"The Otter Tail County Bar"

By

John W. Mason

Foreword

By

Douglas A. Hedin
Editor, MLHP

JOHN WINTERMUTE MASON practiced law in Fergus Falls, the county seat of Otter Tail County, from 1871 to 1916, when he retired. He also served terms as mayor, city attorney, school board member, and state legislator. Like a few other "pioneer lawyers" in newly-formed communities in the mid-nineteenth century, he became interested in preserving recollections of the early settlers, the hardships of the frontier, the accomplishments of the founders – in other words, local history. To that end, he edited a two volume county history published in 1916. A short chapter on the "county bar" was included in the first volume. The author is not identified, but we can assume it was John Mason.

Of the chapters on the "bench and bar" in the many county histories published from the 1880s to the First World War, this is one of the shortest – and oddest. Mason chose not to write biographical sketches of individual lawyers or judges, and lamely concludes with a list of lawyers who once practiced in the county. He devotes most of the chapter defending the legal profession while acknowledging that a few "shysters" damage the its reputation. One observation – likely grounded on personal experience – suggests how difficult it was for the small legal fraternity in a rural county to police itself:

> Within restricted limits, the competition is as sharp and strenuous among lawyers as in any other business. Every shyster has his friends and followers, and naturally they are as unscrupulous as he. A complaint against him by a brother practitioner for dishonest or unprofessional conduct, subjects the complaining one to the charge of jealousy and a desire to injure a competitor. In ninety cases out of a hundred, the dread of that charge restrains the reputable lawyer from moving in the matter of disbarment. Hence, the unworthy member is permitted to continue his career in "shysterdom," while the public looks and holds the fraternity in sympathy, if not in league, with him in his methods and practice.

When the history of attorney discipline in this state is written, Mason's comment may be quoted to explain a lawyer's reluctance to report unethical conduct by a "competitor." One wonders whether this self-censorship – or complicity as the public viewed it, according to Mason – disappeared as the bar grew in numbers.

Mason's lengthy "Reminiscences," which occupy an entire chapter, provide anecdotal evidence about how lawyers practiced in the late nineteenth and early twentieth centuries. He reminds us that it is necessary to consider the length and difficulty of travel when describing and interpreting lawyering during this period. True, the time between arrest and trial was short; jury selection took minutes not days; and trials usually lasted a day or two, not most of a week or more. But before the arrival of railroads, travel between out-state towns and the capital was long and uncomfortable. He recalled a typical trip in the 1870s from Fergus Falls to St. Paul, a distance of about 190 miles:

> People are wont to look back at the "good old times" and deprecate the present. It is well, occasionally, to look back at those old times, and remember them just as they were. In these "good old times" all were praying for a railroad, willing to make any sacrifice, vote bonds and give right-of-way,

depot grounds and the like to secure it. It is interesting to look back and think of what we were thankful for then.

In those days to go to St. Paul from Fergus Falls it took one day to Campbell by stage, at a fare of two dollars and fifty cents. Supper, lodging and breakfast at Campbell, one dollar and fifty cents. The next morning one took a mixed train which went as far as Willmar that day, and the fare was five cents per mile. Supper, lodging and breakfast at Willmar cost one dollar and fifty cents. The next, and the third day, landed one in St. Paul late in the afternoon. With a day spent in St. Paul and the down trip reversed, just one week was consumed in making this journey, at a cost of about thirty-one dollars for fare and hotel bills on the way.

Now, in these degenerate times, one can take his train, with diner and observation cars annexed, and go to St. Paul in five hours, at a cost of two cents per mile; and listen, as he enjoys his cigar in the smoking room, to denunciations of the railroads, their extortions, vile service and accommodations. We are wont to forget that but for the railroads, northern Minnesota today would be a buffalo pasture; and that within the last thirty years railroad rates have declined out of all proportions to the prices of other commodities. It makes one more contented to think of these things once in a while.[1]

This is a journey Mason took many times. As a lawyer for the Great Northern Railway from 1883 to 1910, he is reputed to have argued more appeals before the state supreme court than any other lawyer residing outside the metropolitan area. [2]

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[1] John W. Mason, I *History of Otter Tail County, Minnesota* 585-586 (B. F. Bowen & Co., 1916).

