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## THE UNCONTRADICTED TESTIMONY OF AN INTERESTED WITNESS.

SIDNEY S. BOBBÉ

In jurisprudence, one of the most significant developments of the nineteenth century was the breaking down of the barriers which had prevented parties and other interested witnesses from testifying.<sup>1</sup> Their removal left certain aspects of the law of evidence facing new constructions. Among other things, that which was to prove a most prolific source of litigation was whether or not the uncontradicted testimony of such a witness was entitled to the same conclusive effect as the uncontradicted testimony of a disinterested witness.<sup>2</sup> When this question first came before it, the New York Court of Appeals did not hesitate to hold that interest alone was sufficient to deny conclusiveness to the witness's evidence since his interest presented a question of credibility;<sup>3</sup> and the same attitude was taken by most courts that were called upon to consider the question.<sup>4</sup>

In *Elwood v. Western Union Telegraph Co.*,<sup>5</sup> Judge Rapallo said "that a witness, although unimpeached, may have such an interest in the question at issue as to affect his credibility;" and, having found that the witnesses in that case had an interest to protect, the court held that their relation to the subject-matter in controversy "was of itself sufficient to take from the court the right to dispose of the case upon their evidence."

This position was maintained, with but a single interruption,<sup>6</sup> in

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<sup>1</sup>I WIGMORE, EVIDENCE (2d ed. 1923) §§ 575 *et seq.*: 9 HOLDSWORTH, HIST. OF ENG. LAW (1926) 186 *et seq.* For the purposes of this article, parties will be included in the term "interested witness."

<sup>2</sup>*Lomer v. Meeker*, 25 N. Y. 361 (1862); *Elwes v. Elwes*, 1 Hag. Cons. 269, 287 (1796). In some few states, *e. g.*, Massachusetts and Maryland, apparently the testimony of every witness, interested or disinterested, is always for the jury: *Commonwealth v. McNeese*, 156 Mass. 231, 30 N. E. 1021 (1892), *per* Holmes, J.; *Lindenbaum v. N. Y. & N. H. R. R.*, 197 Mass. 314, 84 N. E. 129 (1908); *Win. J. Leinp Brewing Co. v. Mantz*, 120 Md. 176, 87 Atl. 814 (1913).

<sup>3</sup>*Elwood v. Western Union Telegraph Co.*, 45 N. Y. 549 (1871).

<sup>4</sup>See notes of cases in (1920) 8 A. L. R. 796; (1931) 72 A. L. R. 27; (1905) 4 ANN. CAS. 982; (1907) 12 ANN. CAS. 245.

<sup>5</sup>*Supra* note 3.

<sup>6</sup>*Kelly v. Burroughs*, 102 N. Y. 93, 6 N. E. 109 (1886); for a further discussion of this case see note 27, *infra*.

numerous cases that came before the Court of Appeals<sup>7</sup> until in the year 1900 the case of *Hull v. Littauer*<sup>8</sup> was decided. The court in its opinion stated an exception to the general rule, and this statement has since been adopted with but slight modifications as the sole test of whether or not such testimony must be granted conclusiveness. The court there said, *per* Gray, J.:

"Where, however, the evidence of a party to the action is not contradicted by direct evidence, nor by any legitimate inferences from the evidence; and it is not opposed to the probabilities; nor in its nature surprising or suspicious, there is no reason for denying to it conclusiveness."<sup>9</sup>

As amplified by the later cases,<sup>10</sup> this rule may be said to be that the evidence should be granted conclusiveness, unless the court can say that it is incredible on its face, whether because of inherent improbability, unreasonableness, inconsistency with the facts, circumstances or presumptions in the case, or because of surprising or suspicious features. In other words, although the Court of Appeals has never admitted it, in effect it holds by so ruling that there is no question of credibility unless the evidence presents in its substance the same qualities arousing incredulity which would deny to it conclusiveness if furnished by a disinterested witness instead of an interested one.

Even in the case of a disinterested witness, the testimony need not

<sup>7</sup>*Kavanagh v. Wilson*, 70 N. Y. 177 (1877); *Gildersleeve v. Landon*, 73 N. Y. 609 (1878); *Wohlfahrt v. Beckert*, 92 N. Y. 489 (1883); *Kearney v. Mayor*, 92 N. Y. 618 (1883); *Honegger v. Wettstein*, 94 N. Y. 252 (1883); *Sipple v. State*, 99 N. Y. 284, 1 N. E. 892 (1885); *Munoz v. Wilson*, 111 N. Y. 295, 18 N. E. 855 (1888); *Dean v. M. E. R. Co.*, 119 N. Y. 540, 23 N. E. 1054 (1890); *Canajoharie National Bank v. Diefendorf*, 123 N. Y. 191, 25 N. E. 402, 10 L. R. A. 676 (1890); *Joy v. Diefendorf*, 130 N. Y. 6, 28 N. E. 602, 27 Am. St. Rep. 484 (1891); *Volkmar v. Manhattan Railway Co.*, 134 N. Y. 418, 31 N. E. 870, 30 Am. St. Rep. 678 (1892); *Page v. Krekey*, 137 N. Y. 307, 33 N. E. 311, 21 L. R. A. 409, 33 Am. St. Rep. 731 (1893).

<sup>8</sup>162 N. Y. 569, 57 N. E. 102 (1900).

<sup>9</sup>*Id.* at 572, N. E. at 102-103.

<sup>10</sup>*Second National Bank v. Weston*, 172 N. Y. 250, 55 N. E. 1080, 76 Am. St. Rep. 283 (1902); *Johnson v. New York Central Railroad Co.*, 173 N. Y. 79, 65 N. E. 946 (1903); *Ferris v. Sterling*, 214 N. Y. 249, 108 N. E. 406 (1915); *Der Ohannessian v. Elliott*, 233 N. Y. 326, 135 N. E. 518 (1922); *Schultze v. McGuire*, 241 N. Y. 460, 150 N. E. 516 (1926); *Fluegel v. Coudert*, 244 N. Y. 393, 155 N. E. 683 (1927); *Chaika v. Vandenberg*, 252 N. Y. 101, 169 N. E. 103 (1929); *New York Bankers v. Duncan*, 257 N. Y. 160, 177 N. E. 407 (1931); *St. Andrassy v. Mooney*, 262 N. Y. 368, 186 N. E. 867 (1933); *Chesapeake & Ohio Railway v. Martin*, 283 U. S. 209, 51 Sup. Ct. 23, 75 L. ed. 983 (1931). The cases in other jurisdictions are far too numerous to mention, and most of them are collected in the notes in (1920) 8 A. L. R. 796, and (1931) 72 A. L. R. 27.

be treated as conclusive if it is inherently improbable or suspicious or inconsistent with the facts, circumstances, or presumptions in the case.<sup>11</sup> In the true sense, it then ceases to be uncontradicted, because it is opposed to the inherently probable or to the proven facts, circumstances or presumptions. The courts that adopt this interpretation of the *Hull* case have therefore applied no more rigorous test to interested testimony than is or should be applied to disinterested, save that they frequently strive instinctively to preserve the question of credibility in the case of the interested witness by scrutinizing more keenly the facts in order to discern, if possible, some inherent improbability or inconsistency. The present writer maintains that this occasional instinctive discrimination is neither satisfactory nor scientific, and that interest itself should be preserved as creating an issue of credibility regardless of the plausibility of the testimony.

