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DISCUSSION OF RECENT DECISIONS

CONSTITUTIONALITY OF A STATUTE MAKING THE JURY THE JUDGE OF THE LAW AND THE FACTS IN CRIMINAL CASES.—Ben Bruner,[1] on trial in the Criminal Court of Cook County upon an indictment charging robbery with a gun, requested that the following instruction be given to the jury: "The court instructs the jury that they are the judges of the law as well as the facts of this case, and if they can say upon their oaths that they know the law better than the court does, they have a right to do so; but before assuming so solemn a responsibility they should be assured that they are not acting from caprice or prejudice, that they are not controlled by their wills or their wishes, but from deep and confident conviction that the court is wrong and that they are right. Before saying this upon their oaths, it is their duty to reflect whether, from their study and experience, they are better qualified to judge of the law than the court; if, under all the circumstances, they are prepared to say that the court is wrong in its exposition of the law, the statute has given them the right." The court refused to give

[1] The People v. Bruner, 343 Ill. 146.

this instruction, but gave instead, the instruction requested by the state, as follows: "The court is the sole judge of the law in the case, and it becomes the duty of the jury to follow the law as it is given to it by the court in his instructions. You have no right to disregard it, or disregard any portion thereof; but you are bound to take the whole of it as it is given to you by the court and apply it to this case." The defendant was found guilty, and sued out his writ of error in the Supreme Court of Illinois, assigning as error the court's ruling in regard to the above mentioned instructions.

The refused instruction was couched in almost identical language with that of the Illinois Supreme Court in *Schnier* v. *The People*,[2] and was based upon Section 11 of Division 13 of the Criminal Code,[3] which provides that "Juries in all criminal cases shall be judges of the law and the fact." This is a re-enactment of an identical statute of 1827.[4]

The trial court justified its refusal of the first and the giving of the second instruction on the grounds that this statute is unconstitutional, in that it contravenes Section 5 of Article 2 of the Constitution of 1870, "that the right of trial by jury as heretofore enjoyed shall remain inviolate," and the third article of the Constitution which distributes the powers of the state government among the legislative, executive, and judicial departments, and prohibits the exercise, except as expressly directed or permitted, by any person or collection of persons constituting one of these departments, of any power properly belonging to either of the other departments.

Mr. Justice DeYoung delivered the opinion of the Supreme Court, affirming the decision of the lower court. Briefly, the court finds that "the right of trial by jury as heretofore enjoyed" means the right as it existed at common law, and that at common law the jury was bound to take the law as laid down by the court. Therefore, as this is the right guaranteed by the Constitution, and as the legislature cannot exercise judicial power, the statute making the jury judges of the law, as well as the fact, cannot be sustained.

Mr. Justice DeYoung, to substantiate his first holding that the jury in criminal cases answers only as to the facts, states that the right to trial by jury guaranteed by the Constitution of 1870 is the same right as that guaranteed by the Constitution of 1848, "that the right of trial by jury shall remain inviolate," and that guaranteed by the Constitution of 1818, "that the right of trial

[2] 23 Ill. 11.

[3] Cahill's Ill. Rev. St., 1931, Ch. 38, par. 764.

[4] Revised Code of 1827, p. 163.

by jury shall remain inviolate." To determine what this right is, he says, it is necessary to resort to the common law of England. Mr. DeYoung cites Coke: *"Ad quaestionem facti non respondent judices, ad quaestionem juris non respondent juratores."*[5]

But even the most superficial research into early English cases will reveal that this question—the right of the jury to determine both law and fact in criminal cases—has been the source of bitter controversy for a very long period of time.

