



**EVIDENCE**  
**IN**  
**TRIALS AT COMMON LAW**

**by**  
**JOHN HENRY WIGMORE**

*In Ten Volumes*

**VOLUME 3A**

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**Wolters Kluwer**

Law & Business

AUSTIN BOSTON CHICAGO NEW YORK THE NETHERLANDS

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59III-12/70

ISBN 978-0-7355-6421-3

*Seventh Printing*

Published by Aspen Publishers  
76 Ninth Avenue, New York, NY 10011  
*Formerly published by Little, Brown and Company*

PRINTED IN THE UNITED STATES OF AMERICA

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Book I. Admissibility (*continued*)  
 Part I. Relevancy (*continued*)  
 Title II. Testimonial Evidence (*continued*)  
 Subtitle II. Testimonial Impeachment

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## A. GENERAL THEORY OF IMPEACHMENT

§874. Analysis of the process of impeachment. A testimonial assertion comes, as evidence, in the same logical form as a circumstantial evidential fact (§475 *supra*); i.e., the form of proposed inference is: A asserts the existence of fact X; therefore, fact X exists. Hence, the problem of the cogency of this inference involves (as all other judicial inferences do) the question how many and what other hypotheses there are which explain away the evidential fact of A's assertion as due to some other cause than the existence of fact X (§32 *supra*). The evidential fact is simply that A makes the assertion; the problem is can it be explained away, so that we need not accept fact X as the conclusion? In short, the whole process of impeachment or discrediting of a witness, as known to practitioners, is nothing but the *general logical process of explanation* (§34 *supra*).<sup>1</sup> So, too, the process of corroboration or sup-

§874. <sup>1</sup> The term "impeachment," however, is by some courts and practitioners limited to a discrediting of *character* for veracity; e.g. *Lenz v. Public Service Ry. Co.*, 98 N.J.L. 849, 121 Atl. 741 (1923); but this usage is incorrect.

A person must have given testimony if the impeachment process is to become operative as to him. *Taylor v. Klahm*, 8 Mich. App. 516, 519, 154 N.W.2d 529, 531 (1967) ("The proper time for impeaching the credit of a witness is after he has been examined, and evidence is not admissible to impeach a person who has not yet been introduced, sworn, or examined as a witness"); *Crowder v. Carroll*, 251 S.C. 192, 161 S.E.2d 235 (1968) (*accord*); *Reitano v. Dobbs*, 31 App. Div. 2d 104, 295 N.Y.S.2d 573 (1968) (*accord, semble*).

The two cases which follow involve the question whether a witness had so far testi-

fied that he became subject to impeachment. In each case the court neglects to take account of the possibility of dissembling by the witness (see §789 *supra*). *Pellegrini v. Chicago Great Western Ry.*, 319 F.2d 447, 454 (1963) ("Plaintiff contends that the court erroneously permitted introduction of proof that he had been convicted of a felony in 1944, for the purpose of impeachment. The contention rests on the premise that plaintiff had testified to no material fact, which is a prerequisite to the right to impeach by the introduction of a felony conviction. He was called as a witness in his own behalf, for what purpose we do not know, and testified only as follows: 'Q. Would you tell us your name? A. Willie Pellegrini. Q. Where do you live, Willie? A. 5044-31st Street, Melrose Park. I have a headache now. Noise. Q. All right. A. Where is Edie? Where is Edie? Where is

port of a witness is the logical process of closing up the possible avenues of explanation, and thus making the proposed inference more and more necessary and unavoidable.

