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LAY OPINIONS IN NEW YORK

Edith L. Fisch*

Stated simply, the opinion rule requires the ordinary lay witness to confine his testimony to a report of facts and, in the absence of a probative need, excludes his inferences, conclusions or opinions. 1

Until the 1800's the English courts apparently had no rule excluding the conclusions and inferences of the ordinary lay witness when accompanied by facts obtained by personal observation. 2 Early American courts adopted this view 3 and objections to opinions arose only when the witness had no facts on which to predicate his inferences or conclusions. 4 "Opinion is no evidence," it was held, "without assigning the reason for such opinion." 5 Another court formulated the rule in the following terms:

Mere abstract opinion is not evidence; but . . . any . . . person conversant on the subject may state facts, and his opinion on these facts. 6

From these statements it is apparent that the courts aimed, not at excluding conclusions based on fact, but at insuring the testimonial competency of the witness. This ancient principle of testimonial qualification required a witness to speak from his personal observation and report only what he saw and heard. 7 Thus the opinion rule in its early formulation did not prohibit conclusions and inferences, if based on fact. What was prohibited was testimony consisting of surmise, conjecture or guess. 8

* See Contributors' Section, Masthead, page 69, for biographical data.

1 Ferguson v. Hubbell, 97 N.Y. 507, 49 Am. Rep. 544 (1884), reversing 26 Hun 250 (N.Y. 1882). The words "inference," "conclusion," and "opinion" are used interchangeably to connote reasoning. CHAMBERLAYNE, TRIAL EVIDENCE § 918 (2d ed. 1936). For a discussion of the exceptions to the opinion rule see pp. 45-54 infra.

2 KING & PILLINGER, OPINION EVIDENCE IN ILLINOIS 7 (1942); 7 WIGMORE, EVIDENCE § 1917 (3d ed. 1940); Bozeman, Suggested Reforms of the Opinion Rule, 13 TEMP. L. Q. 296, 299 (1939).

3 7 WIGMORE, op. cit. supra note 2, § 1917.


5 Rambler v. Tryon, 7 S.&R. 89, 94 (Pa. 1821); accord, Beatty v. Gilmore, 16 Pa. 463 (1851); Seibles v. Blackhead, 1 McMul. 57 (S.C. 1840); semble, State v. Allen, 8 N.C. 6, 9 (1820).


7 9 HOLDSWORTH, HISTORY OF ENGLISH LAW 211 (1826); THAYER, EVIDENCE AT THE COMMON LAW 524 (1898).

8 Rambler v. Tryon, 7 S.&R. 89, 94 (Pa. 1821) ("But the witnesses' opinion . . . must not be founded on the hearsay of others, or the oath of others. . . . To give such latitude as was allowed in this case to a cross examination would be trying a cause, not
During the middle 1800's the opinion rule underwent a transformation. “Opinion is no evidence without assigning the reason" evolved into an exclusionary principle which asserted that “the opinion of a witness is not evidence.” The objection to opinions in the sense of a surmise or speculation became an objection to the reporting of conclusions and inferences. It is in this latter sense that the opinion rule is known and used today. The precise reason for this change is not known. Wigmore attributes it to “careless usage”; McCormack, to the ambiguity inherent in the word “opinion.” Whatever the cause of the transition, there is little doubt that the opinion rule has produced more conflict, confusion and disorder than any other rule known to the law of evidence.

Prominent among the various reasons which have been put forth to justify the opinion rule is that such testimony invades the province of the jury. It has been frequently asserted that when a witness reports conclusions and opinions his judgment is substituted for that of the jury, which should draw its own conclusions and inferences. The func-

by the evidence of facts and opinions formed by the witnesses, from their own observation and knowledge, but would be trying it on opinions founded on hypothesis and facts stated by others, . . . ".


10 Rambler v. Tryon, 7 S.&R. 89 (Pa. 1821); accord, Harrison v. Rowan, 3 Wash. C.C. 580, 587 (C.C.D.N.J. 1820) (". . . mere opinions of the witnesses are entitled to little or no regard, unless they are supported by good reasons, founded on facts which warrant them in the opinion of the jury. If the reasons are frivolous or inconclusive, the opinions of the witnesses are worth nothing.").


12 Although the opinion rule operates only as to inferences and conclusions, courts sometimes use the word "opinion" in the sense of conjecture, surmise, or guess. Marine Trust Co. of Buffalo v. Willis, 240 App. Div. 176, 269 N.Y. Supp. 204 (4th Dep't 1934); Blek v. Davis, 193 App. Div. 215, 183 N.Y. Supp. 737 (2d Dep't 1920); Volsin v. Commercial Ins. Co., 60 App. Div. 135, 70 N.Y. Supp. 147 (1st Dep't 1901).

13 7 Wigmore, Evidence § 1917.

14 McCormick, supra note 9, at 110. Compare Hand, Considerations Regarding Expert Testimony, 15 Harv. L. Rev. 40, 44 (1901) (Hand attributes the origin of the rule "to a gradual recognition by successive judges of the advantage of curtailing the trial and simplifying issues by leaving out redundant matter.").

15 See authorities note 23 infra.

tion of the jury is thereby usurped and the parties deprived of their right to a jury trial.\textsuperscript{17}

The opinion rule has also been approved as a means of barring superfluous testimony.\textsuperscript{18} This is said to be implicit in those numerous decisions which exclude the opinions of a witness on matters of common knowledge.\textsuperscript{19} Such testimony is presumably of no value as the jury, when presented with the facts, can draw the necessary conclusions.\textsuperscript{20}

In a few instances the rule has been sanctioned as a means of safeguarding the trustworthiness of testimony, the assumption being that:

Where witnesses testify to facts they may be specifically contradicted, and if they testify falsely, they are liable to punishment for perjury. But they may give false opinions without fear of punishment.\textsuperscript{21}

Other courts, recognizing the frailties of human nature, have expressed distrust of opinions because they are "much more frequently founded on prejudices, or biased by our feelings, than we are aware of."\textsuperscript{22}

**Criticism of the Rule**

Since the last decade of the nineteenth century the opinion rule has been subjected to severe and frequent attacks by legal authorities.\textsuperscript{23} The basic objection to the rule stems from the fact that it rests on the unrealistic assumption that a matter of fact is in opposition to, and can be clearly distinguished from a matter of opinion. The unrealism of this position has been thus explained as follows:

