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Chapter 20: Evidence

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CHAPTER 20

Evidence

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§20.1. Judicial notice: Common knowledge. The question whether a particular issue can be resolved on the basis of common knowledge, or requires testimony of an expert, is frequently before the Supreme Judicial Court. Interesting cases came up during the 1961 SURVEY year.

Stewart v. Worcester Gas Light Co.[1] arose out of a gas explosion. A gas leak was caused when a contractor's power hoe, while digging in the lawn in front of a house, caught, bent, and broke the service pipe-line running under the lawn from the street main into the house. Gas seeped into the cellar of the house, where it was later ignited by the sparking of a thermostat switch in an electric water heater. The plaintiffs contended that the gas company was negligent in two respects. Since there was no expert testimony as to the proper practice of gas companies in such matters, the plaintiffs would not be entitled to go to the jury unless the matters were held to be cognizable through the common experience and general knowledge of the community.

The plaintiffs' first contention was based on the fact that when, at the householder's order, the gas company had terminated gas service to the house about seven years before the accident, it shut off the gas at a point inside the house, and not at a shutoff located at the curb of the public way some forty-two feet away from the house, which would have been a simple operation. If there had been no gas in the service line, the explosion would not have occurred.

Precedent was found to be lacking in Massachusetts, and in conflict elsewhere. Said the Court,

> The jury, on the basis of their general knowledge of practical affairs, might reasonably infer that there was sufficient risk of deterioration or disturbance of the pipe and of its being forgotten or neglected by successive owners and others to make it reasonable for the gas company to shut off gas from the service pipe. A verdict could not properly have been directed for the gas company on the negligence counts.

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§20.1. [1] 341 Mass. 425, 170 N.E.2d 330 (1960).

> Undoubtedly, it would have assisted the jury if there had been evidence of generally approved gas company practice as to service discontinuances. The question, however, was not so dependent on expert engineering knowledge that a jury could have no basis of decision without expert testimony.[2]

To dispose of the matter before it, the gas company's exception to denial of its motion for a directed verdict, the Court, of course, had to go no further.

However, in an appropriate situation, a ruling that the gas company's conduct not only could be found to be negligent, but constituted negligence as a matter of law, would appear to be warranted. The decision itself does not foreclose the question.[3] The matter is simple, and involves only obvious considerations drawn from common experience and general knowledge. Indeed, the proposition is of such patent validity that not only is there no necessity of "expert" opinion or evidence of the general practice of gas companies to support it, as the Court held, but, contrary to the intimation of the dictum in the second paragraph quoted above from the opinion, there appears to be no justification for admitting such evidence at all, either to establish or to oppose the proposition.[4] The following classic statement is apropos:

> Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It may never set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.[5]

Because of the necessity of a new trial, the Court also discussed the question whether the gas company could also be found to have been negligent, as claimed by the plaintiffs, in its location of a "dresser coupling." As explained in a footnote,

> A dresser coupling is a fitting designed to join two pipes without threading. It is intended to absorb any displacement or lateral play of underground pipes. It may be safer than a

2 341 Mass. at 434, 170 N.E.2d at 336. The Court cited Lovely's Case, 336 Mass. 512, 515-516, 146 N.E.2d 488, 491 (1957), as an example of a ruling analogous to that under discussion. For divergent evaluations of the merits of that case, equally applicable here, see the comments in 1958 Ann. Surv. Mass. Law §§20.2, 20.3, 22.1.

3 There is an unfortunate tendency at the trial level to interpret a decision such as that in the Stewart case as if it were a holding that the question must be submitted to the jury, which, of course, is not correct.

4 "Where a matter may easily be comprehended by jurors the testimony of an expert has no place." Turcotte v. Dewitt, 332 Mass. 160, 165, 124 N.E.2d 241, 245 (1955).

5 Learned Hand, J., The T. J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932).

> threaded union. It has a sleeve at each end which fits over the ends of the pipes to be connected. The fitting can be made tight. . . .[6]

Such a coupling joined the pipes in the service supply line at a point two or three feet from the house, about ten feet from where the pipe entered the house, and forty-two feet from the curb shutoff. When the power hoe bent the gas service pipe, it came apart at the dresser coupling.

There was testimony of an engineer that in his opinion a dresser coupling should be located at the street, where it would be available for inspection and not likely to cause trouble in the house "in cases of anything happening." On cross-examination the witness stated that he thought a location at the street was better, but that he had not said that the location near the house was "absolutely improper." There was no other opinion testimony, and no evidence as to the usual practice of gas companies in the use of dresser couplings.

Without belaboring the point, or going into detail as to the apparently simple line of reasoning that could follow from the elementary considerations indicated by the testimony of the engineer, it might well be thought that the merits of this situation, like that of the choice of a shutoff point earlier described, should be held to be within the comprehension of the jury.

The Court, however, after characterizing the use of dresser couplings as "obviously a highly technical matter," went on to say:

> Members of a jury, as part of their ordinary experience . . . would have no basis without expert testimony for determining whether this installation complied reasonably with proper standards of care. [The engineer's] very general testimony . . . was too inconclusive to afford a reasonable basis in such a technical matter for finding negligence in what was done. It left the jury to conjecture and surmise without adequately founded . . . essential, expert guidance.[7]

The divergent holdings in the *Stewart* case strikingly illustrate the essentially ad hoc nature of decisions drawing lines of demarcation between knowledge which is common and that which is expert.

