CHAPTER 22

Evidence

FREDERICK A. MC DERMOTT

§22.1. Judicial notice: Foreign law. In the 1954 SURVEY, with reference to the duty of a trial judge to judicially notice applicable foreign law despite the fact that it had not been called to his attention with adequate particularity, it was stated that "The Supreme Judicial Court has avoided any general statement to the effect that the trial court has even the discretion, to say nothing of the responsibility, of taking judicial notice of foreign law, possibly because of fear that recognition of such discretion to notice foreign law sua sponte might easily ripen into the equivalent of a general mandate for research on the part of the trial court." [1]

That statement must now be qualified since the opinion in *Medeiros v. Perry*[2] decided during the 1955 SURVEY year. There the Court observed, "By St. 1926, c. 168, now G.L. (Ter. Ed.) c. 233, §70, our courts may take judicial notice of the law of Rhode Island, even though it was not brought to the attention of the trial court. Hiller v. American Telephone & Telegraph Co., 324 Mass. 24." [3]

The *Hiller* case does not appear to be a precedent for the statement, insofar as it may be taken to refer to the existence of such discretion in the trial court itself.[4] The use of the plural "courts" may well have been inadvertent. Though the ruling is permissive only and does not change the law with respect to the rights of the parties, its effect may be to move a conscientious trial judge to do research which he would previously have left entirely to the diligence of counsel.

§22.2. Judicial notice: Practicability of adoption by persons of the same faith. Since 1950, G.L., c. 210, §5B has provided in part, "In

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§22.1. [1] 1954 Ann. Surv. Mass. Law §26.1.
[2] 332 Mass. 158, 1955 Mass. Adv. Sh. 19, 124 N.E.2d 240.
[3] 1955 Mass. Adv. Sh. at 20, 124 N.E.2d at 241.
[4] 324 Mass. 24, 27-28, 84 N.E.2d 548, 550-551 (1949).

making orders for adoption, the judge when practicable must give custody only to persons of the same religious faith as that of the child." [1]

Another episode in the short but stormy history of this statute of interest in the field of evidence occurred during the SURVEY year. In *Duarte et al., Petitioners,*[2] on an unopposed petition for adoption, the probate court took judicial notice of "the facts brought to its attention, that in this predominantly Catholic community, [New Bedford] there are pending many applications for placements of children of the Catholic faith in homes that can supply both the necessary physical and spiritual requirements where this child can be placed for adoption, and in view of all the circumstances, it would not be 'practicable' in this instance to give custody to persons of a different religious faith than that of the child." [3]

The Supreme Judicial Court reversed the decree dismissing the petition on the ground that the judge had erred in so taking judicial notice. Such facts, said the Court, may have been personally known to the probate judge, but, if so, this was his knowledge as an individual observer outside of court, and not a matter of common knowledge or knowledge by notoriety.

Although the correctness of the Court's conclusion as to the current content of the mass mind might well be open to serious doubt, discussion upon such a line would not be useful.[4] However, the Court seems to imply that there is no other basis on which judicial notice of such facts might be properly rested. Exception may well be taken to such a proposition.

As the Court once said, ". . . we are not inclined to a narrow and illiberal application of the doctrine of judicial notice." [5] The *Duarte* decision does not appear to be consistent with such a policy, nor with recent judicial precedent. In *Petition of Mazurowski,*[6] discussed in the 1954 SURVEY,[7] the Supreme Judicial Court upheld certain orders of the probate judge under the provisions of the so-called "Iron Curtain" statute, saying:

> The judge of probate ruled, we think rightly, that "Inasmuch as there was no adverse party" the responsibility rested upon the judge "to see that the proper parties are entitled to receive the funds at their full value." Accordingly, acting sua sponte, he made inquiries from the Department of State . . . We think that it was proper for the judge to avail himself and that it is proper

§22.2. [1] Acts of 1950, c. 737, §3.

[2] 331 Mass. 747, 122 N.E.2d 890 (1954). This case is also discussed in §9.3 *supra.*

[3] 331 Mass. at 749, 122 N.E.2d at 892.

[4] ["Roma locuta, causa finita."] See the dissenting opinion of Justice Ronan in Gally et al., Petitioners, 329 Mass. 143, 158, 107 N.E.2d 21, 30 (1952).

[5] Finlay v. Eastern Racing Assn., 308 Mass. 20, 27, 30 N.E.2d 859, 863 (1941).

