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New Trials for Technical Errors

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NOTE AND COMMENT

NEW TRIALS FOR TECHNICAL ERRORS.—A witness called to testify is presumed to be of good character. Hence no proof of it is necessary. But out of abundant caution this presumption is fortified by evidence. The witness is thus shown to be in fact exactly what the law presumes him to be. Result—the case is reversed for the commission of this grave and prejudicial error.—*Lockett* v. *State* (Ark. 1918), 207 S. W. 55.

No one but an American lawyer could treat the above statement seriously. Only an American court could announce so extraordinary a decision. In no other English speaking country would the people tolerate such a perversion of justice.

The case above cited was a remarkable one, in that it was first unanimously decided the other way. The court held that error in admitting evidence "to prove what the law would otherwise presume is harmless." This decision was based on a prior decision to the same effect. *Patrick* v. *State* (Ark. 1918), 204 S. W. 852. But on a rehearing the court unanimously reversed itself, and held that since the rule of evidence here violated was declared by statute, as was not the case in *Patrick* v. *State*, to refuse to hold the error prejudicial and reversible would be to nullify the statute.

The argument as to the statute is supported by no authority, and it is difficult to see how an error becomes any more prejudicial merely because the rule which is violated is found in the statute books instead of in the reports. Statutes often prohibit opinion evidence, but a reversal would hardly result from a drop of opinion in a cumulative ocean of facts.

The real cause of such a ruling as this is the medieval attitude of the American bar on matters of procedure. We think in terms of the age of Coke.

We use candles because they were used in the Inns of Court, ignorant of the fact that those Inns have blazed with electric lights for half a century.

Of the authorities relied on in the case under discussion, few are in point. Many were cases where such evidence was held to have been rightly excluded. Others were cases where other errors obviously prejudicial accompanied the erroneous admission of evidence, resulting in a reversal. *State* v. *Owens*, 109 Iowa 1, cited in the opinion, and *Brann* v. *Campbell*, 86 Ind. 516 and *Bank* v. *Blakeman*, 19 Okla. 106, cited in a text book which the opinion cites, seem to be the only authorities supporting the decision of the Arkansas court, and even these had already been discredited by *Patrick* v. *State*, (*supra*), because they did not involve a statutory rule, and *Patrick* v. *State* was expressly reaffirmed as sound. On the other hand *Green* v. *State* (Tex. Crim. Appeals), 12 S. W. 872, which was also cited in the same text book denounced the doctrine of reversible error in such cases. It clearly was not the force of authority but the instinct for technicality that brought about this decision. It is only an example of a tendency which manifests itself in a thousand ways.

The comfortable indifference of former times has been rudely shaken by the social renaissance ushered in by the great war, and nowhere will reform be more imperatively demanded than in judical administration. There can be no doubt that we are at least a generation behind Great Britain in our legal methods.

Fifteen years ago Mr. Wigmore sounded a warning, which apparently has not yet been generally heeded. Speaking of the American doctrine of granting new trials for error in applying the rules of evidence, he said: "The whole doctrine, no doubt, has its deepest roots in the inveterate and unconscious professional instinct, which grows to venerate unduly the rules that form its daily mental pabulum. Whether in civil or criminal cases, it has done more than any other one rule of law to increase the delay and expense of litigation, to encourage defiant criminality and oppression, and to foster the spirit of litigious gambling. Added to this is the indirect result produced upon the ever-lurking animal instinct of gregarious human brutality, which takes the failures of criminal justice as its pretext and sates itself with cruel lynchings. * * * Some of the instances of its enforcement would seem incredible even in the justice of a tribe of African fetish-worshippers. * * * We shall some day awake to be convinced that a system of necessary rules of evidence can exist and be obeyed, without affixing indiscriminately to every contravention of them the monstrous penalty of a new trial." 1 Wigmore on Evidence §21. We can only hope that the next fifteen years will show more progress in making procedure the servant of justice than the last fifteen have shown.

E. R. S.