It will thus be among the purposes of this article to point out that the existing interpretation of the *Hull* case is fallacious from every point of view, and that it has been adopted only through a misconception of what are supposed to be the controlling precedents. What is of even greater importance is that, because based on wrong principles, it has served to obscure the real problem involved, which is to develop a much-needed and desirable rule defining exactly under what circumstances such testimony should be treated as conclusive in spite of interest. That proposed rule the writer will venture to set forth in the course of this article.

First let us examine the underlying philosophy of the *Elwood* case which denied conclusiveness solely because of interest. In that case, Judge Rapallo gave no further reason for his ruling than the mere narration of the facts showing the interest that the witnesses had to protect without imputing an actual want of truthfulness to them.

But the reasons were more fully and very ably stated in a case rely-

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<sup>11</sup>*Elwood v. Western Union*, *supra* note 3; *Koehler v. Adler*, 78 N. Y. 287 (1879); *Plyer v. German American Ins. Co.*, 121 N. Y. 689, 24 N. E. 929 (1890); *Quock Ting v. U. S.*, 140 U. S. 417, 11 Sup. Ct. 733 (1891); *Blankman v. Vallejo*, 15 Cal. 638, 645 (1860); *Podolski v. Stone*, 186 Ill. 540, 58 N. E. 340 (1900); *Boudeman v. Arnold*, 200 Mich. 162, 166 N. W. 985, 8 A. L. R. 789 (1918); *Davis v. Hardy*, 6 Barn. & C. 225 (1827); *The "Odin"*, 1 C. Rob. 252 (1799); Jeremy Bentham said: "The improbability of a fact in itself, may be considered as a sort of counter-testimony—a sort of *circumstantial* evidence, operating in contradiction to any *direct* evidence by which the fact in question would otherwise be considered as proved." 6 BENTHAM, WORKS (1843) 153; also 7 *id.* at 76.

ing upon the *Elwood* case before the Buffalo Superior Court, *Hodge v. City of Buffalo*,<sup>12</sup> where Judge James M. Smith said:<sup>13</sup>

"Whoever has witnessed in our courts the operation of the law by which parties and those directly and most strongly interested in suits are permitted to testify therein, must have been convinced that it has opened a wide door for the perversion of the truth, and placed before litigants a temptation to falsehood and perjury, most difficult to resist. Those sound rules which remain undisturbed, and which determine the force and value of evidence derived from such sources, ought to be more carefully observed and enforced than ever before. That the interest of the witness must affect his testimony is a truth as universal in its application as men's mental and moral infirmities. All experience shows that under the bias of interest, men cannot judge correctly even when they most earnestly desire to do so; much less can they give fair and impartial evidence, when parties to a litigation, which not only involves their interests, but, as is almost always the case, excites their passions and prejudices. Under such influences, men will, even though not consciously, suppress some facts, soften or modify others, and give to all such color and impress as is most favorable to themselves. These are most controlling considerations in respect to the credibility of human testimony, and ought never to be overlooked in applying the rules of evidence and determining its weight in the scale of truth."

Here is a jurist obviously speaking out of his experience as a trial judge; and his opinion of the emotional effect of self-interest on a person's testimony is just as fully in accord with modern psychology as it is with the same thought more quaintly and less discriminatingly expressed more than three centuries ago by Coke:<sup>14</sup>

"Experience proves that men's consciences grow so large that the respect of their private advantage rather induces men (and chiefly those who have declining estates) to perjury \* \* \*."

It was largely due to the influence of Coke that the law which went to the extreme of altogether excluding the testimony of parties was later extended to interested witnesses.<sup>15</sup> That remedy proved worse than the disease, but there can be no doubt that there is a deep-seated,

<sup>12</sup>1 Abb. N. C. 356 (1874).

<sup>13</sup>*Id.* at 358-359. Judge Smith's colleagues were George W. Clinton and James Sheldon, and the reporter of this case refers to this bench as "a tribunal of highly respected authority," as indeed it was. CHESTER, COURTS AND LAWYERS OF NEW YORK (1925) 1266; 1 HISTORY OF THE BENCH AND BAR OF NEW YORK (1897) 281.

<sup>14</sup>Slade's Case, (1602) 4 Co. Rep. f. 95a.

<sup>15</sup>Co. LITT, 6 b.; 9 HOLDSWORTH, HIST. OF ENG. LAW (1926) 194-195; 1 WIGMORE, EVIDENCE (2d ed. 1923) § 575.

well-founded human reason to mistrust testimony coming from the mouth of a party or an interested witness, not necessarily because of a deliberate intention to commit perjury, but because of the overpowering influence of men's desires and feelings over their mental processes.

So strongly imbedded indeed was this distrust of the testimony of interested witnesses that although the abuses attending the entire exclusion of their testimony were manifestly shocking, it required an epoch-making struggle, first in England<sup>16</sup> and then in the United States,<sup>17</sup> to bring about the reform that would permit such a witness to testify. Jeremy Bentham had been the philosopher and prime mover of the reform.<sup>18</sup> But it is a gross perversion of his ideas ever to ignore the factor of interest. His thesis was only partly that it was criminally stupid to exclude the testimony. With equal emphasis, he insisted that the trier of the facts should be required in weighing the probative force of the testimony to bear uppermost in its mind the unconscious effect of interest in promoting mendacity.<sup>19</sup> It was furthest from his thoughts that once the testimony was no longer excluded the factor of interest could ever be disregarded; and, when the EVIDENCE ACT OF 1843 was enacted in England, it contained a preamble expressly reserving to the triers of the facts the right "to exercise their judgment on the credit of the witnesses adduced and on the truth of their testimony." Likewise, when the reform was first officially proposed in New York, the Commissioners on Practice and Pleadings said:<sup>20</sup>

"It is wiser, we cannot doubt, to place the witness on the stand and let the jury judge of his testimony."

In most of the American states where such a statute was adopted it was expressly provided that the interest of the witness may be shown for the purpose of affecting his credibility.<sup>21</sup>

<sup>16</sup>EVIDENCE ACT OF 1843, (Lord Denman's Act).

<sup>17</sup>Michigan was the first in 1846; then New York in 1848, followed soon after by the other states. But there was a lag of several years both in England and the United States in dropping the barriers against parties' testifying. See 1 WIGMORE, EVIDENCE 2d ed. § 488n.