[6] 331 Mass. 33, 116 N.E.2d 854 (1954).

[7] 1954 Ann. Surv. Mass. Law §26.1.

> for us to avail ourselves, of superior sources of information on such matters relating to foreign law and administrative regulations possessed by the high executive officers of the government, but not directly available to the courts or to litigants.[8]

In the *Duarte* case there was no opposition to the petition which might have produced evidence as to the availability of possible adopting parents of the faith of the child. There was no guardian ad litem appointed who might have investigated and reported the facts to the court or opposed the petition on the ground of the statute, as was done in *Goldman, Petitioner.*[9] The report of the Department of Public Welfare filed with the Probate Court as required by Acts of 1950, c. 737, §2, now G.L., c. 210, §5A, in cases of petitions involving a child under fourteen, did not contain any information as to the practicability of adoption by parents of the same faith as the child, despite the fact that a report adequate to "give the court full knowledge of the desirability of the proposed adoption" has been held to be a condition precedent to a decree on such a petition, which the Probate Court is powerless to waive.[10] In the *Duarte* case, the attempt of the probate judge to inform himself by judicial notice was held to be error.

While it has always been regarded as proper for the court to take into account the matter of religion in adoption cases,[11] Section 5B made the practicability of adoption by parents of the same faith as the child the controlling factor, as a matter of public policy of the Commonwealth. The facts relevant in each case should be ensured of intelligent determination in some manner in the Probate Court, or this aspect of our public policy will be largely a dead letter of the statute law. The probate judge, under Section 5B, as well as under the well-settled principles generally governing adoption proceedings, is obliged to exercise a sound discretion.[12] (It is difficult to see how discretion can be sound if it is not informed.)

In the *Duarte* case, as in the earlier case of *Gally et al., Petitioners,*[13] there was a total absence of evidence or information before the court as to the availability of possible adopting parents of the same faith as the child, aside from the abortive attempt at judicial notice. Never-

[8] 331 Mass. at 38-39, 116 N.E.2d at 858.

[9] 331 Mass. 647, 121 N.E.2d 843 (1954), *cert. denied sub nom.* Goldman v. Fogarty, 348 U.S. 942 (1955), discussed in 1954 Ann. Surv. Mass. Law §§11.10, 13.6.

[10] Krakow v. Department of Public Welfare, 326 Mass. 452, 95 N.E.2d 184 (1950). In the earlier cases thus far decided under G.L., c. 210, §5B — Gally et al., Petitioners, 329 Mass. 143, 107 N.E.2d 21 (1952); Goldman, Petitioner, note 9 *supra,* — as well as in the Duarte case, the reports filed by the Department of Public Welfare made no reference to the practicability of adoption by parents of the same faith as the child, and the omission was not adverted to in the opinions of the Supreme Judicial Court.

[11] Purinton v. Jamrock, 195 Mass. 187, 80 N.E. 802 (1907).

[12] Gally et al., Petitioners, 329 Mass. 143, 147-149, 107 N.E.2d 21, 24-25 (1952).

[13] Ibid.

theless, it was held in the *Gally* case, and confirmed in the *Duarte* opinion, that adoption *must* be decreed where the petitioners, though of a disparate faith, are found to be otherwise suitable, despite the fact that in both cases, because of the absolute lack of evidence or information, there necessarily was a complete default of the judicial discretion required in respect to the public policy underlying Section 5B.

The effect of the *Gally* case, as thus confirmed in the *Duarte* decision, is that there is no burden upon petitioners of a different faith to establish that adoption by parents of the same faith as the child is not practicable,[14] and further, that there is no affirmative duty on the probate judge to take any steps to inform himself so as to be able to exercise the discretion required under the statute.

It would seem to be obvious that the probate judge could easily make, or cause to be made, inquiry of the Department of Public Welfare and of appropriate charitable corporations engaged in child care for reports as to the practicability of adoption by parents of the faith of the child. The analogy of this procedure to the historic resort to an amicus curiae is clear.[15] That the information so obtained may not be within the common knowledge of the man in the street is not material. The rights of petitioners may be guarded by notifying them of the information so acquired, and affording to them opportunity to present such other information as they might desire relevant to the matter to be noticed.[16]

It may be conservatively thought that a finding on evidence is to be preferred to the taking of judicial notice on a matter of this kind. However, the basis on which such a finding may be arrived at in practice may be observed by examination of the record in the case of *Goldman, Petitioner.* The "detailed evidence" which was held sufficient in that case to support a finding of practicability of adoption by parents of the same faith appears to have consisted of a conglomeration of hearsay no better than and of exactly the same type as would be obtained by the inquiry suggested above.[17] In fact, the question appears to be one highly unsuited to trial in the usual manner upon evidence, and capable of being better handled on a basis of judicial

[14] The statement apparently to the contrary in Goldman, Petitioner, 331 Mass. 647, 652, 122 N.E.2d 843, 845 (1954), must be taken to be qualified by the implications of the Gally and Duarte decisions.