\begin{itemize}
  \item\textsuperscript{17} Moran v. Standard Oil Co., 211 N.Y. 187, 105 N.E. 217 (1914), reversing 153 App. Div. 894, 137 N.Y. Supp. 1130 (1st Dep't 1912); McCarragher v. Rogers, 120 N.Y. 526, 24 N.E. 812 (1890); Harris v. Panama R.R., 3 Bosw. 7 (N.Y. 1858); Morehouse v. Matthews, 2 N. Y. 514 (1849); Lincoln v. Railway Co., 23 Wend. 425 (N.Y. 1840).
  \item\textsuperscript{18} Comments on the Proposed Missouri Evidence Code, 14 Mo. L. Rev. 252, 295 (1949).
  \item\textsuperscript{19} Ibid.
  \item\textsuperscript{20} Curtis, New York Law of Evidence § 360 (1926).
  \item\textsuperscript{21} Ferguson v. Hubbell, 97 N.Y. 507, 49 Am. Rep. 544 (1844), reversing 26 Hun 250 (N.Y. 1882). See also 3 Jones, Commentary on the Law of Evidence § 1242 (2d ed. 1926) (Witnesses so often disregard the truth that if they were permitted to state opinions “the administration of justice would become little less than a farce.”). 9 Holdsworth, op. cit. supra note 7, at 212.
  \item\textsuperscript{22} Clark v. Fisher, 1 Paige Ch. 171, 173 (N.Y. 1828); accord, Mayor v. Pentz, 24 Wend. 668, 675-6 (N.Y. 1840); Norman v. Wells, 17 Wend. 136, 161-2 (N.Y. 1837).
  \item\textsuperscript{23} King & Pil linger, Opinion Evidence in Illinois 1-13 (1942); 7 Wigmore, Evidence § 1919; Model Code of Evidence 198-202 (1942); Bozeman, supra note 2, at 297, 300 (1939); Dayton, A Program for Legal Reform in the United States, 16 The Consensus 58 (1931); Comments, 14 Mo. L. Rev. 252, 294 (1949). Only a few cases have discussed the merits or demerits of the opinion rule. For example see Healy v. Visalia etc. R.R., 101 Cal. 585, 36 Pac. 125 (1894); MacLaren v. Bishop, 113 Conn. 312, 155 Atl. 210 (1931); Hardy v. Merrill, 56 N.H. 241 (1875).
\end{itemize}
The demand that the witness "state the facts" is based upon a misconception of the relation between words and things—the relation between language and reality. Such a demand assumes that "statements of fact" can have the same cold, hard, objective reality as tangible objects, or events. It assumes that the distinction between statements of fact and statements of opinion is as clear and sharp as that between air and water. It assumes that statements of fact and statements of opinion are in self-evident opposition like yes and no, or Grant and Lee. These assumptions are false. . . . 24

It is generally agreed that all statements are in some measure inferences from experience25 and in this sense all testimony is opinion evidence.26 The difference between a matter of fact and a matter of opinion, from a legal point of view, is believed to be not a "difference between opposites or contrasting absolutes, but a mere difference in degree with no recognizable line to mark the boundary."27 A matter of fact does not differ in kind from a matter of opinion. It is merely a more specific description or a less remote inference.28 Because it is impossible to divide statements of fact from statements of opinion by a bright clear line, the judges have reached different results on the same question, and the reports contain conflicting29 and sometimes question-

25 Hand, supra note 14, at 50; McCormick, supra note 9, at 111.
26 Thayer, A Preliminary Treatise on Evidence at the Common Law 524 (1898) ("In a sense all testimony to matter of fact is opinion evidence; i.e., it is a conclusion formed from phenomena and mental impressions."). See also 7 Wigmore, Evidence § 1919:
We may in ordinary conversation roughly group off distinct domains for "opinion" on the one hand and "fact" or "knowledge" on the other; but as soon as we come to analyze and define these terms for the purpose of that accuracy which is necessary in legal rulings, we find that the distinction vanishes, that a flux ensues, and that nearly everything that we choose to call "fact" either is or may be "opinion" or inference.

See also City of Salem v. Webster, 95 Ill. App. 120, 124, aff'd, 192 Ill. 369, 61 N.E. 323 (1901) ("Every statement of fact by a witness contains an element of conclusion of the witness from facts not stated.").
27 McCormick, supra note 9, at 111. See also 7 Wigmore, Evidence § 1919:
... if we prefer the idea that "opinion" is inference and fact is "original perception" then it may be understood that no such distinction can scientifically be made, since the processes of knowledge and the sources of illusion are the same for both.

28 In re Liquors Seized at Auto Inn, Plattsburgh, N.Y., 204 App. Div. 185, 197 N.Y. Supp. 758 (3d Dep't 1923); See also King & Pillinger, op. cit. supra note 23, at 4; McCormick, supra note 9, at 111.
29 Lipschitz v. Halperin, 53 Misc. 280, 103 N.Y. Supp. 202 (Sup. Ct. 1907) (statement as to ownership held fact); Richmond v. Brewster, 2 N.Y. Supp. 400 (N.Y. City Ct. 1888) (statement of ownership held opinion); Reynolds v. Van Buren, 10 Misc. 703, 31 N.Y. Supp. 827 (Ct. C.P. N.Y. County 1895) (statement that "wood was rotten" admitted as a statement of fact); Dugan v. American Transfer Co., 160 App. Div. 11, 145 N.Y. Supp. 31 (2d Dep't 1913) (statement that "the rope was rotten" held inadmissible
Objections to the opinion rule have arisen out of the fact that witnesses told to state facts and not opinions usually become baffled and confused, and their testimony, warped into the terminology and framework of the opinion rule, is sometimes misleading or inaccurate. This is explained in the following comment by the Commission on the Administration of Justice in New York State:

There is probably no rule of evidence which causes more consternation to an inexperienced witness than the rule that the witness may not state his opinion or conclusion. The ordinary witness is unfamiliar with the rule and its technical meaning and he is confused as to what he is permitted to say and what he is not permitted to say. The result is that a witness who could make a clear and helpful statement if he were permitted to testify in the normal way in which he would discuss the matter outside the court room, gives a confused and dismembered account which may in some respects be misleading or incomplete. The attempt to force the testimony of the witness into a fixed legal mould with which the witness is unfamiliar oftentimes results in the suppression or omission of vital facts. The presentation of the evidence will be much simplified and clarified by permitting the witness to state what he knows about the transaction in issue in the ordinary way, even though some conclusions or opinions may be interwoven in his testimony. If any of his conclusions are unsupported by the facts which he observed, this may be brought out on cross examination, and the effect of the unjustified conclusion destroyed.

The opinion rule, to the extent that it prevents the jury from "seeing the facts as the witness saw them," has been charged with obstructing the search for truth. One authority has gone so far as to express

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30 Brito v. City of New York, 254 App. Div. 896. 5 N.Y.S.2d 515 (2d Dep't 1938) (Bathing beach not open to public for bathing is not a statement of fact.); Allen v. Rogers, 70 Hun 48, 23 N.Y. Supp. 1071 (Sup. Ct. 1893) (Question, "Did you at any time know that A was working for you?" called for an opinion.); People v. Deacons, 109 N.Y. 374, 16 N.E. 676 (1888) (Answer to question which of two engines discharged the most sparks was held to be a statement of fact.); Chandler v. Allen, 20 Hun 424 (N.Y. 1830) (Statement that partner made repairs amounting to fifty dollars from his own pocket was a conclusion.).