Kane v. Fields Corner Grille, Inc.[8] involved another instance of this function, on the issue of impairment of earning capacity in an action for personal injury. The following quotation from the opinion will adequately present the point:

> Furthermore, the jury on the evidence of a full time bricklaying or supervisory job and a part time job in the water department could have concluded that the plaintiff had an earn-

[6] 341 Mass. 425, 429, 170 N.E.2d 330, 333 (1960).
[7] 341 Mass. at 435, 170 N.E.2d at 337.
[8] 341 Mass. 640, 171 N.E.2d 287 (1961).

ing capacity in the range of $175 [per week] even in the absence of specific evidence of such earnings. "The assessment of damages for such impairment rests largely upon the common knowledge of the jury . . . sometimes with little aid from the evidence." [9]

In another decision which, if cast in the form of fiction, might well be called "The Case of the Altered Bequest," but which is more prosaically entitled *Flynn v. Barrington*,[10] the Court achieved dramatic effects by the use of knowledge drawn from common experience, while disregarding the testimony of a handwriting expert. This was an appeal from the allowance of a will in which the contestant claimed that the figures in a pecuniary bequest had been altered.

The body of the will had been written by the decedent on a stationer's form. The attesting witnesses did not see the relevant clause at the execution of the will, and there was no testimony as to how it read at that time, nor as to anything concerning the will or its custody between its execution and the time of its filing in the Probate Court. A handwriting expert testified at the trial that the figures had been altered.

The will itself was produced at the argument on the appeal, and the evidence and findings were reported, which put the Court in the position of fact finder, with power to find facts contrary to those found by the trial judge if convinced that he was plainly wrong.[11]

The Court pointed out that except for the benefit of hearing the oral testimony of the handwriting expert, it was in as good a position as the trial judge to determine from the document itself whether alteration had occurred. Stating that it was wholly disregarding the testimony of the handwriting expert (which was substantially to the same effect) and basing its conclusion solely upon examination of the instrument itself, the Court found that the figures had been altered. Specifically, it found that in the purported bequest of $160,000, the digit "1" had been inserted by being crowded in after the dollar sign and five other figures had been written, that the figure "6" had been written in over another figure, and that the "0" immediately following it had been overwritten.

Since there was no evidence that the alterations were made prior to the execution of the will, the Court reversed the decree but ordered the case remanded for further hearing. In anticipation thereof,

9 341 Mass. at 646, 171 N.E.2d at 292, quoting from Doherty v. Ruiz, 302 Mass. 145, 147, 18 N.E.2d 542, 543 (1939).

10 342 Mass. 189, 172 N.E.2d 593 (1961).

11 A probate appeal is treated like an appeal in equity. G.L., c. 215, §§9, 11, 12; c. 214, §24. "An appeal in equity with a report of the evidence and a report of the material facts opens up for our decision all questions of fact, law and discretion. It is our duty to examine the evidence. We can find facts not expressly found by the judge and we can reverse the conclusion reached by him if found to be tainted by some error of law, but the findings of fact made by him are to stand unless we are satisfied that they are plainly wrong." Willett v. Willett, 333 Mass. 323, 324, 130 N.E.2d 582, 583 (1955).

the Court said that if the proponents failed to establish the actual amount of the gift at the time of execution, the state of the record might nevertheless be such as to warrant probate of the unaltered document, treating the gift as one in the minimum amount of $10,000, since the will on its face indicated that the figures originally written for the gift had included "0 000" with some digit (unidentifiable, but probably a "1") preceding them.

§20.2. Hearsay: Effect of an admission. The evidential effect of an admission,[1] which in its simplest form may be defined as a statement of a party that is detrimental to the position of the party at the trial, is often misunderstood, as was manifested in contrasting cases decided during the 1961 SURVEY year.

In *Brown v. Metropolitan Transit Authority*[2] the trial judge unduly limited the effect of an admission by the plaintiff. An issue was whether the fall which caused the plaintiff's injuries had been caused by ice on a manhole cover. If so, a statutory notice was required as a condition precedent to the cause of action,[3] which notice the plaintiff had not given. The plaintiff testified before the jury that she fell as a result of stepping on a smooth, worn manhole cover which was slippery as a result of being wet, but on which there was no ice. Later there was testimony by the stenographer at the trial before an auditor to the effect that the plaintiff had therein testified that the manhole cover was covered with ice.[4]

The trial judge ruled that such evidence was limited to affecting the credibility of the plaintiff, which would give it only the effect of a prior contradictory statement of a nonparty witness and not permit its use as affirmative evidence of the fact stated therein.[5] As the Supreme Judicial Court pointed out, a prior contradictory statement of a witness who is a party, which constitutes an admission, is admissible in evidence for all purposes.

Error on the same question, but at the opposite extreme, was also reversed in *Jordan v. MacMelville*.[6] In this auto tort case, there was evidence of the defendant's negligence. The findings of an auditor and the plaintiff's testimony before the jury were both to the effect that there was no fog on her windshield, and that she saw the defendant's

§20.2. [1] The question whether admissions are properly classified as exceptions to the hearsay rule, or are admissible on the basis of an estoppel involving no reliance on the credibility of the declarant and thus not hearsay, has occasioned much theorizing. For a discussion and references see Hughes, Evidence §512 (1961). The dispute does not affect the rule that an admission has the effect of warranting a finding.

[2] 341 Mass. 690, 171 N.E.2d 869 (1961).

[3] G.L., c. 84, §§18, 21.

[4] In her testimony, the plaintiff also admitted that she had stated, in answer to an interrogatory, that she had slipped on a "smooth, worn, icy, wet manhole cover." Such a statement would properly have the same effect as the prior testimony of the plaintiff discussed in the opinion.

[5] Salonen v. Paanenen, 320 Mass. 568, 575, 71 N.E.2d 227, 232 (1947). See also Blackman v. Coffin, 300 Mass. 432, 15 N.E.2d 469 (1938).