[15] See The Claveresk, 264 Fed. 276, 279 (2d Cir. 1920); Beckwith and Soberheim, Amicus Curia — Ministers of Justice, 17 Ford. L. Rev. 38 (1948).

[16] Cf. Model Code of Evidence, Rule 804(1): "The judge shall inform the parties of the tenor of any matter to be judicially noticed by him and afford each of them reasonable opportunity to present to him information relevant to the propriety of taking such judicial notice or to the tenor of the matter to be noticed."

[17] The Court itself was moved to remark: "It is true . . . that it would have been more desirable if more definite proof could have been had that suitable Catholic persons had actually seen these particular children and stood ready to adopt both of them at the same time. Such more definite proof, however, would probably, in the circumstances, have been hard to obtain." 331 Mass. 647, 650, 121 N.E.2d 843, 845 (1954).

notice, particularly in the non-adversary atmosphere of an adoption proceeding, where the best interests of the child, and not the performance put on by the parties in a courtroom, is the paramount consideration.

It may be that Acts of 1954, c. 649, now G.L., c. 210, §2A, which in the case of adoption of a child under fourteen by anyone other than a blood relative, step-parent or testamentary guardian, requires approval by the Department of Public Welfare or a charitable corporation engaged in child care, will minimize the unfortunate effect of the holdings in the *Gally* and *Duarte* cases in the field of adoption. However, no cases have yet construed that statute, and its validity, meaning, and implementation are still to be decided.

At any rate, it is to be hoped that the implications of the decision in *Duarte* having a constrictive effect on the general exercise of judicial notice will not be extended in future decisions in the field of evidence.

§22.3. Relevancy: Benefits received during claimed disability. A case of great importance in the trial of personal injury claims was decided during the 1955 SURVEY year in *McElwain v. Capotosto.*[1] The plaintiff, a post-office employee, testified to defendant's negligent operation of a motor vehicle which resulted in a collision with a mail truck, causing injury to and disability of the plaintiff. In cross-examination defendant sought to elicit from plaintiff an admission that he would be entitled to receive pay or disability compensation while absent from work after such an accident. Plaintiff objected that such evidence would not be relevant in mitigation of damages. The judge, who was sitting without a jury, agreed, but admitted the line of questioning to show the degree of disability. Plaintiff's answers indicated that he would get such pay or compensation. The judge found specifically that defendant was negligent, but also found that plaintiff suffered no damages that were the direct and proximate result thereof.

The Supreme Judicial Court noted that the record was not clear that plaintiff had seasonably excepted to all of the evidence, but was of the opinion that its admission was within the discretion of the trial judge, saying:

> We think the judge meant that the line of questioning had some bearing on the issue whether the plaintiff's absence from work was really due to an injury received at the time of the accident or was caused or prolonged by the fact that he would be paid if he did not work, even though the sum paid him would not reduce the recoverable damages for any period of disability actually due to the accident . . . It is elementary that the extent of cross-examination is generally within the control of the trial judge.[2]

§22.3. [1] 332 Mass. 1, 1955 Mass. Adv. Sh. 865, 122 N.E.2d 901.
[2] 1955 Mass. Adv. Sh. at 866, 122 N.E.2d at 902.

The particular question does not appear to have been previously passed on in Massachusetts.[3] The holding will open a wide and fertile field for defense counsel. There appears to be no basis for distinguishing a case where plaintiff is entitled to collect substantial accident or disability insurance benefits by a contract extrinsic to his employment. In fact, there seems to be no reason to limit the ruling to cases where plaintiff is legally entitled to collect such payments or benefits — it would appear to be equally relevant to prove that a solicitous employer, relative, or other person gratuitously conferred substantial benefits on the plaintiff during the period of the alleged disability. It may be argued effectively that the receipt of such benefits of a substantial nature in addition to the prospect of collecting full damages for loss of earning capacity from the defendant, for doing nothing, must have appeared more attractive to the plaintiff than a return to work. Particularly will this be true where the plaintiff's symptoms are largely subjective and therefore lacking solid supporting medical testimony.

