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## Evidence: Use of Scientific Books Under the Hearsay Rule

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Despite the strong reasoning advanced by the courts holding contracts absolving a husband of his duty to support his wife void, there are decisions holding such contracts valid and binding upon the parties. *In re Tierney's Estate*, 266 N.Y.S. 51 (1933); *Greenfield v. Greenfield*, 146 N.Y.S. 865 (1914); *Goldman v. Goldman*, 282 N.Y. 296, 26 N.E. (2d) 265 (1940); *Hallam v. Hallam*, 298 Ill. App. 445, 19 N.E. (2d) 101 (1939); *Reardon v. Woerner*, 97 N.Y.S. 747 (1906); *Garlock v. Garlock*, 5 N.Y.S. (2d) 619 (1938); *Winter v. Winter*, 191 N.Y. 462 (1908). In *Greenfield v. Greenfield, supra*, the court held valid a separation agreement of \$2,500 for a wife's release of all claims, present and future, against her husband's support. In *Reardon v. Woerner, supra*, the court considered a contract in which the husband agreed to pay a trustee for the wife's benefit to be valid. And in *Garlock v. Garlock, supra*, the agreement provided that the husband pay \$15,000 annually in return for a release of his liability for further support of his wife; this was held to be binding. The underlying basis for the decisions holding support contracts to be valid is probably expressed in *Winter v. Winter, supra*: "She (the wife) is the best judge of what she needs for support and the amount may be fixed and settled by agreement made after actual separation without violating any principal of law or any statute now in existence." It is interesting to note that the New York cases cited above were decided in the face of a statute directly declaring such contract to be void. *Hallam v. Hallam, supra*, gives a logical reason for the side-stepping of this statute, "Hallam did not seek to avoid his obligation, but, on the contrary met it by creating this annuity as agreed."

The amount of money provided in a contract for the support of the wife seems to be of primary importance in determining the validity of a settlement. If the amount is ample, considering the circumstances of the parties, then it is likely to be upheld. If not, then the settlement is likely to be declared void either as against public policy or statute, or because it is "inequitable." In the last analysis it would seem that the courts decide whether a settlement is fair and adequate under all the circumstances. If they feel that a settlement is inadequate, they have no difficulty in finding a basis for voiding it.

Wisconsin courts have not had occasion to decide this question squarely but by their dicta they indicate that they would hold such contracts void. *Ryan v. Dockery*, 134 Wis. 431 (1908); *Rowell v. Barber*, 142 Wis. 304, 318 (1910); *Perkinson v. Clarke*, 135 Wis. 584, 591 (1908); *Estate of Simonson*, 164 Wis. 590, 594 (1917). In *Ryan v. Dockery, supra*, a husband contracted to care for, nurse and support his blind wife. The court, stated: that the husband could receive no remuneration for the care of his invalid wife, "The law requires a husband to support, care for, and provide comforts for his wife in sickness as well as in health . . . The husband cannot shirk it even by contract with his wife." A husband and wife, it was said, may contract with each other before marriage as to their mutual property rights, but they cannot vary the personal duties and obligations to each other which result from the marriage contract itself.

ROBERT T. MCGRAW.

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**Evidence—Use of Scientific Books under the Hearsay Rule.**—The defendant was indicted for larceny by false pretenses. The State alleged that he had fraudulently induced the complainant to transfer to him certain valuable property by the aid of false representations. It was claimed that the defendant made certain claims as to the character or quality of certain mining property, held

by the Holmes Western Consolidated Mines, Inc., and assertions as to the extent of the holdings of capital stock of that corporation by the defendant and his associates. Hoval A. Smith, a mining engineer, was a witness for the defendant and testified that he believed that the mining properties in question possessed great future potential value. A certain private written report by one Morris J. Elsing, also a mining engineer, was then produced by the counsel for the State. The report of Elsing set forth detailed conclusions essentially contradictory to the testimony that Smith had given on his direct examination. Upon cross examination, testimony disclosed that Smith had an utterly different conception of the value of the properties than Elsing. Defendant objected to the admission of Elsing's report. The trial judge said, "The rules of evidence provide that when an expert takes the stand and gives an opinion he may . . . be shown other books and other opinions, and asked whether he agrees with the other books or the opinions therein contained." Elsing's report was admitted.