[6] 342 Mass. 478, 174 N.E.2d 374 (1961).

vehicle before the collision. On cross-examination, however, the plaintiff admitted that at the scene of the accident she had said to both the defendant and a police officer that her windshield was covered with fog, that she did not see the defendant before the collision, and that the accident was her fault. She explained that she had made the statements as nervous chatter which was continuous on her part after the accident. There was a jury verdict for the plaintiff.

The trial judge, however, entered a verdict for the defendant under leave reserved, which the defendant sought to justify on the ground that the plaintiff's earlier statements conclusively barred her from recovery as a matter of law, as admissions of sole culpability, or at least contributory negligence. The Court, of course, reversed, holding that the prior contradictory statements of the plaintiff were not, as a matter of law, binding on the plaintiff so as to bar her recovery, but were admissions, constituting evidence to be weighed by the jury in the light of the circumstances under which they were made and the later testimony of the plaintiff.

It should perhaps be noted also, although the question was not before the Court, that the admissions by the plaintiff, being evidence to the contrary of the facts found by the auditor, reduced the effect of the auditor's findings[7] in those respects from that of an artificially compelling force to that of an inference.

§20.3. Hearsay: Admission implied from conduct of a party. The basis required for the drawing of an adverse inference from a party's failure to call a witness was defined in *Grady v. Collins Transportation Co.*[1] The case involved actions by the owner of an automobile and its operator, her son, for damages and injury incurred in a collision with the defendant's truck.

The son testified to the effect that the truck was being driven around a curve partly on the wrong side of the road. This was denied by the driver of the truck, who also testified that the automobile came directly at the truck, and that although he pulled the truck over to the bank beside the road, the automobile struck its trailer. Two police officers testified that after the accident the son in substance said that he came too fast around the curve, and that he was not acquainted with the road and thought he was going to hit a telephone pole, so he pulled the car back to the left side of the road.

The case was tried about nine years after the accident. The son also testified that there had been four boys riding with him, that after the collision he discussed with them in the hospital how the accident happened, that he had not seen them lately, that he had given their names to his counsel, that all four lived in Worcester (where the case was tried) and as far as he knew still did, and that he did not know

[7] Findings of an auditor are given the effect of prima facie evidence by G.L., c. 221, §56. Cook v. Farm Service Stores, Inc., 301 Mass. 564, 566-568, 17 N.E.2d 890, 892-893 (1938).

§20.3. [1] 341 Mass. 502, 170 N.E.2d 725 (1960).

whether any attempt had been made to see any of them lately. None of the four boys was called as a witness.

The plaintiffs' counsel requested an instruction to the effect that no inference could be drawn against the plaintiffs for failing to bring in the passengers, because the defendant had a right to produce them if he desired.[2] The trial judge refused the request and, pointing out that there had been no explanation as to why the boys were not brought in as witnesses, charged the jury that they were warranted in drawing the inference that if they had been called, their testimony would not have helped the plaintiffs. The plaintiffs excepted. There were verdicts for the defendant.

In sustaining the action of the trial judge, the Supreme Judicial Court gave the usual statement of the general rule, which requires, as a basis of the inference, proof that the witness is in the control of the party and available. Saying that "control" of the witness by the party means only such relationship between the two that it is likely that his presence could be procured, the Court passed over this aspect of the rule.

The opinion was largely devoted to an analysis of many ealier cases on the question whether the rule requires proof of "actual" availability of the witness, or is satisfied by proof of his "probable" availability. The Court's analysis shows that while some of the cases express the rule in terms demanding proof of actual availability, many more do not. Stating that there is no inflexible requirement in every case of proof of actual availability, the Court concluded that within the limits of the rule the trial judge may allow the inference to be drawn if the circumstances emphatically call for the presence of the witness, the evidence shows his probable availability to the party, and his absence is not explained.

Applying these requirements to the *Grady* case, the Court held that the allowance of the inference was proper, since the son's uncorroborated testimony was opposed by that of three witnesses and there was very substantial likelihood that, notwithstanding the nine-year interval, one or more of the passengers lived in Worcester or nearby. It was held to be "plainly reasonable" to conclude that the plaintiffs should have either called the witnesses or explained their absence.

The result of the case is clearly proper. To require proof of "actual availability," as some cases indicate to be the rule, would be highly unrealistic, although the opinion does not make this point. The opinion equates the term as used in recent cases with "immediate physical availability." Such availability of a witness may, of course, be established as a matter of law[3] or by testimony of facts requiring such a

[2] The reason stated for the instruction requested is so palpably inadequate that the opinion did not expressly advert to it other than to state the request and overrule the exception to its refusal.

[3] Thus, e.g., when the identity of the witness, his relationship to the party, and his presence at the trial at a time or times when he might appropriately be called to the stand are judicially noticed, as in Commonwealth v. Spencer, 212 Mass.

finding. In such instances, the test of "actual availability" would be satisfied.

But such cases are relatively rare. The usual situation is one in which availability of the witness depends upon inference from the circumstances of the case. Such circumstantial evidence will seldom, if ever, be of such a character as to warrant a finding so specific, i.e., that at the time or times appropriate for his testifying at the trial, the absent witness was immediately physically available. To require such a particularized finding as a condition precedent would in effect make the drawing of the adverse inference generally impossible.

Fortunately, as has been seen, the case holds that within the limits of the rule proof of "probable availability" is sufficient. The holding was somewhat dimmed by a preliminary statement, in apparent deference to precedent, to the effect that proof of actual availability was not "an inflexible requirement for every case." [4] The net effect, however, appears to be that the cases requiring such proof, although not expressly overruled, are left to wither on the vine.

