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Leading Articles

JUDICIAL DETERMINATION OF CREDIBILITY IN JURY-TRIED ACTIONS

David Dow *

It is a commonplace to say that in a jury-tried action the judge determines the law and the jury determines the facts. It is equally common to point out that neither statement is wholly true, though when a court undertakes to decide a question of fact it is apt to say that it is doing so "as a matter of law."

It is less common—but equally true under present theories—to divide the process of decision into two categories: (1) the determination of "what happened," and (2) the proper application of the relevant legal standards to the first determination. The assumption is made that this is the actual mental process that occurs in the mind of the trier, even though it is highly doubtful that this is so in many if not in most cases. Nevertheless it is the assumption we use in checking verdicts and trial judge decisions where there is no jury; and if it is not true, still we do not know what happened in the trier's mind and therefore have no better way of checking the result.

CREDIBILITY DEFINED

A somewhat different mental process is also assumed, although it is stated perhaps less often. It is that the trier must somehow determine first what parts, if any, of a witness's testimony are true and from all of these infer additional facts. The process of inference which the trier is assumed (whether rightly or wrongly) to go through is thus twofold in many situations. That process may be simply an inference that witness is telling the truth; for example, the simple testimony by W: "I saw Jones sign Exhibit 1", or "I saw Adams stab Smith" where the signature on Exhibit 1 or the stabbing of Smith is an ultimate fact in issue. But if Exhibit 1 is a statement by Jones declaring how he drove

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his car, the truth of whether Jones signed that Exhibit is merely a starting point for further inferences as to how Jones actually drove his car which will be combined with other inferences from other evidence. Or if the testimony of W in the stabbing case goes on to say that Adams owed Smith money and loved Smith's wife, then the jury must decide both whether W is telling the truth *and* whether these facts (if facts they be) when combined with other evidence and assumptions lead by a combination of inferences to a conclusion of premeditation. The former is called a *testimonial inference* or a *direct inference*. The latter is called a *derivative inference,* or an *indirect inference*; or the inference concept is concealed in the phrase "circumstancial evidence."[1] The former or *testimonial inference* is the one we are dealing with when we talk about the credibility of the witness and the one in which we are primarily interested here.

It will be seen that this division of inferences between testimonial and derivative is simply one way of attempting to define the term "credibility" by the method of exclusion. Although a possible definition of "credibility" might be limited to the single factor of the sincerity of the witness—that is, whether he is consciously telling the truth as he believes it at the moment—I am convinced that in using the term the courts normally intend to include the other factors which bear on the testimonial inference. These are the ability of the witness to have observed accurately, the accuracy of his memory, and his ability to communicate his thoughts. The last is of course not only a function of the witness but also of the jury and judge and all are tempered by the attitudes and arguments of counsel.

If we think in terms of the weight of the evidence (rather than in terms of "inference") we find a similar sort of ambiguity. Weight may sometimes refer to the process of inference from Fact plus Fact to Fact, or to conclusion, and it may also refer to the process of determining how much of what a witness says is to be believed. The concept may, however, present a truer picture of the actual mental process which, instead of proceeding from "credibility is so and so" to the derivative inferences which follow therefrom, more likely blends the two processes. All factors are somehow weighed in a mental balance and an acceptable result reached. If then the individual juror is asked to say whether a witness W spoke the truth when he said Fact A is true he may

[1] For a more detailed discussion of this distinction see Judge Frank, concurring, in United States v. Masiello, 235 F.2d 279 (2d Cir. 1956) at page 289.

say "no", not necessarily because this was his original judgment of the credibility of witness W but because the juror has determined his verdict in such a way that Fact A must not be so. On the other hand he may very well never have believed W in the first place; or having at first believed W he came later to disbelieve him because of conflicting witnesses and what appear to be compelling derivative inferences. But when we come to the question of the power of the judge to control the jury, we do not ask what actually did go on in the mind of each juror (except perhaps when an issue of misconduct is raised) but we ask whether there is a rational explanation for the result based on the testimonial inference to derivative inference process which *might* have taken place.

When a trial judge undertakes to direct a verdict, he is for the most part dealing either with the second of these inferences, that is the derivative inference of Fact plus Fact to "what happened" Fact, or with the propriety of the comparison of Fact and Legal Standard. The standard applied by the trial judge in most jurisdictions today is some local verbal variant of whether the derivative inferences that counsel seeks to draw in justifying the verdict are those that a reasonable man could draw. It is customary to include in the statement of such a standard the idea that the testimonial inferences—the credibility of the witnesses—are matters which must be excluded since such things lie solely in the province of the jury.

We are concerned here with the extent to which this last idea is not true. The judge may, and very often does, hold that a witness must be believed or must not be believed. My purpose is to bring together the various situations in which this may be done. The vast amount of case law makes it impossible to cite all the authorities. The attempt will rather be to generalize the more or less well defined areas of judicial control, to analyze the theoretical basis for that control, to show the interrelationships involved, and to discuss some (but only some) of the recent cases. I am specifically excluding such partial methods of judicial control as the right to comment on the weight of the evidence and the right to grant a new trial.

EXCLUSIONARY RULES OF EVIDENCE

In the first place there are certain rules which concern the number of witnesses required to prove a particular fact or issue—rules which state either that one witness is not sufficient to sustain the burden of proof or that one *kind* of witness is not enough. In

one sense these rules may be thought of not as determining the non-credibility of the single witness, but merely as saying that it is wholly immaterial whether the jury believes the witness or not. But this might also be said of any other situation in which the judge directs a verdict on the ground that the witness or witnesses are not to be believed. The rules are fully discussed in various places and for our purposes it will therefore be sufficient only to suggest their existence.[2]

Of the first kind—those in which the kind of *case* demands more than one witness—the principal examples are Treason, Perjury, and Probate of a contested will. The second concerns cases in which a particular kind of *witness* is deemed insufficient unless corroborated. Examples are Divorce in which the parties' testimony must be corroborated; Confessions in criminal cases; the testimony of the complainant in a sex case; and in some states the testimony of an accomplice in a criminal prosecution which must be corroborated. To these should be added the relaxation of the Dead Man statutes found in a few states which permit the survivor to testify if corroborated.[3]

There are several further rules, closely akin to those dealing with the power to direct a verdict in the face of evidence in the record, but which deal rather with the original exclusion of the testimony. A great many of the exclusionary rules of evidence are based (in part at least) on the idea that the jury should not be permitted the chance of believing the witness. It is much easier for a court to exclude hearsay, for example, than to say that it is insufficient in the face of a motion for a directed verdict. In fact, in this example the rule is usually the other way—that once the hearsay is admitted, it may be sufficient to support the verdict.[4] Similarly much evidence is excluded under the rubric of "irrelevancy." But these rules of exclusion are in reality directed at the probability of the jury drawing an unreasonable derivative inference rather than an inaccurate testimonial inference. The credibility of the witness is immaterial. The exclusion of evidence based on estoppel may be part of the substantive law defining what issues may be raised between the parties—the objection should be the immateriality of the evidence—or it may be based on the idea that certain testimony is inherently incredible. The latter kind of estoppel draws no distinction between exclu-

[2] 7 WIGMORE, EVIDENCE, § 2032 seq. (3d ed. 1940).

[3] 5 WIGMORE, EVIDENCE, § 1576 (3d ed. 1940).

[4] McCORMICK, EVIDENCE, 459 (1954).

sion of the testimony and its sufficiency if introduced. It is precisely what concerns us here and will be discussed in detail later.

On the other hand, the rules which exclude a witness on the grounds of general lack of competency are directly related to inherent non-credibility of the witness. If a person is so insane that (in the opinion of the trial judge) he was incapable of observing correctly or remembering adequately or relating intelligently the things remembered, he is excluded as incompetent. The jury should not be bothered with—or trusted with—what he may have to say. The same is true of children who do not measure up to the proper standard of competency, whether that standard deals only with his testimonial capacities or wether it also includes the requirement of understanding the obligations of an oath. And similarly a witness who is excluded under the Dead Man statute is so excluded because of the legislative determination that he is not to be believed. On the other hand, the incompetency of one spouse to testify against the other is based on the entirely different ground of protecting the witness spouse and the family, rather than on the needs of insulating the jury from inherently incredible testimony. And the same is of course true of the rules of testimonial privilege, such as attorney-client or physician-patient.

CREDIBILITY INVOLVED IN DETERMINING REASONABLENESS OF DERIVATIVE INFERENCES

We come then to those cases in which the testimony of particular witnesses has been introduced and a motion for a directed verdict—or its equivalent—has been made. It is clear, though the fact is sometimes overlooked by the courts, that the determination of this motion may involve a judicial determination of credibility even though the basic problem to which the trial judge addresses himself is that of the reasonableness of the derivative inferences. The first such situation arises when the motion is made by the party having the burden of proof, and no evidence has been introduced by the opposing party. If the motion is to be granted, it must be upon the assumption that the moving party's witnesses (or some of them) have spoken truly.

If the opposing party has also moved for a directed verdict, then the rules are less clear as to whether the traditional function of the jury in deciding issues of credibility is invaded by a determination in favor of the party having the burden of proof. Some courts have regularly treated the double motion for a directed verdict as a waiver of jury trial by both parties. Under such a rule the jury's functions are hardly invaded by the trial judge,

though he must of course determine the credibility of the witnesses. Under more modern rules, particularly those patterned after Rule 50 of the Federal Rules of Civil Procedure, the double motion is not a waiver of jury trial,[5] and thus a determination by the judge in favor of the party with the burden of proof will involve determining issues of credibility. Where this is done, however, it can usually be explained under some other well understood exception to the rule of jury determination of credibility rather than having to be explained as a special case. I refer to the rules dealing with the effect of uncontradicted testimony.

Where the motion is made in favor of the party having the burden of proof and the opposing party *has* introduced some evidence, it is equally true that the judge must make a determination of witness credibility, but the state of the case may be such that this does not so clearly involve an invasion of the jury's function—at least under more modern views of that function. The problem probably arises most frequently on the issue of contributory negligence in a state where the burden of proof on that issue is on the defendant. If the judge grants the motion on the basis of the testimony of witnesses introduced by the defendant, then the situation is no different from that discussed in the preceding paragraph—the granting of a directed verdict in favor of the party which has the burden of proof. But the more usual case is that in which the determination is based in part, if not altogether, on the testimony introduced by the plaintiff. Again we must recognize two quite different possibilities. In the first the plaintiff by his witnesses has taken a clear position as to the way in which the accident happened and defendant is willing—at least for the sake of arguing the motion—to agree with the plaintiff. When the trial judge agrees with both parties, as he undobtedly will, it is true that he assumes the credibility of the witnesses, but he does so because the parties have thus admitted the facts as clearly as if they had expressly done so in their pleadings. The plaintiff has in effect made a judicial admission which withdraws the issue of credibility from the realm of the jury. The derivative inference problems which remain do not concern us here. The second possibility is that in which the plaintiff has not intended to adopt the same fact theory proposed by defendant, but some of his witnesses have unfortunately testified in such a way as to support defendant's theory. If the trial judge now decides in favor of defendant on his motion for directed verdict, it cannot be on the basis of an

[5] Neb. Rev. Stat. § 25-1315.01 (Reissue 1956); In re Estate of Coons, 154 Neb. 690, 48 N.W.2d 778 (1951).

intended judicial admission by plaintiff, but it must be on some other basis which involves a judge determination of credibility on an issue which both parties controvert. There are, of course, several well recognized bases upon which this can be, and is, done which will be discussed later. I refer to the binding effect of one's own testimony, or of the testimony of one's own witnesses.

When the motion is made against the party with the burden of proof, the usual verbalization of the directed verdict rule is to assume that the witnesses for the opponent of the motion have spoken truthfully and to disregard the testimony of witnesses for the party making the motion. In other words, the party making the motion waives his right to have the jury *disbelieve* the opponent's witnesses for the purpose of the motion. It has been seriously doubted, at least by one writer, that this is actually what the judges do.[6] Mr. Blume cogently argues that it is quite impossible for the trial judge to erase from his mind the testimony of proponent's witnesses no matter how conscientiously he attempts to do so, though in some cases the task is made easier by the fact that the opponent's witnesses can be brought under one or another of the standard rules which permit the trial judge either to believe or disbelieve the witnesses "as a matter of law." In those states which frankly permit the trial judge to consider all of the evidence, it is of course true that in doing so he must evaluate the credibility of the witnesses. It is impossible to speak as Minnesota often does in terms of "overwhelming evidence" being sufficient to support a directed verdict, without admitting that the judge makes an independent estimate of whether or not the witnesses for the proponent of the motion are speaking truth.[7]

BASES FOR JUDICIAL CONTROL

Before proceeding further it is desirable to point out that there are at least four kinds of ideas running through the cases which deal with judge control of credibility. The first of these has already been suggested, that a party may have made an intended admission, or if not strictly intended the state of the evidence in the case is such that there is no basis for deciding otherwise. This

[6] Blume, Origin and Development of the Directed Verdict, 48 Mich. L. Rev. 555 (1950). See also Comment by McBaine in 31 Calif. L. Rev. 454 (1943) on Galloway v. United States 319 U.S. 372 (1943).

[7] Hanson v. Homeland Ins. Co., 232 Minn. 403, 45 N.W.2d 637 (1951). See also Van Tassel v. Patterson, 235 Minn. 152, 50 N.W.2d 113 (1951).

is usually called a judicial admission. The second involves a variety of cases in which belief or disbelief is enforced because there is a logical reason why it must be so.

The third idea equates the power of control in the two areas of testimonial and derivative inferences. In effect it states that the primary standard or criterion to apply is whether a reasonable man could come to the opposite conclusion and it further states that the proverbial reasonable man's conclusions must be tested as to the reasonableness of his belief or disbelief of what all the witnesses say, as well as to the reasonableness of the conclusions he reaches by derivative inference. This is the effect of the Minnesota rule mentioned above and of some of the New York cases. It has the virtue of simplicity (in statement) to recommend it and it probably more nearly follows the idea that the two processes of testimonial and derivative inference are inextricably interwoven in most jury decisions.

The fourth kind of idea is that there may be some policy factors involved, other than the one that the jury should be somehow limited to rational testimonial inferences. These may be rooted in theories of estoppel or in the concepts thought to underlie the adversary theory of litigation.

These various kinds of ideas will be found to be intertwined in the cases, even in a single case, like the strands of a braided rope. To examine them more closely it is necessary to consider separately the various illustrative situations in which judge control is sanctioned and see to what extent they can be logically defended. To do this I will make a somewhat arbitrary distinction between rules which prevent the jury from believing a witness and those which require the jury to believe a witness—or stated another way: those which deny the right to believe and those which deny the right to disbelieve. The reasons which underlie the two ideas are often different. It will, however, be soon apparent that in many cases where control is exercised we are dealing with a conflict between the testimony of two witnesses and that to require belief of one necessarily involves disbelief of the other. The courts do not always choose to recognize (or at least to discuss) this necessary conflict, but tend to accept and enforce the reasons requiring belief or disbelief of one of the conflicting witnesses and to disregard the effect of such ruling on the testimony of the other. I will consider the situations denying the right to believe first.

SELF-CONTRADICTION ON THE WITNESS STAND

Perhaps the most obvious situation, and yet one on which there is relatively little appellate court material, arises when the witness makes a mistake and immediately corrects himself. This may arise from a slip of the tongue or a misunderstanding of the question. It is reasonable to say here that the jury cannot believe the first statement—that is, that the judge in deciding the motion for directed verdict should disregard the first and mistaken statement. And if this be so it should also be true that it makes no difference at what point the witness is made to see his mistake and change his testimony—whether on the direct examination, the cross-examination, or redirect. If the witness is positive in taking a stand on the fact, the rule is only a slight modification of the doctrine prohibiting the jury from drawing negative testimonial inferences.[8] Thus if the witness testifies: "The light was green," the jury may not from this testimony alone infer that the light was red. The result should be no different if the witness first testifies the light was red and later specifically testifies he was mistaken and that the light was green, no matter how fervently the jury may disbelieve the second and correcting testimony.[9] The no-negative-inference rule is based in part on the proposition that in the vast majority of cases it is an unreasonable inference, but primarily on the fact that to hold otherwise would make it impossible for an appellate court to uphold any directed verdict where there was any testimony in the record directed to the issue in question.[10] It may be argued that in the hypothetical case suggested, there is testimony in the record favoring the proposition that the light was red, but the reasonableness of this inference must still rest on the unrecorded demeanor of the witness at the time the correcting testimony is made.

Nor should the rule be any different if the witness clearly takes the final position that he does not know whether the light was red or green. Whichever party has the burden of proof on this issue should lose if this is the only evidence. The difficult problem is the one in which it is not clear whether the witness means to say "red," "green," or "I don't know"; but rather is led to say both "red" and "green" at different times. For the most

[8] Infra at note 54 seq.

[9] Stewart v. Ray, 366 Pa. 134, 76 A2d. 628 (1950); Cox v. Wilkes-Barre Ry. Corp., 340 Pa. 554, 17 A.2d 367 (1941).

[10] See Dyer v. MacDougall, discussed infra at Note 54.

part the courts will treat this as a jury question,[11] though there is authority for the proposition that the witness must be disbelieved. A series of early Pennsylvania cases so holds on the ground that to believe either statement would be merely a guess, conjecture, or surmise—language usually applied to a problem involving derivative inferences.[12] In Maryland the court is inclined to hold such testimony 'too inconclusive, contradictory and uncertain to be the basis of a legal conclusion."[13] Other courts have recognized a similar rule, but the later tendency is to restrict its application to a case in which the inconsistency is so plain as to show that the witness must have lied one way or the other *and* this inconsistency is unexplained.[14]

If the trial court is held to the strict limits of the rule suggested and may only take the case from the jury when it is clear that the only witness has in fact refused to take a stand one way or the other on the fact question, much can be said in the abstract for the rule. It generally boils down to the proposition that it prevents a verdict based in fact on no evidence. But the question must remain: is the judge or the jury to determine that this is the position which the witness intended to leave?

It is apparent that the answer to this question is a political one, that is the determination depends on the relative values of jury versus judge determination; yet we might properly look to see if there are not rational considerations that bear on it. In the first place, it is quite possible to argue that the entire area of credibility

[11] See Henry v. Bacon, 143 Conn. 648, 124 A.2d 913 (1956): "The jury are the judges of the credibility of witnesses, whether the contradiction is between different witnesses or between differing statements made by the same witness."; Little v. Watkins Motor Lines, 256 F.2d 145 (8th Cir. 1958).

[12] Mulligan v. Lehigh Traction Co., 241 Pa. 139, 88 A. 318 (1913); Zenzil v. D. L. & W. R. R. Co., 257 Pa. 473, 101 A. 809 (1917); Goater v. Klotz, 279 Pa. 392, 124 A. 83 (1924). But see Black v. Philadelphia Rapid Transit Co., 239 Pa. 463, 86 A. 1066 (1913) and Parker v. Matheson Motor Co., 241 P. 467, 88 A. 653 (1913).

