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EVIDENCE-UNCONTRADICTED TESTIMONY

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EVIDENCE—UNCONTRADICTED TESTIMONY—The great majority of jurisdictions in the United States recognize the rule that in civil cases “clear, positive, direct and undisputed testimony, not improbable or contradictory, given by an unimpeached witness, cannot be rejected or disregarded by either court or jury, unless the evidence discloses facts and circumstances which furnish a reasonable ground for so doing.”¹ It is the purpose of this comment to discuss (1) the reasons underlying this rule, and the extent to which it is recognized, rejected or limited in various jurisdictions; (2) the application of the rule to fact situations in jurisdictions where it is recognized.

A. *The Rule of Law*

1. *The underlying problem.* Questions of fact are normally left to the trier of fact, hereinafter referred to, for the sake of simplicity, as the jury. In deciding whether a fact testified to by a witness has been proved, the jury must decide whether that witness is to be believed. Where such testimony is uncontradicted, the legal problem arises whether the jury is to have absolute freedom to believe or disbelieve

¹ Olson v. Hoffman, 175 Minn. 287, 221 N.W. 10 (1928).

the witness, or whether under some circumstances it must accept his testimony as true. On the one hand it may be urged that in order to maintain our traditional jury system, the question of a witness' credibility must be left to a completely independent jury without interference by the judge. On the other, it may be argued that the possibility that a jury may abuse its privilege requires the judge to place some limits beyond which the jury may not go in exercising its discretion.

2. *Minority rule—absolute privilege to disbelieve.* Massachusetts has answered this problem by conferring an absolute privilege on the jury to believe or disbelieve any witness. The approach of the Massachusetts court is illustrated in a case involving a contested will. One of the issues was whether the will had been duly executed; a subscribing witness having testified without contradiction that the will had been duly executed, the trial court directed a verdict on this issue. Holding that this instruction was erroneous, the Supreme Court observed: "While the jury, upon the facts, could not have been expected to reach any other conclusion than that which was recorded under the direction of the court, the issue was one to be passed upon by a jury, which is the ordinary tribunal for the determination of questions of fact. Where a proposition is only to be established by testimony of witnesses, the judge cannot properly direct a jury to decide that the fact is proved affirmatively by testimony. It is for the jury to say whether the witnesses are entitled to credit."²

Maryland³ has adopted the Massachusetts rule, and Pennsylvania⁴ follows it, with the qualification that the trial court may grant a new trial (but may not enter a judgment n. o. v.) if it believes the jury capriciously disregarded the testimony of a witness. In Missouri, earlier doubts⁵ seem to have been resolved in favor of the Massachusetts rule.⁶

3. *Minority rule—privilege to disbelieve interested witness.* Other courts, unwilling to permit the jury to disbelieve the testimony of any and all witnesses, have left it with this privilege where the witness is interested. The reasons for this rule are largely the same as

² *Giles v. Giles*, 204 Mass. 383 at 385, 90 N.E. 595 (1910); see also, cases cited in *Lindenbaum v. N.Y., N.H. & H. R.R.*, 197 Mass. 314 at 323, 84 N.E. 129 (1908); *Krinsky v. Whitney*, 315 Mass. 661, 54 N.E. (2d) 36 (1944).

³ *Alexander v. Tingle*, 181 Md. 464, 30 A. (2d) 737 (1943).

⁴ *MacDonald v. Pennsylvania R. Co.*, 348 Pa. 558, 36 A. (2d) 492 (1944); 8 *TEMPLE L. Q.* 434 (1934).

⁵ *Baird v. Wilks*, (Mo. App. 1920) 218 S.W. 918.

⁶ *Lafferty v. Kansas City Casualty Co.*, 287 Mo. 555, 229 S.W. 750 (1921); *Wiener v. Mutual Life Ins. Co. of New York*, 352 Mo. 673, 179 S.W. (2d) 39 (1944).

those which formerly barred interested witnesses from testifying. It is said that a man deeply interested in the results of a given event cannot judge correctly the true facts surrounding it, even in the every-day affairs of life outside a courtroom, and that when he is called upon to testify to these facts it is highly probable either that he will succumb to the temptation deliberately to distort the facts, or that he will be unable, even in the exercise of the utmost good faith, to describe them accurately.

