

were to be used in connection with a particular investigation, they would seem not to be a "fishing expedition," but a reasonable demand and therefore within the Fourth Amendment.<sup>25</sup>

**Evidence—Wrongful Death—Admissibility of Plaintiff's Evidence on Deceased's Careful Habits—[Illinois].**—In an action for the death of the plaintiff's intestate, struck by the defendant's automobile, the plaintiff called the defendant who testified fully on the accident. There were no other eyewitnesses. Later the plaintiff introduced evidence on the careful habits of his intestate to prove freedom from contributory negligence. On appeal from a judgment for the plaintiff, *held*, reversed. The habit evidence should have been excluded as the defendant, called by the plaintiff, was an eyewitness. *Scally v. Flannery*.<sup>2</sup>

The instant decision might well have been expected, for logical conclusions to be drawn from the Illinois cases practically preclude the effective use of habit evidence to show freedom from contributory negligence in any case in which the defendant has seen the accident. In the recent case of *Nordman v. Carlson*,<sup>2</sup> where the plaintiff had declined to call the defendant as an eyewitness, evidence of the careful habits of the deceased was admitted. The decision was based on the ground that such evidence is rendered inadmissible only by the availability of a competent eyewitness and that the defendant was rendered incompetent by the Illinois "dead man" statute.<sup>3</sup> There is Illinois authority, however, to the effect that if the plaintiff or another person interested in the estate testifies to the careful habits of the deceased on the issue of freedom from contributory negligence, such testimony is evidence of a "transaction"<sup>4</sup> between the defendant and the deceased and removes the defendant's incompetency.<sup>5</sup> If this authority were followed the defendant could testify, and then logically the habit evidence originally admitted would have to be stricken.<sup>6</sup> Upon this analysis, the defendant's testimony, since rendered admissible only by that of the plaintiff, should also be stricken. This peculiar result might best be avoided by deeming the defendant's objection to the plaintiff's habit evidence waived by the introduction of direct evidence based on its admission.

The general rule that habit evidence is inadmissible if testimony of credible eyewitnesses<sup>7</sup> is available<sup>8</sup> seems perfectly sound. The probative value of a general habit

<sup>25</sup> Cf. *Hearst v. Black*, 87 F. (2d) 68 (App. D.C. 1936), noted 35 Mich. L. Rev. 1383 (1937); see also *Federal Trade Commission v. American Tobacco Co.*, 264 U.S. 298, 306 (1924); 36 Col. L. Rev. 84 (1936).

<sup>1</sup> 292 Ill. App. 349, 11 N.E. (2d) 123 (1937).

<sup>2</sup> 291 Ill. App. 438, 10 N.E. (2d) 53 (1937).

<sup>3</sup> Ill. Rev. Stat. 1937, c. 51, § 2.

<sup>4</sup> An accident is a "transaction" within the meaning of the statute. *Van Meter v. Goldfarb*, 217 Ill. 620, 148 N.E. 391 (1925).

<sup>5</sup> *Rouse v. Tomasek*, 279 Ill. App. 557 (1935).

<sup>6</sup> *Moore v. Bloomington D. & C. R. Co.*, 295 Ill. 63, 128 N.E. 721 (1920); *Soucie v. Payne*, 299 Ill. 552, 132 N.E. 779 (1921).

<sup>7</sup> The problem of whether a person is an eyewitness has raised some difficulty: One who saw the deceased shortly before or after the accident has been held to be an eyewitness. *Cox v. Chicago & N.W.R.Co.*, 9 Ill. App. 15 (1900); *Anderson v. Metropolitan W.S.E. Co.*,

of care on the issue of a specific act or forbearance, is so slight<sup>9</sup> that many jurisdictions refuse to admit it under any circumstances.<sup>10</sup> And in the jurisdictions which permit its introduction, it is confined to such cases of necessity as those in which no direct evidence is available<sup>11</sup> or direct evidence is in conflict.<sup>12</sup> This necessity does not exist upon the question of contributory negligence if there were disinterested eyewitnesses to the occurrence. To enforce this limitation, however, where the only eyewitness is the defendant, thus forcing the plaintiff as in the instant case to rely solely on a hostile witness, seems unjust, for the policy of equality which underlies the "dead man" statutes<sup>13</sup> demands the contrary. The harshness of this enforcement is greatly increased in a jurisdiction, such as Illinois,<sup>14</sup> which places the burden on the plaintiff to disprove contributory negligence.<sup>15</sup> The burden of proving a negative is substantial in itself. As long as the only eyewitness is the defendant, the plaintiff will be virtually unable to establish a *prima facie* case.<sup>16</sup> Especially is this true in Illinois where the