<sup>18</sup>BENTHAM, RATIONALE OF JUDICIAL EVIDENCE (1827); 7 BENTHAM, WORKS (1843) 393 *et. seq.*

<sup>19</sup>6 BENTHAM, WORKS (1843) 154-156; 7 *id.* at pp. 256 *et seq.*, 386 *et seq.*, 567.

<sup>20</sup>FIRST REPORT OF THE COMMISSIONERS ON PRACTICE AND PLEADINGS (1848) 247.

<sup>21</sup>2 WIGMORE, EVIDENCE (2d ed. 1923) § 966, where the statutes and rulings are collated. And even in the absence of such a qualifying clause in the statute, it is the considered judgment of the learned author, there expressed, that the interest of the witness is unquestionably "a circumstance available to impeach him." See also 5 CHAMBERLAYNE, EVIDENCE (1916) § 3752; 6 JONES, EVIDENCE (2d ed. 1926) § 2470.

Even today there is the well-established although anomalous exception, still part of the law of New York, C. P. A. Section 347, and of almost every other state,<sup>22</sup> forbidding the testimony of an interested witness in any action or proceeding brought against the estate of a deceased person.

The interest of a witness has therefore always actually been considered a preponderant factor; yet it has now been virtually denied all effect where the testimony is uncontradicted,—a step that should hardly be taken without the most cogent reasons. To ignore this factor altogether, as the courts have done, is to fly in the face of our own everyday experience and that of the ages.

Upon what basis was the *Hull* case decided? The plaintiff was there suing for the purchase price of merchandise, but gave no evidence whatever as to the nature of the agreement for the sale. The defendant, on the other hand, testified that the contract was an entire one, for a larger quantity than the quantity delivered, and claimed that the plaintiff was therefore not entitled to recover. This testimony was not contradicted, and the court held that no issue was presented and therefore directed a verdict which the Court of Appeals sustained. That court recognized that the testimony of an interested witness was not to be regarded in the same way as that of a disinterested witness, but held that whether it should be accepted without question depended upon the situation as developed by the facts and circumstances *and the attitude of his adversary*.

Inasmuch as the plaintiff had given no evidence whatever with respect to the agreement for the sale of the goods, this alone would have justified the direction of a verdict for the defendant, since that was an essential part of the plaintiff's case. But the court also went on to point out that one Tolman, the man who had made the sale to the defendants, "*might have given his version of the agreement if at variance with what was claimed by the defendant; but he was not put upon the witness stand.*"<sup>23</sup> The court held that those circumstances were sufficient to distinguish the case and to place it outside of the operation of the general rule. These certainly were distinguishing facts, and if the court had based its opinion solely thereupon, it and other courts would not later have fallen into the confusion consequent on following blindly the other language of the opinion without reference to what was decided in the case.

However, when the court in its opinion laid down the rule involving an examination of the probability of the testimony, (wholly irrelevant

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<sup>22</sup>1 WIGMORE, EVIDENCE (2d ed. 1923) § 488n.

<sup>23</sup>Italics are the writer's.

to what it decided) it did so upon the basis of two authorities neither of which should have been accepted as such. In the first place, it relied upon the case of *Lomer v. Meeker*<sup>24</sup> which was not a case involving an interested witness at all.<sup>25</sup> The question was never there presented or discussed on that basis, and the only thing there decided was that the uncontradicted and unimpeached testimony of a *disinterested* witness could not be disregarded by a jury. The other authority relied upon was the case of *Kelly v. Burroughs*,<sup>26</sup> which in turn was based solely upon the authority of *Lomer v. Meeker* and was never followed by the court from the date of its decision in 1886 until 1900, although many other cases involving the same question had in the meanwhile been decided the other way.<sup>27</sup>

Now, if the court in the *Hull* case had formulated a rule based upon what it was actually deciding, it is suggested that such a rule, wholly practical and logical, would have been as follows:

*The uncontradicted testimony of an interested witness is not to be treated as conclusive unless the adversary's failure to contradict it, under all the circumstances of the case, can be reasonably construed as an admission of its truth.*

It is the primary purpose of this article to suggest the adoption of such an interpretation in lieu of the existing interpretation, which has only caused confusion and misunderstanding.

In the *Hull* case, it will be noted, the plaintiff had had it in his power, as the court expressly found, to contradict the testimony of the interested witness if it was untrue, but chose instead to remain silent and to allow that testimony to be unchallenged. It would there have been a fruitless inquiry to ascertain whether that uncontradicted testimony was or was not opposed to the probabilities, or did or did not contain suspicious features. A concocted story can be made probable just as easily as otherwise, especially if there is no opportunity for contradiction. The important factor was that the adverse party, by failing

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<sup>24</sup>25 N. Y. 361 (1862).

<sup>25</sup>He happened to be a co-defendant who had defaulted, and against whom a judgment would be entered regardless of the outcome of the claim against Meeker and another defendant, on whose behalf he was testifying.

<sup>26</sup>102 N. Y. 93, 6 N. E. 109 (1886).

<sup>27</sup>See *supra* note 6. All that the court said in *Kelly v. Burroughs* on the subject was: "The mere fact that the plaintiff, who testified to important particulars, was interested was unimportant in view of the fact that there was no conflict in the evidence, or any thing or circumstance from which an inference against the fact testified to by him could be drawn. The cases cited by the appellant lacked this element, while *Lomer v. Meeker*, 25 N. Y. 361, sustains the ruling of the trial court."

*voluntarily* to contradict the testimony, *which he could have done if it was untrue*, had by his silence conceded its truthfulness.

The significance lay, not in the fact that the testimony of the interested witness was probable and free from suspicion and doubt, but in that the plaintiff had a witness, Tolman, who "might have given his version of the agreement if at variance with what was claimed by the defendant."<sup>28</sup> Under those circumstances, not to put Tolman on the witness stand was an eloquent admission of the truthfulness of the defendant's testimony, and it would therefore have been wholly illogical to refuse to treat it as conclusive, since the plaintiff himself had wilfully so treated it. But that would not have been so if Tolman, the only witness the plaintiff could have had, had been dead or otherwise unavailable as a witness. In that case, the failure to contradict the testimony could not have been treated as an admission because it would have been wholly involuntary.

It is no novel thing in the law for silence at times and under appropriate conditions to mean consent.<sup>29</sup> Thus it is well settled in the law of evidence that where a definite statement of an alleged fact is made in the presence and hearing of a party whom it affects personally in his rights, and is of such a nature as to call for a reply, and the party addressed has knowledge of the matter to which reference is made which enables him to answer if he is inclined to make reply, and the circumstances are such as to make a reply proper and natural, that statement taken in connection with a total or even partial failure of response is admissible in evidence as tending to show an assent to the truth of the facts stated.<sup>30</sup> Where, therefore, the adverse party voluntarily refrains from contradicting damaging evidence, it has the same effect as would the admission in evidence of proof of assent by silence where there is a duty to speak.