Accordingly, the New York courts at first refused to recognize the testimony of interested witnesses as conclusive, however strong the witness' story; later, however, this doctrine was abandoned.⁷ The question was unsettled in Texas as late as 1931,⁸ but the following rule now seems established in that state: "While the jury has no right arbitrarily to disregard the positive testimony of unimpeached and uncontradicted witnesses, the mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury."⁹ The same rule is in force in Arkansas,¹⁰ Arizona,¹¹ and possibly Washington.¹²

4. *The majority rule.* Most states have been unwilling to allow the jury a free rein in rejecting the testimony even of an interested witness. Probably the most searching analysis of the reasons for this conclusion is found in the opinion of Justice Campbell of the South Dakota Supreme Court in *Jerke v. Delmont State Bank*.¹³ In that case, the action of the trial court in directing a verdict on the basis of uncontradicted testimony of an interested witness was upheld, although the judgment was reversed on other grounds. Rejecting the "glittering generality" that "questions of fact are for the jury," the court reasoned that the jury, a part of the machinery of the court under the

⁷ For a strong presentation of the arguments in favor of leaving the credibility of interested witnesses to the jury, as well as a detailed analysis of the New York cases, see Bobbe, "The Uncontradicted Testimony of an Interested Witness," 20 CORN. L. Q. 33 (1935).

⁸ *Golden v. First State Bank of Bomarton*, (Tex. Civ. App. 1931) 38 S.W. (2d) 628.

⁹ *Simmonds v. St. L., B. & M. Ry. Co.*, 127 Tex. 23, 91 S.W. (2d) 332 (1936); *Gammill v. Mullins*, (Tex. Civ. App. 1945) 188 S.W. (2d) 986.

¹⁰ *Skillern v. Baker*, 82 Ark. 86, 100 S.W. 764 (1907); *McCullum v. Graber*, 207 Ark. 1053, 184 S.W. (2d) 264 (1944).

¹¹ *Lentz v. Landers*, 21 Ariz. 117, 185 P. 821 (1919); *MacRae v. MacRae*, 57 Ariz. 157, 112 P. (2d) 213 (1941).

¹² Early cases so holding, such as *Citizens' Savings Bank v. Houtchens*, 64 Wash. 275, 116 P. 866 (1911), seem never to have been overruled. Little recent light on the subject has been discovered. *Nearhoff v. Rucker*, 156 Wash. 621, 287 P. 658 (1930), held that the jury was not bound to accept an interested witness' testimony, but the opinion indicates that this may not have been on the ground of interest alone.

¹³ 54 S.D. 446, 223 N.W. 585 (1929).

general control of the judge, must be confined to a reasonable, rational process in its determination of facts. The credibility of a witness must be tested rationally, just as any other question involved in the litigation; "the mere fact of interest in the controversy does not in and of itself, and apart from other circumstances appearing in the case, render it a reasonable thing to disbelieve the testimony of a witness whom otherwise it would be unreasonable to disbelieve. . . ." ¹⁴ The court concluded that "the rule of reasonable judgment must be applied to each case upon its particular facts, and, if the testimony in behalf of the party having the burden of proof is clear and full, not extraordinary or incredible in the light of general experience, and not contradicted, either directly or indirectly, by other witnesses or by circumstances disclosed, and is so plain and complete that disbelief therein could not arise by rational processes applied to the evidence, . . . it is not only permissible, but highly proper, to direct a verdict, and the direction of such verdict should not be prevented merely by reason of the fact that one or more of the witnesses are interested in the transaction or the result of the suit." ¹⁵

This attempt to break down the approach of various courts into three "rules" is subject to the infirmities of any effort to generalize and classify the reactions of different courts to different fact situations. It seems clear, however, that there is a real difference between what might be termed the separation of powers approach of the Massachusetts court, which seems to regard judge and jury as independent, sovereign agencies, and the approach of the South Dakota court, which recognizes the supreme control of the judge over all agencies of the judicial process, including the jury. It also seems clear that the great weight of authority supports the South Dakota court. ¹⁶

The difference between the Texas court and the South Dakota court as to testimony of interested witnesses is less basic; even though interest of itself may not be a ground for denying credence, it is cer-

¹⁴ *Id.* at 461.

¹⁵ *Id.* at 467.