170 Ill. App. 210 (1912). *Contra*: Missouri Furnace Co. v. Abend, 107 Ill. 44 (1883); Smith v. Kewanee L. & P. R. Co., 175 Ill. App. 354 (1902). One who saw only part of the circumstances leading to the accident is generally held not to be an eyewitness. Noonan v. Maus, 197 Ill. App. 103 (1915); Wallis v. Southern P. R. Co., 184 Cal. 662, 195 Pac. 408 (1921); Fiske v. Atchinson T. & S. Fe R. Co., 90 Kan. 409, 133 Pac. 871 (1913); Tucker v. Boston & Me. R. Co., 73 N.H. 132, 59 Atl. 943 (1905). On the issue of drunkenness of the deceased, one who saw him shortly before the accident was held an eyewitness. Chicago & A. R. Co. v. Pearson, 184 Ill. 386, 56 N.E. 633 (1900); Lane v. Missouri P. R. Co., 132 Mo. 4, 33 S.W. 645 (1895); Bedenbaugh v. Southern R. Co., 69 S.C. 1, 48 S.E. 53 (1904). Where the question is in doubt the testimony of the witness is disregarded. Ill. C. R. Co. v. Ashline, 171 Ill. 313, 49 N.E. 521 (1898); or left to the jury. Platter v. Minn. & St. L. R. Co., 162 Iowa 142, 143 N.W. 992 (1913).

<sup>8</sup> Gay v. Winter, 34 Cal 153 (1867); Hussey v. Boston & Me. R. Co., 82 N.H. 236, 133 Atl. 9 (1926); Chicago R. I. & P. R. Co., v. Clark 108 Ill. 113 (1883); 1 Wigmore, Evidence § 65 (2d ed. 1923).

<sup>9</sup> 1 Wigmore, *op. cit. supra* note 8, §§ 64, 65.

<sup>10</sup> Parsons v. Syracuse & N. Y. R. Co., 205 N.Y. 226, 98 N.E. 331 (1912); Mullen v. Mohican Co., 97 Conn. 107, 115 Atl. 685 (1921); Louisville & N. R. Co. v. Adams' Admr., 205 Ky. 203, 265 S. W. 623 (1924); 1 Wigmore, *loc. cit. supra* note 8.

<sup>11</sup> Armstrong v. C. & W. I. R. Co., 350 Ill. 426, 183 N.E. 478 (1932); Frederickson v. Iowa C. R. Co., 156 Iowa 26, 135 N.W. 12 (1912); Clark v. Detroit R. Co., 197 Mich. 489, 163 N.W. 964 (1917); Overman Wheel Co. v. Griffin, 67 Fed. 659 (C.C.A. 1st 1895); Hussey v. Boston & Me. R. Co., 82 N.H. 236, 133 Atl. 9 (1926).

<sup>12</sup> Cleveland C.C. & St. L. R. Co. v. Keenan, 190 Ill. 217, 60 N.E. 107 (1901); Parkinson v. Nashua & L. R. Co., 61 N.H. 416 (1881); Enright v. Atlanta, 78 Ga. 288 (1886); Allard v. Northwestern Contract Co., 64 Wash. 14, 116 Pac. 457 (1911).

<sup>13</sup> "The purpose . . . is to . . . put the two parties in a suit upon terms of equality in regard to the opportunity of giving testimony." Van Meter v. Goldfarb, 317 Ill. 620, 623, 148 N.E. 391, 392 (1925). See also Nordman v. Carlson, 291 Ill. App. 438, 442, 10 N.E. (2d) 53, 55 (1937).

<sup>14</sup> North Chicago St. R. Co. v. Louis, 138 Ill. 9, 27 N.E. 451 (1891); Newell v. Cleveland, C.C. & St. L. Ry. Co., 261 Ill. 505, 104 N.E. 223 (1914).