[13] Slocum v. Jolley, 153 Md. 343, 138 A. 244 (1927); Eisenhower v. Baltimore Transit Co., 190 Md. 528, 59 A.2d 313 (1948); Kaufman v. Baltimore Transit Co., 197 Md. 141, 78 A.2d 464 (1951).

[14] Adelsberger v. Sheehy, 332 Mo. 954, 59 S.W|2d 644 (1933); Ringeisen v. City of St. Louis, 238 S.W.2d 57 (Mo.App. 1951); Johnston v. Cincinnati N.O. & T. P. Ry. Co:, 146 Tenn. 135, 240 S.W. 429 (1922); Lawrence v. Lawrence, 35 Tenn. App. 648, 250 SW.2d 781 (1951); Laporte v. Houle, 90 N. H. 50, 4 A.2d 649 (1939); Romano v. Littleton Construction Co., 95 N.H. 404, 64 A.2d 695 (1949); Thompson v. Hannah Farmers Coop. Elevator Co., 79 N.W.2d 31 (N.D. 1956).

is in no different position from that of the reasonableness of the derivative inferences the jury draws. There is nothing that stands out apart and makes the determination of the jury in the realm of credibility more desirable from a political point of view than their determination of either the derivative inference or the Fact-Standard comparison function. It is all a part of the one idea of judicial control over the process of decision. No doubt many judges would adhere to this reasoning, and apparently that is what has happened in New York where the problem has received much attention. The courts of that State have come to the conclusion that testimony may be declared incredible as a matter of law where one cannot put his finger on any precise rationalization of the judicial result.[15]

But the elusiveness of the determination and the impossibility of putting a rational reason on the directed verdict result itself speak against the claim that the court is properly determining that no reasonable man could say that this witness has spoken truly or falsely, or that he has taken the flat position that he does not wish to be on record as having stated the facts to be one way or the other—unless of course he has. If he has flatly said "I don't know," then there is good reason for the court to say that his previous testimony should go for naught. This would be little different from the slip of tongue or mistake situation first considered. If it is impossible to give a rational reason for saying that the witness has specifically taken that position, then it is at least difficult to say what a "reasonable" man would say. To be sure, this argument assumes that a reasonable man is one who has a reason, and though this may be so in the abstract it is probably not so in the sense that he can always state that reason in such a way as to persuade others that his reason is based on sound assumptions. Yet since it is agreed that the presumption lies with credibility, at least should there not be a reason, and a good one, which can be articulated by the judge before he is permitted to say that the jury must disbelieve the witness?

Again, if the basis is a political one, it might be thought that there would be some distinction between the kinds of cases that are involved—that in some sorts of cases (contract, for example, as opposed to tort) it would be wiser and more in line with general community values to permit the judge to say what witnesses a

[15] See Bank of United States v. Manheim, 264 N.Y. 45, 189 N.E. 776 1934); Blum v. Fresh Grown Preserve Corp. 292 N. Y. 241, 54 N.E.2d 809 (1944); 15 N.Y. Jud. Council Ann. Rep. 278-282 (Leg. Doc. No. 18, 1949) and materials cited therein.

reasonable man would believe, and in other sorts of cases the community values would dictate against judge decision. Such for example is the approach which some writers take to the problem of whether or not to use the special verdict device.[16] But I have found no such suggestion in the cases. A somewhat analogous determination is made, however, in holding that certain *issues* are to be judge-decided. The familiar example is the issue of fraud as a defense to the enforcement of a release or contract which usually involves simply a question of which witness is to be believed.[17] Unfortunately the rationalization of these holdings is apt to be historical rather than functional.

It might be supposed that we should ask whether or not the judge is better able to determine whether the witness has taken a specific position, that he has a certain expertise which makes him a better judge of this sort of thing. To be sure there are many who believe that this is so; the difficulty is that we have no way of finding out. The fact that the training of a judge may be shown to make him better able to handle a large mass of evidence (and that he has more time to do so in a non-jury case) is not particularly relevant to the question of the credibility of each witness. On the other hand, there may be much to the idea that in non-metropolitan areas the jury will have a personal knowledge of the individual witness which the judge does not, as well as a peculiar knowledge of the relevant arts and facts with which the witnesses are dealing.[18]

[16] See Wyzanski, A Trial Judge's Freedom and Responsibility, 65 Harv. L. Rev. 1281 (1952); 5 MOORE, FEDERAL PRACTICE, § 49.05 (2d ed. 1951).

[17] 43 A.L.R.2d 786, (1955) -

[18] Compare 1 STARKIE, EVIDENCE 444 (3d Am. Ed. 1830):

"As the power of discriminating between truth and falsehood depends rather upon the exercise of an experienced and intelligent mind, than upon the application of artificial and technical rules, the law of England has delegated this important office to a Jury of the country.

"One great advantage derived from this venerable institution is, that this mode of trial excludes a number of technical and artificial rules and distinctions, which but for the complete and absolute separation of law from fact would be sure to arise. Were the decision of facts to be constantly referred to the same individual, the frequent occurrence of similar combinations of facts would tempt him to frame general and artificial rules, which, when they were applicable, would save mental exertion in particular instances; and perhaps a laudable wish to decide consistently, and that fondness for generalizing, which is incident to every reflecting mind, would tend to the same point,

The traditional powers of the judge to add his comments on credibility and weight, to grant a new trial because he does not agree with the jury,[19] or because he believes the jury has acted through prejudice are the usually accepted compromises in this area where rational reasons for disbelief cannot be clearly articulated.

There remains one group of facts which usually bears heavily in maintaining some kind of distinction between the testimonial and derivative inference functions. They are comprised under the usual heading of "demeanor." the manner in which the witness testifies. It is true that the trial judge is theoretically in as good a position to judge these things as the jury, but in practice it may be doubted that the trial judge can be expected to maintain a constant awareness of all the myriad things that go to comprise manner and demeanor whereas there are twelve jurors who are not expected to be all distracted at the same time. The judge also necessarily has his mind on many other things. Moreover, demeanor probably produces different effects on different people to a greater extent than most people, if not most judges, realize. Nor is the judgment reached as to the effect of demeanor the sort of thing that can be reasonably explained, and this is one of the reasons for using the combined judgment of twelve; and to revert to an earlier argument if the reasonableness or unreasonableness of such a judgment cannot be explained, it is hard to say that the judgment is unreasonable.

But the problem of demeanor is even more difficult to handle on the appellate level. It is of course impossible to report demeanor to the appellate court, except in the sense that the trial judge can say whether or not he took the demeanor of the witnesses into consideration. If the trial judge does not say, the appellate court can then assume that demeanor was an important factor; and if so, it should follow that since they cannot assess its effect they must affirm the action of the trial judge. This is an alternative the appellate courts will avoid in nearly every instance. But the contrary assumption that demeanor should have no bearing on the result in the trial court is equally unfortunate because

and would lead to the introduction of refined and subtle distinctions. A Juror, on the contrary, called on to discharge his duty but seldom, possesses neither inclination nor opportunity to generalize and refine; unfettered, therefore, by technicalities, he decides according to the natural weight and force of the evidence."

[19] These first two common law powers are not, of course, within the power of a Nebraska trial judge.

it isn't true. Faced with this dilemma, the appellate courts, at least when discussing this particular problem, adopt the principle that discretion is the better part of valor and do not refer to it at all. Yet it undoubtedly enters into the almost universal refusal to treat testimonial inferences on exactly the same level as derivative inferences.[20]

Perhaps the most that can be said is that there is a great reluctance to deny to the jury the right to believe a particular witness unless there can be given a solid reason why the witness should not be believed, though there is authority for the proposition that it is enough to say that the testimony is unbelievable. It is suggested that the great bulk of the cases can be said to hold that the reason given by the judge for requiring disbelief must be such that it can be said that the jury in fact could not (or did not) believe the witness—they rather would be deciding the case without regard to whether or not they believed or disbelieved the witness. If this can be demonstrated, then a directed verdict or its equivalent becomes proper.

This is in effect the line which I have suggested should be and is drawn in considering the witness who equivocates or contradicts himself at the trial. This may also be demonstrated in a backhanded sort of way by the fact that the courts almost without exception distinguish between contradictions at trial and contradictions shown between the trial testimony and statements made before trial. In the latter situation the credibility is one for the jury to determine. Nor does it make any difference whether the contradiction before trial was under oath or not, as if it were given in a deposition. It may of course be true that the handling of the prior inconsistent statement at the trial will develop in such a way that the witness in fact not only admits the contradiction but ends his trial testimony, because of the prior inconsistent statement, with a clear retraction of what he originally said on the direct examination. The question then is simply that of trial contradiction.

ESTOPPEL

I have suggested that in dealing with the question of whether a witness who equivocates must be disbelieved the courts are seeking a reason for saying that it would be unreasonable for the

[20] Ingram v. City of Pittsburgh, 350 Pa. 344, 39 A.2d 49 (1944); Coughlin v. Arms Textile Co., 94 N. H. 57, 46 A.2d 130 (1946); but cf. Hebert v. Boston & M.R.R., 90 N.H. 324, 8 A.2d 744 (1939).

jury to believe. They may find such a reason in the clear contradiction of the witness in his trial testimony, whereas they will usually not find such a reason when the contradiction exists between the testimony given at the trial and some pre-trial statement. There is, however, one situation—or rather group of situations—in which a pre-trial contradiction may lead to the holding that the jury must disbelieve the trial testimony, and this is not justified by finding that the mere contradiction is such that there is a reason to require belief. It is rather justified by an extension of the idea of estoppel.

Traditionally the idea of estoppel may be of two kinds: estoppel in pais in which a party has taken a position which his opponent has relied on to his detriment, that is he has taken some action which a change of position by the first party would detrimentally affect; and estoppel by judgment or collateral estoppel in which a judgment between two parties is held binding between them as to any issue litigated if the judgment in fact can be found to have determined it. The extension to which I now turn does not necessarily involve a judgment, is not necessarily confined to a subsequent controversy between the same parties, and does not necessarily involve any reliance.

A series of cases in Nebraska perhaps best illustrates this rule which requires a jury to disbelieve a witness.[21] The court holds that the jury must disbelieve a party if it be shown that the party has previously testified to an inconsistent fact within his knowledge *and* that the changed testimony is apparently dictated by the fact that he must thus change his testimony to make a case, unless he gives some other reasonable explanation of the change. Two types of situations have prompted the application of this rule. In one the party is told by the court that his version of the facts will not support a recovery, and in a later trial of the action he changes his testimony to meet the difficulty pointed out by the court. In *Peterson v. Omaha & C. B. Street Railway Co.*,[22] the plaintiff and her witnesses testified at the first trial to a version of an accident which the Supreme Court on appeal said was so contrary to the physical facts that it would not support a recovery.

[21] Ellis v. Omaha Cold Storage Co., 122 Neb. 567, 240 N.W. 760 (1932); Peterson v. Omaha & C.B. Street Ry. Co., 134 Neb. 322, 278 N.W. 561 (1938); Gohlinghorst v. Ruess, 146 Neb. 470, 20 N.W.2d 381 (1945); Gormely v. Peoples Cab. Inc., 142 Neb. 346, 6 N.W.2d 78 (1942); Carranza v. Payne-Larson Furniture Co., 165 Neb. 352, 85 N.W.2d 694 (1957) [a non-jury case].

[22] 134 Neb. 322, 278 N.W. 561 (1938).

In the retrial she and her witnesses changed their testimony as to how the accident happened so as to fit the physical facts. The court held that the defendant was entitled to a directed verdict since the sole motive apparent for such changed testimony was to meet the objections that the court had pointed out to the plaintiff. To hold otherwise would "allow the parties to toy with the administration of law and make a mockery of justice."

The second situation was that confronting the court in *Gohlinghorst v. Ruess.*[23] Here there had been an accident at an intersection between two cars driven by Schumacher and Baier. Kelty was riding with Baier and was killed, his widow sued Ruess, the owner of the car driven by Schumacher and in which Gohlinghorst was riding as a passenger. Gohlinghorst gave a deposition in that action, the purport of which was to absolve Schumacher of negligence and place the blame for the accident on Baier. In the principal case plaintiff Gohlinghorst testified in such a way as to place the blame entirely on her host Schumacher. The actual discrepancies had to do with the time before the accident when plaintiff warned Schumacher of the approach of the Baier car and the speed of the Baier car. Again the court held that a directed verdict for the defendant was proper because the motive for the change was clearly shown to be the necessity of changing to meet "the exigencies of the case," and no other reasonable explanation was given. The rule was last applied in a non-jury workmen's compensation case where the changed testimony was dictated by the fact that the Supreme Court in a different case had laid down a rule of law which clearly precluded the party from recovering if he maintained the same testimony he had given at the first trial.[24]

In other recent cases the Nebraska court has refused to apply the rule when it was not clear that the changed testimony was dictated by a ruling that the party's first version of the facts was insufficient to support a recovery or by a change in interest of the party from one case to a different one.[25] The court holds that unless this is shown, the prior testimony or deposition is merely an admission which raises an issue of credibility for the jury. In *Kipf* and in *Angstadt* the court suggests further that the rule is

[23] 146 Neb. 470, 20 N.W.2d 381 (1945).

[24] Carranza v. Payne-Larson Furniture Co., 165 Neb. 352, 85 N.W.2d 694 (1957).

[25] Kipf v. Bitner, 150 Neb. 155, 33 N.W.2d 518 (1948); Angstadt v. Coleman, 156 Neb. 850, 58 N.W.2d 507 (1953); Dorn v. Sturges, 157 Neb. 491, 59 N.W.2d 751 (1953); Armer v. Omaha & C.B. St. Ry. Co., 153 Neb. 352, 44 N.W.2d 640 (1950).

based on ideas of estoppel where the party by his previous testimony has obtained a benefit or imposed a detriment on the opposing party. If the court is here referring to true estoppel in fact, it is hard to see in what way the opposing party has changed his position in reliance on anything said or done by the plaintiff in the past. He has merely been put to the expense of trying a case. The idea of benefit previously obtained by contradictory prior testimony is illustrated in the *Gormley* case. This is in effect the same as estoppel by judgment discussed infra. In *Gohlinghorst* the plaintiff may have received some personal satisfaction in having her friend protected from liability as a result of her prior deposition, but the only tangible benefits certainly ran to that friend.

It may be asked under the foregoing theory why there should be a distinction made between a court telling the party that his testimony will not support a recovery and counsel telling the party the same thing, which seems to be the distinction inherent in the cases holding that the issue of credibility is for the jury. I cannot find that the courts have considered the question from this point of view, but at least it can be said that when the instruction comes from the court it is readily provable, while it is doubtful that a clear admission of unethical coaching by counsel can be obtained.[26]

Outside of Nebraska there have been several recent discussions of this problem and others similar to it. In Idaho[27] the rule was applied in a case very similar to *Gohlinghorst,* but where the contradiction appeared from a claim made in a prior suit against a third party. The prior suit had been settled, however, prior to trial so there was no contradictory testimony. And in *Hebert v. Boston and Maine R. R. Co.,*[28] the New Hampshire court applied the rule to prevent a party from changing his testimony in the second trial of the same case to accommodate his version of the facts to the law stated by the court on the first appeal.[29]

[26] It should also be noted that this problem arises on motions for Summary Judgment, discussed infra at Note 158.

[27] Loomis v. Church, 76 Idaho 87, 277 P.2d 561 (1954).

[28] 8 A.2d 744 (1939), But cf. Gagnon v. Pronovost, 97 N.H. 500, 92 A.2d 904 (1952).

[29] See also: Schulze v. Schulze, 121 Cal. App. 75, 262 P.2d 646 (1953) [non-jury]; Parks v. Parks, 181 Va. 126, 23 S.E.2d 792 (1943) [non-jury]; Woods v. Washington Fidelity Nat. Ins. Co., 113 S.W.2d 121 (Mo. App. 1938). A number of cases talk in similar terms, but are in reality simple cases of collateral estoppel, e.g., Martin v. Wood, 71 Ariz. 457, 229 P.2d 710 (1951).

In several other cases courts have discussed the rule but refused to apply it on the ground that the party had made a reasonable explanation of his changed testimony, apparently accepting as reasonable the explanation that he was mistaken before or had changed his mind.[30] These are of course consistent with the Nebraska theory which requires something more than a mere change of mind to effect an estoppel. And the same is true of *Tebbs v. Peterson*[31] where the Utah court held the plaintiff's explanation "palpably absurd." Plaintiff first said that he didn't see any car coming toward him when he ran into defendant's parked car. He was therefore nonsuited for contributory negligence. In the next trial he said that there were blinding lights coming toward him, and sought to avoid his prior testimony by saying he had then been asked about *cars* not *lights* and furthermore he had been nervous, upset and "hadn't put the study on it." The Tennessee courts only estop the party when it is clear that the testimony amounts to willful perjury, perhaps merely a different formula for the rule applied in Nebraska.[32] They specifically put the reason on the prejudice to the administration of justice.[33] Other courts have refused to follow this extension of collateral estoppel doctrines.[34]

One should be careful in considering this facet of the doctrine of estoppel not to confuse it with another fairly well supported rule that has to do with the election of a legal position in one suit and the denial of that legal position in another. If this contradiction involves testifying to Fact A in the first suit and to Fact Not A in the second, then the rules of testimonial estoppel we have been considering do apply. But if the contradictory positions merely involve stating different—albeit inconsistent—conclusions from the same facts, then these rules do not apply. The rules of

[30] Metcalf v. Barnard-Curtis Co., 120 Mont. 50, 180 P.2d 263 (1947); Pro-phy-lac-tic Brush Co. v. Jordan Marsh Co., 165 F.2d 591, (1st Cir. 1948).

[31] 122 Utah 214, 247 P.2d 897 (1952).

[32] D. M. Rose & Co. v. Snyder, 185 Tenn. 499, 206 S.W.2d 897, 906 (1947); Monroe County Motor Co. v. Tennessee Odin Ins. Co., 33 Tenn. App. 223, 231 S.W.2d 386 (1950).

[33] Melton v. Anderson, 32 Tenn. App. 335, 222 S.W.2d 666 (1948); State v. City of Knoxville, 33 Tenn. App. 622, 232 S.W.2d 564 (1950).