Two hundred and eighty years before Ben Bruner's requested instruction was refused, we find Colonel Lilburne, on trial for treason, stoutly asserting that " 'The jury by law are not only judges of fact but of law also, and you who call yourselves judges of the law, are no more but Norman intruders, and indeed and in truth, if the jury please, are no more but cyphers to pronounce their verdict.' " Mr. Justice Jermine hotly replied, " 'Was there ever such a damnable blasphemous heresy as this, to call the judges of the law cyphers?' "[6]

The justice's characterization of the contention as "a damnable blasphemous heresy" was not sufficient, however, to keep Mr. Pratt, later Lord Camden, when moving before Lord Mansfield for leave to file the information (in the case of *King* v. *Shebbeare*)[7] to say, "It is merely to put the matter in the way of trial; for I admit, and his lordship well knows, that the jury are the judges of the law as well as the fact." But Mansfield instructed the jury the other way. In a later case,[8] Camden carried the argument to the House of Lords, where Lord Chatham, arguing against Mansfield's instruction, said, "I always understood that the jury were competent judges of the law as well as the fact; and, indeed, if they were not, I can see no essential benefit from their institution to the community."[9]

Fox's Libel Act, in 1791,[10] settled the controversy in favor of Camden's contention—though limited, it is true, to libel suits. By this Act, the determination of whether or not a writing was libelous was left exclusively to the jury. Significantly enough, the Act was deemed declaratory, since in its beginning it recited that it was "therefore declared and enacted."

Naturally enough, in the American Colonies, the consensus of opinion was heartily in favor of Lord Camden's contention, for

5 Co. Litt. 155 b.
6 Trial of Colonel Lilburne, (2nd Ed.) 107.
7 Hilary Term, 31 Geo. II 1758, K. B. Mss.
8 Woodfall's Case, 20 How. St. Tr. 869.
9 16 Parl. Hist. 1302—1307.
10 32 Geo. III, c. 60.

the colonists regarded the King's judges with suspicion. "John Adams, in his diary for February 12, 1771, in a passage which is probably either an extract from or a memorandum of a speech before the Colonial Legislature, urges that in the then state of things public policy demanded that not only in criminal but in civil cases juries should be at liberty to take the law in their own hands."[11]

It is apparent that John Adams entertained no doubt whatever that the jury determined the law as well as the facts in criminal as well as in civil cases. Nor was Mr. Adams alone in his opinion. Chief Justice Jay, of the United States Supreme Court, charging the jury in *Georgia* v. *Brailsford*[12] said, "It may not be amiss here, gentlemen, to remind you of the good old rule that on questions of fact it is the province of the jury, on questions of law it is the province of the court to decide. But it must be observed that by the same law which recognizes this reasonable distribution of jurisdiction you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy."

When we remember that this was a civil case, and not a criminal one, Justice Jay's statement shows the lengths to which this idea had run.

In *People* v. *Crosswell*,[13] no less an authority than Chancellor Kent upholds the right of the jury to determine the law as well as the facts.

During Bowen's Trial[14] in Massachusetts, in 1816, the court said, "In all capital cases, the jury are the judges of the law and fact. The court are to direct them in matters of law, and although it is safer for them to rely on instructions delivered from that source, still, gentlemen, they are to decide for themselves."

Of course, ever since Bushell's Case,[15] it has never been doubted that the jury had the power to disregard the law as laid down by the judge. And, neither in England nor America, has it ever been held, at least within the last three hundred years, that a jury could not, by returning a verdict of "Not Guilty" determine both the law and the fact as to the case at issue. Mr. Justice Gray is considering this when he says in his dissenting opinion in *Sparf and Hansen v. United States*:[16] "Upon the

[11] Wharton, Criminal Procedure, (10th Ed.) Vol. III, sec. 1745.
[12] 3 Dall. (U. S.) 1.
[13] 3 Johns. Cas. 337.
[14] Bowen's Trial, 51.
[15] Vaughan 135.
[16] 156 U. S. 51.

facts, although the judge may state his view of them, the duty of decision remains with the jury, and cannot be thrown by them upon the judge. Upon the law involved in the issue of fact, the jury, if they are satisfied to do so, may let it be decided by the judge, either by returning a general verdict in accordance with his opinion as expressed to them, or by returning a special verdict reciting the facts as found by them, and, by thus separating the law from the facts, put the question of law in shape to be decided by the court in a more formal manner. But the whole issue, complicated of law and fact, being submitted to their determination, the law does not require of them to separate the law from the fact, but authorizes them to decide both at once by a general verdict."