Another application of the principle is the presumption or inference arising from a party's failure to produce testimony or to take the stand. Such a failure to produce testimony or to testify in his own behalf,

<sup>28</sup>162 N. Y. 569, 57 N. E. 102 (1900).

<sup>29</sup>1 WIGMORE, EVIDENCE (2d ed. 1923) § 292 and 2 *id.* § 1071; Stecher Lithograph Co. v. Inman, 175 N. Y. 124, 67 N. E. 213 (1903) and authorities there cited; Warner v. Fuller, 245 Mass. 520, 528, 139 N. E. 811, 814-15 (1923) and cases there cited.

Wigmore says at § 292: "Silence, when the assertion of another person would naturally call for a dissent if it were untrue, may be equivalent to an assent to the assertion. This, however, fixes the party, by adoption, with the other person's assertion and thus it ceases to be a question of conduct evidence and involves a genuine admission in express words."

<sup>30</sup>Warner v. Fuller, *supra* note 29.

when the evidence, if it exists at all, is in his possession or control, permits every inference warranted by the evidence offered to be indulged in against him.<sup>31</sup> This in effect destroys the issue of credibility and concedes that no such issue is presented in the case.

The axiom stated by Lord Mansfield in *Blatch v. Archer*<sup>32</sup> that "all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other side to have contradicted" has been accepted as law by the Supreme Court of the United States and by the Court of Appeals respectively in the cases of *Kirby*, *Jordan* and *Travelers Insurance Company*, just cited. When, therefore, contradiction though presumably available is not offered, it is in effect testimony by conduct, if not indeed an actual admission, granting the credibility of the interested witness.<sup>33</sup> His testimony then becomes conclusive.

Other instances where silence may mean consent arise in the law of agency where it may lead to the ratification of an unauthorized act<sup>34</sup> and also in the law of contracts involving acceptance of an offer.<sup>35</sup>

To hold that the failure to contradict is an admission of truthfulness under circumstances where a party "knows or ought to know that a reasonable person will regard his silence as assent"<sup>36</sup> is therefore no novel doctrine in the law.

A vastly different situation presents itself, however, when the party does not have it reasonably in his power to contradict the testimony even if untrue. Is it fair then to grant conclusiveness to that testimony merely because it rings true and is in no way incredible in its content? The temptation to falsify, particularly on the part of interested persons, is certainly increased where there is no fear of contradiction; and yet no adequate safeguard is permitted against such a result. Thus, if an interested witness should testify as to a transaction with a person who

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<sup>31</sup>Wood v. Hubbell, 10 N. Y. 479, 486 (1854); Wylde v. Northern R. R., 53 N. Y. 156 (1873); Bleecker v. Johnston, 69 N. Y. 309, 311 (1877); Dowling v. Hastings, 211 N. Y. 199, 202, 105 N. E. 194, 195 (1914); Matter of Jordan v. Decorative Co., 230 N. Y. 522, 130 N. E. 634 (1921); Travelers Insurance Company v. Pomerantz, 246 N. Y. 63, 69, 158 N. E. 21, 23 (1927); Kirby v. Tallmadge, 160 U. S. 379, 383, 16 Sup. Ct. 349, 350-51 (1895); Blatch v. Archer, 1 Cowp. 63, 65 (1774); 1 WIGMORE, EVIDENCE (2d ed. 1923) §§ 278, 289, 291; 1 JONES, EVIDENCE (2d ed. 1926) § 84.

<sup>32</sup>1 Cowp. 63, 65 (1774).

<sup>33</sup>Cf. 1 WIGMORE, EVIDENCE (2d ed. 1923) § 292; see *supra* note 29.

<sup>34</sup>1 MECHEM, AGENCY (2d ed. 1914) §§ 453, 454-464; RESTATEMENT, AGENCY (1933) §§ 49a and 94.

<sup>35</sup>1 WILLISTON, CONTRACTS (1927) §§ 91, 278; RESTATEMENT, CONTRACTS (1932) § 72.

<sup>36</sup>1 WILLISTON, CONTRACTS (1927) § 278.

is unavailable as a witness or as to a matter or thing wholly within the mental processes of the witness or within his peculiar knowledge or control, such testimony must, under the *Hull* rule, thus construed, be granted conclusiveness, although it all relates to matters or things beyond contradiction. The only requirement is that the testimony shall be probable and free from suspicious features.

On the other hand, assume that the testimony is with relation to a matter or thing which can be easily contradicted if untrue, but the interested party tells a story which, although true, and challenging contradiction if untrue, strains the credulity of the court or jury. The adverse party need not attempt to contradict it, but solely *because of the surprising nature of the testimony* can raise an issue of credibility.

Thus, whether in granting or in denying conclusiveness the court, by the adoption of this unrealistic construction of the *Hull* decision, may work a manifest injustice. On the other hand, that which is really implied by the *Hull* decision is a satisfactory and workable rule fully in accord both with human nature and legal principles.

As already pointed out, it was intimated though not expressed in the *Hull* case, and was in fact decisive of that case as the court clearly indicated, that, since the evidence if untrue could have been contradicted, the adverse party by his silence indicated assent. The significance of this factor was also clearly pointed out in several other cases that have come before the courts.

Thus, the Supreme Court of the United States in *Chesapeake & Ohio Railway v. Martin*<sup>37</sup> in granting conclusiveness to such testimony said:

"Its accuracy was not controverted by proof or circumstance directly or inferentially; and it is difficult to, see why, if inaccurate, it readily could not have been shown to be so."<sup>38</sup>

This would have been a sufficient and logical basis for that decision, and it would then probably have been wholly unnecessary for the court to consider the reasonableness or inherent probability of the testimony. But it refrained from basing its decision on that ground, and in fact refrained from formulating any rule whatever except the inferential adoption of the so-called rule of the *Hull* case. Thus, the court examined the testimony in detail, and determined that the witness was candid in his manner of testifying, that his testimony was reasonable upon its face, and in accord with probability, and not open to doubt "from any reasonable point of view."<sup>39</sup>

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<sup>37</sup>283 U. S. 209, 51 Sup. Ct. 23, 75 L. ed. 983 (1931).

<sup>38</sup>*Id.* at 216; Sup. Ct. at 456; L. Ed. at 988. Italics are the writer's.

<sup>39</sup>The Court also discussed the fact that the testimony was corroborated in-

In other words, the highest court in the land was obliged, quite unnecessarily as it happened, to employ its valuable time in determining the quality of the witness's testimony and its inherent credibility while ignoring the factor of interest. Such a course could have been avoided, because the solution of the problem lay at hand in the self-evident fact that the adversary's failure to speak when there was a duty to do so if the testimony was untrue was in effect an admission of its truth. A reading of the rather lengthy opinion of the court is convincing evidence of the complexity of the problem if the presently understood rule of the *Hull* case continues to be applied, instead of the suggested rule.