[34] Colvert Ice Cream & Dairy Prod. Co., v. Citrus Prod. Co. 179 Okla. 285, 65 P.2d 455 (1937); Maxfield v. Maxfield, 258 P.2d 915 (Okla. 1953) [non-jury]; Lintern v. Zentz, 327 Mich. 595, 42 N.W.2d 753 (1950) [non-jury].

collateral estoppel by judgment would apply if the same parties or their privies are present in both cases.[35] If different parties are involved, then an estoppel may be applied if the party has been successful in the first case. Such was the Idaho case of *Jensen v. USF&G.*[36] Here plaintiff had delivered grain to one Hubbard and he sued Hubbard on the theory that the transaction was a sale, securing a default judgment for the price. Apparently Hubbard was uncollectible so belatedly he sued defendant surety on the theory that Hubbard was a warehouseman. The court held him estopped by the *successful* conclusion of the first action, though the parties were not the same.[37]

These estoppel problems received an interesting application and discussion in the recent decision of the second circuit Court of Appeals in *Bertha Building Corporation v. National Theatres Corporation.*[38] The action was under the Sherman Act for treble damages and the defense here in litigation was the California statute of limitations. The precise issue litigated was whether defendant National had been amenable to process in California—if it had been, the statute of limitations was a good defense. This issue was tried to the judge, who found for defendant, and plaintiff appealed. The Court of Appeals held, Judge Hand dissenting, that the issue should have been presented to a jury, and reversed. The plaintiff argued both in the trial court and in the Court of Appeals that it was entitled to a favorable ruling as a matter of law because in ten other cases National had taken the position that it was not amenable to process in California and that this constituted a "judicial estoppel." The trial judge treated this as

[35] Scarano v. Central Ry. of N.J., 203 F.2d 510 (3rd Cir. 1953). See generally Scott, Collateral Estoppel by Judgment, 56 Harv. L. Rev. 1 (1942).

[36] 78 Idaho 145, 298 P.2d 976 (1956).

[37] See also, Shinsaku Nagano v. McGrath, 187 F.2d 753 (7th Cir. 1951); Hamilton Nat. Bank v. Woods, 34 Tenn. App. 360, 238 S.W.2d 109 (1948); Eads Hide & Wood Co. v. Merrill, 252 F. 2d 80 (10th Cir. 1958) [a non-jury case]. The Missouri rule that a plaintiff cannot recover against two different defendants on inconsistent fact theories states the same idea. Hemminghaus v. Ferguson, 358 Mo. 476, 215 S.W.2d 481 (1948). Compare Coleman v. Southern Pac. Co., 141 Cal. App. 121, 296 P.2d 386 (1956) and Sylvania Electric Products, Inc. v. Barker, 228 F.2d 842 (1st Cir. 1955). In both cases the courts held that plaintiff was not estopped by a prior settlement. In neither case was collateral estoppel involved since the issue had not been litigated, and in Sylvania the first suit involved a different party defendant.

[38] 248 F.2d 833 (2d Cir. 1957).

a problem in inconsistent defenses; if inconsistent defenses are permitted in one action there is no reason why they should not be permitted in separate actions.[39] At least this is so, he held, where it is not shown that the position was successfully maintained and apparently National had not been practically successful in the other cases since it had eventually defended them on the merits when pressed by the plaintiffs. The majority in the Court of Appeals failed to consider the argument, treating the prior claims of National merely as evidence to be weighed against the evidence presented by National that it was not present in California at the time in question. Judge Hand, however, did consider the argument and dismissed it for a different reason. First he found no warrant for the proposition that statements made by the defendant in pleadings and affidavits in other actions created an estoppel "except suggestions in one or two law reviews." He did not refer to the question of whether defendant had been successful or not in the prior position, though in view of the trial judge's opinion he undoubtedly had it in mind. But he then continued:

> Moreover, since such a doctrine is plainly contrary to the underlying basis of the whole doctrine of estoppel by judgment it is plainly without foundation. Judgment by estoppel is not designed as a moral sanction against inconsistency: it does not visit penalties upon those who take one position today and deny it tomorrow; it is designed only to prevent a party who has, or has not, prevailed upon an issue in an earlier action to vex the same antagonist with the same dispute in a later one.[40]

This, of course, is language of strict collateral estoppel and the question of success is limited to an issue, raised between the same parties, which has once been litigated and determined between them. As Hand says, here the question of success is unimportant. His position on the main question is quite consistent with his previously stated dislike of the entire doctrine of collateral estoppel.[41]

TESTIMONY CONTRARY TO PHYSICAL FACTS

It is generally agreed by all courts that the jury will not be permitted to believe testimony that is contradicted by physical facts. Were a witness to testify that the sun rose at midnight in Chicago, no one would even argue that the jury might believe him. This is the sort of "physical fact" that is within the realm of judicial

[39] District court opinion, 140 F.Supp. 909, 914 (E.D. N.Y. 1956).

[40] 248 F.2d 833, 837 (2d Cir. 1957).

[41] See The Evergreens v. Nunan, 141 F.2d 927 (2d Cir. 1944).

notice. The difficult questions arise when the physical facts must be established in some other way.[42]

But it is first necessary again to point out the distinction between testimonial and derivative inferences. Physical facts may be the basis of a directed verdict if they lead inescapably—i.e. reasonable men cannot conclude otherwise—to a conclusion which legally means either liability or non-liability. Or they may be such that a reasonable conclusion can be drawn either way in which case we have a question for the jury. But in either event we are talking about derivative inferences. Take for example a head-on collision between two cars. The physical facts available are the debris on the road, the position and damage to the cars, and skid-marks. Driver A has sued driver B. From the physical facts it may be reasonable (1) only to conclude that B was on the wrong side of the road, (2) only that A was on the wrong side of the road, (3) only that both were on the wrong side of the road; or it may be reasonable to conclude any one of the alternatives; or it may *not* be reasonable to conclude any of them, that is any conclusion would be a mere guess or surmise. All of these represent derivative inferences drawn from the physical facts. Depending on other factors, such as the law and facts relating to contributory negligence and last clear chance, the case may or may not be one in which a directed verdict (or its equivalent) is proper.

But this also assumes that the physical facts are true. The problem of testimonial inferences in this situation comes up in two ways. In the first place it comes up because the truth of the physical facts must be based upon belief of some testimony concerning them, unless they are established by judicial admissions. This involves questions of when a witness must be believed, which I will discuss in more detail below, rather than the question of when a witness must be disbelieved. The latter is involved, however, if a witness testifies to facts which are contrary to the inferences drawn from the physical facts. Thus in the case supposed we have a composite of the problems of derivative inferences, enforced belief, and enforced disbelief.[43]

[42] In Scott v. Hansen, 228 Iowa 37, 289 N.W. 710 (1940) the court held unbelieveable as contrary to judicial notice testimony that a cow when hit by defendant's car flew 30 feet in the air and bounced like a rubber ball. For an excellent discussion, see Elzig v. Gudwangen, 91 F.2d 434 (8th Cir. 1937).

[43] These problems are forcefully illustrated in Van Gilder v. C. & E. Trucking Corp., 352 Mich. 672, 90 N.W.2d 828 (1958).

For example, suppose further in the head on collision case that the debris, skid-marks, and position and damage to the cars at rest immediately after the accident are testified to by investigating police officers. A testifies that he was on his side of the road at all times and that B drove across the center line and struck him. B testifies that he was on his side of the road at all times and that A drove across the center line and struck him. Clearly the credibility of A and B is for the jury, unless the physical facts are found to be established as true *and* they lead to only one reasonable derivative inference. In that case, the courts hold that the testimony of A or B, whichever contradicts the only reasonable inference drawn from the physical facts, must be disbelieved. The problem will be more compounded if we further suppose that an expert testifies positively with respect to the derivative inference. The foregoing analysis, although not usually made explicit in the cases, is implicit in all of them. And it has been a fruitful source of appellate litigation.[44]

With respect to that part of the problem which deals with enforced disbelief, the cases are in substantial agreement. I will discuss later that part of the problem which deals with enforced belief, that is the determination that the physical facts are actually established. However, two special aspects may better be discussed here because the enforced belief rules either do not apply or are customarily disregarded by the courts.

POSITIVE-NEGATIVE RULE

The first concerns the Positive-Negative rule. Loosely stated, as it often is, this rule holds that if there is positive evidence that a thing occurred and negative evidence that the same thing did not occur, the positive evidence must control—the jury is not allowed to believe those witnesses who say it did not occur. It is most usually applied to cases in which the ringing of a bell or other warning device by a railroad or the sounding of a horn or the presence of lights on an automobile is in issue. More precisely, the rule is limited to cases in which the witnesses who testify that they did *not* hear the bell or horn or see the lights are not shown to have been in such a position that they would probably have heard or seen, or were not shown to have been focusing their at-

[44] Jones v. Union P. R.R. Co., 141 Neb. 112, 2 N.W.2d 624 (1942) and Shiers v. Cowgill, 157 Neb. 265, 59 N.W.2d 407 (1953) are illustrative decisions. See West Digest, Key, Trial 139; Evidence 588.

tention so that they probably would have heard or seen the warning if it had been given.[45]

In our present context, it should be pointed out that the rule is also a facet of enforced *belief* (rather than *disbelief*) since the positive testimony of other witnesses is a necessary condition of its application. For the most part, however, the courts overlook this fact and assume that the witnesses who say they heard the bell are telling the truth. In the railroad cases these are often employees of the defendant railroad and the question might well be put whether their obvious bias should not make their credibility a jury question. But it is not quite so simple as this, because we must also note that in the great majority of these cases the burden of proof is on the plaintiff to prove that the bell was not ringing. Thus it can be argued that the courts do not have to assume that the witnesses who say the bell was ringing are telling the truth, but merely that the plaintiff has failed to prove that it was not ringing. But if this were so, the plaintiff should lose whether defendant produces any witnesses or not, which is not what this rule says.

It should be further pointed out that we are now dealing with a shadowy area between testimonial and derivative inferences. If the witness says, "The bell was not ringing," the inference that the bell was not ringing looks direct or testimonial. But if the witness says, "I did not hear the bell ringing," the real nature of the inference becomes clearer. And in the great majority of cases the witness probably means the latter and could undoubtedly be led to say so if questioned closely. Here the inference that the bell was not ringing must be a composite of the fact of not hearing and of the other facts which bear upon the ability of the witness to have observed. But this is still within our definition of a testimonial inference, or of credibility, which carries the idea of belief or disbelief of a witness to the truth or acceptance of the fact testified to rather than simply to the sincerity of the witness or his state of mind. Thus the two forms of the testimony suggested above mean the same thing to the witness and to the jury—the latter is merely a somewhat more precise means of communicating the same idea. On the other hand, it may be with equal reason supposed that witness did not in fact intend to say anything about whether the bell was ringing or not—he was merely stating a fact that he didn't hear it. In this sense the inference that the bell was not ringing could be analyzed as a derivative inference. But whichever was the intent of witness, the inference to the fact that

[45] The rule is discussed in Pongruber v. Patrick, 157 Neb. 799, 61 N.W.2d 578 (1953).

the bell was not ringing involves the same theoretical processes of reasoning whether we denominate it as direct or indirect, testimonial or derivative. Nor should we expect the courts to apply any different rules between the two. To be more explicit, it is the same thing for a court to say that it assumes the witness is telling the truth that he did not hear the bell ringing and still to say that under all the circumstances it is unreasonable to infer the bell was not ringing—which is the usual formula for the derivative inference situation—or for the court to say that it is unreasonable for the jury to believe the witness' testimony that the bell was not ringing when he was so placed that he would not have heard it anyway, which is the formula of enforced disbelief.

TESTIMONY NOT BASED ON PERSONAL KNOWLEDGE

There are several situations which comprise the second problem to which I referred as special aspects of the broader physical facts rule and which are somewhat related to the positive-negative rule. Very generally, let us suppose a case in which it is demonstrated that the witness testifies to facts without any personal knowledge of the facts. Normally, of course, such testimony is inadmissible and will be excluded on proper objection or motion to strike.[46] But if the testimony is left in, should it be held sufficient to support a verdict? There are not many cases treating the problem stated thus baldly as one involving credibility, though I would suppose a court would have little difficulty disposing of such a case by requiring disbelief.[47] There is a vast number of cases, however, in which the witness purports to have some basis for his statement. When that basis is the inadmissible hearsay of others, the courts quite generally say that the inferences to be drawn are for the jury, applying the derivative formula.[48] The workmen's compensation cases holding otherwise with respect to hearsay statements of a deceased workman are usually non-jury cases and therefore not within the scope of our problem.[49]

[46] McCORMICK, EVIDENCE § 10, at 19 (1954). Flaherty v. M. & St. L. Ry. Co., 251 Minn. 345, 87 N.W.2d 633 (1958).

[47] E.g., Schmidt v. Hayden, 205 Iowa 1369, 219 N.W. 399 (1928); "Where a witness gives his conclusion, without stating the facts supporting such conclusion, especially when it is one bearing upon, controlling, or determining the ultimate question in the case, this court is not bound by such conclusion." Shaw v. McKenzie, 131 Me. 248, 160 A. 911 (1932).

[48] McCORMICK, EVIDENCE, 459 (1954).

[49] E.g., Hamilton v. Huebner, 146 Neb. 320, 19 N.W.2d 552 (1945).

The same sort of problem is involved in dealing with opinion evidence which would have been inadmissible if objected to or stricken on motion, though the cases cover a much wider area. It is of course common to see a court direct a verdict, explaining its action on the theory that the jury should not be permitted to speculate or to conjecture as to what happened. This is to say that the derivative inference the jury is asked to draw is unreasonable. But what if a witness is permitted to draw the same unreasonable inference in his testimony? Should this involve a different kind of reasoning—one in which the credibility of the witness is treated as raising a different problem?

Suppose first the unusual case that the jury and the witness are in possession of the same basic facts and the witness has no special expertise. It should follow that if the jury's inference is unreasonable, the witness' is also, whether the particular opinion is couched in terms of what happened or in terms involving the application of a legal standard.

Suppose next the much more usual case that the witness speaks from some personal observation and is therefore in a somewhat better position than the jury to draw an inference as to what happened—he cannot explain the entire picture; in fact, he may not have observed it. Such an opinion may be held unreasonable as a matter of law where it is shown that the witness' opinion could not have been based on a sufficient observation.[50] It may be held insufficient to support a verdict where the opinion is contrary to the laws of nature or to physical facts which are otherwise established as true by evidence which the jury must believe.

The problem which arises when the laws of nature or the physical facts do not make the opinion per se unreasonable was forcefully presented in a recent FELA case.[51] Plaintiff claimed an unsafe place to work due to grease and cinders, or pebbles, on the floor upon which he slipped and as a result struck his head against his desk. Plaintiff's case rested upon his own testimony that he "must have slipped," hearsay statements by plaintiff to a witness that he slipped on some cinders or pebbles under his desk, and testimony of plaintiff's wife that he had grease on the cuffs of his trousers when he came home that evening. A majority of the Court of Appeals held that this was sufficient evidence to

[50] Pennsylvania R.R. v. Chamberlain, 288 U.S. 333 (1933); Galloway v. United States, 319 U.S. 372 (1943); Fairman v. Cook, 142 Neb. 893, 8 N.W.2d 315 (1943).

[51] Gibson v. Elgin, Joliet & E. Ry., 246 F.2d 834 (7th Cir. 1957).

support the plaintiff's verdict and the Supreme Court denied certiorari.[52] The dissenting judge in the Court of Appeals, however, noted the difficult problem of saying that the opinion of plaintiff that he "must have slipped" was evidence that he did. He sought to draw a distinction between such a guess by the witness and a similar guess by the jury, the latter he thought proper under Supreme Court decisions but not the former.

Before concluding this part of the discussion we should recall one facet of the opinion rule which I have designedly omitted up to this point. Many cases, in dealing with the problem of admissibility, hold an opinion inadmissible because it "usurps the province of the jury," that is because the witness draws a conclusion or makes an inference in the same way that the jury must do. The phrase is undoubtedly an unfortunate one. Since it can be applied to any sort of an inference, whether normally held permissible or not, it discourages analysis and has led to many questionable decisions. It is customary for writers to attack it on the ground that the jury is not required to believe the witness's opinion or inference any more than they are required to believe any testimony reporting sensory impressions of the witness—an assumption which we shall see is not entirely true. At the least the idea should not be used to keep out an opinion or inference that would be admissible under modern theories because it would be helpful to the jury. Much testimony can be best given in the form of an opinion because of the complex nature of the way people assimilate and remember sensory impressions and because a jury, certainly with the help of cross-examination and argument, can reasonably evaluate the weight it deserves.

The courts, however, have not been quick to adopt this approach and the phrase constantly recurs in the cases and consequently in the argument of counsel, though there are many recent cases discarding the reason when counsel seek to apply it to "short-hand fact" opinions or to "what happened" conclusions as opposed to conclusions clearly involving the application of a legal standard such as negligence. It seems to me that one reason for the judicial reticence in discarding many aspects of the opinion rule may be the difficult problem of handling the issue of the credibility of an opinion of a witness. The problem is not always seen as one involving the derivative inference concepts which are more easily dealt with in the context of the directed verdict formulas. To put it another way, the objection that an opinion usurps the province

[52] 355 U.S. 897 (1957).

of the jury may often more realistically mean that the courts are afraid it usurps the province of the *judge.*

BELIEF REQUIRED

I turn, then, to those cases in which the belief of a witness is required. They may be roughly broken down into three categories: (1) those in which the court requires belief of testimony *unfavorable to the offerer*—or to use the more common phrase, in which a party is held to be bound by testimony which he has offered; (2) those in which the court requires the belief of testimony *favorable to the offeror* and which is in some way opposed by the opponent; and (3) those in which the court requires the belief of testimony favorable to the offerer which is not opposed by the opponent.

It will be recalled that in many situations the courts are dealing with conflicts of testimony and therefore the problems in this area could with perhaps equal logic be treated as facets of the problems of required disbelief, since when there is a conflict, requiring belief of one side must automatically require disbelief of the other. Still in the areas of conflict discussed here emphasis is usually placed on the requirement of belief; the element of disbelief is subordinated in the treatment by the courts. It can, for example, be readily seen that the problems of estoppel discussed above are problems of conflict between testimony. Sometimes it is a conflict in the testimony of a single witness and sometimes it is a conflict between several witnesses, all offered by the same side. But in those cases the element of disbelief is dominant in the treatment by the courts because the contrary testimony (which would be that testimony which must be believed) took place at some other time and place. It was not first offered in this case. And yet the ideas underlying estoppel and those underlying the requirement that a party is bound in some way by testimony which he has offered seem to be part of the same concept that a position which has once been firmly taken should not be changed.

JUDICIAL ADMISSIONS

Most of the writers however, and frequently the courts, approach the more obvious cases from the point of view of Judical Admissions. The issues in the case are determined by the pleadings; these may contain admissions which have the effect of removing certain fact issues from the area of the litigation. That is to say that the pleading admissions must be believed, although of course the jury's position is never brought into such a question.

Now when we reach the time of trial, it is apparent that if an admission is made at the trial there is no reason why it cannot have the same effect. In fact it may be treated as simply an amendment to the pleadings, though it is seldom that we see the court saying precisely this.