But the majority of the court decided contrary to Justice Gray. *Georgia* v. *Brailsford* has never been followed and authority in this country is overwhelmingly to the contrary. *Sparf and Hansen* v. *United States* has settled the question once for all as far as United States courts are concerned. Mr. DeYoung, in his opinion in the Bruner case, cites thirty-five cases from twenty-two different states, holding that the jury determines facts only. Granted, then, that this question is no longer open to argument.

It is equally plain, however, that the question was not definitely settled until the last hundred years. It can hardly be imagined that such men as Camden, Jay, John Adams, and Chancellor Kent would support a doctrine which had been definitely discarded by the authorities. We must understand, then, that there were not wanting authorities on both sides of the argument in the early nineteenth century.

The first Constitution of the State of Illinois was adopted in 1818. And the statute in question, it will be remembered, was first made law in 1827.

"In the construction of the language of the Constitution * * * we are to place ourselves as nearly as possible in the condition of the men who framed that instrument."[17] For the time being, therefore, let us imagine that we are examining the Statute of 1827 (which was identical with that of 1874) to determine whether or not it is in conflict with the Constitution of 1818, which, Mr. DeYoung says, guarantees the same right to a jury trial as the Constitution of 1870.

The question before us may be compared to the question which presents itself to a judge who is asked to set aside a verdict on the grounds that it is against the weight of the evidence. He does not ask himself, "Would I, upon this evidence, have

[17] Ex parte Bain, 121 U. S. 1.

found the same way as the jury has found?" but instead "Considering all the evidence, is it possible that reasonable men could reach this verdict?" If the second question is answered in the affirmative the answer to the first does not matter, for the verdict must stand. A similar question presents itself to the court when passing upon the constitutionality of a statute.

This principle was expressed by Justice Harris in *The People* v. *The Supervisors of Orange.*[18] "A legislative act is not to be declared void upon a mere conflict of interpretation between the legislative and judicial power. Before proceeding to annul, by judicial sentence, what has been enacted by the law-making power, it should clearly appear that the act cannot be supported by any reasonable intendment or allowable presumption."

In the Sinking Fund Cases,[19] Chief Justice Waite said, "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt."

Justice Charlton, in *Grimball* v. *Ross,*[20] said, "No nice doubts, no critical exposition of words, no abstract rules of interpretation suitable in a contest between individuals, ought to be resorted to in deciding upon the constitutional operation of a statute. This violation of a constitutional right ought to be as obvious to the comprehension of every one as an axiomatic truth, as that the parts are equal to the whole."

Chief Justice Tilghman, in *Commonwealth* v. *Smith,*[21] puts it, "For weighty reasons, it has been assumed as a principle in construing constitutions by the Supreme Court of the United States, by this court and every other court of reputation in the United States, that an act of the legislature is not to be declared void unless the violation of the constitution is so manifest as to leave no room for reasonable doubt."

Nor is Illinois a stranger to this doctrine. The court says, in *The People* v. *Brady,*[22] "Every presumption is indulged in favor of the validity of a statute and every reasonable doubt resolved in its favor." Substantially the same language is used in six earlier cases.[23]

18 17 N. Y. 235.

19 Union Pacific Railroad Company v. United States and Central Pacific Railroad Company v. Gallatin, 99 U. S. 700.

20 T. U. P. Charlt. 175.

21 13 Pa. 117.

22 262 Ill. 578.

23 Newland v. Marsh, 19 Ill. 376; The People v. Hazelwood, 116 Ill. 319; The People v. Nelson et al., 133 Ill. 565; Berry v. City of Chicago, 192 Ill. 154; Village of Donovan v. Donovan, 236 Ill. 636; City of Chicago v. Lowenthal, 242 Ill. 404.