It was *held*, on appeal, that such a broad ruling could not be sustained. There was no attempt to impeach any testimony of the witness respecting this report. Smith had made no reference to the report upon his direct examination. The State used the deductions of the absent Elsing as self-probative direct contradictions of Smith's evidence for the defendant. The court stated that such a breach of the rule against "hearsay" would not be allowed. *People v. Riccardi*, 32 N.E. (2nd) 776 (N.Y. 1941).

The principal case raises the question of the extent to which, under the hearsay rule, books and written reports may be used at a trial, either with or without the author being a witness.

Life and mortality tables are almost universally accepted to be admissible as true and correct evidence of all they contain. "It has long been unquestioned that standard tables of mortality (used in computing annuities, life insurance sums, dower, and damages for the loss of life) and almanacs are admissible in evidence." 3 Wigmore on Evidence (2 Edition 1923) sec. 1698, page 647. Because the statements in such publications are accurate and correct, they may be read into the record. *Penley v. Teague and Harlow Co.*, 126 Me. 583, 140 Atl. 374 (1928). However, mortality tables, though admissible on the question of life expectancy, are not conclusive. *Donoghue v. Smith*, 114 Conn. 64, 157 Atl. 415 (1931). The requirement of preliminary proof of the authenticity and universal acceptance is entirely in the discretion of the court. *Penley v. Teague & Harlow Co.*, *supra*; *Hendershot v. N. Y. S. & W. R. Co.*, 138 Atl. 206 (N.J. 1927). There is a limitation upon the use of mortality tables in personal injury cases: they may be used only in actions involving permanent or possible permanent injuries. *Donoghue v. Smith*, *supra*. Although the length of life is the main factor under consideration, the condition of the party in question is always to be considered. *Auer v. Sinclair Refining Co.*, 103 N.J.L. 372, 137 Atl. 555 (1927); *McCaffrey v. Schwartz*, 285 Pa. 561, 132 Atl. 810 (1926). "Such table only gives the average of a large number of lives, and in the individual case the expectancy may be higher or lower than the average. While generally held admissible, they are not conclusive nor are they the exclusive evidence admissible in proof of that fact, which the jury may determine from other evidence such as the age, health, habits, and physical condition of the plaintiff. The courts decline to admit tables such as these in actions for the injury of a temporary nature as the expectancy of life is not an element to be considered." *Penley v. Teague & Harlow Co.*, *supra*.

The courts are not all in accord in regard to the admissibility of medical and scientific books. The great majority of them hold that such books cannot be

admitted as proof of the declarations and opinions which they contain, due to the fact that the authors do not write under oath and the basis of their opinions and beliefs cannot be tested by cross examination. The admissibility of such books is considered a violation of the hearsay rule. *State v. Baldwin*, 36 Kan. 1, 12 Pac. 318 (1886); *Scott v. Astoria R. Co.*, 72 Pac. 594 (Oregon 1903); *Huffman v. Click*, 77 N.C. 55 (1877); *Boyle v. State*, 57 Wis. 472, 15 N.W. 827 (1883); *Marsh Wood Products Co. v. Babcock & Wilcox Co.*, 207 Wis. 209, 240 N.W. 392 (1932).

While the material in medical and scientific books may not be admissible in itself, an expert having read and studied it may give an opinion which may be formed from that material. *Marshall v. Brown*, 50 Mich. 147, 15 N.W. 55 (1883); *State v. Baldwin*, 36 Kan. 1, 12 Pac. 318 (1886). Such books may be read in evidence when the expert bases his opinion upon the work of a particular author. However, where the expert has made no reference to standard authorities, or mention of such works, counsel cannot show that the expert is sustained in his testimony by standard and recognized authorities. *Fox v. Peninsular White Lead and Color Works*, 84 Mich. 676, 48 N.W. 203 (1891). There is a minority view to the rule that the expert may read from his references, which holds that to permit an expert to state that his opinion is sustained and supported by certain authorities is erroneous, since the question indirectly calls for statements from these books. *People v. Millard*, 53 Mich. 63, 18 N.W. 562 (1884); *Link v. Sheldon*, 18 N.Y.S. 815 (Cir. Ct. Onondago Co. 1892).

The use of books upon cross examination is definitely limited. The admission of scientific books in evidence before a jury is generally frowned upon by the courts, as is the reading of extracts from them to contradict an expert. "The weight of current authority is decidedly against the admission of scientific books in evidence before a jury, and against allowing them to be read from to contradict an expert, generally. When, however, an expert assumes to base his opinion upon the work of a particular author, that work may be read in evidence to contradict him." *City of Bloomington v. Schrock*, 110 Ill. 219, 51 Am. Rep. 679 (1884). Medical and other scientific works are not admissible upon cross-examination when their introduction is not for the direct contradiction of something asserted by the witness. *City of Bloomington v. Schrock, supra*.