The phrase "probable availability" obviously connotes proof of something other and less than immediate physical availability. Its content is not spelled out in the opinion; indeed, it would be profitless to attempt to do so specifically. As the Court said, "Whether an inference can be drawn from the failure to call witnesses necessarily depends, as with inference generally, upon the posture of the particular case and the state of the evidence." [5]

The intent and effect of the decision may, however, be clarified by explanation in general terms. The crux of the holding lies in its allocation of the burden of proof. There is, of course, no requirement, either of logic or of law, that all persons with any knowledge relevant to the issues must be called as witnesses. The party who seeks to raise an adverse inference from his opponent's failure to call a particular witness, therefore, has the burden of proof of facts which warrant it. But if the posture of a case is such as to raise a reasonable expectation that one of the parties would in his own interest produce a particular witness to support his contention, and he fails to do so, and the inference is warranted that by the exercise of reasonable diligence he could have secured the presence of the witness, the inference that he did not produce the witness because he knows that his truthful testimony would be unfavorable to the party's contention is raised, *without more.*

Once the adverse inference is raised, the party who failed to produce the witness has both the burden of going forward with evidence and the burden of proof of facts that would tend to explain that his nonproduction of the witness was for other reasons not detrimental to the

438, 451-452, 99 N.E. 266, 271 (1912). Other methods would be by formal admission, stipulation, or testimony of a party by which he is bound, which either expressly states that fact or asserts facts from which the conclusion is required.

[4] 341 Mass. 502, 505, 170 N.E.2d 725, 727 (1960).

[5] 341 Mass. at 506, 170 N.E.2d at 727-728, quoting from Commonwealth v. O'Rourke, 311 Mass. 213, 222, 40 N.E.2d 883, 888 (1942).

party, and thus negative the adverse inference. (The burden of proof as to whether, on all the evidence, the adverse inference should be drawn by the fact finder, of course, still remains on the party who urges it.)

The reasons for a party's failure to produce a witness are peculiarly within his own or his counsel's knowledge, and ordinarily could be put into the case without undue difficulty. If they would destroy the basis or lessen the weight of the inference, it is reasonable to expect that they would be introduced.[6] It is proper, therefore, to allocate to him the burden of exculpatory proof. As the Court said in the *Grady* case, "It was reasonable that the plaintiff sustain the burden of explaining the failure to produce even one of the four." [7]

As has been noted, the Court held that the drawing of the adverse inference in the *Grady* case satisfied the requirements laid down therein and was "plainly reasonable." This, standing alone, would be a forthright pronouncement. The holding, however, was prefaced by a repetition of qualifying phrases carried over from statements in earlier decisions: "We reiterate that even where, as in this case, the issue lies in the discretion of the judge, caution should be exercised in permitting the adverse inference." [8]

This language thus unfortunately holds that permission for the argument of the adverse inference is merely discretionary, and further, the judge is adjured to caution in granting it, even in a case in which the drawing of the inference has been rendered plainly reasonable by fulfillment of the requirements laid down in the opinion. It is not clear why such restrictions should be put upon the use of the inference, which is simple in nature and of a type commonly employed in ordinary experience, except perhaps out of undue deference to dicta which, under the circumstances, have no relevance.[9]

The *Grady* case was shortly followed by *Commonwealth v. Smith*,[10] which upheld the allowance of comment by the prosecution on the failure of the defendant to call as a witness a close friend of his, with whom the defendant testified he had been throughout the period during which the defendant's unsupported testimony sought to set up an

[6] There is, of course, the possibility, dear to writers of courtroom dramas, that the situation is one in which there are valid reasons for the nonproduction of the witness which, however, are of such a nature that the party is either unable or unwilling to expose them at the trial. Such instances, it is thought, occur only rarely in the grist of actual trials. In any event, since all inferences are based on no more than probability, the possibility that any particular inference may not be in accord with the truth is always present.

[7] 341 Mass. 502, 509, 170 N.E.2d 725, 729 (1960).

[8] Ibid.

[9] For example, see Commonwealth v. Finnerty, 148 Mass. 162, 167, 19 N.E. 215, 217 (1889), and McKim v. Foley, 170 Mass. 426, 49 N.E. 625 (1898), both of which were cited in the opinion. It was probably the Court's conscientious desire to comply with its own caveat of caution that led to the requirement stated in the opinion that the circumstances of the case must call "emphatically" for the presence of the absent witness.

[10] 342 Mass. 180, 172 N.E.2d 597 (1961).

alibi. The Court, citing the *Grady* case, held without discussion that the evidence showed the probable availability of the witness.

Two other recent decisions in the same area warrant mention by way of distinction from the situation in the *Grady* case. As shown in the simpler of the two, *Jensen v. McEldowney*,[11] a statement in the course of argument to the effect that no witnesses were brought in to testify to a particular fact does not necessarily involve an attempt to move the fact finder to draw the adverse inference, and if it does not do so, no question as to the propriety of the inference is raised.

The other case, that of *Hillery v. Hillery*,[12] is more complicated. That case dealt with the adverse inference raised by evasive and untruthful testimony by a party, which is strongly analogous to the inference discussed in the *Grady* case. The evidential effect of both of these inferences is that of an admission implied from conduct of a party, and the holding in the *Hillery* case would be equally applicable in the same circumstances to the inference arising from failure to call a witness.

The facts of the *Hillery* situation must be clearly distinguished from those of the *Grady* case. In *Grady,* the inference was raised against the plaintiffs, who had the burden of proof, and was held to be properly operative as evidence weakening the credibility of the plaintiff son's testimony. In *Hillery,* however, the inference was adverse to the defendant, who did not have the burden of proof.