In other words, the Constitution and the statute must be read together and reconciled if it is possible to do so. Or, as expressed by Mr. James B. Thayer, "The ultimate question is not what is the true meaning of the Constitution, but whether legislation is sustainable or not."[24]

Applying this reasoning to the problem before us, what do we find? In 1818, the question as to the respective provinces of judge and jury was a highly controversial one. The constitution adopted by the people of the State of Illinois provides that "the right of trial by jury shall remain inviolate." What did this provision mean in 1818? We cannot say, with absolute certainty, for at that time there were two schools of thought on the subject. Now, it is true, we have very definitely decided which one of these ideas was wrong, but remember, we are placing ourselves "in the condition of the men who made the instrument." Remember also that nine years later the legislature—and a number of its members were the same men who drew up the Constitution of 1818—enacted the statute above mentioned. In view of these facts, to hold that the men who drew up the Constitution did not mean—and as reasonable men could not have meant, that the jury were to judge both law and fact, seems to be a ruling as arbitrary as it is unjustified.

But when we apply the same reasoning to the Statute of 1874 compared with the Constitution of 1870, the decision reached by the Supreme Court seems little less than preposterous. For the court says that when the people adopted a Constitution providing for a jury trial as "heretofore enjoyed" they did not mean, and could not have meant, the jury trial as it had existed during the previous forty-one years, but meant instead a jury trial as it had never been conducted at any time, within the state. And the Supreme Court finds that this is the only possible construction to place upon this section.

The case of *George* v. *People*[25] is cited by the court to show that this constitutional provision refers to the jury as it existed in England. And it is true that the court does make this statement, but the whole case can hardly be said to be an authority for the decision in *People* v. *Bruner*. For it is plain that Mr. Justice Craig never doubts for an instant the validity of the statute before us.

At all events, this holding is squarely contradicted by a later case,[26] in which it is said, "The right of trial by jury, which is preserved by the Constitution, is the right as it had been enjoyed

[24] 7 Har. Law Rev. 150.

[25] 167 Ill. 447.

[26] City of Spring Valley v. Spring Valley Coal Company, 173 Ill. 497.

before the adoption of that instrument. . . . The question whether a statute infringes the constitutional provision that the right to trial by jury, as theretofore enjoyed shall remain inviolate, raises a purely historical question and nothing else." Four other cases[27] hold that the right to a jury trial guaranteed by the Constitution of 1870 is the right as it existed at the time of the adoption of that instrument.

Mr. Justice DeYoung cites two additional cases[28] to show that the right guaranteed is the right as it was enjoyed in England. But these cases actually hold that the right guaranteed by the Constitution of 1870 is the right "as it existed at common law and as it was enjoyed at the time of the adoption of the Constitution." In other words, the judges who wrote these opinions evidently believed that even in England the common law jury answered to both law and facts in criminal trials. So these cases are really very far from supporting Mr. DeYoung's finding.

To sum up, it is only by the most technical reasoning that we can raise any doubt at all as to the meaning of the words "heretofore enjoyed." And we have seen that it is the duty of the court to determine doubtful questions of constitutionality in favor of the validity of the statute. Here, the Supreme Court has done precisely the opposite, overturning a line of cases that began a hundred years ago.

In this view of the case, it is not necessary to determine whether or not the statute contravenes that section of the Constitution which provides for the separation of the powers of government into three distinct departments. For if it can be shown that there is any possibility that the constitutional provision of 1870, "the right of trial by jury as heretofore enjoyed," means to perpetuate the jury trial as it then existed and always had existed in Illinois, the Statute of 1874 is merely declaratory of the existing law.

The judge who delivered the opinion of the court advances many cogent arguments to show that it is more practical and reasonable for the court to determine the law than the jury, and points out the many miscarriages of justice which may result from the contrary rule. But this is all beside the point. No authorities need be cited, however, to prove that there is no sanction whatever for the doctrine that a law is unconstitutional because it is unwise.

[27] Commercial Insurance Company v. Scammon, 123 Ill. 601; Borg v. Chicago, Rock Island and Pacific Ry. Co., 162 Ill. 348; Brewster v. The People, 183 Ill. 143; Paulson v. The People, 195 Ill. 507.

[28] Sinopoli v. Chicago Railways Co., 316 Ill. 609; Liska v. Chicago Railways Co., 318 Ill. 570.

REPORT OF A PHYSICIAN APPOINTED BY A COURT TO EXAMINE A CLAIMANT IN A WORKMEN'S COMPENSATION CASE AS THE BASIS FOR AN ACTION OF LIBEL.—In a recent case in the Supreme Court of Kansas[1] the court had before it the much discussed and disputed question of a witness's privilege to give testimony of a defamatory nature in a judicial proceeding.