¹⁶ Cases are collected in 8 A.L.R. 796 (1920). For more recent developments, see *Fidelity & Casualty Co. of New York v. Abraham*, 70 Cal. App. (2d) 776, 161 P. (2d) 689 (1945) (uncontradicted testimony of defendant's lawyer binding on trial court); *Thomas v. Lockwood*, 198 Ga. 437, 31 S.E. (2d) 791 (1944) (uncontradicted testimony of disinterested witness binding on jury); *Idaho Times Pub. Co. v. Industrial Accident Board*, 63 Idaho 720, 126 P. (2d) 573 (1942) (uncontradicted testimony of interested witness binding on Board); *Mamina v. Homeland Ins. Co.*, 371 Ill. 555, 21 N.E. (2d) 726 (1939) (uncontradicted testimony of disinterested witness binding on trial court); *Johnson v. Tregle*, (La. App. 1942) 8 S. (2d) 755 (corroborated testimony of plaintiff binding on trial court even though improbable); *Standifer v. Standifer*, 192 Okla. 669, 138 P. (2d) 825 (1943) (defendant's corroborated, uncontradicted testimony binding on trial court).

tainly considered among other factors by all courts in determining whether uncontradicted testimony must be accepted.¹⁷ It will be noted that most of the cases discussed later in this comment involved testimony of interested witnesses; in a close case testimony of an interested witness may be considered improbable when similar testimony of a disinterested witness might have been accepted as conclusive. Conversely, courts have fastened upon interest as a reason for submitting a witness' testimony to the jury when there were other factors which would have justified the result.¹⁸

B. *Application of the Majority Rule*

By referring to the statement of the majority rule in the opening paragraph of this comment, it will be seen that numerous qualifications are placed upon its application to specific fact situations. Quite obviously, it applies only where the testimony is "undisputed"¹⁹ and "given by an unimpeached witness."²⁰ The requirement that the testimony be "clear" and "positive" permits the jury to disregard it where the witness is discredited by his manner on the stand.²¹ The testimony

¹⁷ Compare the statement of the Kentucky court that the majority rule "does not necessarily apply, if the uncontradicted evidence is given by interested witnesses. In this connection it may be said that the evidence, although uncontradicted, must be positive, clear, and unequivocal. . . ." *Bullock v. Gay, Admr.*, 296 Ky. 489 at 491, 177 S.W. (2d) 883 (1944). Rejection of the testimony was justified in this case partly because the witness was interested, and partly because of weaknesses in the testimony itself; the result in this case seems typical: interest added to some other factor affecting credibility requires submission of the testimony to the jury.

¹⁸ "Indeed, there is but little real support for the frequently stated rule that the interest of a witness renders his uncontradicted testimony a question for the jury. In the following cases, statements of the character referred to may be found, but the rule will not be found to have been applied except where the testimony of the interested witness . . . was . . . inconsistent with other portions of his testimony, with other evidence, or with the natural probabilities, or the conduct or attitude of the witness was such as to cast suspicion on his credibility." 72 A.L.R. 27 at 32 (1931).

¹⁹ Testimony has been considered undisputed within the rule where contradicted on an immaterial point. *State v. Fraley*, 189 Okla. 511, 118 P. (2d) 1023 (1941). But where it was contradicted on a material point, the jury was held to be entitled to disregard it entirely. *Lyric Amusement Co. v. Jeffries*, 58 Ariz. 381, 120 P. (2d) 417 (1941).

²⁰ Clearly if the witness is shown to have a bad character the jury is justified in refusing to believe him. Or if he can be shown to have made contradictory statements out of court his testimony may be rejected. *Williams v. Jayne*, 210 Minn. 594, 299 N.W. 853 (1941). Although it is generally said that a witness may be impeached by showing he is interested [3 WIGMORE, EVIDENCE, 3d ed., § 966 (1940)], as has been shown above this generally is not considered justification for disregarding his uncontradicted testimony.

²¹ *Napper v. Rice*, 127 W.Va. 157, 32 S.E. (2d) 41 (1944). But the facts justifying rejection on this ground must appear in the record. *Williams v. Jayne*, supra, note 20.

must be "direct" and not a matter of opinion, conjecture or inference.²² Of the many qualifications placed upon the majority rule, those which require that the testimony be "not improbable or contradictory" and that there be no "facts and circumstances which furnish a reasonable ground" for disregarding it most frequently raise fighting issues in its application.

1. *Improbability.* Probably the most frequently asserted ground for refusing to accept undisputed testimony is that the witness' story is improbable. Opposite extremes in dealing with the credibility of improbable testimony are illustrated in two recent cases.