The *Hillery* case was a hearing on the amount of alimony to be awarded to a wife under a decree nisi granting her a divorce. The wife had the burden of proof as to the financial resources of her husband, to support the order of alimony. The husband appealed from the alimony decree, the judge made findings of facts, and the evidence was reported.[13]

The evidence (which need not be stated) warranted findings that the husband had income and property to a certain extent. It included testimony of the husband. The judge found that the husband's testimony as to his income had been evasive and untruthful, and the Court concurred in that finding. The decree awarded alimony to the wife in an amount substantially higher than the husband would have the capacity to pay, on the basis of the findings warranted by the evidence as to his income and property, apart from the adverse inference raised from his testimony. The decree was held to be plainly wrong, since it was not supported by evidence of the husband's capacity to pay that amount.

In a similar situation, a finding for the plaintiff, who had the burden of proof, which was supported only by the adverse inference alleged to arise from the defendant's failure to call witnesses, was also held to be

11 341 Mass. 485, 170 N.E.2d 472 (1960).

12 342 Mass. 371, 173 N.E.2d 269 (1961). See §7.1 *supra* for detailed discussion of this case.

13 See §20.1 *supra,* note 11, as to the status of a case on appeal from a Probate Court under such circumstances.

improper in the earlier decision in *Cutler v. Jordan Marsh Co.*[14]

The findings in both the *Hillery* and *Cutler* cases, in favor of the party with the burden of proof, necessarily involved rulings that the implied admissions, standing alone, had the effect of evidence. This, however, is not the law.

There is, under our jurisprudence, an important limitation on the evidential effect of implied admissions, which is illustrated in these cases. The adverse inference arising from conduct of a party will warrant disbelief of the contention or testimony of the party. (This is all that was involved in the *Grady* case.) However, such disbelief alone does not, under fundamental principles of the burden of proof, constitute evidence of the contrary proposition, and therefore will not support a finding thereof.[15]

Thus, when a party with the burden of proof on an issue relies solely on such an admission to make out his case, he loses as a matter of law. It is only when the party with the burden of proof has otherwise made out a prima facie case that his opponent has the burden of going forward with evidence if he wishes to better his position with the fact finder. Not until then does the fact finder's disbelief of the contention or testimony of the opponent, and the inference which may be drawn from disbelief, become material.[16]

§20.4. Hearsay: Assessment as evidence of value. At common law, the amount for which property was assessed for tax purposes would be inadmissible on the issue of the value of the property, as hearsay and opinion. However, by statute, G.L., c. 79, §35, it is provided that:

> The valuation made by the assessors of a town for the purpose of taxation for the three years next preceding the date of the taking of . . . real estate by the commonwealth or by a county, city, town or district under authority of law may, in proceedings brought under section fourteen to recover the damages to such real estate . . . be introduced as evidence of the fair market value of the real estate by any party to the suit . . .

In *Bennett v. Brookline Redevelopment Authority*[1] it was held that such evidence is also admissible in a similar suit arising out of a taking by a redevelopment authority.

The nexus is made by two provisions of G.L., c. 121, one of which, Section 26BB, authorizes a housing authority to take by eminent domain and also specifies (with exception not here material) that the provisions of Chapter 79 "relative to counties, cities, towns, and districts, so far as pertinent, shall be applicable to a housing authority," and the other, Section 26QQ, provides that "all the provisions of law

14 265 Mass. 245, 245-248, 163 N.E. 863, 864 (1928).

15 Credit Service Corp. v. Barker, 308 Mass. 476, 481, 33 N.E.2d 293, 295 (1941); D'Arcangelo v. Tartar, 265 Mass. 350, 164 N.E. 87 (1928). See also Pariso v. Towse, 45 F.2d 962, 964-965 (2d Cir. 1930).

16 Boston v. Santosuosso, 307 Mass. 302, 349, 30 N.E.2d 278, 304-305 (1940).

§20.4. 1 342 Mass. 407, 174 N.E.2d 26 (1961).

applicable to housing authorities in cities and towns, with respect to land assembly and redevelopment projects shall be applicable to redevelopment authorities."

The Supreme Judicial Court held that the procedural or adjectival provisions of Chapter 79 as well as those of a substantive nature were applicable to a taking by a redevelopment authority. The opinion noted that whatever pertinency assessed valuation may have as evidence of value was no less because of the difference in the taking authority, and that the decision would have the desirable result of promoting uniformity in the assessment of damages.

The opinion in *Boston v. Gordon*[2] (in dealing with its companion case, *Boston v. Woodward Apartments*) recognized a further exception to the rules excluding hearsay and opinion by holding assessed valuation admissible on the issue of value of the locus in an action for the collection of real estate taxes.

The city sued the defendant corporation to recover an alleged balance due on taxes for the years 1953 through 1958. On February 4, 1958, the Land Court had entered a decree foreclosing all rights to redeem from a prior tax taking of the locus, the tax title account in which included taxes and charges from 1948 through 1956. The Court held that the foreclosure of the tax title was analogous to the foreclosure of a mortagage by entry, and would not operate as a discharge of all the liabilities then reflected in the tax title account, but only as a payment thereof to the extent of the fair market value of the real estate on the date of the foreclosure decree.

At the trial, the city sought to introduce proof that the market value was $7500, in the form of expert opinion and evidence of the sale of the locus by the city on July 15, 1958, for that price. The trial court excluded the evidence, to which the city excepted. On the city's appeal, the defendant contended that admission of this evidence would be improper, because the assessment on the locus as of January 1, 1958, was (as it had been since 1948) $34,500. The Court, however, pointed out that the city was not bound by the acts of the assessors, who are public officials and not its agents, and held that the city's position involved no inconsistency that would require exclusion of evidence of the market value at issue.