The holding appears to be proper. The burden of proof on the issue of disability is on the plaintiff. The evidence is designed to attack the credibility of his testimony on that issue. The objection that such evidence of itself does not create a real probability, but proves only the possibility that plaintiff was motivated by considerations other than an actual disability, is not valid. Such an objection would be well taken to such evidence offered by the party with the burden of proving a particular motive, whose case must create more than mere speculation or conjecture. However, when the evidence is offered, as here, by the defendant, who does not have the burden of proof as to motive, it is sufficient for admission that it may properly create in the mind of the fact finder a feeling of doubt sufficient to prevent persuasion by the plaintiff's testimony as to his claimed motive.

In fact, the opinion, while adequate to the decision, perhaps understates the merits of defendant's position. The Court affirms the ruling as within the discretion of the trial judge. It would appear that the proof of facts establishing the existence of a reasonably believable motive other than that asserted by the plaintiff is so pertinent on the question of his credibility as to make its admission a matter of right and not of favor. The evidence is of course collateral on the merits, but it is certainly not collateral on plaintiff's credibility.

It is true that the *McElwain* decision might be regarded as an opening wedge and it might be feared that purportedly under its authority evidence of very remote and highly improbable motives might be of-

[3] No authority is cited in the opinion except for the general proposition as to the discretion of the trial judge. No case in Massachusetts directly in point has been found. See, however, Feins v. Ralby, 245 Mass. 228, 134 N.E. 530 (1923); Ceresola v. Joseph F. Paul Co., 224 Mass. 395, 113 N.E. 358 (1916); Bock v. Wall, 207 Mass. 506, 93 N.E. 821 (1911); Hanson & Parker v. Wittenberg, 205 Mass. 319, 91 N.E. 383 (1910); Clarke v. Brown, 120 Mass. 206 (1876).

fered. The obvious answer is stated in the opinion, namely, that whether other possible motivation sought to be established is of sufficient probability to be relevant is a question for the trial judge, and in drawing the line in such matters much must necessarily be left to his discretion.

§22.4. **Evidential effect of notary's certificate on issue of acknowledgment.** In the case of *Hale v. Hale,*[1] a divorced wife brought against her former husband a petition for partition of a parcel of real estate which had been owned by them as tenants by the entirety. At the trial the respondent relied upon a deed executed by the petitioner during the marriage conveying directly to her husband all her right, title and interest in the property.[2] The probate judge, after hearing and without decision, reserved and reported the case to the Supreme Judicial Court upon the pleadings and the evidence.

The deed contained the usual certificate of a notary public to the effect that the grantor had appeared and acknowledged the instrument to be her free act and deed. Petitioner contended, however, that the deed was invalid under the provision of the enabling statute that "no such . . . conveyance . . . shall have any effect, either in passing title or otherwise, until the deed . . . is duly acknowledged and recorded . . ." [3] The evidence, petitioner argued, showed that the deed in question had not been duly acknowledged, although it had been recorded.

The Court summarized the petitioner's "evidence" of non-acknowledgment as follows: "The petitioner testified that she did not remember appearing before a notary and acknowledging the deed. All that the respondent's testimony added to this was that he was not sure whether the petitioner signed the deed at home or at his office, but he took it to the registry for recording immediately after it was signed." [4] In disposing adversely of the petitioner's contention, the Court said:

> Although there is no finding of the judge on the issue of acknowledgment, we are of opinion that a finding that the deed was not duly acknowledged would not be justified . . . the notary's certificate is proof presumptive of a valid acknowledgment. "The legal presumption of the proper performance of official duty by a public officer requires that this effect should be given it." *Iantosca v. Iantosca,* 324 Mass. 316, 321-322. Perhaps strictly speaking this is not a true presumption but rather the drawing of an inference of regularity and compliance with law. See *Moroni v. Brawders,* 317 Mass. 48, 52-53; Wigmore on Evidence (3rd ed.) §2534. The recitals in the certificate, of course, could be contradicted but we are of opinion that the evidence fell far

§22.4. [1] 332 Mass. 329, 1955 Mass. Adv. Sh. 221, 125 N.E.2d 142.
[2] See §1.7 *supra* for a discussion of the case on the merits.
[3] G.L., c. 209, §3.
[4] 1955 Mass. Adv. Sh. at 225, 125 N.E.2d at 144.