31 King & Pilling, op. cit. supra note 23, at 1.

32 United States v. Cotter, 60 F.2d 689, 693-4, (2d Cir. 1932), cert. denied, 287 U.S. 666 (1932). See also Comments, 14 Mo. L. Rev. 252, 294 (1949).


his belief that the rule "has done more than any other rule of procedure to reduce our litigation towards a state of legalized gambling."36

The claim that opinion evidence usurps the function of the jury has been waved aside as "a mere bit of empty rhetoric."37 The usurpation theory assumes that the jury, instead of forming its own conclusions, will adopt those of the witnesses.38 Legal scholars have pointed out that the jury is not bound to accept the opinions of a witness,39 nor will it do so if it is not satisfied as to the credibility of the witness as well as the reasonableness of his opinions.40

The charge that the opinion rule is necessary to prevent superfluous testimony and thus save time41 has been met with the countercharge that such testimony is necessary and expedient in order to present to the jury a complete and clear picture of what occurred.42 And, far from being a time saver, the opinion rule has been accused of prolonging and increasing the amount of time, money and effort expended on a trial because of quibbling and often useless disputes about whether a question calls for a witness to state facts or opinions, not to say anything of the numerous appeals engendered by contested rulings of the trial judge.43

It has also been claimed that, besides all the other defects and disadvantages, little is accomplished by the opinion rule. A skilful lawyer, by the form of the question, is often successful in circumventing the rule.44 Furthermore, the opinion of a witness is often apparent to the jury from his answers or from the side on which he testifies.45 Authorities, convinced that the opinion rule is impractical as well as an obstruction to the attainment of justice, feel that it should be abolished,46

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36 7 Wigmore, Evidence § 1929 (The rule "makes for injustice rather than justice.").
37 Id. § 1920.
39 1 Greenleaf, Evidence § 441-b (16th ed. 1899).
41 Hand, supra note 14, at 44; Norman v. Wells, 17 Wend. 136, 164 (N.Y. 1837). See also note 10 supra.
42 Sixth Annual Report of the Judicial Council of New York 342 (1940); 1 Greenleaf, Evidence § 441-b.
43 Morgan, Forward to Model Code of Evidence 34 (1942); McCormick, supra note 9, at 114.
44 Bozeman, supra note 2, at 300.
or at least drastically revised, and the legal profession has been criticized for failing to remedy the situation. The Judicial Council of the State of New York was one of the several organizations which recognized the difficulties involved in applying the opinion rule and in 1943 recommended the adoption of the following proposed statute:

A non-expert witness may in the discretion of the court give testimony in the nature of an inference or opinion, provided, that the facts upon which such inference or opinion is based have been personally observed by the witness and are stated by him, if in the opinion of the court they are capable of being stated, and provided further that no special knowledge, skill, experience or training is required to draw such inference or state such opinion.

The New York Legislature has not as yet enacted any legislation along these lines.

**Operation of the Rule**

The law on the subject of opinion evidence abounds with so many conflicting decisions that there is scarcely any holding on the subject

Leg. Doc. No. 50, p. 298 (1934); 38 A.B.A. REP. 583 (1938); Bozeman, supra note 2, at 300; Dayton, supra note 23, at 57-8; Dawes, *Evidence—Opinion Evidence on Issues before the Jury*, 16 N.C.L. REV. 180, 183 (1938).

*Model Code of Evidence*, Rule 401 (1942); McCormick, supra note 9, at 113-5 (1945); Comments, 14 Mo. L. REV. 252, 296 (1949).

Note, 26 ILL. L. REV. 431, 432 (1931).

*Ninth Annual Report of the Judicial Council of New York* 56-7 (1943). The Council in 1947 withdrew its recommendation of this proposed statute in favor of further consideration. The Council is now considering the adoption of *The Model Code of Evidence of the American Law Institute*. Rule 401 of the *Model Code* reads as follows:

(1) In testifying to what he has perceived, a witness, whether or not an expert, may give his testimony in terms which include inferences and may state all the relevant inferences, whether or not embracing ultimate issues to be decided by the trier of fact, unless the court finds (a) that to draw such inferences requires a special knowledge, skill, experience, or training which the witness does not possess, or (b) that the witness can readily and with equal accuracy and adequacy communicate what he has perceived to the trier of fact without testifying in terms of inference or stating inferences, and his use of inferences in testifying will be likely to mislead the trier of fact to the prejudices of the objecting party. (2) The judge may require that a witness, before testifying in terms of inference, be first examined concerning the data upon which the inference is founded.

For an earlier draft of the statute proposed in the *Ninth Annual Report* see the *Sixth Annual Report of the Judicial Council of New York* 365 (1940). In 1934 the New York State Commission on the Administration of Justice, supra note 46, proposed the following rule:

The Court may in any case where the interest of justice will be served thereby, permit any witness to state his opinion or conclusion based upon his personal knowledge or observation concerning any matter with respect to which a non-expert witness is qualified to form an opinion.

See also 29 Mass. L. Q. 5, 7 (1944) where a Committee of the Massachusetts Lawyers' Institute recommended to the bench and bar consideration of § 401 of the *Model Code of Evidence*. See Note, 26 ILL. L. REV. 431, 432 (1931) for the text of a bill providing for the admission of lay opinions which was submitted to the Alabama legislature.
which may not be met by a contrary one. This chaotic situation has been brought about, not only because statements of fact and opinion can not be sharply distinguished, but because the courts tend to characterize a statement as fact or opinion on the basis of the purpose for which it is offered. Statements which are indirectly probative of ultimate issues are labelled facts and admitted more readily than those which closely approach the vital issues. It has also been stated that where witnesses tend to make uniform inferences from certain facts the courts are apt to treat their statements as direct knowledge, whereas if a statement is a matter of observation but witnesses tend to make observations differently, then the court is likely to treat the direct knowledge as opinion.

It might be supposed that the severe and frequent bombardment of the opinion rule by legal authorities would be reflected in a more liberal application of the rule. Yet, although other courts have yielded to this pressure, the New York courts not only have remained adamant

60 E.g. Vogel v. Montgomery Ward, 275 App. Div. 727, 86 N.Y.S.2d 817 (3rd Dep't 1949) ("floor safe," inadmissible as opinion); McDermott v. Third Ave. R.R., 44 Hun 107 (1887), aff'd, 115 N.Y. 670, 22 N.E. 1126 (1889) (street car could have "passed safely"—even if opinion, it is admissible because based upon personal observation of the facts); Knapp v. Smith, 27 N.Y. 281, 84 Am. Dec. 280 (1863) ("possession" not a conclusion); Arents v. R.R., 156 N.Y. 1, 50 N.E. 422 (1898) ("possession" a conclusion); Pitchler v. Reese, 171 N.Y. 577, 64 N.E. 441 (1902), affirming 63 N.Y. Supp. 1116 (4th Dep't 1900) (ownership a fact); Miller v. R.R., 71 N.Y. 380 (1877) (ownership a conclusion). See also cases cited note 29 supra.

61 See pp. 34-38 supra.

62 Compare the following cases where testimony relating to vital issues was excluded as opinion, Schoellkopf v. McGowan, 43 F. Supp. 568 (W.D.N.Y. 1942) (purpose for which trusts were established); Brito v. City of New York, 254 App. Div. 896, 5 N.Y.S.2d 515 (2d Dep't 1938) (bathing beach not open to public for bathing); Brown v. St. Vincent's Hospital, 222 App. Div. 402, 226 N.Y. Supp. 317 (3d Dep't 1928) (testimony that hospital employed witness, directed, and paid him); Patterson Gas Governor Co. v. Glenby, 4 Misc. 532, 24 N.Y. Supp. 575 (Ct. C.P. N.Y. City & County 1893) (whether a certain percentage of gas was saved by using a gas governor), with the following cases: Liscomb v. Agate, 67 Hun 388, 22 N.Y. Supp. 126 (Sup. Ct. 1893) (question whether witness gave his partner a "correct" statement of his transaction held statement of fact); Brinker v. Hanover Fire Ins. Co., 80 N.Y. 108 (1880) (whether proofs of loss were forwarded as soon as possible held statement of fact). See also Curtis, New York Law of Evidence § 522 (1926).