In a previous case on which this action of libel is based the plaintiff, here, Bert J. Mickens, had recovered a judgment in a Workmen's Compensation action against his employers, the Laurence Paper and Manufacturing Co. After the rendition of the judgment the court appointed the defendant, here, J. S. Davis, a physician, to examine the plaintiff and determine whether his disability was still existing, and whether it was permanent or partial, and report the result of such inquiry. The plaintiff on such order submitted to an examination in pursuance of said order of court at Ottawa, Kansas. Interrogatories were submitted and defendant physician in answer to interrogatory number five which was: "State what the disability is, and the direct effect that any existing disability has on Bert J. Mickens's ability to perform any work?" To which the defendant answered: "Spinal cord lesion. Apparently due to syphilis. This is a progressive lesion and he will probably never be any better than he is now."

The plaintiff then brought the action under consideration charging the physician with libel. The plaintiff set forth in his petition that the statement made was false and that it was made with a malicious intent to injure him. To this petition the defendant demurred and in argument the plaintiff set up that the privilege should have been pleaded specially, but on this point the court said: "If the plaintiff himself assert in his petition facts which establish the privileged character of the words complained of, he asserts nonliability of the defendant, and there is no reason for the court to decline to entertain a demurrer." In sustaining the demurrer the court quoted from *Marney* v. *Joseph*[2] as follows: "It is first contended that the defamatory statements in question belong in the class called absolute privilege. This privilege is founded on public policy and provides immunity for those engaged in the public service and in the enactment and administration of law. It is not intended so much for the protection of those engaged in that service as it is for the promotion of the public welfare; the purpose being that members of the legislature, judges of courts, jurors, lawyers, and witnesses may speak their minds freely

[1] Mickens v. Davis et al., 132 Kan. 49.

[2] 94 Kan. 18.

and exercise their respective functions without incurring the risk of a criminal prosecution or an action for recovery of damages."

Inasmuch as this case was disposed of on demurrer the decision admits that the words written were malicious, and that they were written with knowledge of their falsity by the witness. There is no question as to their relevancy to the case at issue, nor as to whether it was a judicial proceeding, as it is made so by statute in Kansas. Hence the question decided on here was clearly: "Will an action for libel lie against a witness in a judicial proceeding for statements made in answer to interrogatories propounded by the court where the same are made by a witness with knowledge of their falsity and with malicious intent, where the answers are relevant to the issues?"

It is interesting to note the development of the doctrine of privilege of a witness in a judicial proceeding and the reasons for its allowances as a defense. In *Dawkins* v. *Lord Rokeby*[3], a leading English case on the subject, in answer to a question put by the Lord Chancellor, the consulted judges replied: "A long series of decisions has settled that no action will lie against a witness for what he says or writes in giving evidence before a court of justice. This does not proceed on the ground that the occasion rebuts the prima facie presumption that words disparaging to another are maliciously spoken or written. If this were all, evidence of express malice would remove this ground. But the principle, we apprehend, is that public policy requires that witnesses should give their testimony free from any fear of being harassed by an action on an allegation, whether true or false, that they acted from malice."

Again in *Seaman* v. *Netherclift*,[4] another leading English case, Chief Justice Cockburn states the English view wherein he says: "If there is anything as to which the authority is overwhelming, it is that a witness is privileged to the extent of what he says in course of his examination. Neither is that privilege affected by the relevancy or irrelevancy of what he says; for then he would be obliged to judge of what is relevant or irrelevant, and questions might be, and are, constantly asked which are not strictly relevant to the issue. But that, beyond all question, this unqualified privilege extends to a witness is established by a long series of cases, the last of which is *Dawkins* v. *Lord Rokeby,* after which to contend to the contrary is hopeless. It was there expressly decided that the evidence of a witness, with reference to the inquiry [the inquiry referred to being

[3] L. R. 7 H. L. 744.
[4] L. R. 2 C. P. Div. 53.

proceedings before a military court of inquiry instituted to investigate the conduct of an officer] is privileged, notwithstanding it may be malicious; and to ask us to decide to the contrary is to ask what is beyond our power. But I agree that if in this case, beyond being spoken maliciously, the words had not been spoken in the character of a witness, or not while he was giving evidence in the case, the result might have been different. For I am very far from desiring to be considered as laying down as law that what a witness states altogether out of the character and sphere of a witness, or what he may say *dehors* the matter in hand, is necessarily protected."