Curiously enough—and this also is illustrative of the utter confusion into which the question has fallen—the Supreme Court of the United States, although quoting at great length from *Hull v. Littauer* and other cases, nowhere mentions its own apparently conflicting decision in *Sonnenheil v. Moerlein Brewing Co.*<sup>40</sup> where the testimony in denial of knowledge of fraud was apparently free from suspicion and doubt, and yet was denied conclusiveness by the Supreme Court merely because of the interest of the witness. But it is also significant that in the *Sonnenheil* case, although that fact is not mentioned in the opinion, the testimony related to the mental operations of the witnesses and, being thus beyond contradiction even if untrue, was properly denied conclusiveness upon logical principles.

On the other hand, in *Rumsey v. Boutwell*,<sup>41</sup> decided prior to the *Hull* case, in speaking of the plaintiff's testimony, Presiding Justice Learned said:

"If the testimony of Rumsey was not true, it was difficult, if not impossible for the defendant to contradict it. Admitting that the plaintiff made the contracts indicated by the slips, where could the defendant obtain evidence to contradict the testimony of Rumsey \* \* \*? This consideration shows the justice of the principle above examined, that in such cases as this, the question must be determined by the jury, and that the court cannot decide as a matter of law that the plaintiff's testimony must be believed."

In *Kennedy v. McAllaster*,<sup>42</sup> also decided prior to the *Hull* case, the defendant's testimony related to the alleged care used in the inspection of a street elevator. The court, in refusing to grant conclusiveness to the testimony, said:

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dependently, but this also was not accepted as a sufficient basis by itself for the decision.

<sup>40</sup>172 U. S. 401, 19 Sup. Ct. 233 (1898).

<sup>41</sup>61 Hun 165, 169, 15 N. Y. Supp. 765, 767, (1891).

<sup>42</sup>31 App. Div. 453, 462, 52 N. Y. Supp. 714, 720-1 (4th Dept. 1898).

"Evidently it would be most difficult, if not impossible, for the plaintiff to contradict their statements that they had made frequent inspection of the elevator and its appliances. Is it not, therefore, a very proper case for the consideration of the jury?"

The courts of Texas have expressly recognized that the uncontradicted testimony of an interested witness ought not to be submitted to the jury where the opposing party is able to introduce testimony to contradict it and fails to do so;<sup>43</sup> and in New Jersey the same rule seems to be recognized.<sup>44</sup>

Strangely enough, there has been open recognition of this principle by the New York Court of Appeals only in cases involving claims against the estate or property of a decedent.<sup>45</sup> For instance, it was held in *Foreman v. Foreman*<sup>46</sup> that uncontradicted testimony in support of such a claim presents a question of credibility when, because of death, direct contradiction is "difficult, if not impossible." There remains, however, considerable doubt whether the Court of Appeals is ready to extend the principle even to the situation where the testimony merely relates to a transaction with a witness who is dead at the time of the trial (but not involving a claim against his estate) for when that situation arose in *Edward S. Mitchell, Inc. v. Dannemann Hosiery Mills*<sup>47</sup> the court preferred to base its decision upon the improbabilities and contradictions in the testimony in addition to the death of the witness rather than upon the latter fact alone.

Outside of this limited field where "death has sealed the lips of the alleged promissor" the court has apparently entirely overlooked the principle involved, so far at least as its expressions of opinion would indicate. It is only upon examination of the facts of the adjudicated cases in the Court of Appeals that we find that in many instances the principle here suggested is obviously the one that actually animated the court's decision.

Thus, in *Kavanagh v. Wilson*,<sup>48</sup> although the opinion of the court proceeds upon the general principle that interest alone creates a question of credibility, Judge Earl stated:

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<sup>43</sup>*City of San Antonio v. E. H. Rollins & Sons*, (Tex. Civ. App.) 127 S. W. 1166 (1910); *Beene & Trotter v. Rotan Grocery Co.*, 50 Tex. Civ. App. 448, 110 S. W. 162 (1908); *Hansen v. Williams*, (Tex. Civ. App.) 113 S. W. 312 (1908).

<sup>44</sup>*Schmidt v. Marconi Wireless Tel. Co.*, 86 N. J. L. 183, 90 Atl. 1017 (1914).

<sup>45</sup>*McKeon v. Van Slyck*, 223 N. Y. 392, 119 N. E. 851 (1918); *Foreman v. Foreman*, 251 N. Y. 237, 242, 167 N. E. 428, 429 (1929); see *Matter of Kindberg*, 207 N. Y. 220, 227, 100 N. E. 789, 790 (1912).

<sup>46</sup>*Supra* note 45.

<sup>47</sup>258 N. Y. 22, 179 N. E. 39 (1931).

<sup>48</sup>70 N. Y. 177, 180 (1877).

"No one was living who could contradict the witness if he did not testify truthfully,"

thus indicating that this was an important consideration in the court's decision.

A similar result was reached in cases where the testimony related to an alleged warning given to one who was deceased at the time of the trial;<sup>49</sup> in cases where the testimony related to matters peculiarly within the knowledge and control of the witness;<sup>50</sup> and in cases that related to operations of the witness's own mind.<sup>51</sup> In none of these cases, it is true, did the court put its decision on that ground, but it must be obvious that the fact that in each of these cases the testimony was as a practical matter beyond contradiction even if untrue was an important consideration with the court.

Conversely, the case of *Kelly v. Burroughs*<sup>52</sup> can be explained (although here again the opinion does not attempt this explanation) on the ground that the uncontradicted testimony related to an outstanding fact which was capable of contradiction if untrue, namely, the making of a payment to a third party; therefore the decision of the court which granted conclusiveness to that testimony was undoubtedly sound.<sup>53</sup>

Thus, it is apparent that the writer's interpretation of the true rule of the *Hull* case, in addition to being in accord with established legal principles, has respectable authority in its support both in the expres-

<sup>49</sup>*Wohlfart v. Beckert*, 92 N. Y. 489 (1883); *Irish v. Union Bag & Paper Co.*, 103 App. Div. 45, 92 N. Y. Supp. 695 (3d Dept. 1905), *aff'd*, 183 N. Y. 508, 76 N. E. 1097 (1905); *Courtney v. Niagara Falls Co.*, 138 App. Div. 383, 122 N. Y. Supp. 721 (4th Dept. 1910), *aff'd*, 201 N. Y. 584 (1911). *Contra*: *Hauss v. Lake Erie etc. Co.*, 105 Fed. 733 (C. C. A. 6th, 1901)—a case relied upon by the Supreme Court in *C. & O. Ry. v. Martin*, 283 U. S. 209, 51 Sup. Ct. 23, 75 L. ed. 983 (1931).