The closest analogy is in those cases which permit a judgment to be entered for defendant as the result of the opening statement of plaintiff's counsel, and at least in those states which do not require that the opening statement disclose a complete cause of action, the courts are very careful to make sure that the damaging admission is clearly intended as such and made with a full understanding of the consequences.[53] This is also true when applied to an attorney's admission during the trial, but after the opening statements.

The same idea is applied when defendant is in effect bound by his failure to dispute some of the facts testified to by plaintiff or plaintiff's witnesses though technically the fact is in issue by the pleadings. It is an intended judicial admission by silence, the same as if he had failed to respond to a pre-trial request to admit and a statute or court rule turns this failure into an affirmative judicial admission. In practically every case which considers the propriety of granting a directed verdict, the court starts with such "admitted facts" or "uncontroverted facts." So much is clear, and this is never thought of as impinging on the function of the jury in the area of credibility. Rather it is recognized that in such cases the parties have not put credibility in issue.

PARTY'S OWN EVIDENCE

But what if a party does intend to contest the credibility either of his own testimony or that of his witnesses? Will he be permitted to do so? Before reaching this question two subsidiary situations must be distinguished. In the first place, there are many cases in which it is not clear whether or not the party does in fact intend to contest the issue. This is more usually a problem when dealing with testimony offered by an opponent.

In the second place, there may be cases in which the intent to contest the issue is clear but no evidence is in fact offered to do so. If the testimony is directed to an issue on which the *opponent* has the burden of proof, the offeror may in theory argue that

[53] Temple v. Cotton Transfer Co., 126 Neb. 287, 253 N.W. 394 (1934); Tuck v. C. & O. Ry. Co., 251 F.2d 180 (4th Cir. 1958).

the jury should be permitted to disbelieve his witness and we then have a clear issue: does the judge have the power to control the jury by requiring them to believe the testimony favorable to the opponent. But if the testimony is directed to an issue on which the *offeror* has the burden of proof (and it is in favor of the opponent) the mere intent to contradict such testimony will not satisfy the offeror's burden of proof. We have then a case of lack of proof, and the offeror loses, not necessarily because his witnesses "must be believed" but rather because he has offered no evidence to support his own burden.

This situation is made peculiarly clear in the case of *Dyer v. McDougall.*[54] The issue arose on a motion for a summary judgment, but it was treated as being controlled by the same rules which would have applied if a motion for directed verdict had been made at trial. Plaintiff sought to prove slander but the only admissible testimony he could offer was of witnesses who had taken the position that they would deny that the slanderous statement was made. Plaintiff then argued that these witnesses were biased or interested, or both, and that such impeachment could be the basis for an inference that the opposite of their testimony was true. Judge Hand declined to permit such an inference, on the ground that to do so would abrogate the power of the appellate court to review the decision of the trial judge on a motion for a directed verdict.

The point was again strikingly presented (although not in a jury case) in *Nishikawa v. Dulles.*[55] The government sought to denaturalize Nishikawa for joining the Japanese army. If he did so voluntarily, the statute required denaturalization; if he did so involuntarily, it did not. Nishikawa testified that he did not join voluntarily and although the government contested this fact it did not offer any independent evidence. The trial judge and the Court of Appeals held that on the issue of voluntariness Nishikawa had the burden of proof; Nishikawa was not to be believed; therefore there was no evidence to support this burden. In reversing the Supreme Court held that the burden on the issue of voluntariness lay on the government and that the mere disbelief of Nishikawa could not supply the necessary affirmative proof.[56]

[54] 201 F.2d 265 (2d Cir. 1952).

[55] 235 F.2d 135 (9th Cir. 1956) reversed. 356 U.S. 129 (1958).

[56] 356 U.S. 129, 137 (1958). Here it made no difference who offered the only evidence in the case.

This analysis will explain a number of the cases which talk in terms of plaintiff being "bound" by the testimony of his own witnesses when that testimony is not contradicted. Unfortunately it will not explain the application of the same idea (a party is "bound" by his own witnesses) in a case where the issue to which the testimony of plaintiff's witness is directed is one on which the defendant has the burden of proof. For if my analysis is correct, the jury should be permitted to disbelieve the witness and there would then be no evidence to support the defendant's burden; and to be sure, there are many cases so holding. Nor does it explain those minority of states which never permit the plaintiff to contradict his own testimony.

The cases are far too numerous which rely solely on the rubric that the plaintiff is bound by his own testimony, or on that of his own witnesses, to conclude that this is only a shorthand way of saying the plaintiff has failed in his proof. There are, in fact, a number of other considerations apparent in the cases.

First. There is often a troublesome problem whether the testimony should or should not be treated as a judicial admission—an unqualified concession of fact. If so it is of course binding. It is respectfully suggested, however, that the better view is to leave the issue to the jury when there is any doubt as to the intent to admit.

Second. In some of the cases the judicial admissions problem is further compounded by the admixture of facts and conclusions in the testimony offered by the plaintiff. A number of cases refuse to hold a plaintiff bound by a mere opinion or estimate of objective facts.[57] But suppose the opinions, or conclusions, are favorable to his position and that he has also testified to the underlying facts. It is quite usual to find a court holding him to the truth of the underlying facts as being in the nature of a judicial admission. This is most often seen in cases applying the rule that a plaintiff is guilty of contributory negligence when he looked and did not see.[58]

Third. The indiscriminate citing of both jury and non-jury cases by many courts leaves the impression that the distinction

[57] The cases are collected in 169 A.L.R. 798 (1947) and 62 A.L.R.2d 1191 (1958).

[58] Frandeka v. St. Louis Pub. Serv. Co., 361 Mo. 245, 234 S.W.2d 540 (1950).

in the function of the judge in the two kinds of trial is not always clearly seen and applied. And closely akin to this is the constant interplay between issues of credibility—testimonial inference—and issues involving derivative inferences, such that the concept of unreasonableness is applied to both. This is quite apparent in *Burdon v. Wood*[59] in which plaintiff sued defendant for unlawfully shooting plaintiff's husband. The sole defense was the defendant acted in justifiable self-defense, an issue on which the defendant had the burden of proof, but the evidence was adduced by the plaintiff. All of the witnesses testified that the plaintiff's deceased had shot at defendant first and Judge Minton placed his reversal of a judgment for the plaintiff on the ground that no reasonable person could doubt, in the face of all the unimpeached and uncontradicted testimony, that defendant was in fear of his life. His statement that "The plaintiff cannot challenge her own unimpeached witnesses" was almost an afterthought and the ruling would undoubtedly have been the same if the evidence had been introduced by the defendant.

Fourth. Perhaps the principal reason leading courts to hold a party bound by his own evidence lies in the idea that a litigant should not be permitted to contradict himself, short of offering a reasonable explanation of the contradiction. It represents a moral judgment much like that disclosed in the estoppel cases discussed above; and as might be expected it is seldom easy to generalize a rule. The author of the much cited article in 169 A.L.R. 798 breaks the cases down into two categories: (1) where the party contradicts himself; (2) where the party proposes to introduce testimony of a witness which contradicts the party's own testimony. To this should be added the case in which a witness called by the party has testified against him, a situation not intended to be covered in the article referred to.

Assuming that we do not have a clear case of a judicial admission, nearly all jurisdictions hold that a party's own unfavorable testimony will not bind him if he contradicts himself. We have seen, however, that this is subject to the rule that the contradiction may be so glaring as to amount to a denial of knowledge and therefore to require *disbelief* of any favorable testimony. In two states it has also been completely denied, although strangely enough they apparently permit the party to contradict himself by other evidence. Georgia and Montana hold that in the case

[59] 142 F.2d 303 (7th Cir. 1944).

supposed the party is bound by his least favorable testimony, while the decisions in Utah are somewhat equivocal.[60]

It is also said that the majority of the States permit a party to contradict his own unfavorable testimony by other evidence in the case, so long as his own testimony does not amount to a judicial admission. After reading a myriad of cases I cannot be so sure that this simple statement of a general rule is justified. Perhaps the best modern statement of the rule and its reasons is found in *Alamo v. Del Rosario*,[61] where the controlling issue in the case was whether defendant stopped his car (in which plaintiff was riding as a passenger) in the middle of the street and stayed there while the bus which hit it was a block away, or whether defendant moved his car into the path of the bus. Plaintiff testified that the former was true but witnesses said the latter was true and in this state of the evidence the defendant claimed the right to a directed verdict. The court held against the defendant's contention. First there was no judicial admission because there was no intention to be held to the facts testified to by the plaintiff—he introduced conflicting evidence—and there was no estoppel because defendant did not in any way rely on plaintiff's testimony. The court then suggested that the rule binding the plaintiff looks like punishment (the moral factor) and dismissed this because punishment should follow a charge therefor, and anyway it is highly unlikely that plaintiff deliberately lied (the only basis upon which he might be punished) because it was against his interest in this case. Moreover, it is peculiarly true in accident cases that memory is faulty and the plaintiff's case should not be made to rest or fall on his own memory alone. The court relied on Dean Wigmore's treatment of this problem, and pointed out that many cases cited for the contrary rule did not come within the reasoning bceause no contradictory evidence had been introduced.[62]

Nebraska has consistently followed this rule, refusing to bind the party when his own testimony is contradicted by other evi-

[60] Annot., 169 A.L.R. 798, 807 (1947); Alvarado v. Tucker, 2 Utah 2d 16, 268 P.2d 986 (1954) may be in part explained by the concept that witness changed his testimony on cross-examination. There is also a suggestion that the Georgia rule applies in Nebraska, see Grainger v. Byrne, 160 Neb. 10, 69 N.W.2d 293 (1953).

[61] 98 F.2d 328 (D.C. Cir. 1938).

[62] See also Pennsylvania R.R. v. Pomeroy, 239 F.2d 435, 443 (D.C. Cir. 1957) where the same distinction is made.

dence.[63] Two recent cases may appear at first reading to hold otherwise, but in the first it is clear that the court treated the contradictory evidence as not being in conflict with that already brought out, and in the second there was in fact no contradictory evidence.[64]

The opposite view is perhaps best epitomized by the early holding of the Virginia court in *Massie v. Firmstone*:[65] "No litigant can successfully ask a court or jury to believe that he has not told the truth." The rigor of this rule is most firmly upheld in states like Missouri and Pennsylvania. In the latter the Supreme Court recently reaffirmed a long line of Superior court cases on the particular issue of proof of contributory negligence from the testimony of the plaintiff. "A plaintiff is bound by the way in which he made his own case, even though one of his witnesses made a better one for him."[66] Missouri goes so far as to hold that when plaintiff testifies that defendant train gave no bell or whistle warning, he cannot have the benefit of the defense witnesses who testified that the whistle was sounded to prove that there was a

[63] E.g., Kipf v. Bitner, 150 Neb. 155, 33 N.W.2d 518 (1948); Rueger v. Hawks, 150 Neb. 834, 36 N.W.2d 236 (1949); Burhoop v. Bracken, 164 Neb. 382, 82 N.W.2d 557 (1957).

[64] Southwestern Truck Sales & Rental Co. v. Johnson, 165 Neb. 407, 85 N.W.2d 705 (1957); Fairchild v. Sorenson, 165 Neb. 667, 87 N.W.2d 235 (1957). In Johnson the issue was whether certain equipment had been repossessed. Bogard, the President of the plaintiff, testified they had been repossessed in November. Another witness that he talked with defendant in December and they were then in defendant's yard. The court said; "It will be noted that Goffinett and Bogard were testifying to facts which they knew, i.e., the date of repossession and in accord with the allegations of defendant's answer. The witness was testifying to the facts that he knew which however, were only a foundation for a conclusion contrary to that of the Goffinett and Bogard direct evidence." (p. 417) The court further pointed out that Goffinett and Bogard made no effort to retract, qualify, or otherwise explain the positive force of their own evidence.

[65] 134 Va. 450, 114 S.E. 652 (1922). See also Bell v. Harmon, 284 S.W.2d 812 (Ky. 1955).

[66] Lafferty v. DiJohn, 390 Pa. 123, 135 A.2d 375 at 380 (1957). The particular question involved the amount of time which elapsed after plaintiff stepped into the street and before he was hit by defendant's car. The colorful dissent of Judge Musmanno takes bitter issue with the rule on the ground that the plaintiff participant in an accident will probably have a faulty memory and he should be permitted the benefit of the testimony of witnesses not involved in the accident and whose observation and memory are therefore more reliable. Compare Hutchins and Schlesinger, Some Observations on the Law of Evidence - Memory, 41 Harv. L. Rev. 860 (1928).

working whistle on the train. But this ruling is tempered by its conjunction with another rule of Missouri law that a plaintiff cannot go to the jury on alternative fact theories. He is bound to the fact theory that he put forth in his evidence, though of course not all of the Missouri cases can be thus easily explained.[67] The similar rule in South Dakota goes back to *Miller v. Stevens*[68] which in turn relied on an early Georgia case where Judge Lumpkin said: "Every witness is under a solemn obligation to tell the truth, the whole truth, and nothing but the truth, and this obligation is especially binding upon one who seeks, by his own testimony, to establish a substantial right against another. It surely can never be unfair to a party laboring under no mental infirmity to deal with his case from the standpoint of his own testimony as a witness."[69] But Lumpkin was dealing with a self-contradicting plaintiff, the Georgia court holds that although the plaintiff may not contradict himself by his own testimony he may do so by other witnesses, and the case was actually sent back for a new trial.

There are, however, several commonly stated limitations to this strict rule binding the party by his own testimony in the face of other more favorable testimony. In the first place it is often stated that the rule will not apply when the testimony deals with matter which is merely an estimate or opinion.[70] Missouri and Iowa further will relieve the party of the binding effect of his testimony if he himself testifies that he was mistaken and perhaps that he gives some reasonable explanation.[71]

A third modification quite often seen is that the plaintiff is only bound as to facts which are specially within his own knowledge. In Massachusetts, it is usually held that the plaintiff will

[67] West v. St. Louis San Francisco Ry. Co., 295 S.W.2d 48 (Mo. 1956). See also Dilallo v. Lynch, 340 Mo. 82, 101 S.W.2d 7 (1936); Mollman v. St. Louis Public Service Co., 192 S.W.2d 618 (Mo. App. 1946). It may also be that the Missouri Court is not entirely convinced of the propriety of its humanitarian rule in negligence cases and this is one way of avoiding it; but the distinction drawn in the cases between a theory that the train did not whistle and that it could not whistle is surely a tenuous one.

[68] 63 S.Dak. 10, 256 N.W. 152 (1934).

[69] Western & Atlantic R.R. v. Evans, 96 Ga. 481, 23 S.E. 494 (1895).

[70] See e.g. cases collected in Annot. 169 A.L.R. 798, 819 seq. (1947), Valdin v. Holteen, 199 Ore. 134, 260 P.2d 504 (1953); Anderson-Prichard Oil Corp. v. Parker, 245 F.2d 831 (10th Cir. 1957).

[71] 169 A.L.R. 798, 815, 819.

only be bound where the fact testified to is specially within his own knowledge in the sense that it is a subjective thing such as personal knowledge, intent or motive.[72] It may be seriously questioned whether such a limitation does not in fact amount to a null class within the problem we are considering, since it is difficult to imagine a case in which a party's testimony about his own state of mind can be contradicted by someone else, and this is pointed out in the controversial decision in *Harlow v. LeClair.*[73] But the situation was argued in *Bockman v. Mitchell Bros. Truck Lines*[74] where the issue was the contributory negligence (or assumption of risk) of plaintiff in working near live wires, and this depended on his recognizing the danger. The court held that the plaintiff was bound by his testimony that he had warned the defendant's operators of the crane whose boom struck the wire. He argued that he was entitled to the advantage of the operators' testimony that the plaintiff had not warned him, but the court held him bound. Here the testimony was not directly that he knew, but was of facts from which the knowledge could readily be inferred.

The problem was further considered in two recent opinions of the Kentucky Court of Appeals. In *Sutherland v. Davis*[75] the plaintiff guest sued host for damages in an accident. The defense was contributory negligence in that the plaintiff had knowingly driven with the defendant while he was drunk. Plaintiff testified that defendant was very drunk but the defendant testified that though he had a number of drinks he was sober. The court affirmed a directed verdict for the defendant on the ground that the plaintiff was bound by her testimony. The rule adopted was a careful modification of the minority rule holding a party bound by his own testimony even where there is other contradicting evidence in the case. "We believe the law to be that admissions fatal to his cause given in the testimony of a party to an action on the trial of the case should be viewed in the light of all the conditions and circumstances proven in the case; and unless all

[72] Annot., 169 A.L.R. 798, 813 (1947). Taylor v. Jacobson, 336 Mass. 709, 147 N.E.2d 770 (1958).

[73] 82 N.H. 506, 136 A. 128 (1927). See the attack on it in the Alamo case (supra, note 61) where the judge points out that the significant state of mind was not that of the plaintiff but of the defendant, and this plaintiff could not fathom.

[74] 213 Ore. 88, 320 P.2d 266 (1958).

[75] 286 Ky. 743, 151 S.W.2d 1021 (1941).

such circumstances and conditions give rise to the probability of error in the party's own testimony he should not be permitted to avert the consequences of his testimony by the introduction of, or reliance on, other evidence in the case."[76] This rule is clearly less rigorous than that applied in Missouri or Pennsylvania.[77]

The Kentucky court again considered the problem in *Bell v. Harmon*[78] where the plaintiff sued for damages resulting from a head-on collision between the car in which he was riding as a passenger and one driven by Johnson. At the trial plaintiff testified that Johnson's car had crossed the center line and run into the one driven by defendant Harmon. Other evidence showed that Harmon had crossed the center line. The jury apparently believed the latter and held for Bell and against Harmon, but Harmon appealed on the ground that his motion for a directed verdict should have been granted on the basis of plaintiff's testimony. The majority quoted from the Sutherland case but held for Harmon because plaintiff's testimony had been deliberate and unequivocal, and it would be imposing upon the court to permit plaintiff to recover under such circumstances. This is a far cry from the careful rule stated in the *Sutherland case*, and one judge dissented with the argument that the binding effect of Sutherland should be limited to a case in which the testimony refers to the

[76] 286 Ky. 743, 151 S.W.2d 1021, 1024 (1941). Compare Illian v. McManaman, 156 Neb. 12, 54 N.W.2d 244 (1952) where the same problem confronted plaintiff. There the plaintiff's unfavorable testimony that the defendant guest was drunk had been given in a deposition, and on motion for summary judgment the plaintiff was permitted to avoid the binding consequences by an affidavit that stated she might have been mistaken in her observations and conclusions.

