than “substantial,” is proof against a directed verdict. And it has been held in other cases that hearsay which is inadmissible, but which is introduced without objection by the adversary, is to be given “any evidentiary value it may possess.”⁹ No intimations are given that such

⁴ *Jordan Marsh Co. v. Labor Relations Commission*, 316 Mass. 748, 756, 757, 56 N.E.2d 915, 919, 920 (1944). The Court held that “the evidence in this case discloses no reasonable ground” for the finding.

⁵ *Maniscalco v. Director of Division of Employment Security*, 327 Mass. 211, 214, 97 N.E.2d 639, 641 (1951). The Court there held that there was in the case “no evidence which would support a finding,” the only “evidence” being “nothing more than a guess or speculation.”

⁶ 331 Mass. 101, 117 N.E.2d 164. The Court made no reference to the language in *Wagstaff v. Director of Division of Employment Security*, 322 Mass. 664, 667, 79 N.E.2d 3, 5 (1948): “The written statement of the treasurer of the employing unit was sufficient support for the board’s findings.” This appears to be plainly to the opposite effect. The cases may be reconciled on the results, if not on the language, on the basis that the burden of proof is on the claimant in both cases. See *Farrar v. Division of Employment Security*, 324 Mass. 45, 84 N.E.2d 540 (1949).

⁷ 1954 Mass. Adv. Sh. 423, 119 N.E.2d 388. The Court also said that the evidence “although somewhat meager was in our opinion sufficient to support the finding.”

⁸ To the effect that the same principle is applied in the review of findings of the Industrial Accident Board, see *Perangelo's Case*, 277 Mass. 59, 177 N.E. 892 (1931), and *Filosa's Case*, 295 Mass. 592, 4 N.E.2d 439 (1936).

⁹ See, for example, *Mahoney v. Harley Private Hospital*, 279 Mass. 96, 180 N.E. 723 (1932), and *Pochi v. Brett*, 319 Mass. 197, 65 N.E.2d 195 (1946).

evaluation is not for the fact-finder, even where the inadmissible hearsay is the only evidence on the fact.

A motion for a new trial, asking the court to set aside a verdict or finding on the ground that it is against the weight of the evidence, raises a question analogous to that involved in a judicial review of an administrative finding, in that in effect it calls for a review by the trial court to determine whether there was present in the case "evidence to support a finding." The content of the question is entirely different in relation to such a motion for a new trial from that in the case of a motion for a directed verdict. As has already been seen, a verdict cannot be directed when there is "any" evidence to support a finding.

But when asked to set aside a verdict as against the weight of the evidence, the judge must necessarily consider the probative force of the evidence and not merely the presence or absence of any evidence upon the disputed point. . . . He may set aside the verdict only if he is satisfied that the jury has failed to exercise an honest and reasonable judgment in accordance with the controlling principles of law.¹⁰

The honesty of the judgment of the fact-finder being assumed for the purpose of this discussion, a standard for determining whether a finding or verdict is also "reasonable" may be found in *Kabatchnick v. Hanover-Elm Corp. supra*. In that case the Court quoted from earlier decisions: "The view no longer prevails that a party who has the burden of proof can retain a verdict in his favor by pointing to a mere scintilla of evidence, when, on an examination of the whole case, the court can find no substantial evidence to support it." ¹¹

A court may therefore grant a new trial if the "evidence to support a finding" in favor of the party with the burden of proof is not "substantial." As has been seen, in proceedings either in court or before an administrative tribunal, a finding may well be made upon evidence which is not "substantial," in either its quantitative or qualitative implications or both.

However, the language of the Court in the *Kabatchnick* case does not necessarily mean and should not be construed to mean that a finding in a court case cannot stand and *must* be set aside if the evidence to support it is less than "substantial." On the question whether such a finding *must* be set aside, there is ample justification for a possible difference in the results of a review of a finding of a court and that of an administrative agency.

Administrative tribunals generally are not held to the rules of evi-

¹⁰ Qua, C.J., in *Hartmann v. Boston Herald-Traveler Corp.* 323 Mass. 56, 60, 80 N.E.2d 16, 18 (1948). The same rule applies in criminal cases where there has been a finding of guilt. *Commonwealth v. Gricus*, 317 Mass. 403, 406, 407, 58 N.E.2d 241, 243 (1944). Where the trial is without jury, however, the court is not bound to entertain a motion for a new trial on this ground. *G.L.*, c. 231, §129; *Bartley v. Phillips*, 317 Mass. 35, 39, 57 N.E.2d 26, 29 (1944).

¹¹ 1954 Mass. Adv. Sh. 397, 403, 119 N.E.2d 169, 174, 175.

dence and procedure of courts of law. Therefore there is no preliminary sifting of the matter introduced as "evidence" at their hearings. Nor is there in such proceedings any device like the motion for a directed verdict. Counsel may, of course, present a request for a ruling which will be its equivalent, but there is no way in which the tribunal can be forced to rule thereon except implicitly in its findings. Effective protection against an improper administrative finding therefore comes *only* by way of *review* of the finding by the courts, and not by way of rulings during the proceeding on the admissibility or presence of evidence.¹²

In the case of the usual adversary proceeding in a court of law, however, the parties have ample opportunity to protect themselves during the trial by seasonable objection to inadmissible evidence, and by a motion for a verdict or its equivalent where there is no evidence. If a party has failed to protect his rights, the doctrine of invited error will come into play.