The first case was an action for damages for an alleged assault. The plaintiff was a 52-year-old woman chiropractor, who lived and practiced her trade in two rooms on the second floor of a hotel in a small Montana town. She testified that the defendant, a 27-year-old married man from whom she was trying to borrow money, visited her in her office at nine o'clock in the evening and attempted to rape her. Apparently there was no direct evidence contradicting her statements. The jury returned a verdict for plaintiff, and judgment was entered thereon. On appeal, judgment was reversed in a 3-2 decision.²³ The majority felt that plaintiff's testimony was too improbable to support the verdict, in view of the facts that plaintiff was almost twice defendant's age; that although the incident was alleged to have occurred in a more or less public place there was no evidence that anyone heard a disturbance; that plaintiff had been trying to get money from defendant and continued to do so after the alleged assault; and that plaintiff failed to report the incident to anyone until several months after it was alleged to have happened. The dissenting judges felt that the appellate court should not substitute its judgment for that of the jury in deciding whether to believe plaintiff's story. None of the judges regarded the testimony as binding on the jury.

The second case, tried by a Louisiana district court, involved a claim for workmen's compensation. Plaintiff testified that he had been injured by a blow from a crank which kicked back while he was attempting to start his employer's truck. He was corroborated by an eyewitness. An eminent physician testified for defendant that he doubted that plaintiff's injuries could have been caused in this manner. An equally eminent physician testified for plaintiff that while such an injury from such a cause is extremely rare, similar instances have been

²² In *Glass v. Bosworth*, 113 Vt. 303, 34 A. (2d) 113 (1943), a doctor's uncontradicted testimony that injuries sustained by plaintiff in a collision aggravated a long-standing heart ailment was held not to be conclusive because it was a matter of opinion and not of demonstrable fact.

²³ *Cullen v. Peschel*, 115 Mont. 187, 142 P. (2d) 559 (1943).

recorded in medical texts. The trial court found that it was too improbable that such an accident could have occurred, or if it did, that plaintiff's injuries resulted therefrom. Judgment for defendant was reversed on appeal, the opinion stating in part that "conclusions of improbability must and should ordinarily yield to uncontroverted evidence, such as we find in the testimony of plaintiff and corroborated by an eyewitness."²⁴

Thus the Montana court decided that improbable testimony could not support a verdict for the witness,²⁵ while the Louisiana court decided that it required such a verdict.²⁶ Between these two extremes is a wide area where improbability furnishes a ground for submitting uncontradicted testimony to the jury. An example is a suit recently brought by the administrator of Joanna Held to declare void transfers under which her nephews, Fred and Isaac Morris, claimed title to a ranch formerly owned by the decedent. Isaac and Fred held deeds to the ranch; the issue was whether these deeds had been delivered. The evidence showed that Isaac, Fred, and Fred's wife, Pearl, occupied and operated the ranch from 1929 to 1941 while their aunt lived in a nearby city, and that they were frequent visitors at the home of their aunt, who was extremely fond of Fred and Isaac. Pearl testified that in 1939 Mrs. Held handed her a sealed envelope marked "To Fred and Isaac Morris," telling her that the deeds were enclosed but that they were not to be recorded until after Mrs. Held's death; she also testified that she had shown this envelope to Fred and Isaac, but that no one had opened it until Mrs. Held died. Although this testimony was uncontradicted the court to which the case was tried held that the deeds were void for lack of delivery. This decision was affirmed on appeal²⁷ on the ground that Pearl's story was inherently improbable. It was felt that the trial judge was warranted in refusing to believe

²⁴ Johnson v. Tregle, (La. App. 1942) 8 S. (2d) 755 at 758.

²⁵ While it seems doubtful that the testimony in the Montana case was too improbable to support the verdict, this is the usual result where the testimony is contrary to scientific principles or natural laws. In Louisville Water Co. v. Lally, 168 Ky. 348, 182 S.W. 186 (1916), plaintiff's corroborated testimony, uncontradicted, was held insufficient to support a finding that defendant water company had turned on water in city mains with such force that it unscrewed a closed faucet in plaintiff's home, flooding it. See also 21 A.L.R. 141 (1922).

²⁶ See also Huber v. Rosing, 22 Wash. (2d) 110, 154 P. (2d) 609 (1944), holding that uncontradicted testimony of witnesses for the defendant that he was driving fifteen miles per hour when his car collided with plaintiff's truck could not be disregarded even though evidence of damage to the truck tended to show that defendant was driving faster. The explanation of the rulings in both cases would seem to be that direct evidence should prevail over evidence based on opinion or speculation.