[77] Compare also Jacobs v. Munez, 157 F.Supp. 129 (S.D. N.Y. 1957). Plaintiff sued the owner of the car in which she was riding. which was driven by her husband, and the owner and driver of a truck which was in a head-on collision with the car in which she was riding. Plaintiff and her husband both testified that the husband had stayed in his own lane, and at this point the court granted the motion of the owner of her car for a dismissal, holding her bound by the unequivocal testimony that her husband was not negligent. This was in the face of her offer to call the driver of the truck who would testify that the husband had crossed the center line and driven into the truck. The trial continued against the truck driver and owner but the jury failed to agree. The opinion cited was in support of an order denying plaintiff's motion to reinstate the defendant car owner at the second trial on the ground that the dismissal was with prejudice and therefore res judicata.

[78] 284 S.W.2d 812 (Ky. 1955).

party's state of mind—there the knowledge that defendant was drunk.[79]

We have, then, a number of jurisdictions applying a rule which binds a party by his own testimony even though there is other contradictory evidence in the case, a rule which is nowhere so clearly defined that we can be certain what its application will be in any particular case, but based on the idea that a party is somehow morally estopped to say that what he has said is not true. Still, the idea admits that where there is doubt as to the real truth in the sense that the party may probably not know that truth, the binding effect should not be applied. Sometimes this doubt may be plain from the nature of the testimony or the nature of the facts testified to but often we see that the court requires that the party himself make this doubt explicit. There is no attempt by the courts to suggest that such a rule does not violate the dogma that issues of credibility are to be left to the jury. In many of the cases it is clear that the court applies the rule artificially without attempting to justify it as probably reaching a truthful result; though that was evidently the justification of the *Sutherland* rule in Kentucky and the cases such as *Laffey v. Mullen* in Massachusetts,[80] *Harlow v. LaClair* in New Hampshire,[81] and *Bockman v. Mitchell Bros. Truck Lines* in Oregon[82] which apply the rule only to subjective facts, to the state of mind of the party. This is a high price to pay, merely to require a party to say "I might be mistaken." In cases of alternative liability it also places the party in a real and unnecessary dilemna, for if he does testify doubtfully he runs the risk of being told that his evidence does not support a reasonable inference and a further practical risk of not persuading the jury either way.

If a party, with the opportunity for extensive investigation and discovery and upon the advice of counsel, deliberately chooses to adopt certain facts as true, there is perhaps some reason to hold him bound by this choice. The case would be clearer if the opponent had relied on this deliberate choice by failing to prepare

[79] The court in Bell v. Harmon refers to Nebraska as upholding the rule it reaches, citing Gohlinghorst v. Ruess. But Gohlinghorst was a case of self-contradiction and the entire reasoning behind that line of cases is based on this distinction. See supra, Note 21. In view of the many other Nebraska cases, it seems impossible to put Nebraska in this category. See supra, note 25.

[80] 275 Mass. 277, 175 N.E. 736 (1931).

[81] 82 N.H. 506, 136 A. 128 (1927).

[82] 213 Ore. 88, 320 P.2d 266 (1958).

to defend against the new fact theory. But many courts would not consider even this controlling if an amendment to the pleadings if offered, and the opponent is given a proper opportunity to prepare to meet it.[83] But there is no reason to force the choice upon him when his memory happens to conflict with that of someone else, and his memory happens to be unfavorable. This is precisely the sort of conflict the jury was developed to resolve. If, per contra, he remembers favorably and someone else remembers unfavorably, there is no doubt that the issue would go to the jury. Nor should it make any difference whether the party's unfavorable testimony is brought out on direct or cross; he should not be penalized before the jury by any rule which forces him to tell only a part of his story on direct examination. And finally, on the moral issue, I suggest that the binding rule is more conducive to personal dishonesty than one which freely permits a party to tell his whole story as he remembers it.

PARTY BOUND BY SILENCE

It would perhaps be logical at this point to take up the problems dealing with the question of whether a party is or should be bound in any way by testimony of witnesses which he himself has introduced. But these problems are in part, at least, dependent on the ideas governing the binding effect on party A of testimony introduced by party B; and I will therefore take up that question first.

What this means is that we are now considering the question of whether it is ever correct to say that the testimony of a witness must be believed when that testimony is *favorable* to the *offeror* whereas we have been considering the binding effect of testimony unfavorable to the offeror. Again it should be pointed out that theoretically the question of who has the burden of proof on the issue should be significant; though it is seldom discussed in the cases. If the offeror has the burden of proof and it is held that his witnesses must be believed, then the credibility of those witnesses is directly controlled by the judge. If the opponent has the burden of proof and no other evidence is present in the case from which that burden could be supported, it is not necessarily so that the holding that the witness (testifying contrary to the burden of proof) must be believed also means that the credibility is controlled by the judge since it would then also be true that the opponent fails because there is no evidence in the case to support his burden.

[83] See Comment by James, 71 Harv. L. Rev. 1473 (1958).

This is, of course only true if we accept the principle of *Dyer v. McDougall,* discussed above,[84] that the disbelief alone of a witness cannot equal belief of the opposite of what he testified to. If, on the other hand, the opponent has the burden of proof and he has submitted evidence from which a reasonable inference might be drawn to support his burden, and we then say that testimony in contradiction must be believed, we have a case in which the issue of credibility is controlled by the judge.

If we think in terms of judicial admissions, I think it is fair to say that no court would ever hold that a jury must always be given the opportunity to disbelieve a witness under all circumstances. It is true that language from various opinions can be cited which looks as if the court was so holding;[85] but all courts agree that if the fact testified to is not intended to be disputed, it must be believed.[86] The real question is how far does counsel have to go in disputing the fact before he will be permitted to have the issue determined by the jury. Or to put it another way, and the way in which it is put by most of the courts, testimony must be believed where there is no reason for disbelieving it and the question is how much reason must appear in the record to support the disbelief. As might be expected, there is a vast amount of confusion as to where this line is to be drawn.

Looking at the problem still from the point of view of intended judicial admissions, it is recognized that there is no necessity for a flat admission of counsel, his silence and the composition of his whole case may be equally as persuasive of an admission as his saying so. Perhaps this was the rule which the Missouri court sought to establish in *Rogers v. Thompson.*[87] Missouri had held

[84] At note 54.

[85] Roadman v. Bellone, 379 Pa. 483, 108 A.2d 754 (1954). The court here uses its often repeated statement: "No fact based on oral testimony in a trial ever possesses the character of legal inconstrovertibility until it receives the imprimatur of a jury's acceptance." Langley v. Pacific Gas & Electric Co., 41 Cal.2d 655, 262 P.2d 846 (1953).

[86] Maryland goes as far as any court in this direction. The court held in Alexander v. Tingle, 181 Md. 464, 30 A.2d 737, 740 (1943):

"Our conclusion, therefore, is that the correct interpretation of Rule 4 is that any party may properly move for a directed verdict in his favor on any issue as to which his opponent has the burden of proof, but not for an instructed verdict on any issue as to which the moving party has the burden of proof, unless the facts are uncontroverted, or the parties have agreed as to the facts." But perhaps its application of the rule is not always so clear. Dunstan v. Bethlehem Steel Co., 187 Md. 571, 51 A.2d 288, 291.

[87] 364 Mo. 605, 265 S.W.2d 282 (1954).

in several cases that the testimony of witnesses for the party with the burden of proof presents a jury case, whether they are contradicted or impeached or not and in fact whether any evidence at all is introduced by the opponent, but in *Rogers* they said that this rule is modified by the proposition that it is not true "where there is no real dispute of the basic facts supported by uncontradicted testimony essential to a claim or an affirmative defense"[88]

Mr. Bobbe, in an excellent article[89] dealing with New York law and the case of *Hull v. Littauer,*[90] stated a proposition that is not quite so broad as the one proposed by the Missouri court. In *Rogers* it should be noted that there is no way suggested for saying when the basic facts are in dispute and when they are not, though there is the suggestion that this might be determined from the other evidence that the opponent introduces—and this is of course true in so many cases in which the courts start out by saying something like "the undisputed facts are as follows:" But Bobbe goes further in the sense that he admits that there should be cases in which it would be reasonable to force an admission on a party even though it was clear that he did not intend to make it. He proposes that such an admission be forced on a party when his silence in the face of adverse testimony can be construed as an admission and that silence can be so construed when the party is obviously in the position to introduce controverting testimony or evidence, but fails to do so. Actually Bobbe was only dealing with the special situation of the conclusive effect of a party's own testimony or of some other supposedly interested witness, but there is no reason not to extend it.

Bobbe's position was adopted by the Utah court in a non-jury case[91] and is at least strongly supported by the Kentucky case of *Bullock v. Gay.*[92] Kentucky draws a distinction between interested witnesses and disinterested witnesses, the latter being entitled to conclusive credibility where they are uncontradicted and the testimony is direct, unequivocal, and not improbable. In *Bullock* the court held that the credibility of the testimony of plaintiff's witness to the promise in issue was for the jury. It was significant that not only was this witness interested in the

[88] 265 S.W.2d at 287.

[89] Bobbe, the Uncontradicted Testimony of an Interested Witness, 20 Corn. L.Q. 33 (1934).

[90] 162 N.Y. 569, 57 N.E. 102 (1900).

[91] Smith v. Industrial Commission, 104 Utah 318, 140 P.2d 314 (1943).

[92] 296 Ky. 489, 177 S.W.2d 883 (1944).

sense that he was the actor in the transaction about which he testified, but the defendant had no one alive who could testify about that transaction.[93] And many other cases can be similarly analyzed, that is they show a situation in which the opponent might well have been expected to have contradicting evidence but he introduced none. If the offeror has the burden of proof, then as we said before, the issue of credibility is controlled by the judge, but this is true because the opponent's failure to bring in contradicting evidence can be construed as a judicial admission of the facts testified to.[94]

But it must be admitted that this careful definition of when silence can be properly construed as a judicial admission, despite the clearly expressed intent to controvert the issue, is seldom found in the opinions. They speak rather in flat terms that an uncontroverted and unimpeached witness must be believed unless, to quote the New Mexico court:

> From the New Mexico cases discussed, we believe the rule in this jurisdiction to be that the testimony of a witness, whether interested or disinterested, cannot arbitrarily be disregarded by the trier of the facts; but it cannot be said that the trier of facts has acted arbitrarily in disregarding such testimony, although not directly contradicted, whenever any of the following matters appear from the record:
>
> (a) That the witness is impeached by direct evidence of his lack of varacity or of his bad moral character, or by some other legal method of impeachment.
>
> (b) That the testimony is equivocal or contains inherent improbabilities.
>
> (c) That there are suspicious circumstances surrounding the transaction testified to.

[93] The court said: "Had the person who it was alleged made the promise been living and capable of testifying at the trial, and refused to deny the evidence given by plaintiffs' witness, the court would have been justified in finding, as a matter of law, that the promise to pay had been made." 296 Ky. at 493, 177 S.W.2d at 886. Bullock was followed in Barnes v. Kennedy, 242 S.W.2d 616 (Ky. 1951). Iowa came to a contrary result in Hildenbrand v. Stinson, 241 Iowa 593, 41 N.W.2d 698 (1950). It should also be noted that we are here dealing with the fundamental problem presented in many cases where summary judgment is applied for and the opponent wishes to rely solely on the right of the jury to disbelieve the moving party's witnesses without offering any reason therefor.

[94] For other cases using this argument, see Mercatante v. City of New York, 142 N.Y.S.2d 473 (App.Div. 1st, 1955); Watson v. Rocke, 224 S.W.2d 297, (Tex.Civ.App. 1949); L. E. Witham & Co. v. Allen, 64 S.W.2d 1024 (Tex.Civ.App. 1933), ("the defendant listened when he should have talked").

(d) That legitimate inferences may be drawn from the facts and circumstances of the case that contradict or cast reasonable doubt upon the truth or accuracy of the oral testimony.[95]

It might be asked: if the idea which controls is some form of the concept of a judicial or intended admission, why then cannot the problem be very simply handled by having the trial judge ask counsel whether or not he intends to make such an admission? Undoubtedly this is often done, despite the time-honored (but only *time*-honored) tradition in many courts that the judge is merely a passive umpire. Surely if the trial judge intends to direct a verdict on such a ground, it is due to the counsel and client that they understand the court's thinking before the ruling is made so that he can do what is possible to demonstrate a reason for disbelief of his opponent's witnesses. But these are not the cases which usually come to the appellate court. It may be suggested too that of the hundreds of cases which refer to the problem, there may well be a substantial percentage in which counsel makes no real claim in the appellate court to dispute the facts testified to.

It is quite usual to see the courts adopting language very similar to that of the New Mexico court, quoted above, to the effect that a witness may be disbelieved when he is contradicted by other facts and circumstances which cast reasonable doubt upon the truth of the oral testimony. The contradiction does not have to come from an eye witness of the same occurrence but may be in the nature of circumstantial evidence.[96] But even this is not always so, for what if there is not much strength to those derivative inferences? The problem is seen most often in cases in which the plaintiff relies on the physical facts to support a factual theory of negligence which is specifically denied by the defendant or his employees, such as speed or that the defendant was on the wrong side of the road. In these situations the facts relied on by the plaintiff may lead to more than one possible factual theory of how the accident happened, some leading to liability and some not. A holding of a directed verdict for the defendant in such a case must, of course mean that the judge

[95] Medler v. Henry, 44 N.M. 275, 101 P.2d 398, 403 (1940). The court held that the jury could disbelieve the witnesses because there were suspicious circumstances.

[96] Warren v. Griffing, 200 Okla. 108, 190 P.2d 1014 (1948); House v. Smith, 117 Colo. 305, 187 P.2d 587 (1947); Williams v. Paul F. Beich Co., 74 Ga. 429, 40 S.E.2d 92 (1946); Grengs v. Ericgson, 225 Minn. 153, 29 N.W.2d 881 (1947).

weighed the evidence, a weighing of the derivative inference against the direct inference, and he has done so in a case in which it is impossible to suggest that there is any judicial admission.[97] Georgia states the rule in a slightly different way, holding that an otherwise uncontradicted and unimpeached witness must be believed in the face of circumstantial evidence if the testimony and the circumstantial evidence can be construed to be consistent with each other.[98]

Courts usually find comfort for the holding that circumstantial evidence will not raise a jury issue when there is a direct testimonial denial from the decision of the United States Supreme Court in *Pennsylvania Railroad v. Chamberlain*.[99] It is quite true that the opinion in this case makes a sweeping statement, going even further than most courts which cite it would be willing to go:

> And the desired inference is precluded for the further reason that respondent's right of recovery depends upon the existence of a particular fact which must be inferred from proven facts, and this is not permissible in the face of the positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which testimony it affirmatively appears that the fact sought to be inferred did not exist. . . .[100]

It is at least doubtful if such language was at all necessary to the holding in the case since the plaintiff's only evidence that two strings of railroad cars had come together was from a witness who testified that he heard (he did not see) a loud crash in a busy railroad yard and that he later thought that the two strings of cars were going together, but he was not in such a position that he could have seen whether they were or not. From this meager basis of the alleged collision it could as easily have been held that the plaintiff's case lacked any ground for a reasonable inference of the collision. The court did decide that since the inferences of collision and not-collision were equally strong, neither was reasonable. This is hardly precedent for a holding

97 Arnall Mills v. Smallwood, 68 F.2d 57, (5th Cir. 1933); Winn v. Consolidated Coach Corp., 65 F.2d 256 (6th Cir. 1933) with which compare the very similar fact situation and contrary holding in Swanson v. Martin, 120 Colo. 361, 209 P.2d 917 (1949).

98 Taggart v. Savannah Gas Co. 179 Ga. 181, 175 S.E. 491 (1934); Griffin v. Barrett, 183 Ga. 152, 187 S.E. 828 (1936).

99 288 U.S. 333 (1933).

100 288 U.S. 333, 340 (1933). This is not, of course, the only doubtful dictum in this amazing opinion.

that uncontradicted testimonial evidence will legally outweigh circumstantial evidence that would otherwise have supported a contrary inference, which was apparently the holding in *Nicholas v. Davis.*[101] In this case the Court of Appeals placed its reliance more on *Chesapeake & Ohio Ry. Co. v. Martin*[102] and *Pence v. United States,*[103] both of which are distinguishable. The latter case involved a holding that the prior statements of the plaintiff's insured (admissible as a vicarious admission) were binding on the issue of his knowledge of his physical condition—an extension rather of the doctrine that a party is bound by his own testimony. The *Martin* case involved the question whether it was reasonable for a railroad to take as long as twenty days to transport potatoes from Michigan to Richmond, Virginia. The plaintiff who had to avoid the requirement of the bill of lading that claims be presented within six months from the reasonable date of expected delivery, offered no evidence on this point and the court held that as a matter of law something less than twenty days was a reasonable time for the carriage. In doing so the opinion states that the testimony of the defendant's freight agent that eight days was reasonable was binding since there was no contradiction, except in terms of judge or jury notice which the court did not mention and which would probably not be within the usual theory of judicial notice. If it was proper for judicial notice, the court found for the defendant on that fact. The only other evidence in the case supported the defendant's position since it was admitted by the plaintiff that the actual time taken for the carriage of the potatoes in question was eight days. Thus the *Martin* case involved a situation in which there was in fact no contradicting evidence, and no matter who had the burden of proof on the issue (the court does not discuss the problem) it does not control *Nicholas.*

The same distinction has been recently pointed out by the Michigan court in a series of cases culminating (for the moment) in *Hopkins v. Lake.*[104] The issue in Hopkins was whether the driver of defendant's truck knew of the "unexpected presence"

[101] 204 F.2d 200 (10th Cir. 1953). The issue involved a claim for tax refund in which plaintiff claimed that his wife's interest in a partnership had legitimate business reasons, and he so testified. There were other facts which indicated that the sole purpose for her interest was to dilute the tax liability.

[102] 283 U.S. 209 (1931).

[103] 316 U.S. 332, (1942).

[104] 348 Minn. 382, 83 N.W.2d 262 (1957).

of the plaintiff, a little child, when he started blindly to back his truck. The truck driver testified that he did not have any knowledge and the minority of the court thought this binding. The majority held otherwise and, somewhat ambiguously, said the case was ruled by two early Michigan cases which had held that no witness must be believed even if he is uncontradicted and then distinguished a later Michigan case on the ground that there had been no contradictory evidence.[105]

The *Martin* case is also interesting because of the way it has been handled by the Second Circuit Court of Appeals. This court, under the leadership of Judge Learned Hand and Judge Frank, has for many years upheld the theory that the trier of the facts should have the right to disbelieve any witness, without being subjected to control by the appellate court. It agrees in principle that disbelief should be grounded in reason, but holds to the proposition that since disbelief can and very often is grounded on the demeanor of the witnesses, this is a question which in the nature of things the appellate court cannot know about and therefore it is beyond its power to control. It is what Judge Frank liked to call "un-ruly".[106] In the *Martin* case Mr. Justice Sutherland had referred to the testimony of the freight agent as unshaken by cross-examination and said "A reading of it discloses no lack

105 Yonkus v. McKay, 186 Mich. 203, 152 N.W. 1031 (1915); Durfee v. Woodin 46 Mich. 403, 276 N.W. 495 (1937); Christiansen v. Hilber, 282 Mich. 403, 276 N.W. 495 (1937). The Christiansen case has been further explained in Cebulak v. Lewis, 320 Mich. 710, 32 N.W.2d 21 (1948). See also the discussion below under Presumptions, at note 125 seq.