short of doing so . . . [The petitioner's evidence] did not rebut the presumption or inference of regularity raised by the certificate. There would be little security in conveyances of real estate if a certificate of acknowledgment could be set at naught by such evidence fourteen years later.[5]

The opinion leaves much to be desired from the point of view of the law of evidence. The Court did not expressly rule upon the somewhat troublesome question as to where lies the burden of proof upon the issue.[6] If the burden were held to be upon the petitioner to prove the deed invalid for lack of due acknowledgment, since in the light of the Court's evaluation of petitioner's "evidence" there was *no* evidence to that effect, the decision could have been rested upon the fundamental proposition that where there is no evidence in his favor the party with the burden of proof must *as a matter of law* lose upon the issue.[7]

The fact that the case was not so simply disposed of might be taken to indicate that the Court was of the opinion that the burden was upon the respondent, who relied upon the deed, to establish that it was duly acknowledged. The following discussion will proceed on that assumption.

As has already been noted, the Court held that the notary's certificate raised either an inference or a presumption of acknowledgment; it also held that there was no evidence to the contrary. The decision on the issue was expressed in the words earlier quoted: ". . . we are of opinion that a finding that the deed was not acknowledged would not be justified. . . . [The petitioner's evidence] did not rebut the presumption or inference of regularity raised by the certificate." It must be remembered that the Court was sitting as fact finder as well as ruling on questions of law. Therefore, it is impossible to determine whether the Court *ruled* that a finding of non-acknowledgment was not possible as a matter of law on the ground that the notary's certificate created a presumption and there was no evidence to the contrary,[8] or, on the other hand, *found* the acknowledgment as a matter of fact on weighing the evidence, the certificate being given the effect of an inference.[9] As it stands, the case might well be taken as a

[5] 1955 Mass. Adv. Sh. at 224-225, 125 N.E.2d at 144.

[6] Compare as to the burden of proof the analogous but perhaps distinguishable situation presented in Iantosca v. Iantosca, 324 Mass. 316, 86 N.E.2d 59 (1949), cited by the Court, and referred to later in this section, where the burden of proof was held to be upon a petitioner who sought to set aside a deed similar to that involved in the Hale case.

[7] Shurdut v. John Hancock Mut. Life Ins. Co., 320 Mass. 728, 731, 71 N.E.2d 391, 392 (1947).

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

[9] Cook v. Farm Service Stores, Inc., 301 Mass. 564, 566, 569, 17 N.E.2d 890, 892, 894 (1939).

prime example of the trial judge's classic self-protective formula: "So far as the question is one of fact, I find, and so far as it is one of law, I rule . . ." [10]

The possibility that the certificate has the effect of a presumption is inconsistent with the recent case of *Iantosca v. Iantosca,*[11] cited in the *Hale* opinion. That case arose on a petition by a divorced husband to set aside a deed executed by him during the marriage conveying realty directly to his wife, and also involved the evidential effect of a notary's certificate of acknowledgment contained in the deed. In the opinion the following language appears: "The burden was on the petitioner to prove that the deed was ineffective to pass title and, although he testified that he never acknowledged the deed, the judge could disbelieve him and find proper acknowledgment from the evidence of the certificate alone." [12] This statement, which gives evidential effect to the notary's certificate despite the presence of evidence to the contrary, is inconsistent with the position of the Court in the *Hale* case that it is possible that the certificate has the effect merely of a presumption. Under well-settled Massachusetts authority, a presumption is not itself evidence, but is an artificial compelling force assigned as a matter of law to a basic fact in the absence of evidence to the contrary of the presumed fact, which however when met by such evidence dissolves, leaving nothing for the consideration of the fact finder.[13]

The alternative offered in the *Hale* case, that the certificate of the notary be deemed to create an inference, would be consistent with the language of the Court in the *Iantosca* case, since the evidential force of an inference survives the introduction of evidence to the contrary.[14] However, the vice inherent in this alternative lies in the fact that as a matter of law an inference, even in the total absence of evidence to the contrary, presents a question for the fact finder upon which it is an elementary proposition that he or they may properly find either way. The effect of a notary's certificate of acknowledgment upon a deed, in the total absence of evidence to the contrary, should not be so left to the whim or caprice of the fact finder, who may properly find that the naked fact of certification persuades as to due acknowledgment in one case, while in another it does not.