Observing that the proceeding was not a proper one in which to test, for assessment purposes, the correctness of the assessors' valuation, the Court continued:

> Nevertheless, in proceedings to collect taxes, assessments upon which those taxes are based should be admitted in evidence where it is necessary to show (for a purpose connected with these taxes) the fair cash or market value of the assessed property as of a date reasonably close to the assessment day.[3]

2 342 Mass. 586, 175 N.E.2d 377 (1961).

3 1961 Mass. Adv. Sh. at 843, 175 N.E.2d at 383. The closest approximation to precedent for this holding appears to be dictum that does not go so far. See Commonwealth v. Heffron, 102 Mass. 148, 151-152 (1869).

It seems clear that it is meant that the assessment is to be admitted as evidence of value to be given such weight as the fact finder sees fit. There appears to be no reason to read into the language an intention to limit its use to the purpose of showing the prior position of the assessors, not as evidence of value but only to detract from the credibility of evidence of a lower value offered by the city.

The admission of the assessment as evidence of value cannot be rationalized as an admission or estoppel of the city in any ordinary sense. The assessors are held not to be agents of the city, and therefore an assessment would not be admissible at common law on such a theory, even in an action for the value of land taken by the city. As has already been noted, assessed valuation is now admissible in land taking cases, but only by virtue of a limited statute, which would have no application here.

Furthermore, there is nothing in the opinion to indicate that the assessment would not be admissible in a case where the positions were reversed, and the city offered the assessment as evidence of a value of the locus lower than that claimed by the taxpayer whose right to redeem had been foreclosed by decree. There would appear to be even less reason for the operation of any theory of admission or estoppel against the taxpayer in such a situation.

This anomalous exception to the hearsay rule thus reaches by judicial decision in proceedings for the collection of taxes the same result as was achieved by the statute applicable to land taking cases. While it is difficult to rationalize the basis for allowing it as evidence of value, it is certain that in its limited applicability this exception poses no great threat to the rules excluding hearsay and opinion, and, as the Court in the *Bennett* case said of that decision, it will have the desirable result of promoting uniformity in the assessment of damages.

§20.5. Circumstantial evidence: Statutory presumptions from test for alcoholic content of blood. Chapter 340 of the Acts of 1961, which amends G.L., c. 90, §24, by adding thereto a new paragraph (1)(e), was approved on April 10, 1961.[1] The section provides that in prosecu-

§20.5. [1] The new statute is also noted in §11.5 *supra*. The text of the paragraph is as follows: "In any prosecution for a violation of paragraph 1(*a*) of this section, evidence of the percentage, by weight, of alcohol in the defendant's blood at the time of the alleged offense, as shown by chemical test or analysis of his blood or as indicated by chemical test or analysis of his breath, shall be admissible and deemed relevant to the determination of the question of whether such defendant was at such time under the influence of intoxicating liquor; provided, however, that if such test or analysis was made by or at the direction of a police officer, it was made with the consent of the defendant, the results thereof were made available to him upon his request, and the defendant was afforded a reasonable opportunity, at his request and at his expense, to have another such test or analysis made by a person or physician selected by him. Evidence that the defendant failed or refused to consent to such test or analysis shall not be admissible against him in any civil or criminal proceeding. Blood shall not be withdrawn from any such defendant for the purposes of any such test or analysis except by a physician. If such evidence is that the percentage was five one hundredths or

tions for operating a motor vehicle while under the influence of intoxicating liquor, a chemical test or analysis of the breath or blood of the defendant showing the percentage by weight of alcohol in his blood at the time of the alleged offense "shall be admissible and deemed relevant to the determination of the question whether such defendant was at such time under the influence of intoxicating liquor."

The evidential effect to be accorded to such evidence is stated solely in terms of presumptions that the defendant was or was not under such influence. It therefore appears that except in the almost inconceivable event that the result of such a test adverse to the defendant is the only evidence introduced, the statute will have no legally proper effect in the trial of such cases, since a presumption, in the presence of evidence to the contrary, which can obviously be expected to be produced, dissolves and has no evidential effect.[2]

Such a dismal result can be avoided only if the Supreme Judicial Court should see fit to construe the statute as a whole, contrary to its stated effect, as manifesting the more sensible intent of giving to the result of the test the greatly different effect of prima facie evidence, which, while having the mandatory effect of a presumption in the absence of evidence to the contrary, even when met by such opposing evidence retains the force of an inference.[3]

§20.6. Evidence to support a finding: Evidence which is "not substantial," or no evidence. The case of *Singer Sewing Machine Co. v. Assessors of Boston,*[1] dealing with the validity of an administrative finding, arose out of an application for abatement of a real estate tax filed by the taxpayer with the assessors on November 13, 1958, which was deemed to have been denied by their failure to act thereon within three months thereafter.[2]

The taxpayer appealed to the Appellate Tax Board, asserting in its petition that the bill for the tax in question had been sent out by the assessors on October 14, 1958. The assessors raised the issue of the jurisdiction of the board to entertain the appeal by an allegation that the tax bill had been sent on October 10, 1958.[3] After a hearing, the board found that the application for abatement had been filed more than thirty days after the tax bill was sent, and ruled that it was with-

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less, there shall be a presumption that such defendant was not under the influence of intoxicating liquor; if such evidence is that such percentage was more than five one hundredths but less than fifteen one hundredths, there shall be no presumption; and if such evidence is that such percentage was fifteen one hundredths or more, there shall be a presumption that such defendant was under the influence of intoxicating liquor."