<sup>50</sup>*Gildersleeve v. Landon*, *supra* note 7; *Elwood v. W. U. Telegraph Co.*, *supra* note 3; *Kearney v. Mayor*, *supra* note 7; *Page v. Krekey*, *supra* note 7; *Volkmar v. Manhattan Railway Co.*, *supra* note 7; *Saranac & L. P. R. Co. v. Arnold*, 167 N. Y. 368, 60 N. E. 647 (1901); *Orlando v. Pioneer B. T. Supply Co.*, 239 N. Y. 342, 345, 146 N. E. 621, 622 (1925).

<sup>51</sup>*Dean v. M. E. R. Co.*, *supra* note 7; *Canajoharie National Bank v. Diefendorf*, *supra* note 7; *Joy v. Diefendorf*, *supra* note 7; *New York Bankers v. Duncan*, 257 N. Y. 160, 177 N. E. 407 (1931), and to the same effect is *Sonnentheil v. Moerlein Brewing Co.*, 172 U. S. 401, 19 Sup. Ct. 233 (1898).

<sup>52</sup>102 N. Y. 93, 6 N. E. 109 (1886).

<sup>53</sup>The case of *Lomer v. Meeker*, *supra* note 2, cited as authority for the *Kelly* case, can also be explained in the same way (although it is the writer's contention as above stated that that case in any event did not involve an interested witness) for there the testimony furnished by the defendant was that the plaintiff had obtained a note by usury—a matter easily susceptible of contradiction if untrue.

sions of opinion by the courts and in the actual decisions of the cases.

Nor, to be sure, has the Court of Appeals failed to show extreme reluctance actually to apply the supposed principle of the *Hull* case. Whenever possible, it has strained every effort to find some fact or circumstance which would permit it to deny conclusiveness to the testimony, but the only result of that is "confusion worse confounded." Hence, in the next two cases<sup>54</sup> to come before the court after the decision in the *Hull* case that case was entirely ignored, not followed, and probably overlooked. In the subsequent two cases, the *Hull* case was relied upon, but the cases were actually decided on other grounds.<sup>55</sup> Then in *Gordon v. Ashley*<sup>56</sup> the court apparently reverted to the original rule of the *Elwood* case because, without even mentioning the *Hull* case, it stated that the evidence presented a question of fact since the defense "rested essentially upon the credibility of the defendant."<sup>57</sup>

Subsequently, in four cases the court reiterated the principle,<sup>58</sup> but in the first of the cases cited it is noteworthy that it granted conclusiveness only because the testimony was otherwise corroborated, and in the other three cases cited, although endorsing the so-called rule of the *Hull* case, the court refused to grant conclusiveness to the testimony. In the first of the latter three cases, it was refused because of doubt as to the verity of the testimony based upon some of its contents; in the second, because of the character of the evidence as well as the interest of the witness; and in the third, because of the presence in the testimony of features arousing suspicion and incredulity.

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<sup>54</sup>*Eastland v. Clarke*, 165 N. Y. 420, 59 N. E. 202 (1901); *Saranac etc. Railway Co. v. Arnold*, 167 N. Y. 368, 60 N. E. 647 (1901).

<sup>55</sup>*Second National Bank v. Weston*, 172 N. Y. 250, 55 N. E. 1080 (1902); *Johnson v. New York Central Railroad Co.*, 173 N. Y. 79, 65 N. E. 946 (1903); In the former case, the court held that the testimony was not the only testimony in the case. In the latter case, no matter which way the interested testimony was considered, the plaintiff was not entitled to recover because he had failed to make out a prima facie case.

<sup>56</sup>191 N. Y. 186, 83 N. E. 686 (1908).

<sup>57</sup>See also *Matter of Kindberg*, 207 N. Y. 220, 227, 100 N. E. 789, 790 (1912), where the court again ignored *Hull v. Littauer* and stated that the principle of submitting the testimony of interested witnesses to a jury "is peculiarly applicable where from the circumstances in the case the testimony of the witness is not susceptible of direct contradiction"—the witness in question having testified to the execution of a will.

<sup>58</sup>*Der Ohannessian v. Elliott*, 233 N. Y. 326, 135 N. E. 518 (1922); *Schultze v. McGuire*, 241 N. Y. 460, 150 N. E. 516 (1926); *Chaika v. Vandenberg*, 252 N. Y. 101, 169 N. E. 103 (1929); *New York Bankers v. Duncan*, 257 N. Y. 160, 177 N. E. 407 (1931). But see: *Gaffney v. N. Y. Consol. R. R.*, 220 N. Y. 34, 37, 114 N. E. 1047, 1048 (1917); *Gnichtet v. Stone*, 233 N. Y. 465, 467, 135 N. E. 852, 853 (1922).

So far at least, in the course of the court's application of the rule, it had not once had occasion to grant conclusiveness to the testimony solely because it was uncontradicted.

Then, in a case involving the responsibility of an owner for the use of his automobile by his chauffeur,<sup>59</sup> the court again stated that it would not grant conclusiveness to the testimony of the owner who denied that the car was being used with his authority—a ruling hardly in accord with the prior understanding of the *Hull* case; but there was also present another valid ground for the court's decision.<sup>60</sup> The case therefore cannot be considered as actually overruling such prior interpretation.

Finally, in two cases<sup>61</sup> both involving the question of the control of an automobile, the court did actually apply the principle of the *Hull* case so as to grant conclusiveness to the testimony of the owner of the car, who was the defendant in each case, but only in the latter of the two cases did it indicate clearly in the opinion that it was so doing.<sup>62</sup> Even then the court also relied upon some corroboration furnished by the discharged chauffeur.

Thus, in practice, the actual application of the supposed principle to the determination of cases has been very infrequent and grudging indeed, and this probably indicates the extreme diffidence of the court with regard to its own supposed rule.

The decisions of other courts relying upon the *Hull* case have reflected this hesitation, uncertainty, and doubt.<sup>63</sup>

<sup>59</sup>*Orlando v. Pioneer B. T. Supply Co.*, 239 N. Y. 342, 345, 146 N. E. 621, 622 (1925).

<sup>60</sup>*I.e.*, the master's testimony that he had not given express authority to this particular chauffeur to drive this particular car on the master's business was in effect here rebutted by facts and circumstances showing that the chauffeur was acting within the scope of his employment at the time of the accident.

<sup>61</sup>*Fluegel v. Coudert*, 244 N. Y. 393, 155 N. E. 683 (1927); *St. Andrassy v. Mooney*, 262 N. Y. 368, 186 N. E. 867 (1933).