²⁷ Crilly v. Morris, (S.D. 1945) 19 N.W. (2d) 836.

that Fred and Isaac would have left an envelope containing such a valuable gift unopened for a year and a half; that Mrs. Held would have delivered the deeds in a sealed envelope; or that she would give the deeds to Pearl instead of directly to her favored nephews.

In another recent case involving a decedent's property, the appellate court was more favorably inclined toward plaintiff's story. Plaintiff, a woman theatrical performer, sued for specific performance of an alleged contract by which decedent promised to devise his estate to her in return for her giving up a trip to Europe in furtherance of her career. The evidence showed that plaintiff and decedent had enjoyed a close but platonic friendship for forty-two years, decedent regularly eating supper at plaintiff's residence and spending the evening there reading. Decedent, a member of the bar, left a will disposing of his property to persons other than the plaintiff. The trial court's decree refusing relief was reversed on appeal.²⁸ The majority opinion reasoned that plaintiff's uncontradicted testimony, corroborated by her daughter and a friend, was neither improbable nor inconsistent and could not be rejected. The fact that the corroborating witnesses were acquainted with or related to the plaintiff was held not to impeach them. The fact that decedent, a lawyer, had failed to revoke his old will did not render the story improbable, inasmuch as lawyers are notoriously careless about their own legal affairs. One dissenting judge, noting that the story rested largely on the testimony of interested witnesses, felt that the trial court might properly reject it since it was shown that decedent paid for all his meals with plaintiff and, although working in a courthouse where he must have been impressed with the disastrous effects of failure to revoke an outmoded will, had failed to do so even when the matter was called to his attention shortly before his death.

2. *Circumstances contradicting testimony.* A story which is not improbable may nevertheless be rejected if other circumstances disclosed by the evidence furnish a reasonable ground for doing so. In an action on two fire insurance policies covering lumber which burned on a Saturday night, the defendant insurer denied that the policies had been issued before the fire. Defendant's local agent, authorized to issue policies, testified that he executed the policies on the Wednesday and Thursday preceding the fire. Defendant having introduced no evidence on this issue, the trial court instructed the jury that the fact that the policies had been issued was conclusively established. On defendant's appeal, this instruction was held to be erroneous.²⁹ Not-

²⁸ *Downing v. Maag*, 215 Minn. 506, 10 N.W. (2d) 778 (1943).

²⁹ *Michigan Pipe Co. v. Michigan Fire & Marine Ins. Co.*, 92 Mich. 482, 52 N.W. 1070 (1892).

ing that the agent's wife was a stockholder in, and his brother-in-law an officer of, the plaintiff corporation, the appellate court pointed to a number of circumstances casting suspicion on the testimony, concluding that the jury must determine its credibility. Plaintiff's evidence revealed that when one of its officers asked the agent for the policies on Sunday he failed to produce them, explaining that they were not ready for delivery. Neither of the policies was completed until the Monday following the fire, and none of the employees at the agent's office saw the policies or any record of them before the fire. Although the agent had been instructed to report all insurance to defendant on the day it was issued, he did not mail a report of this insurance until the Monday following the fire, and then took advantage of his position as the local postmaster to postmark the envelope containing the report July 5 (Saturday) instead of July 7 (Monday). In other respects the agent's conduct was not only in violation of instructions but fraudulent; the case seems a clear one for denying conclusiveness to his testimony.

In a more recent case, plaintiff's uncontradicted testimony revealed circumstances which did not tend so strongly to arouse suspicion but which nevertheless furnished a reasonable ground for its rejection. Plaintiff sued to impress a trust upon a house and lot which she had bought for her son. To rebut the presumption that the transaction was intended as a gift to the son, both plaintiff and the son testified that they had agreed that plaintiff should have the beneficial interest in the property. The trial court nevertheless refused relief; judgment was affirmed on appeal.⁸⁰ Plaintiff had permitted her son to mortgage the property to secure his personal debt, had left the son and his wife in sole possession, and had permitted them to make alterations and improvements without consulting her. These circumstances were considered to be more consistent with the presumption of an intended gift than with the asserted intent to retain a beneficial interest.