Fortunately there is another alternative and preferable ruling of law as to the evidentiary effect of the certificate which apparently was not adverted to in either the *Iantosca* or *Hale* decisions. That ruling would be that a notary's certificate constitutes prima facie evidence. Prima facie evidence combines the advantage of both the presumption

[10] Perry v. Hanover, 314 Mass. 167, 50 N.E.2d 41 (1943), and cases cited. See also the dissenting opinion of Justice Counihan in Ferullo's Case, 331 Mass. 635, 121 N.E.2d 858 (1954).

[11] 324 Mass. 316, 86 N.E.2d 59 (1949).

[12] 324 Mass. at 321, 86 N.E.2d at 61.

[13] Duggan v. Bay State Street Ry., 230 Mass. 370, 119 N.E. 757 (1918). See also the cases cited in Epstein v. Boston Housing Authority, 317 Mass. 297, 58 N.E.2d 135 (1944).

[14] Cook v. Farm Service Stores, Inc., 301 Mass. 564, 566, 17 N.E.2d 890, 892 (1939).

and the inference, since it has the effect of artificially compelling a finding in the absence of evidence to the contrary, *and* of permitting a finding even in its presence.[15]

Where the question whether particular evidence creates a presumption or an inference is so close as to make the Court refrain from deciding that it is one and not the other, an obviously desirable ruling is that it has not the effect of either alone, but that of both; in other words, it constitutes prima facie evidence.[16]

§22.5. Opinion evidence: Admissibility. The general rule which excludes expert opinion testimony where it is not required was exemplified during the SURVEY year in *Turcotte v. Dewitt*.[1] In that case plaintiff attempted to obtain the opinion of a police officer as to whether a skid mark observed by him at the scene of an accident was caused by the vehicles involved in the collision. The mark, the positions of the vehicles, and the debris in the area were described in the evidence. The exclusion of the offered evidence was affirmed with the comment that "Where a matter may easily be comprehended by jurors the testimony of an expert has no place. . . . On the other hand, if the subject is of such character or complexity that it cannot be assumed to be within the ordinary experience or knowledge of men, the testimony of an expert is admissible." [2]

An interesting example of a close question on that seemingly simple distinction was soon afforded in *Alden v. Norwood Arena, Inc.*[3] This was an action for death and conscious suffering. The evidence question arose on the issue of conscious suffering. An entry in a hospital record indicated that the deceased had been immediately rendered unconscious by the accident, and had remained so until her death. The plaintiff, the husband of the deceased, who was a physician, had been almost constantly at the hospital bedside of his wife for more than twenty-four hours until her death. As indicating consciousness and suffering, the plaintiff testified that he repeatedly spoke in his wife's ear and, while she could not speak, on four occasions she squeezed his hand, that he observed her facial expression, breathing, color, and movements, that she squirmed to get away from pin pricks, and groaned occasionally.

As the Court noted, citing cases, "There are decisions in which groans, responses and movements are considered as equally consistent with consciousness or unconsciousness." [4] However, the trial court's denial of defendant's motion for a directed verdict on the count for conscious suffering was affirmed. "But considering the fact that Dr. Alden was a physician of many years' experience, we think that his

15 Ibid.

16 See Payne v. R. H. White Co., 314 Mass. 63, 65, 49 N.E.2d 425, 426 (1943).

§22.5. 1 332 Mass. 160, 1955 Mass. Adv. Sh. 21, 124 N.E.2d 241.

2 1955 Mass. Adv. Sh. at 25, 124 N.E.2d at 245.

3 332 Mass. 267, 1955 Mass. Adv. Sh. 137, 124 N.E.2d 505.

4 1955 Mass. Adv. Sh. at 142, 124 N.E.2d at 509.

testimony as to the significance of his wife's appearance and behavior was enough to warrant the judge in submitting the case to the jury." [5] As the Court also said, the question whether there was evidence of conscious suffering to go to the jury is very close.