<sup>62</sup>In several other cases, the Court of Appeals had affirmed without opinion determinations by the various appellate divisions in which the lower courts had denied conclusiveness to the interested testimony solely because of interest, *e. g.*, *Burt v. Quackenbush*, 72 App. Div. 547, 75 N. Y. Supp. 1031 (2d Dept. 1902), *aff'd*, 175 N. Y. 490, 67 N. E. 1081 (1903); *Irish v. Union Bag & Paper Co.*, 103 App. Div. 45, 92 N. Y. Supp. 695 (3d Dept. 1905), *aff'd*, 183 N. Y. 508, 76 N. E. 1097 (1905); *Fuller Buggy Co. v. Waldron*, 112 App. Div. 814, 99 N. Y. Supp. 561 (3d Dept. 1906), *aff'd*, 188 N. Y. 630, 81 N. E. 1165 (1907); *Courtney v. Niagara Falls Co.*, 138 App. Div. 383, 122 N. Y. Supp. 721 (4th Dept. 1910), *aff'd*, 201 N. Y. 584, 95 N. E. 1120 (1911).

<sup>63</sup>Thus, it has been held in some cases that the uncontradicted testimony of an employee or owner regarding the control of an automobile must be accepted as conclusive: *Perlmutter v. Byrne*, 193 App. Div. 769, 184 N. Y. Supp. 580 (1st

It is in connection with the overcoming of presumptions that the particular folly of the rule of the *Hull* case is apparent. Reference has been made to cases involving the well-established presumption of control arising from ownership of a car. This was characterized by Judge Pound in *Orlando v. Pioneer B. T. Supply Co.*<sup>64</sup> as a "useful presumption." It was a presumption originally derived out of the necessities of the plaintiff who was unable to penetrate the cloak of secrecy usually surrounding the question of control.<sup>65</sup> A prima facie case based on mere probabilities was therefore established for him by presumption. That is what makes it a "useful" presumption. Now, if that useful presumption can be conclusively overcome by the testimony of the interested party, and by that alone, then the law will be taking away

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Dept. 1920); *Powers v. Wilson*, 203 App. Div. 232, 196 N. Y. Supp. 600 (3d Dept. 1922); *Graves v. Utica Candy Co.*, 209 App. Div. 193, 204 N. Y. Supp. 682 (4th Dept. 1924). But the contrary has also been held: *Cunningham v. Castle*, 127 App. Div. 580, 111 N. Y. Supp. 1057 (1st Dept. 1908); *Bogorad v. Dix*, 176 App. Div. 774, 162 N. Y. Supp. 992 (1st Dept. 1917); *Glasgow v. Weldt*, 218 App. Div. 749, 218 N. Y. Supp. 115 (2d Dept. 1926); *Earle v. Hull*, 224 App. Div. 761, 229 N. Y. Supp. 756 (2d Dept. 1928); *Herschcovitz, et al. v. Kleinman*, 227 App. Div. 62, 236 N. Y. Supp. 669 (1st Dept. 1929); *Pariso v. Towse*, 45 F. (2d) 962 (C. C. A. 2d, 1930). In the last named case, the court said there was no doubt that the New York courts would certainly hold that the interest of the witness would present an issue of credibility, and then said,—and this is characteristic of the uncertainty of the question—"Just where to draw the line we are not sure." To the same effect is *Fire Association of Philadelphia v. Mechlowitz*, 266 Fed. 322, 325 (C. C. A. 2d, 1920).

In one department of the state it has been held that the testimony of an interested witness as to the happening of an accident is not conclusive: *MacReynolds v. Coney Island & B. R.*, 170 App. Div. 314, 155 N. Y. Supp. 655 (2d Dept. 1915). In reaching this conclusion, the court said that the *Hull* case was entirely harmonious with the *Gordon* case, but did not say how. In the First Department, the diametrically opposite result has recently been reached: *Locicero v. Messina*, 239 App. Div. 635, 267 N. Y. Supp. 901 (1933). In spite of its ruling in *Graves v. Utica Candy Co.*, *supra*, the Fourth Department has held that the credibility of an interested witness, though uncontradicted, presents a question for the jury: *Rosenstein v. Traders Ins. Co.*, 102 App. Div. 147, 92 N. Y. Supp. 326 (1905); *Robinson v. Zappos*, 227 App. Div. 208, 237 N. Y. Supp. 235 (1929); *In re Sebring*, 238 App. Div. 281, 264 N. Y. Supp. 379 (1933). Also see *supra* note 62; *Littlefield v. Lawrence*, 83 App. Div. 327, 82 N. Y. Supp. 25 (1st Dept. 1903); *Wiemers Inc. v. American Fidelity Co.*, 181 App. Div. 774, 168 N. Y. Supp. 874 (1st Dept. 1918) where the court again attempted, but unsuccessfully, in the opinion of the writer, to harmonize the *Hull* case with the *Gordon* case; *McConnell v. Hellwig*, 190 App. Div. 244, 179 N. Y. Supp. 882 (2d Dept. 1920); *Electric Fireproof Co. v. Smith*, 113 App. Div. 615, 99 N. Y. Supp. 37 (1st Dept. 1906); *Rosseau v. Hallenbeck*, 97 N. Y. Supp. 394 (App. Term 1906).

<sup>64</sup>*Supra* note 59.

<sup>65</sup>*Bogorad v. Dix*, 176 App. Div. 774, 162 N. Y. Supp. 992 (1st Dept. 1917);

with one hand what it has with enlightened liberality given with the other. The presumption will become a mockery.

Similarly with the presumption of *res ipsa loquitur*, a presumption also derived obviously out of the necessities of the plaintiff's case:<sup>66</sup> A passer-by is injured by a bolt falling from an elevated railway structure, or by a brick from a house under construction, or by a falling elevator upon which he is a passenger, or by a derailed railway car in which he is a passenger. Under all of these circumstances and many others, where the cause of the accident is under the management and control of another, negligence although not proved is presumed. It is presumed, in reality, because ordinarily it is not provable by the plaintiff since the evidence is in the control of the defendant, or, as stated by Wigmore, "is practically accessible to him but inaccessible to the injured person."<sup>67</sup>

Is it not folly, therefore, to deprive the plaintiff of the full use of that presumption by allowing it to be conclusively overcome by the uncontradicted testimony of the very persons in control? To allow this is in effect to nullify the presumption entirely, for all that is necessary is that the testimony be inherently probable and free from suspicion. For that reason, it is the opinion of the present writer that the decision of the court in *Kennedy v. McAllaster*,<sup>68</sup> refusing conclusiveness to the interested testimony of defendant's employees regarding inspections

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Baker v. Maseeh, 20 Ariz. 201, 179 Pac. 53 (1919); McWhirter v. Fuller, 35 Cal. App. 288, 170 Pac. 417 (1917); Curry v. Bickley, 196 Iowa 827, 195 N. W. 617 (1923); Rockwell v. Standard Stamp Co., 210 Mo. App. 168, 241 S. W. 749 (1922); Dirks v. Ensign Omnibus etc. Co., 107 Neb. 556, 186 N. W. 525 (1922); West v. Kern, 88 Ore. 247, 171 Pac. 413 (1918); Enea v. Pfister, 180 Wis. 329, 192 N. W. 1018 (1923). In New York, the presumption has not generally been based on this ground, except for the Bogorad case, *supra*, and the intimation of Judge Pound in the Orlando case, *supra* note 59, that it is a "useful presumption." The basis that is usually furnished is that there is a probability that control will follow ownership: Norris v. Kohler, 41 N. Y. 42, 45 (1870); Ferris v. Sterling, 214 N. Y. 249, 108 N. E. 406 (1915); St. Andrassy v. Mooney, *supra* note 61; but a mere probability would never be accepted in lieu of evidence if necessity and utility did not require it.