<sup>15</sup> For other jurisdictions having this rule see 4 Wigmore, *op. cit. supra* note 8, § 2507.

<sup>16</sup> Morris v. East Haven, 41 Conn. 252 (1874); Mullen v. Mohican Co., 97 Conn. 107, 115 Atl. 685 (1921); Gray v. Chicago, R.I. & P. R. Co., 143 Iowa 268, 121 N.W. 1097 (1909).

usual presumption of due care on the part of the deceased in a wrongful death action apparently does not exist.<sup>17</sup> Thus, it would seem that the eyewitness rule should not bar habit evidence where the sole eyewitness is interested adversely to the plaintiff.

**Family Relations—*Inter Vivos* Transfers—Protection of Spouse's Statutory Share**—[New York].—Three days before his death, the husband transferred all his real and personal property in trust, reserving income for life, power of revocation, and control of the trustees as to the administration of the trust. The trial court refused to enforce the trust as against the widow's claim for her statutory share in her husband's estate.<sup>1</sup> On appeal, *held*, affirmed. The husband's transfer was "illusory" in respect to the widow's marital rights. *Newman v. Dore*.<sup>2</sup>

In place of common law dower and curtesy, many states have substituted legislation which gives the surviving spouse, even against a will, a percentage of the decedent's personal and real property remaining in the estate at the time of his or her death.<sup>3</sup> While the general policy motivating these statutes was to protect the spouse against disinheritance, the effectiveness of such statutes largely depends upon the extent to which either spouse is permitted to alienate his or her property during life. The statutes are generally silent on the problem of *inter vivos* transfers; and in order to give effect to the policy behind these statutes the courts have sometimes been compelled to nullify transfers made during coverture.

Such relief has been predicated upon two distinct grounds: (1) the subjective intent primarily to defeat the marital rights of the surviving spouse rather than to benefit the person to whom the property is given; or (2) the failure of the transferor to relinquish in part or in whole the incidents of ownership. Under the first theory, followed in a minority of jurisdictions, the main problem turns upon evidence of the transferor's intent.<sup>4</sup> Where definite evidence is lacking, the protection afforded the surviving spouse depends upon the presumptions invoked by the court. Thus, in *Murray v. Murray*<sup>5</sup> the court held that a presumption of an intent to defeat the widow's share arose where the gift constituted a principal part of the husband's estate. In Vermont, contrary to earlier decisions,<sup>6</sup> no presumptions are raised from the fact that the natural

<sup>17</sup> Contrast the refusal of the trial court to grant an instruction in accord with this presumption, as indicated by the record in *Blumb v. Getz*, 366 Ill. 273, 8 N.E. (2d) 620 (1937), with *Anderson v. C.R.I. & P. Ry. Co.* 189 Iowa 739, 175 N.W. 583 (1920); *Gembolis v. Rydeski*, 258 Mich. 521, 243 N.W. 44 (1932); 6 Iowa L. Bull. 55 (1920); *cf.* 44 Harv. L. Rev. 292 (1930).

<sup>1</sup> Cahill's Consl. Laws N.Y. 1930, c. 13, §§ 18, 83.

<sup>2</sup> 275 N.Y. 371, 9 N.E. (2d) 966 (1937); noted 37 Col. L. Rev. 1219 (1937), 7 Brooklyn L. Rev. 241 (1937).

<sup>3</sup> 3 Vernier, American Family Laws §§ 188, 189 (1935). These statutes establish a "legitimate portion" for the surviving spouse, analogous to that of the Civil Law. See note 24 *infra*.

<sup>4</sup> *Evans v. Evans*, 78 N.H. 352, 100 Atl. 671 (1917); *Nichols v. Nichols*, 61 Vt. 426, 18 Atl. 153 (1889); *Manikee v. Beard*, 85 Ky. 20, 2 S.W. 545 (1887); see notes 5-7 *infra*.

<sup>5</sup> 90 Ky. 1, 13 S.W. 244 (1890); see also *Payne v. Tatem*, 236 Ky. 306, 33 S.W. (2d) 2 (1930).

<sup>6</sup> *Thayer v. Thayer*, 14 Vt. 107 (1842); *Nichols v. Nichols*, 61 Vt. 426, 18 Atl. 153 (1889) (mere gratuitous transfer is presumptively fraudulent).