2 Epstein v. Boston Housing Authority, 317 Mass. 297, 58 N.E.2d 135 (1944).

3 Cook v. Farm Service Stores, Inc., 301 Mass. 564, 566-568, 17 N.E.2d 890, 892-893 (1938).

§20.6. 1 341 Mass. 513, 170 N.E.2d 687 (1960).

2 G.L., c. 59, §64.

3 If a real estate tax bill is sent after September 1, an application for abatement may be filed only within thirty days after the sending. G.L., c. 59, §59.

out jurisdiction to hear the appeal. The taxpayer appealed, contending that the finding was not supported by substantial evidence.[4]

The evidence at the hearing was before the Supreme Judicial Court. All of the witnesses on the issue as to the date of the sending of the notice had been called by the appellee assessors. There was in evidence a punch card from which the taxpayer's 1958 tax bill was made up, and testimony of the practice as to the processing and mailing of such notices, which would warrant a finding that the tax bill was mailed,[5] which fact, however, was not in controversy. The question was whether it had been mailed within or more than thirty days before the filing of the application for abatement on November 13, 1958.

On this issue the appellees introduced an affidavit of the deputy tax collector for the ward in which the appellant's property is located to the effect that "on the date specified in the subjoined schedule" he sent by mail postpaid to each person assessed in said ward notice of the amount of his tax. The affidavit was dated October 10, 1958. No further date appeared in the schedule or the body of the affidavit.

It is provided by statute that "An affidavit of the collector or deputy collector sending a tax bill or notice as to the time of sending shall be prima facie evidence that the same was sent at such time." [6] Therefore, assuming that the language of the affidavit is interpreted as stating that the deputy collector mailed the bill on October 10, 1958 (as he testified was intended), the affidavit would have had the artificial compelling effect of establishing that fact as a matter of law, if there were no evidence to the contrary.[7]

However, there was in the case evidence inconsistent with the statement in the affidavit. The deputy collector himself testified that he did not mail the tax bills. His testimony was that he addressed the envelope for the appellant's tax bill [8] and inserted the tax bill therein, and that it was then taken to the mailing room to be mailed out with the rest of the bills.

The testimony linking the bill to the post office, that of the principal

[4] General Laws, c. 30A, §14(8) (Massachusetts Administrative Procedure Act), provides: ". . . the court may set aside or modify the decision . . . if it determines that the substantial rights of any party may have been prejudiced because the agency decision is . . . (e) unsupported by substantial evidence." Section 1(6) provides: " 'Substantial evidence' means such evidence as a reasonable mind might accept as adequate to support a conclusion."

[5] Evidence tying in a file copy of a particular letter with the duty of a clerk to mail such letters was held (by a majority of the Court) to warrant a finding of mailing of the particular notice in Prudential Trust Co. v. Hayes, 247 Mass. 311, 314-315, 142 N.E. 73, 74 (1924). That decision did not require a further determination as to whether the effect of such circumstantial evidence was that of inference, presumption, or prima facie evidence.

[6] G.L., c. 60, §3, as amended by Acts of 1943, c. 166, §2. Later amendments are immaterial to the issue here considered.

[7] Cook v. Farm Service Stores, Inc., 301 Mass. 564, 566-568, 17 N.E.2d 890, 892-893 (1938).

[8] His testimony was that he addressed the envelope to number 159, instead of 149, Broadway, New York City, as instructed by the taxpayer. There is no discussion of the effect of the error in the opinion.

account clerk in the mailing unit, was to the effect that it was his duty to receive correspondence and bills from the various departments, run them through a postage machine, and put them into mail sacks, and that he placed bills in the vestibule for post office pickups and sometimes took them personally to the post office when working overtime. He received tax bills from the office of the collector on October 10, 1958, but could not say for sure what he did on that date, nor did he have any memory of stamping or placing in a mail sack any bill to the appellant.

With regard to the foregoing oral testimony, the Court held:

> It does not affirmatively appear that those bills were placed in the vestibule and taken by the postal department on the same day when he [the deputy collector] placed them in the mailing room. The drawing of such an inference would not be supported by substantial evidence.[9]

This language is ambiguous, but it would appear that the first, rather than the second, sentence more properly states the ruling intended, namely that there was no evidence at all on the issue, rather than that there was evidence which, however, was not substantial. The oral testimony here would not support the finding even if it were made in a court, on the review of which the distinction is properly between "evidence" and "no evidence," and the tenuous demarcation of "evidence" which is "not substantial evidence" is fortunately not required.[10]

It was argued for the assessors that although the artificial compelling force of the deputy collector's affidavit to the effect that he mailed the bill on October 10, 1958, was destroyed by his own testimony that he did not mail it, the affidavit remained as evidence warranting, though no longer compelling, the finding that the deputy collector sent the bill on October 10, 1958.

This contention is clearly in accord with the accepted statement of the law.[11] "But," said the Court, "bearing in mind the vague and unsatisfactory form of the affidavit and the misstated fact it contained, we are of the opinion that the affidavit did not constitute substantial evidence warranting the finding." [12]

Previous decisions have held that administrative findings are not supported by substantial evidence when based solely upon hearsay evidence which would be inadmissible over proper objection in a court of law.[13] The affidavit in the case at bar, however, cannot be

9 341 Mass. 513, 519, 170 N.E.2d 687, 690 (1960).

10 For a discussion and attempted rationalization of these distinctions see 1954 Ann. Surv. Mass. Law §26.7.

11 Cook v. Farm Service Stores, Inc., 301 Mass. 564, 566-568, 17 N.E.2d 890, 892-893 (1938).

12 341 Mass. 513, 519, 170 N.E.2d 687, 690 (1960).