Starkie,[5] speaking of the reason for this privilege, says: "Witnesses, like jurors, appear in court in obedience to the authority of the law, and therefore may be considered, as well as jurors, to be acting in the discharge of a public duty; and though convenience requires that they should be liable to a prosecution for perjury committed in the course of their evidence, or for conspiracy in case of a combination of two or more to give false evidence, they are not responsible in a civil action for any reflections thrown out in delivering their testimony."

Again, Townsend[6] gives the following reason for the privilege: "The due administration of justice requires that a witness should speak, according to his belief, the truth, the whole truth, and nothing but the truth, without regard to the consequences; and he should be encouraged to do this by the consciousness that, except for any willfully false statement, which is perjury, no matter that his testimony may in fact be untrue, or that loss to another ensues by reason of his testimony, no action for slander can be maintained against him. It is not simply a matter between individuals, it concerns the administration of justice. The witness speaks in the hearing and under the control of the court, is compelled to speak, with no right to decide what is material or what is immaterial; and he should not be subject to the possibility of an action for his words."

It would appear from the English cases that the witness's privilege is an absolute one whether relevant to the issue or not. In the United States only two jurisdictions seem to have adopted the broad English rule, namely, Maryland and Kentucky.

In the former state, the case of *Hunckel* v. *Voneiff*,[7] dealt with disputed property. A witness was asked to fix a certain date, and she replied as follows: "Not knowing that a mistress or woman of Mr. Plitt would step in to claim the lawful wife's

[5] Starkie, Slander and Libel, I, 242.

[6] Townsend, Slander and Libel, sec. 223.

[7] 69 Md. 179.

property, I did not keep an account of the date that way. If I would have, I would have noticed the date and all those little particular incidents . . .''. By holding such statement privileged the Maryland court appears to follow the English rule of absolute privilege, although the court bases its decision on the ground that the answer was not irrelevant to the issue.

In the Kentucky case of *Sebree* v. *Thompson*[8] the court seems to follow the English rule of absolute privilege of a witness. Here a deed, absolute on its face, was sought to be adjudged a mortgage. The defendant was called as a witness and testified each allegation made by plaintiff was false and further that plaintiff knew them to be false when swearing to them. In a suit for slander brought by the plaintiff the defendant set up his privilege as a defense. The judgment of the lower court for the plaintiff was reversed by the Supreme Court, which held that the privilege of a witness was an absolute one.

Illinois had the question presented in *Fagan* v. *Fries*[9] wherein it was held that in an action by a discharged employee to recover damages from his employer on account of his discharge, testimony of the employer was privileged, and could not be made the basis of a recovery for slanderous words. In deciding this case the Maryland case of *Hunckel* v. *Voneiff* was given by the court as authority for their decision. But in the Illinois case there is no doubt that the alleged slanderous words were relevant to the case at issue.

Again, in *McDavitt* v. *Boyer*[10] it was held that a witness's material statement charging the plaintiff with perjury was absolutely privileged. It is difficult to determine whether Illinois in the proper case would follow the strict English rule or the American majority rule that the testimony given must be relevant to the case. From the statements of the court in the later case it would appear that the statements of the witness must be material to be privileged.

New York follows the majority rule in qualifying the testimony to relevant matter. In *Allen* v. *Crofoot*,[11] an action for slander was brought against the defendant for testimony given before a justice in the examination of the plaintiff on a criminal charge filed by the defendant. The court held that the hearing before the magistrate, though informal and preliminary to a further investigation by him, was such a judicial proceeding as might cause the defendant to consider it his duty to answer the question asked. It was held, further, that it was a question of fact

[8] 126 Ky. 223.
[9] 30 Ill. App. 236.
[10] 169 Ill. 475.
[11] 2 Wend. (N. Y.) 515.

whether the words were spoken under such circumstances that the defendant had reason to believe, and did in good faith believe, that it was incumbent on him to repeat, at the time, the charge in his complaint.