In a suit on a bond by the administrator of the decedent payee, the defendant maker answered that the note had been paid. Two disinterested witnesses testified that decedent had told them defendant had owed him money but had repaid it. The case was tried to the court, which found that the bond had not been paid. Affirming a judgment for plaintiff, the appellate court found that evidence of circumstances indirectly contradicting the testimony entitled the trial court to disregard it.⁸¹ The decedent was a prudent business man, customarily depositing large sums in the bank upon receipt, but no such deposits were made corresponding to the alleged payments made by defendant. It was also shown that decedent lived in the country;

⁸⁰ *Gomez v. Cecena*, 15 Cal. (2d) 363, 101 P. (2d) 477 (1940).

⁸¹ *Martyn v. Jacoby's Admr.*, 223 Ky. 674, 4 S.W. (2d) 684 (1928).

while the defendant claimed to have paid in cash, the court felt that he would not have taken currency to decedent at his country home when he could more safely and conveniently have paid by check.

Elements of inherent improbability are often combined with independent evidence of contradictory circumstances. An interesting example is found in an action against the ex-treasurer of a county in California for conversion of its funds. To account for the missing funds, defendant testified that as he was removing money from the vault in his office at the county courthouse one morning, he was accosted by an armed man who ordered him to drop the money; that he then lost consciousness, apparently from a blow on the head; that he revived later, locked inside the vault, and attempted to attract attention by kicking on its door; and that when he was released, the money was missing. His wife testified that she visited the courthouse that afternoon in search of her husband; finding the office door locked, she became alarmed, got the janitor to unlock the door, entered the office and opened the vault, releasing defendant. Two witnesses who were with her during the rescue corroborated her story in part, and there was no direct evidence contradicting it. Confronted with a seemingly impregnable defense, the court to which the case was tried found nevertheless for the plaintiff. Judgment was affirmed on appeal.³² The court reasoned that it was inherently improbable that a robber could have accomplished this feat without being seen, and have vanished without leaving a trace. It felt that it was extraordinary that the robbery should have occurred only a few days before defendant's term of office expired, at which time he would be called to account for the money entrusted him.

To show that defendant may not in fact have been locked in the vault, the court carefully analyzed the testimony concerning his release. The wife testified that she knew the combination of the outer door of the vault but, being excited, missed it on her first try; the court pointed out that this would lock the door. Although the wife testified that she unlocked the inner door, using defendant's key which she found in the lock, neither of the corroborating witnesses could say positively that this door was locked.

The district attorney displayed considerable ingenuity in establishing two circumstances tending to show the defendant was not locked inside the vault. First, he showed that the bolts of both doors could be shot from the inside, creating an illusory appearance that they were locked. Secondly, he stationed witnesses throughout the courthouse while a man inside the vault kicked its door and struck its sheet-iron sides. These witnesses testified that while the kicks on the door

³² County of Sonoma v. Stofen, 125 Cal. 32, 57 P. 681 (1899).

were audible, "the blows upon the walls were loud and resonant like the beating of a bass drum." Since the defendant was thoroughly familiar with the construction of the vault, it was felt that if he had really been locked inside, he would have beat upon the walls to summon aid.

3. *Conclusion.* The lawyer confronted with testimony which he is unable to contradict with direct evidence has, then, a number of methods open to avoid a directed verdict. The most obvious, of course, is to impeach the witness. Failing this, all is still not lost. The testimony may be shown upon analysis to be inherently improbable, as in the story of the deeds delivered by Mrs. Held, the attempted rape of the elderly chiropractor, or the daring daylight robbery of the county treasurer. Or it may of itself reveal circumstances casting suspicion on its credibility, as in the case of the fire insurance policies, or indirectly contradicting it, as in the case of the house purchased by the mother for her son. Whether or not the testimony will stand up under careful scrutiny, independent evidence may be available to show its improbability, as the testimony of the medical expert did in the workmen's compensation case. Or independent evidence of outside circumstances may serve to contradict the testimony, as was done by showing the absence of bank deposits in the bond case and the construction of the vault in the case of the county treasurer.

In jurisdictions following the majority rule precedent is of little value in deciding whether uncontradicted testimony is conclusive. "The only rule of law involved is that which announces that the judge will determine the matter without the assistance of the jury, when reasonable minds applied to the evidence could properly come to but one conclusion. The legal principle is simple, and the real question in every case is not a question of law in any proper sense of the word, but is a question of logic, or reason, or judgment. . . ." ³³ The answer depends peculiarly on the ingenuity of the trial lawyer and the sound discretion of the judge.

Robert L. Cardon, S.Ed.

³³ Jerke v. Delmont State Bank, 54 S.D. 446 at 460, 223 N.W. 585 (1929).