13 See, e.g., Sinclair v. Director of Division of Employment Security, 331 Mass. 101, 117 N.E.2d 164 (1954). Cf. Stanton's Case, 331 Mass. 378, 119 N.E.2d 388 (1954).

regarded as inadmissible hearsay, because of the statute giving it the effect of prima facie evidence. The decision might therefore be regarded as creating another and more anomalous category of "evidence" which is "not substantial." That conclusion, it is suggested, is neither necessary nor desirable on the facts of the case.

It is true, of course, that since an administrative finding was involved, the Court needed to go no further than the quoted statement in order to dispose of the case on the point raised by the assessors. However, this judicial self-restraint appears to result in another ambiguity similar to that noted earlier with respect to the ruling on the oral testimony of the mailing clerk.

It is submitted that the facts of the *Singer Sewing Machine* case fall fairly within the situation described in the language commonly referred to as "the rule of *Sullivan v. Boston Elevated Railway Co.*":

> Here is not an instance of more or less conflicting or inconsistent statements made in the course of an examination, where it is for the jury to say what the truth is . . . That is the general rule. . . . But there are occasions where a witness, having made two materially different statements touching the same event, finally adheres definitely to one in preference to the other as being the truth. Under such circumstances the witness is bound by the statement at last given as the truth.[14]

Under this familiar rule, a conflicting version of a witness's testimony which he knowingly abandons is not deemed to be his testimony, and thus no longer remains in the case as evidence of the facts stated therein.[15]

The quoted language appears particularly apt to describe the situation in the *Singer Sewing Machine* case. The deputy collector was obviously confronted with his affidavit, which was in evidence, since he testified as to its meaning. With full knowledge of its content, therefore, he testified to the contrary, namely that he did not mail the tax bill, and, as it appears, finally adhered definitely to that statement. Under the rule of the *Sullivan* case, the repudiated statement of the affidavit to the effect that he did mail the tax bill would no longer be deemed to be in evidence.

On this hypothesis, there would not remain in the case a residue of evidence by way of inference from the discredited affidavit, which, however, would not be "substantial," but there would be no evidence at all to support the finding. The result would then be the same, whether the case had been tried before an administrative body, as it was, or in a court of law. The holding of the opinion does not necessarily conflict with this reasoning, for it is, of course, obvious that "no evidence" does not constitute "substantial evidence."

14 224 Mass. 405, 406, 112 N.E. 1025 (1916).

15 Although the fact that the contrary had been stated and repudiated would, of course, remain, where relevant to the credibility of the version finally settled upon. See Morrissey v. Powell, 304 Mass. 268, 23 N.E.2d 411 (1939).

The assessors further argued that the burden of establishing the fact essential to the jurisdiction of the Appellate Tax Board, namely that the application for abatement was filed within thirty days of the sending of the tax bill, was on the taxpayer. Had the Court seen fit to apply the requested ruling, which appears to be correct as a matter of law,[16] it could properly have affirmed the decision of the board. However, the taxpayer was fortunate. The Court disposed of the contention with the terse comment, "No such point is presented at the moment. The board's finding on which lack of jurisdiction was based was without the supporting evidence made mandatory by statute. We shall not assume that a new hearing by the board will lead to an identical result." [17] The decision of the Appellate Tax Board was reversed and the case remanded for further proceedings.

The Court's choice of ordering a new hearing was a desirable outcome, for it would seem that the issue of the time of mailing of the tax notice had not been adequately tried, and final determination of the question of the jurisdiction of the board on the basis of such a record would not be desirable.

The opinion in *State Board of Retirement v. Contributory Retirement Appeal Board*[18] present similar considerations. This case held that the finding by the appeal board of a causal connection between the official duties of the decedent and his death was not supported by "substantial evidence."

However, in that case the result followed because it was held that the medical opinions necessarily relied on by the claimant of an accidental death benefit were based upon hypothetical questions which assumed facts that were not in evidence and were supported only by conjecture. Such opinions could properly have been excluded when offered or later stricken on motion, but even if left in the record, as they were, they were entitled to no weight as evidence and would not support a finding either of a jury or of an administrative body.[19] Thus again there was no evidence, rather than evidence which was "not substantial," underlying the finding in question.

§20.7. Privilege: Self-incrimination. The Supreme Judicial Court in *Sandrelli v. Commonwealth*[1] reaffirmed the rule enunciated in *Commonwealth v. Joyce*[2] to the effect that the trial court must find reasonable ground of danger of incrimination to justfy the exercise of the privilege of refusal to answer, expressly disapproving the intervening holding of the United States Supreme Court in *Hoffman v.*

16 Assessors of Boston v. Suffolk Law School, 295 Mass. 489, 496-499, 4 N.E.2d 342, 346-348 (1936).

17 341 Mass. 513, 520, 170 N.E.2d 687, 691 (1960).

18 342 Mass. 58, 172 N.E.2d 234 (1961).

19 Brown v. United States Fidelity & Guaranty Co., 336 Mass. 609, 613-614, 147 N.E.2d 160, 163-164 (1958).

§20.7. 1 342 Mass. 129, 172 N.E.2d 449 (1961).

2 326 Mass. 751, 97 N.E.2d 192 (1951).

United States,[3] which adopted the more liberal standard that the privilege exists unless it is perfectly clear to the court that the answer cannot possibly incriminate.

Since the qeustion is essentially one of constitutional law, the decision is merely noticed in this chapter.[4]

[3] 341 U.S. 479, 71 Sup. Ct. 814, 95 L. Ed. 1118 (1951).
[4] See §10.2 *supra*.