What, then, is the distinction, if any, between explanation for circumstantial evidence and explanation for testimonial evidence? Practically the distinction is a real one — is in fact the chief basis for the time-honored division of all evidence into these two classes. Circumstantial evidence is heterogeneous and multifarious in its varieties; testimonial evidence is homogeneous. Circumstantial evidence has no single common feature, and few features partly in common; testimonial evidence has one great feature in common, and numerous large classes having common features. E.g., the finding of an old coat in an empty baker's wagon on a back lot in Halsted street, Cook County — the presence of a broken oil can in a grain car on a sidetrack near Onondaga, New York — the lack of one ten-dollar bill in a roll of ten-dollar bills in a Louisville bank on Monday, January 4 — these are unique, isolated facts which have never happened before in precisely the same way; hence there are no generic truths or laws involved in our inference from them; it is purely empiric. But A's assertion that a street lamp was lighted at a given time or place is generically of a piece with hundreds of thousands of former evidential data, viz., it is a human assertion, resting for credit on human qualities. The human element in this testimony is an element in common, running through the vast mass of prior human testimonies. And even though human beings differ, yet their differences also are generic, each on a vast scale. Moral character, bias, experience, powers of perception in light and dark, powers of memory after a lapse of time, susceptibility to falsify under torture — these and other qualities have been under observation in so many thousands of instances under varying conditions that we have built up generalizations (more or less correct or uniform), which pass for general truths (or at least, as working guides) on those subjects. In short, we possess a fund of general principles, applicable to specific instances of this

my sister? I'm going to find Edie now. There's some noise out here.' . . . Defendant recognizes that impeachment in the manner under discussion is proper only where the witness has testified under oath to facts material to the issues in the case but makes the strained and untenable contention that plaintiff's testimony and his actions on the stand, characterized as 'demonstrative' evidence, justify the admission of the impeaching testimony. No case is cited and we know of none which supports the admission of this testimony . . . " Duffy, C.J.: ". . . I think defendant should have been entitled to place in evidence, proof of plaintiff's felony conviction on the question of whether plaintiff's actions were genuine"; *People v. MacIntosh*, 14 Mich. App. 755, 756, 165 N.W.2d 895, 896 (1968) ("At trial defendant took the stand and testified but only to establish a speech defect. He gave no testimony on direct examination relating to the crime. During cross-examination of defendant, the prosecuting attorney was permitted, over objection, to question defendant with re-

spect to prior convictions. Defendant concedes that the statute, M.C.L.A. §600.2158 (Stat. Ann. 1962 Rev. §27A.2158) permits such cross-examination to draw in question the credibility of defendant, but defendant contends such was not the purpose here. A review of the trial transcript convinces this Court that the cross-examination of defendant with respect to his past convictions was not for the purpose of attacking his credibility. It was done to attack his character, which had not been put in issue by defendant. This practice is reversibly erroneous. *People v. Boske* (1922), 221 Mich. 129, 190 N.W. 656").

When a witness has been impeached the effect of the process "is a matter to be determined by the trier of facts." *Denver Decorators, Inc. v. Twin Teepee Lodge, Inc.*, 163 Colo. 343, 347, 431 P.2d 8, 10 (1967). Thus "[w]hether impeachment, once attempted, is successful is essentially a question for the jury." *Myers v. Gaither*, 232 A.2d 577, 581 (D.C. App. 1967), *aff'd*, 404 F.2d 216.

class of evidence, and almost totally lacking for specific circumstantial evidence. It does not here matter whether those general principles are all sound or not; the point is that we believe them to be, and that we are always disposed to use them in our reasoning upon the probative value of specific human assertions.

How does this bear upon the process of impeachment or explanation? In this way: Through this more or less explicit appeal to such general principles, *most of our reasoning upon the credit of witnesses is put into the deductive form*; in which form these general principles or truths come out into the open as the avowed basis of our inference (§30 *supra*). Thus they can and must be tested for their validity; and thus, if well founded, they may serve as aids to the valuing of other testimony. These aids are generally lacking for circumstantial evidence; their possession is a great advantage in valuing testimonial evidence, and is its prime feature for practical purposes.