Therefore, in arriving at a decision on a motion for a new trial, competing policy considerations of estoppel on the ground of invited error and the desirability that there be an end to litigation, on the one hand, and the objective of substantial justice as between the parties, on the other, will properly be factors,¹³ along with any test truly identifiable as a rule of law laid down as a measure of the quantity or quality of evidence. As the Court has said, "The question whether a verdict is contrary to the weight of the evidence is, upon analysis, one of fact, though commonly spoken of as one of discretion. . . . Only in rare instances . . . can it be held that the denial of a motion for a new trial is an abuse of discretion amounting to an error of law."¹⁴

Whether, in a specific fact situation, there is "any" evidence or none, or whether the "evidence" is "a mere scintilla" or "slight," or is "slight" or "substantial," is a matter upon which the cases are not too helpful generally.¹⁵ Nor, in the nature of such questions, is it very likely that much greater illumination can be cast by way of general definition. As the Court has said, "It is not necessary, perhaps not possible, to lay down a precise formula of general application by which to determine whether the evidence in particular cases is sufficient or not."¹⁶

The ultimate standards for such cataloguing of evidence will un-

¹² See *Moran v. School Committee of Littleton*, 317 Mass. 591, 59 N.E.2d 279 (1945).

¹³ Compare, for example, *Commonwealth v. Theberge*, 330 Mass. 520, 527, 115 N.E.2d 719, 724 (1953), and *Farrell v. Matchett*, 310 Mass. 87, 37 N.E.2d 247 (1941).

¹⁴ *Lummus, J.*, in *Commonwealth v. Gricus*, 317 Mass. 403, 405, 58 N.E.2d 241, 243 (1944). For another comprehensive discussion by the same judge in an action at law, see *Bartley v. Phillips*, 317 Mass. 35, 57 N.E. 26 (1944). A finding in an equity proceeding will not be set aside unless it is "plainly wrong." *Lowell Bar Assn. v. Loeb*, 315 Mass. 176, 178, 52 N.E.2d 27, 30 (1949).

¹⁵ An exception is the decision in the *Sinclair* case (see text at note 6 *supra*), where hearsay inadmissible in an action at law has apparently been effectively tagged as "not substantial" in quality, and is insufficient therefore to support a finding of an administrative body. Perhaps other identifiable classifications will gradually appear from the cases.

¹⁶ *Hillyer v. Dickinson*, 154 Mass. 502, 504, 28 N.E. 905 (1891).

doubtedly continue to be in most cases the subjective reactions of a majority of the Supreme Judicial Court, which of course cannot be ascertained on any other than an ad hoc basis. If it be thought that therefore attempted differentiation of the language of the applicable opinions is mere word-play, it must also be remembered that words are all we have to work with. At the very least, awareness of the current terminology and its stated consequences in its possible applications is desirable.

§26.8. **Opinion testimony on value: Preliminary finding of fact.** Testimony in the form of opinion as to the value of property is, of course, admissible from an expert witness, strictly so called, whose qualification is based on specialized study or professional or occupational experience in the field involved. Opinion testimony as to value is also permissible in the case of a lay or nonexpert witness who is sufficiently familiar with the property or the particular type of property to be able to formulate a reasonably sound estimate as to its value.¹

As a general proposition, where the witness is the owner of the property and has occupied or used it for a substantial period of time, it may ordinarily be assumed that he is qualified to form an intelligent estimate of its value.² The opinion of such a witness is often admitted without objection even though the court makes no express preliminary finding that he is qualified. In such a case the failure to object may be deemed a waiver of a showing of qualification, or the admission of the opinion, without more, can be held to imply the proper preliminary finding.³

However, when objection is made, the question whether the particular witness in any specific instance is actually qualified to give an opinion is raised as a preliminary question of fact for the court.⁴ The question is one of admissibility of the opinion, not merely of the weight to be given to it.

Two cases decided during the survey year have strongly re-emphasized this point. In *Lembo v. Town of Framingham*,⁵ where the Court excluded the offered opinion, it was held that ownership and occupancy alone, without experience in letting stores, did not require, though it might permit, the trial judge to find the witness qualified to express an opinion as to the rental value of a store on the premises, on the issue of the fair market value of the land.

In *Winthrop Products Corp. v. Elroth Co., Inc.*,⁶ the property in question was owned by a corporation of which the witness was the president. He testified that he had purchased the property for the corporation and that he had an opinion as to its value. The trial judge expressly refused to make the preliminary finding and admitted the

§26.8. ¹ *Menici v. Orton Crane & Shovel Co.*, 285 Mass. 499, 189 N.E. 839 (1934).

² *Shea v. Hudson*, 165 Mass. 43, 42 N.E. 114 (1895).

³ See *O'Brien v. Bernoi*, 297 Mass. 271, 274, 8 N.E.2d 780, 781 (1937).

⁴ *Rubin v. Arlington*, 327 Mass. 382, 99 N.E.2d 30 (1951).

⁵ 330 Mass. 461, 115 N.E.2d 370 (1953).

⁶ 331 Mass. 83, 117 N.E.2d 157 (1954).

opinion of the witness over objection, submitting to the jury the question of his qualification. The Supreme Judicial Court found that the mere holding of corporate office is, of itself, not enough to qualify a witness to give an opinion as to the value of property owned by the corporation. Whether a particular corporate officer of a corporation actually has a knowledge of its property which qualifies him to express an opinion as to its value is a preliminary question of fact which the judge must decide. The Court held it error to admit the opinion without making the preliminary finding, thus leaving the entire matter to the jury, and granted a new trial.