The questions asked of Dr. Alden were apparently identical in format with those which could properly be asked of a lay witness, in directing his attention to his observations of fact.[6] The answers of a lay witness might also well have been couched in the same terms of description of the facts as those given by Dr. Alden, since they were simple and commonplace. However, while the answers purport to state observations of fact only, they are pregnant with the opinion of the witness, which necessarily controls in the selection of the facts to be contained in the answers.[7]

In the case of a lay witness, such an opinion, whether expressed or implicit, would probably be disregarded on the ground that the jury would be as capable as the witness of drawing the proper inference. The intimations of the *Alden* case are that the factual manifestations in evidence, standing alone, would have been regarded as ambiguous, and defendant would have been entitled to a directed verdict.[8] However, the facts in evidence did not stand alone, for the Court allowed them to be enhanced by the fact that they were observed by a physician.

Whether the witness was cast by the Court as a true expert in the subject or merely as one with greater than ordinary familiarity with such matters[9] is not clear. Whether there is true expertness in a case of this sort is perhaps doubtful. A conclusion as to consciousness or suffering might well be regarded as an elementary judgment, like that of drunkenness, for example, which also is often difficult to establish by description of observations of fact, but is commonly inferred, and admits of lay opinion.[10]

[5] Ibid.

[6] See, for example, comparable questions ruled admissible in will contests: "Did you ever notice anything to indicate that he [testator] was not of sound mind?" McCoy v. Jordan, 184 Mass. 575, 578, 69 N.E. 358, 359 (1904). "Did you ever notice anything about her [testatrix's] condition that indicated anything singular or unusual respecting her mental condition?" Gorham v. Moor, 197 Mass. 522, 523, 84 N.E. 436, 437 (1908).

[7] For a pungent criticism of this aspect of the Massachusetts rule on opinion testimony, see Hardy v. Merrill, 56 N.H. 227, 250-252 (1875).

[8] Where the only manifestations in evidence are as consistent with purely reflex actions as with conscious effort, the plaintiff cannot avoid a directed verdict, Edgarton v. H. P. Welch Co., 321 Mass. 603, 613, 74 N.E.2d 674, 680 (1947), since the effect of such evidence on the issue would rest entirely upon speculation. Allicia v. Boston Revere Beach & Lynn R.R. Co., 294 Mass. 488, 490, 2 N.E.2d 457, 458 (1936).

[9] "Persons not owners but sufficiently familiar with the property in controversy to express an opinion upon its value have been allowed to do so though not regarded as experts." Menici v. Orton Crane and Shovel Co., 285 Mass. 499, 504, 184 N.E. 839, 841 (1934). See also Rubin v. Town of Arlington, 327 Mass. 382, 384, 99 N.E.2d 30, 31 (1951).

[10] "While it might not be easy accurately to describe each and every minute detail indicative of intoxication, yet the principal objective symptoms are so well known that witnesses have always been permitted to express their opinion as to

§22.6. Opinion: Requisite evidential foundation. The requirement that the opinion testimony of an expert be supported by evidence of all the facts upon which the opinion is based was well illustrated in contrasting cases decided during the 1955 SURVEY year. The general rule appears to be simple and clear; however, in application it is sometimes confusing because of the incorporation of hearsay elements into the testimony of the expert, particularly when his opinion is given in evidence directly on the issue, and not on an express hypothesis as to the basic facts. A brief statement of the governing principles preliminary to examination of the cases is desirable.

The ultimate relevance of any opinion testimony will of course depend upon whether the facts actually found by the fact finder jibe with the facts upon which the opinion is based. Therefore, unless evidence of all of the basic facts is already present when the opinion is offered, the opinion is not immediately relevant, and may be admitted de bene only, and, if the evidence then lacking is not later supplied, the opinion evidence is subject to a motion to strike. Even where all of the basic facts are already in evidence, the general rule is that, to avoid even the appearance of usurpation of the function of the fact finder, opinion may be given in evidence only in the form of an assumption or hypothesis, expressed or implied, as to the basic facts.[1]

This general rule, however, is relaxed in the case of the expert witness who testifies of his own knowledge as to all the basic facts, who is permitted to state his opinion directly on the issue, and not only upon an hypothesis. A still further liberality of practice is found, most commonly in the case of a physician who has treated or examined a patient and has formulated an opinion based in part upon his own observation and in part upon hearsay as to the case history, who also is permitted to testify directly to his opinion as to the condition of the patient without the requirement of an hypothesis as to either the basic facts he observed or those he relied on from hearsay.[2] Even here, however, it must be realized that the opinion is necessarily admitted as an exception and de bene only, whether such condition of its admission is expressed or not. Unless there appears other evidence to prove the basic facts of the case history to which the witness testified only from hearsay, his opinion is never rendered relevant, and is subject to a motion to strike. This was made clear in the Court's discussion in *Charron's Case*,[3] decided at the end of the 1954 SURVEY year.