64 In the following cases the statements although expressly labelled opinion, were admitted: Parsons v. Fosbee, 80 Ga. App. 127, 55 S.E.2d 386 (1949) (defendant was going to "block" road with car); Bragdon v. Bruce, 92 N.E.2d 646 (Ind. App. 1950) (Description of deed as recorded differed from the deed as originally executed.).
but have become increasingly inflexible and illiberal in their application of the rule. Appellate courts, to the extent that they find no prejudicial error resulted from the admission of the conclusions or inferences of a witness, have to some extent softened the rigors of the rule.

A. Negligence Cases

A large proportion of the cases which deal with the opinion rule pertain to negligence. The testimony in such cases concerns not only the direct question of negligence, but also safety, causation and standards of care. At the common law in England opinion evidence on these matters was permissible and according to Wigmore the holdings of the United States courts are “purely a modern excrescence upon the body of the common law.”

The New York courts not only prohibit testimony as to negligence, but statements, less directly probative of the ultimate issue, have also been characterized as conclusions and excluded on the ground that the jury, when presented with the facts, can make the necessary inferences. Thus a lay witness may not state whether an act, object, place or condition is safe, or dangerous, even though the statement

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55 See cases note 52 supra. The fact that the number of reported cases in New York dealing with the opinion rule in connection with lay witnesses has decreased in the last two decades may indicate that, although the courts have not yet seen the light, the members of the bar have recognized the futility of quibbling over whether a statement is one of fact or opinion. In this connection see 29 Mass. L. Q. 8 (1944) where it is pointed out that experienced trial lawyers do not always object to testimony given in ordinary language.


57 7 Wigmore, Evidence § 1949.

58 Ibid.


be based on facts obtained by personal observation. In line with the reasoning which excludes conclusions as to the issue of negligence a passenger may not state whether he had any complaint concerning the manner in which the automobile was driven as this calls for an expression of opinion concerning the conduct of the driver and not what was said or done. Characterization of conduct by a standard of reasonableness is also prohibited. A witness, therefore, is not permitted to state whether an object, condition or situation was necessary, or proper. Nor may a witness testify that supervision was inadequate. Statements pertaining to the cause which produced a particular effect are also subject to exclusion as opinion and thus testimony that a floor collapsed because of excessive weight, or that a weak bank caused the fall of an object have been excluded.


In negligence cases witnesses are sometimes called upon to state whether they could have heard a bell or whistle if it had been sounded. This type of testimony has failed to withstand the charge that it constitutes opinion evidence. Until the case of *Curtis v. Hudson Valley Railway Company*, the courts had held that these statements were not expressions of opinion but statements of fact pertaining to the acuteness of the hearing of the witness. In *Curtis v. Hudson Valley Railway Company*, the Appellate Division, placing its decision on the ground that the general policy of the courts in regard to the opinion rule had grown stricter, found that such testimony violated the opinion rule. This decision apparently settled the problem as it has not been mentioned since. A witness, may, however, testify that he did not hear a bell or whistle, as negative evidence of this character, although weak, is held to be competent.

B. Legal Relations

Many words used in everyday language have a special meaning in law. Such words as "own," "employ," "possess," "owe," "sell" and "necessary" are familiar examples. The cases are in conflict as to whether the use of such words constitutes fact or opinion, and thus the holding of the court can not be predicted with any certainty. It can be said, however, that when such words are vital to the ultimate issues there is a probability that the court will regard them as opinion and not fact. Opinion evidence in this area of the law has been excluded

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69 147 App. Div. 349, 131 N.Y. Supp. 758 (3d Dep't 1911).
71 147 App. Div. 349, 131 N.Y. Supp. 758, 762 (3d Dep't 1911).
not as an invasion of the province of the jury, but as an invasion of the province of the judge. Such evidence has also been regarded as unnecessary as the judge, having special knowledge, can dispense with the opinions of lay witnesses.

C. States of Mind

Evidence relating to the emotional state of another has been excluded as a violation of the opinion rule. When first up for decision in New York the court held that such evidence was admissible as an exception to the general rule. For example, the court held that a witness could testify that one person appeared attached to another. The court argued:

We do not see how the various facts upon which an opinion of the plaintiff's attachment must be grounded are capable of specification, so as to leave it, like ordinary facts, as a matter of inference to the jury.

With the development of a more rigid attitude toward the admission of opinion evidence, courts have excluded statements characterizing testimony pertaining to indebtedness: Marino v. Collis, 54 Misc. 581, 104 N.Y. Supp. 747 (Sup. Ct. 1907); Pope v. McGill, 58 Hun 294, 12 N.Y. Supp. 306 (Sup. Ct. 1890); Rehm v. Weiss, 8 Misc. 525, 28 N.Y. Supp. 772 (N.Y. City Ct. 1894). 

Possession: In the following cases testimony as to possession was held inadmissible: Arents v. R.R., 156 N.Y. 1, 50 N.E. 422 (1898); Boyle v. Williams, 1 Misc. 112, 20 N.Y. Supp. 727 (Ct. C.P. N.Y. City & County 1892). In the following cases such testimony was admitted: Wallace v. Nadine, 57 Hun 239, 10 N.Y. Supp. 919 (Sup. Ct. 1890); Knapp v. Smith, 27 N.Y. 277 (1863); Parsons v. Brown, 15 Barb. 590 (N.Y. 1853). 


Agreement: In the following cases testimony dealing with the word "agreement" was excluded: Rockwell v. Hurst, 13 N.Y. Supp. 290 (Ct. C.P. N.Y. City and County 1891); Case v. Hitchcock, 46 Hun 675, 11 N.Y. St. Rep. 251 (1887); Holler v. Apa, 17 N.Y. Supp. 504 (Ct. C.P. N.Y. City & County 1892). Contra: House v. Howell, 53 Hun 638, 6 N.Y. Supp. 799 (Sup. Ct. 1889).

Authority: Testimony as to authority was admitted in the following cases: People v. Mingey, 190 N.Y. 61, 82 N.E. 728 (1907), affirming 118 App. Div. 652, 103 N.Y. Supp. 627 (1st Dep't 1907); Knapp v. Smith, 27 N.Y. 281 (1863). In the following case such testimony was not permitted: Carr v. Prudential Ins. Co., 115 App. Div. 755, 101 N.Y. Supp. 158 (4th Dep't 1906).


75 7 Wigmore, Evidence § 1952. Wigmore sees in the exclusion of such testimony an analogy to the custom of primitive Polynesians who placed a taboo on certain words connected with the name of a dead chieftain. Id. § 1960.