106 See the charming per curiam opinion in Purcell v. Waterman Steamship Corp., 221 F.2d 953 (2d Cir. 1955) [a non-jury case]. They call the rule that an uncontradicted and unimpeached witness must be believed a "groundless notion" that:

"* * * must rest upon the assumption that the only evidence that should count in a decision of fact is the spoken words of the witnesses, so long as these are not in too great conflict with established physical facts. In short, the whole nexus of sight and sound that is lost in a written record is to count for nothing. Such mutilations of the processes of human inference can emanate only from those who suppose that 'legal reasoning' is a mental process unique and unrelated to ordinary affairs. The words that a witness utters, although they must of course be the vehicle of whatever he has to contribute, are again and again of no probative weight at all because of his address, his bearing and his apparent lack of intelligence. We have so often repeated the substance of this that it is obviously impossible to convince the bar that we mean to live up to it. Conceivably, the day may come when appeals will be heard upon a completely faithful reproduction of the whole scene as it was in the courtroom. Absit

of candor on his part." The Supreme Court of Virginia, in passing on the same testimony and the same argument which they held inapplicable remarked that his testimony "does not show that he had any intimate knowledge upon the subject of what was a reasonable time for such shipment."[107] Sutherland further remarked that it was difficult to see why any inaccuracy could not have been brought out by cross-examination. Judge Frank distinguishes the language by saying that it does not apply to an interested witness *unless* he is corroborated by undisputed facts, as he was in *Martin.*[108] He also, of course, distinguishes *Martin* on the ground that it does not apply to a non-jury case but this he admits is not a very sure distinction, because if testimony is binding as the *Martin* opinion says it is, there is no reason for saying that the decision of a trial judge in a non-jury case is not clearly erroneous. We are dealing with the relationship of the trial judge and the appellate court, the distinction sought to be drawn introduces a third unit—the jury—and in most jurisdictions the appellate court deals with the problems of the jury only through the trial judge. If any distinction is to be drawn one would think the case for leaving the evaluation of demeanor to a jury is stronger than for leaving it to a single judge, since that evaluation will undoubtedly invoke a good deal of unarticulated reasons which the jury is designed to average out.[109]

What is apparent in the argument between those courts which give a great weight to the demeanor of the witnesses and those which refuse to do so is the measure of control which the appellate court should have over the trial judge's handling of the directed verdict motion. Courts which follow *Martin* require the reason for the disbelief to be shown in the record, treating to this extent the problems of the demeanor of the witnesses just as they generally treat any other view by the jury or judge—a decision cannot be affirmed upon a view alone. But there are several reasons why witness demeanor may differ from a view

omen; but at least until that horrid fate shall overtake our devoted successors we shall continue to carry on as we have."

The Ninth Circuit called the same idea "an ancient fallacy which somehow persists despite the courts' numerous rulings to the contrary." NLRB v. Howell Chevrolet Co., 204 F.2d 79, 86 (9th Cir. 1953), also a non-jury case.

[107] Chesapeake & Ohio Ry. v. Martin, 154 Va. 1, 5, 143 S.E. 629, 630 (1928).

[108] Broadcast Music, Inc. v. Havana Madrid Restaurant Corp., 175 F.2d 77 (2d Cir. 1949).

[109] See supra, at note 15-20.

of the scene of an accident or of land which has been condemned. It is a relatively easy matter to supplement such a view by photographs or verbal descriptions. It is not easy to do this with the passing and fleeting things which go to make up the totality of the demeanor of a witness. One way is to have counsel dictate into the record his own observations of the demeanor which would support the determination that the witness was not telling the truth; or the judge could make his own statement in an opinion ruling on the motion for directed verdict. The latter would be preferable, and perhaps it would appear, in a jurisdiction which permits the judge to comment to the jury on the credibility of the witnesses, in that comment where the judge had overruled the motion for directed verdict.

It is also true that good cross-examination does not always seek to point out the obvious. Nor is it always good tactics to cross-examine in such a way as to force the witness to reiterate what he has already said on direct, even thought he may have said it in a halting way. Having lied once it may be easier to do so again.

The rule that the reason for disbelief must be articulated in the record has been most recently examined and espoused in a careful opinion by Chief Justice Vanderbilt of the New Jersey Supreme Court in *Ferdinand v. Agricultural Insurance Company.*[110] The action was for the recovery of insurance on certain jewelry claimed to have been stolen. Plaintiff testified to the ownership of a lot of jewelry which was in his car, that his car had been broken into and much of the good jewelry taken though most of the cheap jewelry was left. The defendant on cross-examination showed discrepancies between his trial testimony and certain statements given to the insurance company. Both parties rested, the defendant introducing no evidence on his own case. Plaintiff moved for a directed verdict which was granted. The appeal resulted in a reversal. The court felt called upon to decide whether the view of lower courts in New Jersey that in such a case the issue of credibility is always for the jury is correct. It refused to so hold—the issue of credibility is no different from the question of derivative inference and is a question of law for the judge when no reasonable man could find that the witness was not credible.[111] The mere fact that the witness is a party cannot be

[110] 22 N.J. 482, 126 A.2d 323, 62 A.L.R.2d 1179 (1956).

[111] "But when the testimony of witnesses, interested in the event or otherwise, is clear and convincing, not incredible in the light of general knowledge and common experience, not extraordinary, not contra-

enough as a matter of law to take it to the jury. On the other hand, "Where men of reason and fairness may entertain differing views as to the truth of testimony, whether it be uncontradicted, uncontroverted or even undisputed, evidence of such a character is for the jury * * * (citations omitted)".[112] The court concluded that in the case there were sufficient things which were difficult to believe in the plaintiff's evidence to make disbelief reasonable and therefore the direction of the verdict was wrong.

Several observations may be pertinent about this opinion. In the first place there is no discussion of the problem of demeanor of the witness and the impossibility of bringing this before the appellate court. From the point of view of the actual decision this was unnecessary because the court found reason for disbelief in other matters, but in an opinion apparently intended to solve all of the problems of the right of the jury to disbelieve uncontradicted testimony this is an unfortunate omission. In the same sense there was no attempt to distinguish between the power of the trial judge and that of the appellate court. It may be inferred that the court will draw no such distinction from its insistence that the jury-judge relationship must involve intelligent direction by the trial judge and that the process of determining credibility involves no different form of reasoning from that involved in determining the reasonableness of a derivative inference. The meaning of this argument is not clear. It seems to say that in both you take what is before you and see whether the inference sought to be drawn is reasonable, applying the common knowl-

dicted in any way by witnesses or circumstances, and so plain and complete that disbelief of the story could not reasonably arise in the rational process of an ordinarily intelligent mind, then a question has been presented for the court to decide and not the jury [citations omitted]. In this process credibility is but one of the elements upon which the mind must work in the determination of the final result. The same reasoning process is used in reaching an opinion as to credibility as is used in arriving at any other opinion or judgment by the court, and there therefore, appears to be no good reason for denying to the court the right to apply its judgment to that issue in the ultimate determination of the result. Credibility in such a case is not a matter for the jury. The power to reach an opinion as to credibility is given to the court in upsetting a verdict at common law and restated in the form of rules in R.R. 1:5-3(a), R.R. 3:7-11(b), and it surely should have the same power in the analogous situation where the circumstances call for a direction of a verdict. In each situation the rule that must prevail is one of reasonable judgment applied to the particular facts of the case." 22 N.J. 482, 494, 126 A.2d 323, 330 (1956).

[112] 22 N.J. at 494, 126 A.2d at 329.

edge that all men have. And this may be so with respect to the trial judge, but it cannot be so with respect to the appellate court for the simple reason that they cannot have before them the same things that were before the trial judge and the jury.

Justice Vanderbilt relies, in part, on Wigmore's Treatise on Evidence; but Wigmore does not necessarily support the court's dictum. Actually Wigmore is equivocal in this area. The cited language suggests that the only time that a verdict can be directed for the proponent is when it can be said that the testimony is undisputed "or whether in some other way that assumption (that the plaintiff's is true) is unnecessary"; and he later suggests that the facts can be derived from the testimony of the opponent which he must concede to be true.[113] This, I suggest, is not the same thing as saying that credibility is a matter of pure reason; though he does say that the majority of courts will direct a verdict for the party with the burden of proof. He treats it rather as a matter of judicial admission of the facts. In a note to section 2498 he criticizes an Illinois decision in the following language: "But the vice of such a rule is the larger one of attempting to lay down rules of *law* to bind the jury in their exclusive function of estimating the credibilities of the case without *any trammels of law.* This is the growing danger of the times for the law of Evidence, and it should be opposed wherever it appears." [emphasis is Dean Wigmore's] And again in section 2034 he says, "The loose and futile but not uncommon heresy that an unimpeached or uncontradicted witness *must* be believed is illustrated in the following opinions;" But he then excuses a Minnesota decision[114] because it dealt with a directed verdict rather than with an instruction to the jury. The case speaks in much the same language as that in South Dakota and Justice Vanderbilt's recent opinion in New Jersey, and I find it impossible to reconcile Dean Wigmore's several statements.

There is some support in the cases for the proposition that a witness who testifies in terms of opinions and conclusions need not be believed, even though the State otherwise would require belief under the circumstances. Wisconsin normally requires belief of an uncontradicted witness, but in *Starry v. E. W. Wylie*

113 The quotes are from 9 WIGMORE, EVIDENCE § 2495 at 305-6 (3d ed. 1940). Wigmore quotes the South Dakota case of Jerke v. Delmont State Bank, 54 S.D. 446, 223 N.W. 585 (1929) at length, as does Justice Vanderbilt.

114 Olsen v. Hoffman, 175 Minn. 368, 221 N.W. 10 (1928).

Co.[115] the court refused to give conclusive effect to testimony that a car 1000 feet ahead of the witness at night was going 55 miles per hour. The rule is often applied in cases involving testimony concerning value.[116] But the idea is not usually separated as a special case. It may perhaps be included in the broader statement of the rule requiring belief only when the testimony is "direct, positive, and unequivocal." Nor have I found any evidence that the subjective state of mind is put in a special category, except as this idea is a part of the concept that binding effect should not be given when contrary evidence is not available to the opponent. It may also be taken into consideration to some extent in those States which attempt to draw a distinction between the testimony of a party or an interested witness and the testimony of a disinterested witness. This distinction, however, based upon the proposition that a party or interested witness is per se impeached—his bias is self-evident.[117]

EXPERT EVIDENCE

The problem of the binding effect of expert testimony involves other considerations, and I do not intend to do more than suggest some of the pertinent problems. Fundamentally the testimony of an expert is different from that of an ordinary witness since by hypothesis it deals with things about which the jury cannot exercise an independently intelligent evaluation. To the extent that an expert limits his testimony to this sort of factual observation and conclusion, a good argument can be made that if he is not contradicted by other experts who can be equally relied upon, his testimony should be believed. A better argument could be made if the expert were divorced from sponsorship by one party or the other. This is the reasoning behind statutes making certain blood-type evidence conclusive.[118]

But I do not find a great deal of support for this argument in the cases. At one time this might have been laid to the traditional distrust of experts entertained by lawyers and judges. Today this is not so. It must rather be explained by the fact that in one sense an expert is always open to the same kind of un-

[115] 267 Wis. 258, 64 N.W.2d 833 (1954).

[116] Keller v. Morehead, 247 S.W.2d 218 (Ky. 1952); Langley v. Pac. Gas & Elec. Co. 41 Cal.2d 655, 262 P.2d 846 (1953).

[117] West Digest, Key, Trial 140 (2).

[118] See Uniform Act on Blood Tests to Determine Paternity, 9 U.L.A. 102 (1957).

articulated disbelief because of the manner in which he testifies or the barrenness of his testimony of any explanation, and because it is very seldom that an expert does limit himself to the statement of facts which are beyond the competence of the jury. He is adopting as true facts which are readily verifiable by other witnesses and this will be so whether he testifies in answer to a hypothetical question or upon his own knowledge of the facts. The famous California cases of *Berry v. Chaplin*[119] and *Arais v. Kalensnikoff*[120] are typical examples. In the personal injury field it is of course generally true that the injuries are testified to by others as well as the expert and moreover there is almost always a clash of experts.

A recent Nebraska case, however, is worthy of note in this connection.[121] The action was on a fire insurance policy for the destruction of the plaintiff's business property by fire. The fire was admitted, but the defense was that it had been set by the plaintiff. The defendant placed the plaintiff at the scene of the fire at a time when he could have set the fire, there was evidence of motive in the form of financial difficulty, and the defendant then placed an expert on the stand who testified in effect that the fire must have been started by the loosening of a connection in the gas line which would permit gas to escape and to be ignited by sparks from an electric motor. Opposed to this evidence the plaintiff denied having anything to do with the loosening of the gas line connections or having any knowledge of anyone else having done so; and the plaintiff introduced an expert who testified that the fire could have been caused by a fault in the flange of one of the gas connections. The fault in the flange was apparently admitted by defendant, but its expert testified that the fault was caused by the fire, and there was evidence that there had been no indication of any leak before the fire. In this state of the evidence and after a third trial, the trial judge denied a motion for a directed verdict for defendant and the jury returned a verdict for the plaintiff. On appeal the court held that the motion for directed verdict should have been granted. No reasonable man could find for the plaintiff in the face of the expert evidence. The plaintiff's expert was dismissed on the ground that his conclusions were unworthy of belief since they were based upon factual assumptions which had no basis in the evidence. The

[119] 74 Cal. App. 2d. 652, 169 P.2d 442 (1946).

[120] 10 Cal. 2d. 428, 74 P.2d 1043 (1938).

[121] Pueppka v. Iowa Mutual Ins. Co. 165 Neb. 781, 87 N.W.2d 410 (1958).

denials of the plaintiff could not make an issue. Nor did the court advert to its own rule that "Experts are as much subject to these human imperfections (interest and bias) as other witnesses."[122]

This case goes as far as any can go in ordering a directed verdict for the party with the burden of proof in the face of a flat denial.[123] The fact that this was the third trial was of course important in deciding that the defendant was entitled to judgment rather than merely to a new trial, which had been the result in the previous fire insurance cases relied on. It is also interesting to note that this case is the opposite of *Nicholas v. Davis*[124] which held that the uncontradicted denial of the party (equivalent to the plaintiff in *Pueppka*) had to be believed.

PRESUMPTIONS

The area of presumptions also presents a special case which has received a good deal of attention from the writers as well as the courts. The question arises in one of two ways: have the basic facts of the presumption been "established" without the necessity of jury determination; and what is the effect of the rebutting evidence. There is no reason why the same rules should not be applied in these situations as are applied in any other case where the question of uncontradicted testimony is raised—except as one may or may not like the original rule establishing the presumption. Thus the question of whether or not the basic facts have been established by judicial admission or not, or by the binding effect of the testimony of the party against whom the presumption operates, is no different from any other case. And the question of whether or not rebutting evidence which has not been contradicted directly will be held binding should depend on the attitude the court takes toward such evidence in any other case.

If the presumption is simply a mechanical one not based on a reasonable inference, the burden of proof is usually not held to

[122] Penhansky v. Drake Realty Const. Co., 109 Neb. 120, 190 N.W. 265 (1922); Brown v. Globe Laboratories, Inc., 165 Neb. 138, 84 N.W.2d 138 (1957).

[123] Falconi v. Federal Deposit Ins. Corp., 153 F.Supp. 867 (W.D. Pa. 1957) reaches a similar result where the issue involved plaintiff's knowledge of an illegal check-kiting scheme, which he denied. The trial court held this denial was demonstrated false by the uncontested documentary evidence explained by an expert. The court of appeals affirmed [257 F.2d 287 (3d Cir. 1958)].

[124] 204 F.2d 200 (10th Cir. 1953) discussed above at note 101 seq.

shift to the opponent of the presumption. Whether the presumption vanishes upon the introduction of any believable rebutting evidence, or whether the presumption only vanishes if the jury believes the opponent's rebutting evidence often does follow the rule applied in other situations.[125] The presumption case often falls into that special category in which the party for whom the presumption operates is unable to produce any contradicting evidence, since the facts lie wholly within knowledge of the opposing party, and thus should not be held to a judicial admission by silence.[126] But the problem is complicated by the necessity of drawing an intelligible instruction, which is not easy. It is also confused by the desire to establish a general rule applicable to all presumptions, a desire more evident in the text writing than in the cases.[127] For if the presumption under consideration is one in which the basic facts do provide a reasonable inference of the presumed fact, then the usual rule is that the testimony rebutting the presumption should not be held to be uncontradicted and the whole issue is for the jury.

It should be emphasized that the Model Code of Evidence sought to apply a special rule to those presumptions in which the basic facts do not provide a reasonable implication of the presumed facts. The Code stated that if evidence in rebuttal is introduced "which would support a finding of the non-existence of the presumed fact" (that is, evidence which *might be* believed) then the presumption vanishes, whether the jury does or does not believe

[125] See holding it a jury question: Blank v. Coffin, 20 Cal.2d 457, 126 P.2d 868 (1942); Stormon v. Weiss, 78 N.D. 10, 65 N.W.2d 475 (1954); O'Dea v. Amodeo, 18 Conn. 58, 170 A.486 (1934); and holding it not a jury question unless impeached or contradicted in some way: Hucliburgh v. Palvic, 274 S.W.2d 94 (Tex. Civ. App. 1954); Morris v. Cartwright, 57 N.M. 328, 258 P.2d 719 (1953); Union Central Life Ins. Co. v. Sims, 208 Ark. 1069, 189 S.W.2d 193 (1954); Christiansen v. Hilber, 282 Mich. 403, 276 N.W. 495 (1937). With the exception of the Michigan case, these follow the usual State rules. In view of Hopkins v. Lake, 348 Mich. 382, 83 N.W.2d 262 (1957) discussed above at note 104, and Monaghan v. Pavsner, 357 Mich. 511, 80 N.W.2d 218 (1956) the Michigan court now appears to be leaning the other way.

[126] i.e., under the theory espoused by Bobbe. See supra at note 89.