<sup>66</sup>Loudoun v. Eighth Avenue R. Co., 162 N. Y. 380, 386, 56 N. E. 988, 989 (1900); Griffen v. Manice, 166 N. Y. 188, 193, 59 N. E. 925, 926, 52 L. R. A. 922, 82 Am. St. Rep. 630 (1901); Plumb v. Richmond Lt. Co., 233 N. Y. 285, 135 N. E. 504 (1922); Ross v. Cotton Mills, 140 N. C. 115, 52 S. E. 121 (1905); Riggsby v. Tritton, 143 Va. 903, 129 S. E. 493 (1925); Scott v. London Dock Co., 3 H. & C. 596 (1865); 3 COOLEY, TORTS (4th ed. 1932) § 480; POLLOCK, LAW OF TORTS (13th ed. 1929) § 463; SALMOND, LAW OF TORTS (7th ed. 1928) 33; 5 WIGMORE, EVIDENCE, (2d ed. 1923) § 2509.

<sup>67</sup>5 WIGMORE, EVIDENCE (2d ed. 1923) § 2509.

<sup>68</sup>31 App. Div. 453, 52 N. Y. Supp. 714 (4th Dept. 1898).

of an elevator, was sound, and the decision in the case of *Abramowitz v. Tenzer*<sup>69</sup> decided since the *Hull* case, holding to the contrary in a similar situation, unsound.

A similar problem is presented in the case of an alleged holder in good faith suing on a note received from a transferor whose title is defective because of fraud. The law casts upon such holder the burden of proving that he had no knowledge of the fraud.<sup>70</sup> In other words, there is a rebuttable presumption that he has such knowledge. Undoubtedly the reason for that presumption is that the facts and circumstances as to the transfer are matters peculiarly within his own knowledge.<sup>71</sup> Formerly, the New York Court of Appeals refused to grant conclusiveness to the testimony of an interested witness as to such good faith.<sup>72</sup> Now, however, the court has indicated that it would grant conclusive effect to such testimony so long as it is "so free from suspicious features as to forbid conflicting inferences,"<sup>73</sup> thereby virtually destroying the beneficial effects of the aforementioned presumption.

The test proposed, in addition to being founded upon obviously correct and recognized principles, would be easily workable and would promote justice. Instead of invoking an anomalous exception to a general rule, elastic and personal in construction, it merely requires the court to place a logical interpretation upon the silence of the adversary depending solely upon whether it is voluntary or not. The present interpretation of the rule has been applied with hesitation, doubt and uncertainty, and unquestionably has placed a premium on perjury so long as the story presented has hung together. It wholly negatives the question of interest, and therefore defeats the inquiry into the truth.

There is but one complication that suggests itself in the administration of the proposed rule, namely, the determination of the question as to whether or not the uncontradicted testimony is reasonably capable

<sup>69</sup>144 App. Div. 170, 128 N. Y. Supp. 951 (1st Dept. 1911).

<sup>70</sup>N. Y. NEGOTIABLE INSTRUMENTS LAW (1909) § 98; UNIFORM NEGOTIABLE INSTRUMENTS LAW § 59; *First National Bank v. Green*, 43 N. Y. 298 (1871); *Canajoharie National Bank v. Diefendorf*, *supra* note 7; *Joy v. Diefendorf*, *supra* note 7; *New York Bankers v. Duncan*, *supra* note 58.

<sup>71</sup>*Giberson v. Jolley*, 120 Ind. 301, 303, 22 N. E. 306, 307 (1889); *Honigman, Proof of Good Faith* (1925) 23 MICH. L. REV. 870.

<sup>72</sup>*Canajoharie National Bank v. Diefendorf*, *supra* note 7; *Joy v. Diefendorf*, *supra* note 7. To the same effect: *Second National Bank v. Hoffman*, 229 Pa. 429, 78 Atl. 1002 (1911).

<sup>73</sup>*New York Bankers v. Duncan*, *supra* note 58. This view is in accord with the view previously expressed by the learned author of the article referred to, *supra* note 71, who apparently did not see the consistency between cases like *Joy v. Diefendorf*, *supra* note 7, and *Hull v. Littauer*.

of contradiction if untrue.<sup>74</sup> But such a question is certainly not as difficult of solution as the question of whether the testimony in its content is free from suspicion and doubt. In the vast majority of cases the availability or otherwise of such evidence will be obvious, as, for instance, in a case where the testimony relates to a conversation with a person now deceased, or to the operation of the witness's own mind, or to a private arrangement made between the owner of a car and his chauffeur. In some small proportion of the cases, it may be necessary, of course, to take testimony on the collateral question as to whether or not the adverse party is able to produce evidence on the subject in controversy. But this should not present insuperable difficulties, and it is a situation similar to that which frequently presents itself when a party introduces evidence to explain his failure to produce a missing witness or document.<sup>75</sup>

The administration of such a rule should therefore be easier than the administration of the present rule which has provoked so disproportionate an amount of litigation and caused the courts to grasp so eagerly for the straws of narrow distinctions. It certainly would simplify the work of the trial justice. He would be presented with a simple, workable test instead of one that calls upon him to examine and weigh all of the evidence in the case and then to form a judgment compounded largely of personal opinion as to the comparative absence of suspicious or improbable features in the testimony. Above all, it leaves intact as a question for a jury, the legitimate trier of the facts, the credibility of an interested witness except only where the adverse party may justly be said to have indicated by his silence that he waives consideration of that question.

The commitment by the courts to the rule as heretofore understood has been timorous, uncertain and fluctuating. It is not too late for them to retrace their steps. If the courts hesitate, the legislature should act. This is much more than a mere question of evidence, important as such a question at times may be. What is to be corrected is a misconceived rule which takes the power of decision away from the jury and automatically and arbitrarily determines cases. Great human rights are involved. They should no longer be left at the mercy of a policy of drift and indecision.

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<sup>74</sup>In *Schmidt v. Marconi Wireless Tel. Co.*, *supra* note 44, the New Jersey Court of Errors and Appeals disposed of the case by deciding that the evidence in question could not reasonably have been anticipated, and that therefore the failure to contradict it could not be considered an implied admission of its truth.

<sup>75</sup>1 WIGMORE, EVIDENCE (2d ed. 1923, §§ 285, 290.