76 See cases note 79 infra.

77 M'Kee v. Nelson, 4 Cow. 355 (N.Y. 1825) (Witness was asked whether it was his opinion or not that plaintiff was sincerely attached to defendant.); Blale v. People, 73 N.Y. 586 (1878) (whether grasp was friendly or unfriendly).

the emotional states of another. An attempt to justify the stricter rule has been made by asserting that the former liberal attitude was necessitated by the fact that the testimony of third persons was the only mode of proof, as parties to an action were not permitted at that time to testify in their own behalf.

The prohibition of the opinion rule extends not only to emotional states but also to motive and intention. A witness, therefore, may not testify to the motive, knowledge, or intention of another. Nor may a witness testify to his own intention or belief except where the validity or invalidity of an undisputed act depends on the intent with which it was done.

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70 People v. Perrin, 224 App. Div. 546, 231 N.Y. Supp. 557 (1st Dep't 1928), aff'd, 251 N.Y. 509, 168 N.E. 407 (1929) (whether attitude of X to Y was friendly or otherwise excluded); Pearce v. Stace, 207 N.Y. 506, 101 N.E. 434 (1913) (Witness was not permitted to answer question whether in his opinion plaintiff was attached to defendant.); People v. Smith, 172 N.Y. 210, 64 N.E. 814 (1902) (Witness was not permitted to state whether conduct seemed to him to be natural and genuine.); Messner v. People, 45 N.Y. 1 (1871) (question whether "the person was crying for joy or what" held incompetent).


81 Western Nat. Bank v. Flannagan, 14 Misc. 317, 35 N.Y. Supp. 848 (Ct. C.P. N.Y. City & County 1895) (Purpose for which note was delivered calls for a conclusion.); People v. Sharp, 107 N.Y. 427, 14 N.E. 319 (1887) (Witness who was given a roll of bills said to be for election purposes could not state that he supposed it was "for the Broadway road" as this is a conclusion as to the inducement for the gift.); Abbott v. People, 86 N.Y. 460 (1881) (what a man intended when he reached for a wrench held inadmissible).

82 Major v. Spies, 66 Barb. 576 (N.Y. 1873) (question "Did plaintiff know you had nothing to do with the labor on the building?").

83 Bogart v. City of New York, 200 N.Y. 379, 93 N.E. 937 (1911), reversing 138 App. Div. 888, 122 N.Y. Supp. 1122 (2d Dep't 1910) (Testimony of wife that husband expected to see the auto races is inadmissible as the witness should be asked to describe acts or statements from which intention or expectation can be determined.); Manufacturers & Traders' Bank v. Koch, 105 N.Y. 630, 12 N.E. 9 (1887) (Witness may not testify to intention of another.).

84 Rimes v. Carpenter, 59 Misc. 445, 110 N.Y. Supp. 965 (Sup. Ct. App. T. 1908) (Where the doing of an act is disputed a witness may not give evidence of the operations of his mind in order to render more probable the doing of an act by him.); Trombly v. Seligman, 191 N.Y. 400, 84 N.E. 280 (1907), reversing 116 App. Div. 910, 101 N.Y. Supp. 1147 (3d Dep't 1906) (plaintiff's understanding of who was buyer held inadmissible.); Nicholas v. Ore Co., 56 N.Y. 618 (1874) (for whom did you set up that machinery excluded.); Cutler v. Carpenter, 1 Cow. 81 (N.Y. 1823) (A witness may not state his belief as to the meaning of a conversation.).

LAY OPINIONS IN NEW YORK

EXCEPTIONS TO THE RULE

The exceptions to the opinion rule signify the extent to which the courts have compromised the conflict between the exclusionary principle of the opinion rule and the probative need for such testimony.

The New York courts quickly realized that a firm and inflexible application of the opinion rule was unfeasible, for in many instances it is "absolutely impossible to separate in words the minute and transient facts observed by the witness from the inference as to some other fact, irresistibly connected with the former in his own mind." Under these circumstances opinions are regarded as the best evidence available.

Cases dealing with the identification of handwriting were among the first group of cases to recognize an exception to the general rule. This exception was soon extended and the exceptions to the general rule have increased over the years to such a degree that they are now not only legion, but legion upon legion. In fact, one court has expressed the belief that:

There is, in truth, no general rule requiring the rejection of opinion as evidence. A general rule can hardly be said to exist, which is lost to sight in an enveloping mass of arbitrary exceptions.

Before the court will admit lay opinions it must be established that the facts which constitute the opinion are incapable of description, the subject matter must be one which does not require expert knowledge, and the witness must be qualified to give his opinion. These prerequisites will be discussed as specific exceptions are considered.

A. Mental Condition

In the ecclesiastical and common law courts of England, lay witnesses were competent to give their opinion on mental soundness if they were acquainted with the person in question. Early New York courts also permitted lay witnesses to give their opinions on mental condition.

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80 Mayor v. Pentz, 24 Wend. 667, 675 (N.Y. 1840); accord, Nellis v. McCarn, 35 Barb. 115, 118 (N.Y. 1861).
88 See pp. 48-51 infra.
89 Hardy v. Merrill, 56 N.H. 227, 241 (1875).
91 Note, 16 TENN. L. REV. 243 (1940). In 29 Mass. L. Q. 7, 8 (1944) there is reference to testimony in a Scotch court where it was sought to prove a person incapable of administering his affairs because of mental incapacity. The witness was asked "'D'ye ken young Sandy?' 'Browley,' said the witness, 'I've kent him sin' he was a laddie.' 'An' is there anything in the cratur, d'ye thin?' 'Deed,' responded the witness, 'there's naething in him ava; he wadna ken a coo frae a cauf.'"
if based upon facts and circumstances within their own personal obser-

vation, such evidence being regarded as an exception to the general
rule. The necessity for admitting opinions in this instance has been
explained in Culver v. Haslam:

Apart from the difficulty of restraining a witness from intermingling his
opinions with his testimony, in questions of this kind, there are strong
reasons why he should be permitted to do so, when he discloses the facts
and circumstances within his own knowledge, upon which they are found-
ed. Human language is imperfect, and it is often impossible to describe,
in an intelligible manner, the operations of the mind of another. We learn
its condition only by its manifestations, and these are indicated not alone
by articulate words, but by signs, gestures, conduct, the expression of the
countenance, and the whole action of the man.

It is true that the courts regarded opinions as unsatisfactory and un-
dependable evidence because of the possibility that they might be
founded on prejudices and bias, but this factor went to the weight of
the evidence and not its competence.

This was the status of the law on the subject until 1853 when Dewitt
v. Barley was decided. On the question of the mental imbecility of a
grantor, the court declared that the opinions of lay witnesses were not
competent evidence on the soundness or unsoundness of mind. The
claim of necessity set forth in Culver v. Haslam was repudiated by the
court when it stated:

There is no such insuperable difficulty in describing the mental mani-
festations which are relied upon in any case to prove insanity as there is
in the cases of personal identity and handwriting. Those manifestations
which usually attend a sound mind are made familiar to all by the inter-
course of all classes of men, and the evidence or mental manifestations
which characterize insanity, so far as they fall under the observation of
men generally, are of that character which witnesses can describe and
relate. They generally consist in acts or words and frequently in both
combined; and there is no more difficulty in describing and relating them
to a jury than there is in many other cases where the witness is required
to state the facts and circumstances and is not permitted to give his
opinion upon the conclusion to which they lead.