[127] See MORGAN, MAGUIRE AND WEINSTEIN, EVIDENCE CASES AND MATERIALS 457 (4th ed. 1957). In view of the vast amount of writing on the subject of Presumptions, I make no pretense to do more than suggest that much of this writing fails to consider the relationship of those problems to the ones discussed in this article.

the rebutting testimony.[128] If this rule is applied in a State where the rebutting testimony must be believed, then of course it does not change the rules normally applied in non-presumption cases. But if it is applied in a State where the rebutting testimony would normally be left to the jury to believe or not, it does change that rule. And this was the effect given to it in *Silva v. Traver*,[129] where the court refused to permit the jury to disbelieve the testimony of the defendant car-owner that he had not consented to the use of his car which resulted in plaintiff's injuries. Under normal circumstances Arizona holds that a party-witness can always be disbelieved.[130] This provision is retained in the Uniform Rules.[131] The provision in the Uniform Rules that when there is a reasonable basis for the inference to the presumed fact the burden of proof shifts does not change the usual rules applicable to uncontradicted testimony. So long as the party aided by the presumption is also supported by a reasonable inference, the allocation of the burden of proof has no effect on the operation of the uncontradicted witness rule.

PARTY BOUND BY TESTIMONY OF HIS OWN WITNESSES[132]

I will now return to the question which I postponed before which deals with the binding effect of the testimony of a witness offered by Party A which turns out to be unfavorable to him. Logically, and I think, actually, a determination of this problem must take into consideration the attitude which one has toward the binding effect of a party's own testimony which is unfavorable, and toward the binding effect of the unfavorable testimony of witnesses introduced by the opponent. There is one other factor which apparently has been significant, and that is the rule that a party cannot impeach his own witness.

It seems reasonably clear that no party will be bound by the testimony of his own witness if he contradicts such testimony with other evidence.[133] At the other end of the spectrum it is equally

[128] MODEL CODE OF EVIDENCE rule 704 (1942). See explanation of this rule at 309-318.

[129] 63 Ariz, 364, 162 P.2d 615 (1945).

[130] This was admitted in the Silva opinion.

[131] UNIFORM RULES OF EVIDENCE, 14.

[132] I am indebted for much of the research in this particular area to Mr. Ira Epstein, of the Nebraska and California bars.

[133] Leach v. Treber, 164 Neb. 419, 82 N.W.2d 544 (1957), [a non-jury case, but this is not significant]; Trask v. Klein, 150 Neb. 316, 34 N.W.2d 396 (1948).

clear that a party will be bound by the testimony of his own witness when it is apparent that he is adopting such testimony and the facts so disclosed as truth. In other words, it may be clear that he is intending to make a judicial admission.

But between these two extremes, there is the usual confusion of decisions, and I am unable to define with certainty any clear-cut rules. The Utah court has apparently adopted as a rule of thumb the same rule for witnesses as for a party's own testimony, which is that a party will be bound by the least favorable testimony which a particular witness gives.[134] The Utah Court argues however, that where a witness contradicts himself, the inferences which may be drawn from such testimony are so confusing that no inference will be reasonable. Therefore, if the party has the burden of proof his entire case fails for lack of proof in the absence of other evidence.

We have seen that although there is good authority for the proposition that testimony of witness X offered by party B is never binding on party A, by far the majority of decisions indicate that such testimony will be binding if it is not contradicted, not impeached and contains no inherent improbabilities. It is to be expected, a fortiori, that the same witness introduced by party A would be binding upon him since, to the idea that the court must find some reason to disbelieve witness X, we now add the idea that this witness has been chosen and offered by party A himself. The whole idea of the adversary system of litigation seems to assume that this is a conscious and reasoned choice and therefore, the underlying theory that this amounts to an intended judicial admission is enforced. In the vast majority of cases that are tried, this is undoubtedly true. These are not, however, the cases that appear in the appellate reports, for it is here that we see the cases in which party A intended to make no such admission.

From the practical point of view, such cases come up in three situations. *First,* where the counsel for party A has every reason to believe that witness X whom he puts on the stand will testify favorably to party A and counsel is unhappily surprised when the testimony turns out to be unfavorable; *second,* counsel for party A knows full well that witness X will testify unfavorably, but he hopes to be able to induce him to change his mind under the pressures of trial or at least hopes to get the benefit of making the witness look bad before the jury; and *third,* the more usual case, in which counsel knows that some of the testimony will be favor-

[134] Alvarado v. Tucker, 2 Utah 2d 16, P.2d 986 (1954).

able and some will be unfavorable and knows further that under the rules of cross-examination, he cannot prevent the unfavorable testimony from being brought out on his case. The last situation will often arise where witness X is adverse in interest to party A, but he happens to be the *only* witness available to party A and it is therefore imperative that he call him to prove his case.

For the most part the problems presented in the first situation, that is, where counsel is genuinely surprised, are dealt with in the cases as problems involving the right of party A to impeach his own witness. Most courts freely permit counsel under these circumstances to show prior inconsistent statements to the witness to induce him to change his mind and if he does change his mind, it is assumed that party A will not be bound by the original unfavorable testimony. If he admits the prior inconsistent statement, but still maintains that his original testimony is true, party A will still be permitted to contradict witness X with witness Y. But, if he is unable to contradict witness X with witness Y, the testimony of witness X will be binding in the sense that party A has failed to maintain his burden of proof on the issue. As in *Dyer v. MacDougall,* the mere disbelief by the jury of witness X cannot support a finding of facts contrary to those testified to by the witness. Nor can party A win his case merely by showing the prior inconsistent statement of witness X which witness X refuses to adopt at the trial because of the well established rule that such prior inconsistent statement cannot be given any substantive effect, unless witness X happens to be the opposing party in the law suit or is in some other way so related to the opposing party that the doctrine of vicarious admissions can be applied.

The second situation differs from the first only in that the common law rule would probably not permit counsel to show the prior inconsistent statement of witness X. It may be noted that this situation provides the only reasonable justification for the rule which prohibits a party from impeaching his own witness.[135]

In the foregoing situations, suppose that the unfavorable testimony is unfavorable in the sense that it supports an issue upon which the opponent has the burden of proof. Here it does not necessarily follow that party A should lose because he has failed to prove his case. If he loses, it is only because the court has held the testimony of his witness to be binding upon him. The same

[135] Ladd, Impeachment of One's Own Witness - New Developments, 4 U. Chi. L. Rev. 69 (1936). See generally 3 WIGMORE, EVIDENCE, §§ 896-918 (3d ed. 1940); McCORMICK, EVIDENCE, 70-82 (1954).

may be true on an issue upon which party A has the burden of proof where witness X testifies to facts from which an inference of liability of party B could be drawn, but testifies to additional facts which explain the former in such a way as to negative liability.[136] In either of these situations, and lacking any contradicting evidence, it has been generally supposed that party A is bound by what his witness says. Since by offering the witness he has vouched for his general credibility, he cannot then say to the jury, "I ask you to believe part of what he says, and disbelieve the rest." There are, however, a number of cases which would modify this rule to the extent that they will not bind party A where the testimony which is unfavorable is for some reason inherently incredible.

It has become more and more apparent as modern litigation has moved from a trial of character to a trial of the facts based upon thorough investigation, that the concept that a party vouches for the witnesses he produces at trial is a false one and that a rule which arbitrarily allies witnesses in a lawsuit with the party who happens to call them to testify must be a rule no longer based on reason. It may very well be that the interest and conscious or unconscious bias of a witness for the party who calls him may be strong and that, therefore, any unfavorable testimony which that witness gives is entitled to special weight, but it does not at all follow from this that the jury should be *required* to believe everything that the witness says that is unfavorable to the offering party. The only justification for such a rule would be that the interest and bias of the witness is such that no reasonable man could disbelieve the testimony of a witness which is unfavorable to the side on which his interest lies—and this is to adopt the reasoning of Justice Vanderbilt,[137] but this has nothing to do with the question of who happens to call the witness. It should be true even if that witness is called by the opponent B and his testimony unfavorable to party A is then not contradicted or impeached in any way by party A. This is but a slight extension of Bobbe's arguments. It is, however, subject to the serious caveat that one can seldom be sure he knows all of the factors that bear on where a witness thinks his interests lie.

It should be at least clear that the vouching—binding—rule can certainly have no reasonable foundation where the interest

136 See e.g. Best v. Huber, 3 Utah 2d. 180, 281 P.2d 209 (1955), discussed infra at note 141.

137 See Ferdinand v. Agricultural Ins. Co., 22 N.J. 482, 126 A.2d 323 (1956), discussed supra at note 110.

and bias of the witness who is called by party A lie with party B. This has led a number of states to modify the old common law rule, but this has been done almost entirely by statute and even the statutes have gone only part way.

These statutes deal specifically with witnesses who are clearly adverse; but though the various statutes do not agree on the definition of an adverse witness they are in the main restricted to persons who have, or had, some direct financial connection with the opposing party. They do not extend to the stranger, to the close friend, nor even to the man with a similar interest to protect; nor under jurisdictions following the unfortunate language of Federal Rule 43 (b) do they extend to the employee whose actions were the cause of the lawsuit, unless perchance he happens to be at trial time an officer, director, or managing agent of the opposing party.[138] They are designed to do one or more of the following:

(a) Permit Party A to examine the adverse witness by leading questions.

(b) Permit Party A to cross-examine the witness.

(c) Permit Party A to impeach the witness generally.

(d) Permit Party A to impeach the witness by showing prior inconsistent statements.

(e) Permit Party A to contradict the witness by another witness.

(f) Provide that Party A is not bound by what the witness says.[139]

[138] Johnson v. Baltimore & O. R.R., 208 F.2d 633 (3d Cir. 1953). There is, however some liberality apparent in judicial interpretation. O'Shea v. Jewel Tea Co., 233 F.2d 530 (7th Cir. 1956) - a former managing agent who was still "in defendant's camp", but plaintiff was also surprised; Maryland Casualty Co. v. Kadon, 225 F.2d 120 (5th Cir. 1955).

[139] (a) Jurisdictions whose statutes or court rules permit Party A to examine an adverse witness called by him by leading: Arizona, Colorado, Delaware, Idaho, Kentucky, Maryland, Nevada, North Dakota, Texas, Utah, Federal.

(b) Jurisdictions whose statutes or court rules permit Party A to cross-examine an adverse witness called by him: California, Georgia, Idaho, Illinois, Massachusetts, Michigan, Minnesota, Montana, New Hampshire, New Jersey, North Carolina, Ohio, Pennsylvania, Rhode Island, Vermont, Virginia, Wisconsin, Wyoming, Hawaii, Federal.

(c) Jurisdictions whose statutes or court rules permit Party A to impeach generally an adverse witness called by him: Arizona, Colora-

Of these provisions, (a) and (e) are merely declaratory of the normal common law. We are primarily interested in provision (f), though the effect of other provisions has been held significant in determining whether or not there should be a rule binding Party A by the testimony of his own witness who is in fact ad-

do, Deleware, Georgia, Idaho, Kentucky, Louisiana, Maine, Maryland, Nevada, New Hampshire, North Dakota, Oregon, Utah, Wisconsin, Federal. Presumably this would include impeachment by showing prior inconsistent statements.

(d) Jurisdictions whose statutes or court rule permit Party A to impeach an adverse witness called by him by showing prior inconsistent statements: Alaska, Arkansas, California, Florida, Idaho, Illinois, Indiana, Kentucky, Massachuetts, Montana, New Mexico, New York (if in writing), North Carolina, Oregon, Rhode Island, Vermont, Virginia, Wyoming, District of Columbia, Hawaii. See also (c). Of these States all but the District of Columbia, Illinois, Indiana and New York specifically provide that a proper foundation must be laid on cross-examination. In addition Federal Rule 26(d)(1) provides specially for the use of depositions to impeach. See discussion by Keeton, Proprietorship over Deponents, 68 Harv. L.Rev. 600 (1955).

(e) Jurisdictions whose statutes or court rules permit Party A to contradict a witness called by him: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Indiana, Kentucky, Maine, Maryland, Mississippi, Montana, Nevada, New Hampshire, New York, North Carolina, North Dakota, Ohio, South Carolina, Utah, Wyoming, Hawaii, Federal. The States listed under (f) also specifically permit contradiction of the adverse witness called by Party A.

(f) Jurisdictions whose statutes or court rules provide that Party A is not bound by the testimony of an adverse witness called by him: (caveat, is it not necessarily true that this is construed to mean anything more than that Party A can contradict or impeach the witness—see the discussion in text). The States differ also as to the definition of an adverse witness. Federal Rule 43(b) limits it to "an adverse party or an officer, director, or Managing agent" of a corporation, partnership or association which is an adverse party. If the State has a wider definition of "adverse witness" this is also indicated.

California: "The party calling such adverse witness shall not be bound by his testimony, and the testimony given by such witness may be rebutted by the party calling him for such examination by other evidence." (Includes any agent of the adverse party and a person for whose immediate benefit the action is prosecuted or defended.)

Colorado: ". . . but the party calling for such examination shall not be concluded thereby, but may rebut it by counter testimony." (Includes a person for whose immediate benefit such action is prosecuted or defended.)

verse. Let us suppose that in a State with an (f) statute Party A calls an adverse witness, but cannot and therefore does not contradict him by any other witness. Let us further suppose that though some of this testimony is unfavorable to Party A, for one reason or another Party A can prove his case if the unfavorable part of the testimony is disbelieved. This can be true where the

Hawaii: "The party calling such adverse witness shall not be bound by his testimony, and the testimony given by such witness may be rebutted by the party calling him for such examination by other evidence." (Includes a person for whose immediate benefit such action is prosecuted or defended.)

Illinois: "The party calling for the examination is not concluded thereby but may rebut the testimony thus given by counter testimony and may impeach the witness by proof of prior inconsistent statements." (Includes any person for whose immediate benefit the action is prosecuted or defended and officers, directors, managing agents and foremen of any party.)

Louisiana: ". . . the parties thus examining opponents shall not be held as vouching to the court for the credibility of the opponents so placed upon the stand, or as estopped from impeaching in any lawful way, the testimony given. . . ." (Includes any agent or representative of the adverse party "having or having had knowledge, charge or supervision in whole or in part of the matter in question" whether he be such agent at time of trial or not.)

Michigan: "... the answers of such witness shall not interfere with the right of such party to introduce evidence upon any issue involved in such suit or proceeding, and the party so calling and examining such witness shall not be bound to accept such answers as true." (Includes any "employee or agent of said opposite party, or any person who at the time of the happening of the transaction out of which such suit or proceeding grew, was an employee or agent of the opposite party.")

Minnesota: "The party calling such adverse witness shall not be bound by his testimony, and the testimony given by such witness may be rebutted by the party calling him for such examination by other evidence." (Includes a person for whose immediate benefit such action is prosecuted or defended and any agent or employee of an adverse party corporation who has knowledge of the matter in controversy.)

Montana: "... the answers of such witness shall not interfere with the right of such party to introduce evidence upon any issue involved in such suit or proceeding, and the party so calling and examining such witness shall not be bound to accept such answers as true." (Includes any employee or agent of the opposite party at time of trial or at the time the transaction occurred out of which the suit grew.)

unfavorable part of the testimony bears on an affirmative defense; where it explains other facts in such a way as to deny liability, but where without the explanation (or disbelieving it) a reasonable derivative inference of liability is left; or where the testimony denies the existence of a fact which would otherwise be presumed.

Ohio: "The party calling for such examination shall not thereby be concluded but may rebut it by counter testimony." (Includes only the adverse party or the officers of an adverse party corporation.)

Pennsylvania: "... the adverse party calling such witnesses shall not be concluded by his (sic) testimony...." (Includes any person whose interest is adverse to the party calling him as a witness.)

Rhode Island: "... the party calling for such examination shall not be concluded or bound by such examination or by any answer made by the witness." Two sentences later is the provision that the party calling may not impeach the witness by evidence of bad character "but may contradict him by other evidence" and may impeach by prior inconsistent statements if a foundation is laid therefor. (Includes any person "whose interest is adverse to the party calling him.)"

Texas: "... the party so calling such adverse witness shall not be bound to accept the testimony of such adverse witness as true, but shall have the right to introduce other evidence...." (Includes a party and any agent of corporate party.)

Utah: Adopts Fed. Rule 43(b) but adds that the party may interrogate an adverse party "without being bound by his testimony."

Washington: "The testimony of a party at the trial or on interrogatories shall not bind his adversary but may be rebutted." (Includes only a party.)

Wisconsin: "The testimony so taken on the trial * * * shall not conclude the party taking the same but he shall be allowed to rebut or impeach the same." (Includes a person for whose immediate benefit the action is prosecuted or defended "or his or its assignor, officer, agent or employee" at time of trial or when the relevant facts occurred.)

Wyoming: "... but the party calling for such examination shall not be concluded thereby and may rebut the evidence given thereon by counter or impeaching testimony." (Includes any person for whose immediate benefit the action is prosecuted or defended "or his or its assignor, officer, agent, or employee" at time of trial or when the relevant facts occurred.)

The applicable statutes and court rules referred to above are:

Alaska—Comp. Laws Ann. §§ 58-4-59; 58-4-62 (1949)

Arizona—Rev. Stat. Ann. Rule 43(g) (1956).

Arkansas—Stat. §§ 28-706, 28-707 (1948)

Some courts hold that the statute means only that Party A is not bound if, and only if, he does successfully contradict the

California—Code Civ. Proc. Ann. §§ 2049, 2051, 2052, 2055 (Deering 1946)
Colorado—Rev. Stat. Ann. Rule 43(b); § 153-1-16 (1953)
Connecticut—Gen. Stat. Ch. 387, § 7952 (1948)
Delaware—Code Ann. Rule 43(b) (1953)
Dist. of Columbia—Code § 14-104 (1951)
Florida—Stat. § 90.09 (1956)
Georgia—Code Ann. § 38-1801 (1954)
Hawaii—Rev. Laws §§ 222-25; 222-27 (1955)
Idaho—Code Rule 43(b) (1958); Rules 9-1206; 9-1207; 9-1209; 9-1210 (1947)
Illinois—Ann. Stat. Ch. 110 § 60 (Smith-Hurd's 1956)
Indiana—Ann. Stat. §§ 2-1726; 2-1728 (Burn's 1933)
Kentucky—Rev. Stat. Rules 43.06; 43.07; 43.08 (1959)
Louisiana—Rev. Stat. §§ 13-3662; 13-3663; 13-3664 (1950)
Maine—Rev. Stat. Ch. 113 § 118 (1954)
Maryland—Code Ann. Art. 35, § 9 (1957)
Massachussets—Ann. Laws 233, §§ 22, 23 (1956)
Michigan—Stat. Ann. § 27-915 (1937)
Minnesota—Stat. Ann. § 595.03 (1945)
Mississippi—Code Ann. § 1710 (1942)
Missouri—Rev. Stat. Ann. §§ 491.030; 491.070 (1949)
Montana—Rev. Codes §§ 93-1901-8; 93-1901-9 (1947)
Nevada—Rev. Stat. Rule 43(b) (1957)
New Hampshire—Rev. Stat. § 516:24 (1955)
New Jersey—Rev. Stat. § 20:81-11 (1937)
New Mexico—Stat. Ann. 20-2-4 (1953)
New York—CPA §§ 343; 343(a)
North Carolina—Gen. Stat. § 8-50 (1953)
North Dakota—Rev. Code Rule 43(b) (1943)
Ohio—Gen. Code. § 11497 (page 1946)
Oregon—Rev. Stat. §§ 45-590; 45-600; 45-610 (1957)
Pennsylvania—Stat. Ann. Tit. 28, § 381 (Purdon's 1953)
Rhode Island—Gen. Laws § 9-17-14 (1956)
South Carolina—Code 1952 §§ 26-507; 26-510 (1952)
Texas—Civ. Stat. Rule 182 (Vernon 1955)
Utah—Code Ann. Rule 43(b) (1953)
Vermont—Stat. Ann. Tit. 12 §§ 1641, 1642 (1958)
Virginia—Code Ann. §§ 8-291; 8-292; 8-293 (1950)
Washington—Rev. Code Rule 42 (1956)
Wisconsin—Stats. Ann. §§ 325.13; 325.14 (1958)
Wyoming—Comp. Stat. Ann. §§ 3-2604; 3-2606 (1945)

witness or impeach him to the extent that disbelief would be reasonable.[140] Such a rule can be justified by the fact that to hold otherwise would reach the anomalous result that the witness must be believed if offered by Party B but may be disbelieved if offered by Party A.