In *Kinney v. Commonwealth*,[4] a land damage case which came down

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the inebriety of a person." Holton v. Boston Elevated Ry., 303 Mass. 242, 246, 21 N.E.2d 251, 253 (1939).

§22.6. [1] Connor v. O'Donell, 230 Mass. 39, 119 N.E. 446 (1918); Commonwealth v. Russ, 232 Mass. 58, 72-74, 122 N.E. 176, 182 (1919); Commonwealth v. Moore, 323 Mass. 70, 75, 80 N.E.2d 24, 27 (1948).

[2] Barber v. Merriam, 11 Allen 322, 324-325 (Mass. 1865); Cronin v. Fitchburg & Co. Street Ry., 181 Mass. 202, 203-204, 63 N.E. 335, 336 (1902).

[3] 331 Mass. 519, 120 N.E.2d 754 (1954).

[4] 332 Mass. 568, 1955 Mass. Adv. Sh. 493, 126 N.E.2d 365.

in the 1955 SURVEY year, the petitioners contended and there was evidence to the effect that the premises had been used as a farm before the taking. An expert for the Commonwealth stated his opinion as to the value of the premises before and after the taking, and when asked to give the reasons therefor, testified that he had considered the location of the real estate, the size and topography of the property, the use to which the property was being put, the use for which the property had formerly in years gone by been used, the use to which the property was adapted; that this was not a farm, that it was a home which a man who was engaged in other lines of business could use for his hobbies. On cross-examination counsel for petitioners elicited from the witness the statement that his "major assumption" in forming his opinion on value was that the principal use of the premises was as a home and not as a farm. Petitioners, relying on what had been said in *Charron's Case,* immediately asked that all of the evidence of the expert be stricken, and excepted to the refusal by the trial judge.

The use of the word "assumption" in describing the mental operation of the expert in categorizing the locus as a home and not a farm is unfortunate, but should not be permitted to obscure its true character. Here the expert personally observed the locus, and from his own factual observations could infer that it was not suitable for use as a farm. Insofar as it might be thought that that inference involved expert opinion, it would appear to be clearly within his competence as a real estate expert to formulate and state it. The intimation of the case, moreover, is that such an inference or opinion is within the common or normal experience of a Berkshire County jury, since the Court commented that "the jury took a view and from it could form their own judgment as to what the whole area had been used for before the taking." [5] On this basis, the inference needed no true expertness, but merely familiarity with the subject matter.[6] In either view, there was certainly more than a mere "assumption" of a basic fact relied upon in the opinion. The Court therefore distinguished the case from the situation discussed in *Charron's Case,* on the ground that the opinion of the expert here was actually based primarily upon examination and observation of the land, by the expert himself.

A case at the other extreme is found in *State Tax Commission v. Assessors of Springfield.*[7] At a hearing before the Appellate Tax Board, an expert witness for the city was allowed over objection to state his opinion as to the value for tax purposes of the plant of telephone and telegraph companies located in Springfield. The expert testified that he had based his opinion of value not only upon information acquired from field inspections made by him or under his direc-

[5] 1955 Mass. Adv. Sh. at 496, 126 N.E.2d at 368.

[6] Cf. §22.5 *supra,* note 9.

[7] 331 Mass. 677, 122 N.E.2d 372 (1954). On the same day the Court disposed of a similar case involving the same issue. State Tax Commission v. Assessors of Haverhill, 331 Mass. 685, 122 N.E.2d 377 (1954).

tion, but also on his own estimates and inferences as to the taxable property underground which he did not see and could not see, predicated on company inventories and reports to the Tax Commissioner and conduit prints in the city engineer's office. His testimony was the only evidence in the case as to the property; the inventories, reports and prints were not in evidence.

The Commission appealed, and the Supreme Judicial Court reversed, saying in part:

> The witness here was admittedly an expert qualified to give an opinion as to the value of the plant of a telephone company, but his experience did not enable him to provide by hearsay the only evidence of what the property was. The question, which is whether there was any basis for his opinion, is one of substance and not of form. . . .
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> That the case was tried before an administrative tribunal and not in a court of law does not render it subject to a different principle. To the slight extent that the record discloses what the property was, there is hearsay exclusively.[8]

[8] 331 Mass. at 684-685, 122 N.E.2d at 376-377.