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92 Culver v. Haslam, 7 Barb. 314 (N.Y. 1849); Stewart's Executors v. Lippinard, 26
Wend. 255 (N.Y. 1841); Jackson v. King, 4 Cow. 207 (N.Y. 1825). Cf. Clark v. Fisher,
1 Paige 171, 173 (N.Y. 1828) (“The evidence of capacity on which the court or jury are
to decide in most contested cases consists in the opinions of witnesses, sometimes with,
but frequently without, the particular facts on which such opinions are founded.”).

93 Culver v. Haslam, 7 Barb. 314 (N.Y. 1841); Clark v. Fisher, 1 Paige 171 (N.Y.
1828) semble.


96 9 N.Y. 371 (1853), reversing 13 Barb. 550 (N.Y. 1852).
Having declared that Culver v. Haslam was decided upon an unsound principle, the court held that its authority was not controlling. The judgment of the lower court was reversed and a new trial ordered. When the decision on retrial of the case came up on appeal the statements of the Court of Appeals in the first Dewitt case on the question of insanity were promptly labelled dicta, as the witnesses had been asked whether the grantor was capable of managing his affairs and business, and not whether he was insane. The court conceded that testimony dealing with this question was inadmissible as it involves opinions on a matter of law as well as fact. But reverting to the theory of Culver v. Haslam, the court held that, when the facts are stated as far as possible, opinions as to mental condition are admissible, for it is impractical "to come to a satisfactory conclusion without receiving to some extent the opinions of witnesses."

Out of the decisions in these two cases the court in Clapp v. Fullerton, decided in 1866, evolved the present-day rule in regard to testimony pertaining to mental condition. In that case a witness was permitted to testify that a testator was of sound mind. Apparently on the authority of the earlier case of Dewitt v. Barley, the court found that the admission of this testimony constituted error, but realizing that this decision had been repudiated in the second Dewitt case, the court developed the hybrid principle that a witness after describing the acts and declarations of the person whose mental soundness is in question, may state that they impressed him as rational or irrational. Thus the dicta in the earlier Dewitt case, in so far as it prohibits a lay witness

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99 This holding has been accepted. See Hewlett v. Wood, 55 N.Y. 634, 636 (1873). See also Note, 7 Mo. L. Rev. 60, 67 (1942).
100 DeWitt v. Barley, 17 N.Y. 340, 348 (1858).
101 34 N.Y. 190, 90 Am. Dec. 681 (1866).
103 Clapp v. Fullerton, 34 N.Y. 190, 90 Am. Dec. 681 (1866). The court cited both opinions in Dewitt v. Barley, 9 N.Y. 371 (1853) and 17 N.Y. 340 (1858), as authority for its holding. Obviously Judge Porter, who is responsible for the present day rule, was among the few people who "would not regret to see this court brought in conflict, upon this important rule of evidence, with the courts of nearly all the States of the Union, as well as the ecclesiastical courts of England." See DeWitt v. Barley, 17 N.Y. 340, 352 (1858). The rule in Clapp v. Fullerton, supra, was followed in Weinberg v. Weinberg, 255 App. Div. 366, 8 N.Y.S.2d 341 (4th Dep't 1938); People v. O'Donnell, 51 App. Div. 115, 54 N.Y. Supp. 256 (3d Dep't 1900); O'Connell v. Beecher, 21 App. Div. 298, 47 N.Y. Supp. 334 (4th Dep't 1897) (Person whose sanity is questioned may not give his opinion as to his own sanity.); People v. Burgess, 153 N.Y. 561, 47 N.E. 889 (1897). See also cases notes 104-7 infra.
from expressing his opinion on the general question of soundness or unsoundness of mind, has become and still is the law today.  

The rule laid down in *Clapp v. Fullerton* has been strictly construed. Thus a witness who described a defendant’s condition and appearance as distinguished from his acts was not permitted to characterize them as rational or irrational. It is also error for a witness to state that a *person* impressed him as irrational, for the rule requires the characterization to relate only to the acts and declarations described. Appellate courts, aware of the illogical nature of these quibbling distinctions, have frequently found these errors non-prejudicial.

If the law of New York was brought in line with the law of the majority of states, and lay witnesses who have had an opportunity to observe were permitted to state their opinions on mental condition, this backdoor method of evading the formula developed in *Clapp v. Fullerton* would become unnecessary. The anomalous position of the New York courts is highlighted by those decisions which permit an attesting witness to testify to the condition of the testator’s mind at the time he made the will, even though the witness had no other knowledge of the testator except that derived from his conduct on that occasion.

**B. Handwriting**

The frequent absence of a witness to the actual writing of a disputed paper or signature has necessitated other means of proving the genu-

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105 People v. Pekarz, 185 N.Y. 470, 78 N.E. 294 (1906).

106 Paine v. Aldrich, 133 N.Y. 544, 30 N.E. 725 (1892), *affirming* 60 Hun 578, 14 N.Y. Supp. 538 (Sup. Ct. 1891); accord, *Myer’s Will*, 184 N.Y. 54, 76 N.E. 920 (1906), *reversing* 100 App. Div. 512, 91 N.Y. Supp. 1104 (4th Dep’t 1905) (“What was the impression these acts and conversation made on you as to whether they were rational or irrational?” *Held* improper); People v. Youngs, 151 N.Y. 210, 45 N.E. 460 (1896) (answer related to person, not acts). Contra: People v. Packenham, 115 N.Y. 202, 21 N.E. 1035 (1899).

107 Johnson v. Cochran, 159 N.Y. 555, 54 N.E. 1092 (1899), *affirming* 91 Hun 165, 36 N.Y. Supp. 283 (Sup. Ct. 1895) (witnes allowed to characterize conduct in a general way as irrational); Wyse v. Wyse, 155 N.Y. 367, 49 N.E. 942 (1898), *affirming* 34 N.Y. Supp. 1151 (1895) (“What impression did Mr. W’s language and conduct make upon your mind as to the condition of his mind—Was it rational or irrational?”); People v. Youngs, 151 N.Y. 210, 45 N.E. 460 (1896).


109 *Matter of Coleman*, 111 N.Y. 220, 19 N.E. 71 (1888); see *Hewlett v. Wood*, 55 N.Y. 634, 635 (1873); *Clapp v. Fullerton*, 34 N.Y. 190, 195 (1866); DeWitt v. barley, 9 N.Y. 371, 387 (1853).

110 The genuineness of handwriting may be proved by the testimony of a person who
inleness of a document. As early as the seventeenth century a witness who had at some time seen the person in question write was permitted to testify to the genuineness of handwriting in civil cases, and before the end of the next century such testimony had become common in criminal cases. During the eighteenth century the rule was enlarged to permit a witness to state his opinion respecting the genuineness of handwriting when familiar with the handwriting of a person claimed to be the writer of a particular paper, even though he had never seen the person in question actually write. The rules permitting lay witnesses to testify to the genuineness of handwriting were adopted by the courts of this state at an early period and are now well established principles.