1. *Classification of impeaching evidence.* Since, then, the process of impeachment or explanation (i.e., the valuation of the discount to be made from the credit of a testimonial assertion) rests usually on a more or less explicit deduction from some generalized truth, and since the force of the explanation will depend much on the number, nature, and correctness of the general principles thus involved, it would seem that the classification of the data should attempt an answer to these questions: What data are virtually deductive? What data are virtually empiric? Under the former head, we should further classify according to the number of general principles or deductions involved. Under the latter head, we should endeavor to analyze the possible general principles latent, and thus to learn the force of the explanations.

a. *Deductive impeachment.* The generic human qualities affecting testimony, and the state of knowledge on the subject, have already been considered (§478 *supra*). The tripartite elements of the testimonial process—perception, memory, narration—have also been examined (§478 *supra*). But the latter do not form separate steps in the inference; they are merely modes in which the deduction operates; hence they do not need to figure separately in the inference. E.g., in estimating the witnesses' credit for an assertion as to a midnight explosion, the facts are offered that one witness has no special experience in explosion sounds, and that another is afflicted with insane delusions; the forms of the inferences are: (1) persons not experienced in explosion sounds are apt to obtain erroneous impressions of direction and intensity; this witness lacks such experience; therefore he is possibly in error as to the fact perceived; (2) persons of insane delusions are apt to imagine non-existent facts; this witness is insane on a certain subject; therefore he is likely to be in error either by his original perception or by the subsequent operation of his memory. Now the former discrediting fact affects only the element of perception, in the testimonial process; the latter affects either or both perception and recollection. Whichever of such elements may be the one affected, it enters as a term of the truth used deductively, and not as a separate step of deduction. Hence, we may ignore those three elements in classifying the separate steps.

Proceeding to the impeaching facts, then, we premise further that they may be first grouped (merely for convenience) as comprising *external* and



*internal* conditions. *External* conditions include general truths as to the effect of light, distance, temperature, position, time, etc., on the functions of perception, memory, and narration. E.g., that an object in a strong light may give misleading impressions as to color; that events observed ten years ago cannot be as well remembered as more recent ones; that a threat of violence usually deters from telling the exact truth — these (if there are such truths) may roughly be grouped as external conditions. *Internal* conditions include general truths as to moral disposition, emotions, sex, experience, etc.; e.g., that a strong emotion disturbs the powers of correct perception and correct memory; that moral unscrupulousness makes correct narration less likely, and so on.

All the foregoing generalities form the first class of data, i.e., data of *immediate* deduction. There is a single step of inference from them to the supposed discrediting conclusion. The formal statement would be: Persons affected by a strong emotion of revenge are apt to distort the facts; this witness has such an emotion; hence, his assertion may not represent the facts as they are. Notice that here we have but one (supposed) general truth to deal with — the major premise; the minor premise is a concrete fact, viz., this man's specific emotion.

The next class is formed by the data of *mediate* deduction. Here the above minor premise comes under analysis. Do we get it from a simple concrete fact, interpreted empirically, or do we get it by the aid of another general truth coupled with another concrete fact as a minor premise? If by the latter way, we must note and test that second general truth also. In this particular instance, either way may be available. E.g., the witness' language of hostility, on or off the stand, may be the simple concrete fact from which the emotion may be inferred; or, the witness may be an accomplice or a policeman (concrete fact), to which we may couple some supposed general truth about accomplices or policemen having generically an emotion of hostility. In the latter case, we thus have a second general truth, upon whose correctness or force our ultimate conclusion will depend. There are scores of such supposed general truths current in the books and in tradition. They are drawn from the more or less extensive experience of life, accumulated and compared and condensed. Sometimes these partial experiences are puzzlingly contradictory, e.g., the views as to the bias of experts and of policemen. Sometimes they are relics of former experience now practically discarded, e.g., the rooted distrust of a convict's testimony.

It is at this point that we meet most of the doubtful general truths affecting testimonial evidence. The data of immediate deduction are seldom formulated; their generality is obviously so broad and loose (at least, for what are above called internal conditions) that they seldom do harm by receiving an exact phrasing; and so far as they have fallen within the range of the scientific psychologist (e.g., the effect of light on color) there are as yet established few general laws having any exact tenor. But the supposed general truths falling within the mediate class, which have mostly grown up empirically in judicial practice, are apt to need special caution, by reason of their plausible verities.

By insisting on the foregoing two processes — those of stating explicitly the immediate data and the mediate data, with one or both of their general