Other courts hold that the statute permits disbelief whether or not there is successful contradiction or impeachment, though they usually also suggest that the witness's story has some elements of inherent doubtfulness. Such was the case of *Best v. Huber*[141] where defendant rammed the back of plaintiff's car. Plaintiff called defendant who admitted the accident but explained it by testifying that her brakes failed. The court held that under the Utah rule[142] which is a slight, but important modification of Fed. Rule 43 (b), the plaintiff was not bound by this testimony. It was inherently disbelievable, the plaintiff had no way of opposing it, and to hold otherwise "could provide an invulnerable defense in cases involving vehicle collision."[143]

The California decisions[144] go back to the thoroughly reasoned case of *Smellie v. Southern Pacific Co.*[145] The action was for personal injuries received in an accident between defendant's train and the car in which plaintiff's decedent was a passenger. The driver of the car and the railroad were joint defendants and the issue involved was the contributory negligence of the plaintiff's decedent. The burden of proof on this issue lay on the plaintiff but he relied on a presumption of due care where the injured per-

140 For example, In re Donovan's Estate, 409 Ill. 195, 98 N.E.2d 757 (1951) [a non-jury case, but this factor is not referred to by the court]. In Hall v. Horak, 329 Mich. 16, 44 N.W.2d 848 (1950) the Michigan court stated a similar construction of its statute; but in Monaghan v. Pavsner, 347 Mich. 511, 80 N.W.2d 218 (1956), a presumption case, an evenly divided court upheld a ruling that an adverse witness should be treated as if he had been called by the opponent. In view of the later decision of Hopkins v. Lake, 348 Mich. 382, 83 N.W.2d 262 (1957) discussed above at note 104, it is by no means clear what that rule is in Michigan.

141 3 Utah 2d. 177, 281 P.2d 208 (1955).

142 Utah Rule 43(b). See reference in note 139 supra.

143 Best v. Huber, 3 Utah 2d. 177, 178, 281 P.2d 208, 209 (1955).

144 See the recent case of Refinite Sales Co. v. Fred R. Bright Co., 119 Cal. App. 56, 258 P.2d 1116 (1953) where plaintiff was held not bound by calling defendant who testified that she (defendant) was only a limited partner and hence not liable generally for partnership debts.

145 212 Cal. 540, 299 P. 529 (1931).

son is dead. The plaintiff called the driver of the car, who testified on this issue that decedent had said, "It's all clear, let's go." The court held that the credibility of this witness was for the jury—the statute was intended to put such an adverse witness in the same position as if he had been called by the opponent, it was "designed to prevent as far as possible parties to an action from perpetrating fraud and dishonesty." Moreover the testimony was of a fact that plaintiff had no way of controverting.

As has been noted above, the United States Supreme Court adopted a very limited rule in the Federal Rules. Rule 43 (b) contains provisions (a) and (e) (which are merely declaratory of general law) and further provides that the calling Party may "impeach him [the adverse party] in all respects as if he had been called by the adverse party." Presumably this includes showing prior inconsistent statements without the necessity of being surprised.[146] But the rule has a limited application and nothing is said about the binding effect of testimony. The problem was presented in *Moran v. Pittsburgh-Des Moines Steel Co.*[147] by an attack on the trial judge's charge to the jury which the appellate court construed to mean that plaintiff was bound by everything an adverse witness called by plaintiff testified to that was not rebutted. The court held the charge reversible error. "Rule 43 (b), we think, is utterly inconsistent with any notion about being bound by his testimony. It seems to us that any statement to the effect that a party is bound by the testimony of a witness whom he is free to contradict and impeach is inherently anomalous."[148]

Moran was a far reaching decision; but the court had farther to go. In 1949 Johnson was killed by one Hall, a detective working for the Baltimore and Ohio Railroad Company. A diversity action against the Railroad was brought under the Pennsylvania Survival Act in the federal district court which was tried three times. The first jury was unable to agree on a verdict; the second jury gave a verdict for $10,000 for the plaintiff which was sent back for a new trial by the trial judge on the issue of damages. The third jury gave a verdict for the plaintiff for $16,000. On the issue of liability the court had told plaintiff's counsel that without calling Hall he did not think the plaintiff had made a case. Plaintiff then called Hall who admitted the killing but testified

[146] See dictum to this effect in Dyer v. MacDougall, 201 F.2d 265, 268 (2d Cir. 1952).

[147] 183 F.2d 467, (3d Cir. 1950).

[148] 183 F.2d 467, 471-472 (3d Cir. 1950).

that he did so in honest and reasonable self defense and explained the facts of the killing in such a way as to support this conclusion. He was corroborated by others to the extent that those others saw knife wounds on Hall after the killing, though they had no way of knowing how they got there. Defendant argued that plaintiff was bound by this testimony of Hall and therefore defendant was entitled to a directed verdict. The Court of Appeals held[149] that Hall did not come within Federal Rule 43 (b) as an adverse witness; plaintiff made no effort to treat him as such, and it is of course doubtful that Hall was a managing agent of defendant anyway. But the court specifically repudiated any idea that the rule which binds a party by what his witness says is appliable to this case. The basic reasoning of the court was that the plaintiff should be permitted to impeach such a witness, whether he be within the statute or not. And in this case the interest of the witness, who alone is available to tell the story, is sufficient to provide a reasonable ground for disbelief. Additionally, the story that Hall told might well have been disbelieved in its particulars as unlikely; but the idea that this reason mentioned by the court was intended to limit the rule permitting an actually adverse witness to be disbelieved to the cases where there are internal weaknesses in the testimony is dispelled by the failure to mention it in the later case of *Larkin v. May Department Stores Company*.[150] Actually the decision in *Johnson* had been fore-shadowed in dictum in *Eckenrode v. Pennsylvania R. R.*[151] On the other hand the sweeping dictum in *United States v. Frank*[152] that *Johnson* destroys the binding rule as to any witness seems unjustified, as in both *Johnson* and *Larkin* the adverse character of the witness was stressed.[153] It has been suggested by one commentator that *Johnson* is on shaky ground because Federal Rule 43 (b) limits impeachment of one's own witness to the adverse witness situation and because the Supreme Court declined to include a clause in

149 Johnson v. Baltimore & O. R.R., 208 F.2d 633 (3d Cir. 1953), cert. den. 347 U.S. 943 (1954).

150 250 F.2d 948 (3d Cir. 1958).

151 164 F.2d 996 (3d Cir. 1947); aff'd, 335 U.S. 329 (1948).

152 151 F.Supp. 866 at 873 (W.D.Pa. 1956).

153 Remember also that plaintiff can always contradict his witness, whether adverse or not, by the testimony of another witness. It might also be argued that Johnson was in reality a case of a derivative inference since the reasonableness of the killing was the issue. This is not the language of the court, however; and strangely enough this sort of thinking is seldom if ever seen in these cases.

Rule 43 (b) permitting a party to show prior contradictory statements of his own witness.[154] As to the first objection: there is nothing in the Rule which specifically limits the right to impeach, nor was the Court asked to do so; and the Rule was intended to liberalize the older binding rule. Moreover the Court has not been inclined to make new law in the field of Evidence by Rule, disassociated from the duty of deciding specific cases. The second objection does not take into consideration the fact that the proposal which the court declined to adopt was not limited to a rule which would have permitted a party to show the prior inconsistent statement of his witness; but rather permitted the showing of a prior inconsistent statement of any witness, no matter who called him, without having first called that statement to the attention of the witness. Discarding the foundation rule is a much more highly debatable question than the advocates of discarding it would have us believe. Another commentator argued that the case should have been directed for the defendant because the testimony of Hall left plaintiff without any proof on the issues on which he had the burden of proof.[155] But the burden of proof on the issue of self defense lay on the defendant,[156] and even if the burden were on the plaintiff the court's position is that the jury should be permitted to believe a part of what Hall testified to and disbelieve the rest. The part they believed could then be so much as showed that the killing was unreasonable.

It should be noted that the logical extenion of *Johnson* is to say that an adverse witness may be disbelieved whether or not he is impeached or contradicted. The mere fact of adversity is a reasonable ground for disbelief. Certainly if this is true as to an adverse witness called by Party A, it should be true if the witness is called by Party B on whose side his interests lie. This is already true in some jurisdictions, but many (if not most) require something more.

From the practical point of view one wonders in many of the cases why counsel brought out through his witness the particular testimony by which he is subsequently held to be bound. It would seem that counsel might well have left this out and forced his opponent to bring it out on his own case. The particular rule regarding the extent of cross-examination will be pertinent here. But if anything this argues for a relaxation of the binding rule:

[154] Note, 102 U. Pa. L. Rev. 675 (1954).

[155] Comment, 1954 Wash. U. L. Q. 348.

[156] PROSSER, TORTS, 88 (2d ed. 1955).

since it applies a purely mechanical test, it places a premium on petty distinctions over who sponsors how much of a witness, and deprives counsel and witness of the right to tell the whole story in a straightforward way.

SUMMARY JUDGMENTS

One cannot conclude this discussion of judicial control of issues of credibility without at least noting their bearing upon the right to Summary judgment. The theory of Summary judgment is that a party should not be permitted to force his opponent to trial merely by pleading properly. It outmodes both the idea that demonstrably false affirmative allegations can only be disposed of by a trial and that by a plea of the general issue (or some modern modification) the defendant can dare the plaintiff to spend the time, effort, and money to prove his case. Unless a genuine issue of fact can be demonstrated, formal trial should not be necessary.

Everyone agrees under such a statute that formal admissions, even though not contained within an authorized pleading, can demonstrate conclusively that no fact issue is left for trial. And in many jurisdictions there are specific provisions to force an opponent to make such admissions, either explicitly or by silence.[157] But there is no such clear agreement when it is made apparent that the fact issue pleaded will ultimately rest upon the credibility of witnesses; except in those cases in which contradictory testimony of different witnesses can be shown, where of course a Summary Judgment would be denied unless under any fact theory a judgment for one party is necessary as a matter of law. Nor does the contradiction we are speaking about have to be direct in the sense that witness X says Fact M is true and witness Y says Fact M is not true. It may be that witness Y merely says Facts O and P are true and from O and P a reasonable inference can be drawn that M is not true. Thus if the issue is the speed of defendant's automobile, witness X may say that he observed it traveling at 10 miles per hour (Fact M). Witness Y may say that he measured skidmarks of 75 feet (Fact O) and the pavement was clean and dry (Fact P).

[157] See: Miller v. Aitken, 160 Neb. 97, 69 N.W.2d 290 (1955) - formal admissions; Kinninger v. School District No. 49, 163 Neb. 33, 77 N.W.2d 767 (1956) - failure to deny requests for admissions; Eden v. Klaas, 165 Neb. 323, 85 N.W.2d 643 (1957) - admissions contained in the affidavit opposing summary judgment.

It should be obvious that whether there is an issue of credibility on the motion for Summary Judgment depends on whether there is any intent on the part of the party opposing the motion to argue that one of the proponent's witnesses may be disbelieved, *and* whether that witness's testimony will be material to a disputed issue. I am here using "disputed issue" to include the ultimate issue (for pleading purposes) and all intermediate issues, or propositions, in the inference pyramid or chain.[158] In the foregoing example, if we discard Y the credibility of X is still not a problem unless the negligence of defendant is an ultimate issue and the speed of defendant is also an intermediate issue. I have said so far that if this is so, then defendant's motion for Summary Judgment will be denied if plaintiff can demonstrate that witness Y will testify either that he observed defendant traveling at 40 miles per hour *or* that he measured defendant's skidmarks of 75 feet on a clean and dry pavement.[159]

But suppose plaintiff has no witness Y and suppose further that no reasonable man could find that 10 miles per hour was a negligent speed. Can plaintiff successfully resist defendant's motion for Summary Judgment by merely claiming that Witness X *may* be disbelieved? If we follow *Dyer v. MacDougall* (as all courts probably do) the defendant will win the motion, for if that is all the evidence there is, plaintiff must fail to prove his case. Does it make any difference that plaintiff can go farther and cast so much doubt on X that there is a strong likelihood that X will be disbelieved? Here lies the distinction that Judge Frank so often made between a motion for summary judgment and a motion for a directed verdict. If we are talking about a directed verdict motion and the state of the evidence merely shows that X has testified to 10 miles per hour and has been shown to be a liar, still defendant will win that motion because the mere fact that X can be reasonably found to be a liar does not mean that there is any legal proof that defendant was traveling at any specific speed which might have been negligent. But on a motion for Summary Judgment we cannot be sure that X will stop there —at a trial, confronted by a judge and jury, X may be induced to change his mind and say defendant was traveling 40 miles per hour. And it may be peculiarly true that this is a demonstrable possibility when we are dealing with facts which are subjective

158 See Healy v. Metropolitan Util. Dist., 158 Neb. 151, 155-156, 62 N.W.2d 543, 546 (1954).

159 The example of course assumes that the issue of speed is the only issue in the case bearing on defendant's negligence.

to the witness, such as knowledge, motive, intent, fraud and the like.[160]

The judicial control of credibility rules may have a further effect on the Summary Judgment motion, as was pointed out by Judge Hand in the *Dyer* case. Can plaintiff gain any ground at all by demonstrating that witness X may be disbelieved, in view of the rules that he cannot impeach his own witness and is bound by their testimony? Hand thought not, at least as to showing prior inconsistent statements, unless Witness X happens to be the defendant because plaintiff will have to call X as his witness. If plaintiff does not have to Call X so much of the problem would not arise; and this would be the case if the issue on which X's testimony is relevant happens to be one on which defendant has the burden of proof.

But suppose that the opponent of the motion for Summary Judgment is not entrapped by the *Dyer* case—the proponent of the motion has the burden of proof, or the opponent has the burden of proof, but the statements of the opponent are the basis of the motion. It is highly doubtful that in the latter case any court would hold that the opponent could defeat the motion simply by arguing that he will testify unfavorably to his own interests but it may be that the jury will disbelieve him. He should be required to say that his testimony will differ from the statements he has made before. Of course it should appear that the difference will still not defeat his position in the law suit. There is though, no reason why he should be required to do this if he can produce other witnesses who contradict him and the jurisdiction would not then grant a motion for directed verdict against him were the evidence in that condition at the end of the trial.

In the former case, where the proponent of the motion has the burden of proof and is not relying on the opponent's own admissions we are met with the old problem of the effect of unimpeached testimony. (We are assuming it is also uncontradicted, either directly or indirectly.) In the terms of Summary Judgment, it is to be expected that most jurisdictions would require the opponent of the motion to demonstrate in some way why it would be reasonable to disbelieve the proponent's witnesses—to show the inherent weaknesses of the testimony or to show some basis for impeachment. But if the State follows the rule that any witnes may

[160] The point is made in Healy, supra note 158; and Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946); Peckham v. Ronrico Corp., 171 F.2d 653 (1st Cir. 1948); Subin v. Goldsmith, 224 F.2d 753 (2d Cir. 1955).

be disbelieved it should follow that the motion will be denied as a matter of course, just as a motion for directed verdict would be denied after trial. And this position on Summary Judgment is enforced by the argument that the opponent should not be required to disclose the nature of his cross-examination beforehand, unless it falls within the area which the jurisdiction legally requires to be disclosed under discovery procedures. It is further enforced by the fact that the demeanor of the witness cannot be evaluated on the Summary Judgment hearing. For these reasons, if a question of credibility is raised by a Summary Judgment motion the motion should be granted even more cautiously than a directed verdict motion after trial. It should, in fact, be enough that the issue is disputed in good faith without requiring a demonstration of the precise manner which will be employed at the trial.

CONCLUSION

In the body of this article I have sought to show the interrelationship of the various situations in which the judge—both trial and appellate—in fact controls the jury's determination of the credibility of witnesses, and further to analyze and criticize some of the rules. To do this I used an artificial classification. By way of conclusion it may be helpful to the reader to suggest a different classification of the various rules, this time in terms of the underlying reasons rather than in terms of the mechanical effect.

Judicial control of credibility has been justified by the courts under one or more of three constantly overlapping concepts. The first of these concepts is that of Judicial Admissions. No civil jury case is ever tried in which this concept is not applied. The parties will always be found to agree on something more than the formal matters in the pleadings, and in the vast majority of cases there are no controversial problems where the concept is restricted to *intended* admissions.

The second concept introduces the idea that the trial judge (and often the appellate judge) has an obligation to keep the determinations of the jury within the bounds of reason. There are many cases in which the inferences bearing on credibility can be demonstrated to be unreasonable, illustrated principally by the Physical Facts rule. But there are many other cases in which reasonableness or unreasonableness is a matter of judgment; and there is here an understandable, if not always defensible, tendency to equate the treatment of testimonial inferences (credibility) with derivative inferences. In many cases the two types

of inferences are inextricably intertwined because the testimony is given in language of derivative inference. In other cases the problem is complicated by a failure to recognize the effect of the application of the burden of proof. It may be further complicated by a failure to recognize that the positions of the trial judge and the appellate judge are essentially different.

The third concept introduces the moral elements underlying estoppel. It starts out with ideas of substantive law, becomes complicated by theories of election grounded in the law of strict pleading, and is supported by the idea that the courts should not lend themselves to what appears to be perjury. It has been further complicated by the rule which forbids a party to impeach his own witness. Both the idea of estoppel and of non-impeachment constantly impinge on both the judicial admission concept and the concept of unreasonableness in the sense that they reinforce the judicial temptation to take the issue of credibility from the jury. The non-impeachment part of this problem has been partially modified by statute in many jurisdictions.

It must be emphasized that although some of the situations can be governed by fairly definable rules, those in which the courts seek to apply the nebulous concepts of reasonableness cannot. Here one can only look profitably for attitudes. It seems to me that those of the Nebraska Supreme Court have generally favored jury determination.