No hard and fast rules govern the degree of familiarity a witness must have as to the handwriting of the person in question in order to be competent to testify to the genuineness of a disputed writing. Experience or ability in regard to identifying handwriting in general need not be proved and in most cases the witness is held to have sufficient knowledge if he can recall seeing the person in question write at least once. But, as in English law, this is not an indispensable pre-

111 9 Holdsworth, History of English Law 213 (1926).
112 Ibid.
113 It appears that this evidence was admissible only if there was no one available who had seen the person in question write and it was not until the beginning of the nineteenth century that this evidence was admitted unconditionally. See Holdsworth, op. cit. supra note 111, at 213. See also People v. Molineux, 168 N.Y. 264, 61 N.E. 286, 62 L.R.A. 193 (1901).
114 Titford v. Knott, 2 Johns. 214 (N.Y. 1801); Jackson v. Van Deusen, 5 Johns. 144 (N.Y. 1809); Johnson v. Daverne, 19 Johns. 134 (N.Y. 1821); see DeWitt v. barley, 13 Barb. 550, 554 (N.Y. 1852).
116 Matthew v. Hill, 165 App. Div. 672, 151 N.Y Supp. 101 (3d Dep't 1915); Tarnofker v. Grissler, 108 N.Y. Supp. 696 (Sup. Ct. 1908); Hammond v. Varian, 54 N.Y. 398 (1873); Van Wyck v. McIntosh, 14 N.Y. 439 (1856); Jackson v. Van Deusen, 5 Johns. 144 (N.Y. 1809). Cf. People v. Corey, 148 N.Y. 476, 42 N.E. 1066 (1896) (Witness "should have an intelligent acquaintance with the handwriting of the party so that he can determine with a reasonable degree of certainty whether the writing offered is his genuine handwriting.").
117 See note 113 supra.
requisite, and familiarity with handwriting may be acquired by seeing some writing of the person in question. In this instance it must be proved that the witness has seen genuine specimens of the handwriting.

The authenticity of the specimens may be established by indirect as well as direct evidence. It has thus been stated that when letters are sent to a particular person on business matters and answers in due course are received, there is a fair inference that the answers were “written by the person from whom they purport to come.” Similarly, the fact that the alleged writer of the paper in question paid a promissory note signed in his name, without explanation, is sufficient to ascribe the authorship of the notes to him. The fact that the witness acted upon a writing purporting to come from the person whose handwriting is in question is not sufficient to establish genuineness as it only tends to prove that the witness believed the writing to be genuine.

The opinions of lay witnesses as to the genuineness of handwriting are derived from a comparison of the writing in question with a mental image of the handwriting of the person claimed to be the writer of the disputed paper. This method of identification has justly been decried. The results of an experiment conducted in 1939 by the Direc-

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121 Dunklin v. Riegelmann, 155 N.Y. Supp. 561, 562 (1st Dep't 1915); Cunningham v. Hudson River Bank, 21 Wend. 557, 559 (N.Y. 1839); accord, Gross v. Sormani, 50 App. Div. 531, 64 N.Y. Supp. 300 (2d Dep't 1900); Hammond v. Varian, 54 N.Y. 398 (1873) (Witness who held note conceded to be genuine is a competent witness as to genuineness of signature.).
123 Cunningham v. Hudson River Bank, 21 Wend. 557 (N.Y. 1839) (Bank employee who had no knowledge other than that derived from signature on checks accepted by him is not qualified to testify as to handwriting.); accord, Dunklin v. Riegelmann, 155 N.Y. Supp. 561 (1st Dep't 1915) (Witness who had no means of knowing the handwriting of person in question except from letters purported to have been written by her is not competent to give evidence as to handwriting, where there was no evidence that letters were written by the person in question or evidence of a course of correspondence between witness and person in question.).
125 Inbau, Lay Witness Identification of Handwriting, 34 Ill. L. Rev. 438, 443 (1939). See also 7 WIGMORE, EVIDENCE §§ 694-96.
tor of the Chicago Police Scientific Crime Detection Laboratory revealed that handwriting identification by lay witnesses when accomplished by means of a mental comparison is startlingly inaccurate, and it was concluded that this performance of mental gymnastics is "too unreliable to be considered acceptable as legal evidence." Despite the publication of the results of this experiment, the judicial recognition of the unreliability of such evidence, and the decreased necessity therefor, the principle of admissibility of lay opinions to prove the genuineness of handwriting remains firmly entrenched in the law of this state.

C. Value

Over one hundred years ago a damage suit was brought against a man who had killed plaintiff's setter dog, and witnesses acquainted with the qualities and market value of setters were permitted to testify to the value of this species of dog. The court regarded this evidence as "barely competent" but found that its admission did not constitute error. Since that case the New York courts, recognizing that a description of property is not sufficient to give the jury a knowledge of value, have permitted qualified lay witnesses to give their opinions as to the value of property and also services.

Deviations from simple value testimony are not permitted. Thus

126 Inbau, supra note 125, at 443.
127 Van Wyck v. McIntosh, 14 N.Y. 439, 448 (1856) ("It is quite true that the proof of handwriting by witnesses who have not seen the very paper written, is among the most unsatisfactory parts of evidence, resting as it always does, upon presumptions of greater or lesser infirmity.").
128 The genuineness of handwriting today is largely determined by experts. See for examples In re Burbank, 104 App. Div. 312, 93 N.Y. Supp. 866 (1st Dep't 1905), aff'd, 185 N.Y. 559, 77 N.E. 1183 (1906).
131 States Import & Export Corp. v. Hartford Fire Ins. Co., 210 App. Div. 374, 206 N.Y. Supp. 323 (2d Dep't 1924) (Testimony as to amount of profits lost is inadmissible.); Bookman v. N.Y. etc. R.R., 137 N.Y. 302, 33 N.E. 333 (1893) (Plaintiff's testimony that if he could keep his right of action against defendant he would sell his property for $25,000 was not a permissible estimate of value.); Cf. Wolper v. N.Y. Water Service Corp., 276 App. Div. 414, 99 N.Y.S.2d 647 (2d Dep't 1950) (Witness may not testify to net worth of customer in absence of evidence of details of assets and liabilities and their value.); Manning v. Maas, 2 Misc. 266, 21 N.Y. Supp. 959 (Ct. C.P. N.Y. City & County 1893) (Loss of profits is inadmissible without stating cost or value.).
a witness may state the value of property before and after the act complained of, but he may not express an opinion as to what the value would have been if the injury had not occurred.\textsuperscript{132} The grounds for such holdings differ. Some courts have based their decisions on the theory that such an estimate amounts to mere speculation.\textsuperscript{133} Other courts have felt that such estimates constitute an opinion on the amount of damages sustained\textsuperscript{134} and since it is well established that opinions on damages are inadmissible such evidence is excluded.\textsuperscript{135}

Value testimony, although admitted as an exception to the general rule and not because it is strictly a subject for expert testimony,\textsuperscript{136} can be given only by a qualified witness\textsuperscript{137} as value testimony by an incompetent witness would be of no help to the jury. The amount of knowledge necessary to qualify a witness depends largely on the discretion of the trial judge.\textsuperscript{138} No rule of law specifies the amount of knowledge a witness must have but it is generally held that the witness must have some acquaintance with the particular property in question as well as knowledge of its market value.\textsuperscript{139} Witnesses who testify to the value of services must have some background of experience and observation.\textsuperscript{140}