Again in New York the question was raised in *Garr* v. *Selden*,[12] where it appeared that an action had been brought by an attorney for services. His clients pleaded the general issue, and gave notice that on the trial they would show that the services were so negligently and improperly rendered as to be of no value. The attorney moved the court to strike out this part of the notice as false and scandalous; whereupon the clients made an affidavit stating that the attorney had revealed confidential communications made to him in his professional capacity, with respect to the services for which he was seeking to recover compensation, and that such confidential communications were revealed to aid a person with an interest adverse to his clients. In an action for libel brought by the attorney the court decided that the defamatory matter in the affidavit was material to the issue raised by the attorney's objection to the notice, and that therefore it was privileged.

In *Nelson* v. *Davis*[13] it was held, that an unsworn statement by a defendant in a criminal case, impeaching the testimony of a witness against him, was absolutely privileged. The court said: "Freedom of speech on the part of the defendant in the preservation of his rights demands that he shall have immunity from actions for damages, on like grounds as those on which public policy requires that every witness should be left free to speak fearlessly the truth, without being in peril of being subjected to damages."

In *Hutchinson* v. *Lewis*[14] it was held that a statement made by a witness after testifying, and outside the court room, could not be made the basis of an action for slander, if such statements were slanderous only when interpreted in the light of material testimony by the speaker in court. This, however, is carrying the privilege of a witness to speak slanderous words farther than the majority of the states are willing to go.

It is well established in the United States that a witness, in answering a question asked by court or counsel, is not bound to determine its materiality or relevancy to the issues of the cause in which he is testifying. If his testimony is responsive to a question, or no objection is made to it, or an objection to it has been overruled, no action for libel or slander can be maintained on account of the testimony, even though it is defama-

[12] 4 N. Y. 91.
[13] 9 Ga. App. 131.
[14] 75 Ind. 55.

tory, immaterial, and given maliciously. This doctrine appears in *Calkins* v. *Sumner*[15] wherein the parties to a dispute agreed to submit their differences to arbitrators for settlement, and the defendant was called before the arbitrators to impeach the testimony of one of the contestants. On cross-examination, he was asked why he would not believe the plaintiff, one of the contestants, under oath, and also if he had ever heard him sworn. To which he relied, "I never heard him swear but once. In a case between myself and him for sand, he swore it on me. I thought he would swear to the truth, but he swore to a lie." It was held that since the answer was responsive to a question by counsel to which no objection was made, or which was not ruled out by the tribunal, no action could be maintained for the defamation. The court said: "I think the correct rule in regard to a witness's liability to an action for what he may say pending his examination before a judicial tribunal, is that he is not answerable in damages for any statements he may make which are responsive to questions put to him, and which are not objected to and ruled out by the court, or concerning the impertinency or impropriety of which he receives no advice from the court or tribunal before which the proceeding is had. . . . We all know that a great majority of the persons called upon to testify in our courts of justice are wholly ignorant of the rules of evidence by which legal proceedings are governed; and that if they were not, they are, in most instances, unacquainted with the true nature of the controversy and the exact legal condition of the issue between the parties, so that they could not determine for themselves the materiality or pertinency of their answers to particular questions propounded. Besides it is not for them to decide such questions. The law has imposed that duty exclusively on courts, and others having authority to hear and determine disputed questions of law and fact. Witnesses do and must rely on the conduct of courts and counsel engaged, and in the absence of objection or warning, ought to be permitted, without fear of harm or molestation, to make truthful and direct responses to all questions which may be put to them.

It appears from the foregoing cases that Kansas, in deciding that where the malicious words spoken are relevant to the case has followed a long line of American authority on the subject. The writer believes the American rule, which qualifies the privilege to relevant testimony in all cases except where the testimony, though irrelevant, is responsive to a question and is not objected to by counsel (or the objection is overruled by the court) is a much safer rule than the English one, which extends the privilege to all irrelevant matter.

[15] 13 Wis. 215.