Medical and scientific books may be used only where the expert has made reference to such authorities and has based his opinion upon these works. The opposing counsel may then, read that work in evidence to contradict him. *Pinney v. Cahill*, 48 Mich. 584, 12 N.W. 862 (1882); *City of Bloomington v. Schrock, supra*; *City of Ripon v. Bittel*, 30 Wis. 614 (1872). It is error upon cross-examination to read certain authorities to which an expert has made no reference and ask him if he agrees with such statement. It is apparent that this is merely a means of presenting to the jury the material contained therein. *Lilley v. Parkinson*, 91 Cal. 659, 27 Pac. 1091 (1891); *People v. McKernan*, 236 Mich. 226, 210 N.W. 219 (1926). In Illinois, when a physician is giving testimony regarding the symptoms of delirium tremens, paragraphs from standard authors may be read to the witness on cross-examination, and he may be asked if he agrees with the author upon the subject in question. This is considered by the Illinois court as merely one of the means of testing the extent of his knowledge, and is not similar to reading the books to the jury. *Connecticut Mutual Life Insurance Co. v. Ellis*, 89 Ill. 516 (1878). The general weight of authority holds that such authorities are receivable in evidence only when a witness has made reference to them as authority for his own opinions, and then

only for the purpose of contradicting him. *Western Union Telegraph Co. v. Annmann*, 296 Fed. 453 (C.C.A. 3rd 1924).

In Michigan, a witness may express an opinion upon certain matter, even though that opinion is derived solely from study. The expert witness is not required to have actual experience with the subject matter in question before he may give his opinion upon the subject. By careful study, diligent attention to lectures, and intelligent reasoning, the expert may form a worthy opinion and one which may be expressed to the jury. *People v. Thacker*, 108 Mich. 652, 66 N.W. 562 (1896).

Wisconsin disagrees with the latter rule, and holds that the opinion of the expert must be formed from experience in addition to his study. Since the book itself cannot be read in evidence, extracts from it cannot be permitted from the lips and memory of the expert. "The testimony of such medical witnesses is at best merely hearsay—what medical books and teachers taught or told them, repeated from memory." *Soquet v. State*, 72 Wis. 659, 40 N.W. 391 (1888); *Zoldoske v. State*, 82 Wis. 580, 52 N.W. 778 (1892).

The American Law Institute makes the following statement on this subject: "A published treatise, periodical or pamphlet on a subject of history, science or art is admissible as tending to prove the truth of a matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the writer of the statement in the treatise, periodical or pamphlet is recognized in his profession or calling as an expert in the subject." The American Law Institute, Code of Evidence, Tentative Draft No. 2, Rule 629.

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**Insurance—Interpretation of "Riding or Driving" and Similar Words in Automobile Accident Insurance Policies.**—While the insured was driving a motor truck the tire on an inner wheel of the dual rear wheels became deflated so as to prevent further use of the truck, on the intended trip, until repairs could be made. Insured took the truck to its garage and began to make repairs by removing the outer wheel so as to be able to remove the disabled inner wheel and flat tire, and while so engaged he was killed by an explosion of the tire on the outer wheel. The accident insurance policy provided indemnity for loss of life resulting from ". . . the wrecking or disablement of any automobile or truck . . . in which the insured is riding or driving . . ." The Insurer demurred to the beneficiary's complaint for recovery on this policy on the ground that the facts alleged were insufficient to constitute a cause of action. On appeal from an order overruling the demurrer the Supreme Court reversed the order, *holding* that while the deflated inner wheel was a "disabling" of the truck within the meaning of the policy, and while the acts necessary to repair it in order to continue the trip could be considered necessarily incidental to the operation of the truck, the plain and unambiguous language of this policy, not using the phrase "operating a vehicle," provides coverage only where the party is injured while actually "driving or riding in the vehicle" at the time of the disablement by which his injury is effected. *Miller v. Washington National Insurance Co.*, 237 Wis. 475, 297 N.W. 359 (1941).

A majority of the courts have held that insurance provisions, such as those quoted from the policy in the principal case, are not as broad in scope as a policy covering injuries sustained while "operating" a motor vehicle. An insured party was held not to have been "driving or riding in" his car when he was injured by an explosion of the tire after he had stepped out of the car at a