\textsuperscript{133} Roberts v. N.Y. El. Ry., 128 N.Y. 455, 28 N.E. 486 (1891).
\textsuperscript{135} Moran v. Standard Oil Co. of N.Y., 211 N.Y. 187, 105 N.E. 217 (1914), reversing 153 App. Div. 894, 137 N.Y. Supp. 1130 (1st Dep't 1912); Hudson v. Caryl, 2 Thomp. & C. 245 (N.Y. 1873); Teerpining v. Corn Exchange Ins. Co., 43 N.Y. 279 (1871); Fish v. Dodge, 4 Denio 311 (N.Y. 1847). The reason for the rule has been stated in Roberts v. N.Y. El. Ry., 128 N.Y. 455, 467, 28 N.E. 486, 488 (1891) ("the rule of damages is a question of law, and the witness upon such a question might adopt a rule of his own, and hold the defendant responsible beyond the legal measure").\textit{Contra:} Nellis v. McCann, 35 Barb. 115 (1861) (Opinion as to damages is admissible.); Rochester & S. R.R. v. Budlong, 10 How. Pr. 289 (N.Y. 1854) (Opinion as to damages is admissible if based on facts.). The last two cases have not been followed in New York.
\textsuperscript{136} Richardson, Evidence § 524 (7th ed. 1948).
\textsuperscript{140} Lamoure v. Caryl, 4 Denio 373 (N.Y. 1897); Helnuth v. Apgar, 17 Misc. 623,
A lay witness may testify not only to his own physical condition, but when he has had an opportunity to observe he may state his opinion as to the physical condition of another. Statements dealing with health, illness, suffering, earning power, and intoxication are thus properly admissible. Opinions pertaining to subjects such as the speed of a vehicle or the depth of a hole are proper subjects for

40 N.Y. Supp. 651 (Sup. Ct. 1896). Speculative conclusions as to services are not admissible. Berla v. Zambetti, 235 App. Div. 464, 257 N.Y. Supp. 179 (1st Dep't 1932) (future earnings); accord, Heiman v. Greenberg, 162 N.Y. Supp. 931 (Sup. Ct. 1917) (amount of goods that would have been sold if plaintiff was not discharged held inadmissible).

141 Vincent-Wilday Inc. v. Strait, 273 App. Div. 1054, 79 N.Y.S.2d 811 (4th Dep't 1948) (Witness was competent to testify as to his past and present condition and as to his ability to work without being caused pain.); Pierpont v. Fifth Ave. Coach Co., 151 App. Div. 40, 135 N.Y. Supp. 322 (2d Dep't 1912).


143 Corbett v. City of Troy, 53 Hun 298, 4 N.Y. Supp. 381 (Sup. Ct. 1889); accord, Cannon v. Brooklyn City R.R., 9 Misc. 282, 29 N.Y. Supp. 722 (Brooklyn City Ct. 1894), aff'd, 149 N.Y. 615, 44 N.E. 1121 (1896). A lay witness is sometimes permitted to state whether a disease or disorder existed although the cases on this point are in conflict. Compare Donovan v. Colonial Life Ins. Co. of America, 119 N.Y. Supp. 1078 (Sup. Ct. 1900) (plaintiff competent to testify as to whether her brother had consumption); Duntzy v. Cornelius Van Burne, 5 Hun 648 (N.Y. 1875) (witnecess permitted to testify that her husband had a rupture); with Gray v. Brooklyn Heights R.R., 175 N.Y. 448, 67 N.E. 899 (1903), reversing 72 App. Div. 424, 76 N.Y. Supp. 20 (2d Dep't 1902) (Plaintiff could not characterize her injury as a “miscarriage.”); Grattan v. Metropolitan Life Ins. Co., 80 N.Y. 281 (1880) (Opinion that X suffered from consumption was inadmissible.).


146 Molissani v. Comadore Laundry Service Corp., 152 Misc. 270, 273 N.Y. Supp. 150 (Sup. Ct. 1934); Donahue v. Mengley, 220 App. Div. 469, 221 N.Y. Supp. 707 (4th Dep't 1927); McCary v. Wells, 51 Hun 171, 4 N.Y. Supp. 672 (Sup. Ct. 1889); People v. Eastwood, 14 N.Y. 563 (1856). The earlier cases admitted such evidence because it was felt that it was impossible to give the jury a “living picture” without using opinions. Recently a reversion in this theory of admission has become apparent as the cases now require a witness to describe the motions, words and conduct of the person in question before expressing an opinion as to whether that person was intoxicated. Compare People v. Eastwood, supra with Molissani v. Comadore Laundry Service Corp., supra.


lay witnesses. Similarly a witness may testify that something was wrong with the "steering gear,"\(^{149}\) that a cab "stopped suddenly,"\(^{150}\) that the limb of a tree was dead,\(^{151}\) or that the noise and motion of a street car was not of the usual kind.\(^{152}\)

Lay witnesses may not only testify to the identity of persons\(^{153}\) and common substances such as whiskey\(^{154}\) or blood\(^{155}\) but also to the resemblance between common objects.\(^{156}\) However, opinion evidence of the resemblance of a child to his supposed father, who is no longer living, in order to prove paternity is not admissible,\(^{157}\) the reason for this rule being stated in *Re Wendel's Estate*, as follows:

> At most their statements [as to resemblance] were mere opinion. The belief of a witness, though honest, as to the alleged resemblance may be largely a matter of fancy or guess work. Moreover, in cases of claims to estates, an impostor might well be selected who in some way resembled the decedent. In my opinion the reception of testimony as to resemblance, particularly before a jury, would be extremely dangerous.\(^{158}\)

**CONCLUSION**

Despite the pressure of severe and frequent criticism for over half a century, the opinion rule remains firmly entrenched in New York law. A source of extensive disorder and uncertainty, the rule has given


\(^{150}\) Coleman v. Frank, 80 N.Y.S.2d 259 (Sup. Ct. Kings County), aff'd, 80 N.Y.S.2d 358 (2d Dep't 1948); *accord*, Fellows v. I.R.T. Co., 117 Misc. 64, 190 N.Y. Supp. 547 (Sup. Ct. 1921) (Car gave a "terrible and terrific jerk.").


\(^{155}\) People v. Burgess, 153 N.Y. 561, 47 N.E. 889 (1897); People v. Deacons, 109 N.Y. 374 (1888); *accord*, King v. New York Central & H. RR., 72 N.Y. 607 (1878) (piece of iron).


\(^{158}\) *Id.* at 271, 262 N.Y. Supp. at 50-1.
rise to conflicting decisions and its application has been complicated by the encrustation of myriad exceptions.

When any particular rule of law becomes seriously whittled away by exceptions and proves more confusing than helpful there is a manifest need for the sharp blade of the legislator. It would seem that abolition of the opinion rule would not only expedite the trial machinery but would facilitate the search for truth and advance the cause of justice.