[2] Ernest V. Shockley describes Mason as the consummate railroad lawyer:

With obvious pleasure, Mason describes several lawsuits that today fall in the "family law" category. He must have told the story of the Luedke divorce many times. Clara Luedke, according to Mason, was a gold-digger, who bewitched August Luedke, a wealthy merchant, into marriage. Less than four months later, she sued for divorce, and the case was placed on the docket of Judge Luther L. Baxter. August hired Mason, who insisted that Chauncey Baxter, the judge's son, be retained as co-counsel. This also was the goal of Clara's lawyers. Mason's phone call to Chauncey beat the opposition by minutes.

Clara applied for substantial temporary alimony and attorneys' fees. Mason delicately glosses over what happened next: "Before the day fixed for such hearing, Chauncey had a filial interview with his father." In court, after Clara's lawyers "made an able and pathetic appeal for a liberal allowance," Judge Baxter announced he did not want to hear from the defendant's lawyers because "I have a rule of my own which I always follow on these applications for temporary alimony"; he thereupon awarded Clara alimony of $4 a week rather than $20, and her attorneys $50 rather than $1,000. Suspecting that Clara was not the innocent, devout, churchgoing millinery she professed to be, Mason personally investigated her background and turned up enough proof of her "fraud, deception and adultery" to secure a cheap settlement.

> The twenty-seven years Mr. Mason spent with the Great Northern as one of their attorneys were filled with hundreds of cases which he handled. His ability is amply testified to by the fact that the company kept him in their employ as long as they could and parted with his services most reluctantly in 1910. Some idea of the amount of business he handled for the company may be seen when it is known that in one year he had no less than seventy-one cases pending. The records will show that he appeared before the supreme court of the state oftener than any other country lawyer in the state. He was frequently called to St. Paul to try cases when the other attorneys of the company were very busy.

Ernest V. Shockley, "John Wintermute Mason," in Mason, supra note 1, at 579-580. The complete sketch is posted in "John W. Mason (1846-1927)" (MLHP, 2012).

It is senseless to hold lawyers practicing at this time to current ethical standards, but it is striking that each side saw an advantage in hiring the judge's son. Mason relates this not with compunction but with pride in his tactical quickness (he even imparts a lesson: "This circumstance shows how much better a phone is than walking when one is in a hurry.").[3] Obviously he did not feel his behavior in the Luedke case – or Chauncey's – constituted the sort of "unprofessional conduct" he condemned a few pages earlier in his chapter on the county bar.[4] He does not particularize what constituted "unprofessional" behavior but it must have been pretty base.

It surely did not occur to Judge Baxter to recuse himself from presiding over a case in which his son appeared. Judicial ethics at this time were in an embryonic stage, if that.[5] The rule that judges should avoid "impro-

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[3] Mason gives 1900 as the date of the Luedke case. His telephone call to Chauncey Baxter might not have been possible a few years earlier. The first telephone company was formed in Fergus Falls in 1892, but service was erratic. Between 1892 and 1898, there was no service within the city at all. In 1898, a new phone company was formed, and service flourished. Mason, supra note 1, at 439-40.

[4] Canon 3 of the ABA's Code of Professional Ethics, adopted in 1908, provided:

> Attempts to Exert Personal Influence on the Court.—Marked attention and unusual hospitality on the part of a lawyer to a Judge, uncalled for by the personal relations the parties, subject both the Judge and the lawyer to misconstructions of motive and should be avoided. A lawyer should not communicate or argue privately with the Judge as to the merits of a pending cause, and he deserves rebuke and denunciation for any device or attempt to gain from a Judge special personal consideration or favor. A self-respecting independence in the discharge of professional duty, without denial or diminution of the courtesy and respect due the Judge's station, is the only proper foundation for cordial personal and official relations between Bench and Bar.

[5] The Canon of Judicial Ethics were adopted by the ABA in 1924:

> No canons of judicial ethics were included in the code of professional ethics adopted by the Association [in 1908], but at the meeting following the adoption of those canons the Association voted, subject to the approval

priety and the appearance of impropriety" was not adopted until about a century later.[6] The intellectual climate of the period did not encourage greater sensitivity to judicial ethics. Moreover, there were physical barriers to the implementation of rigorous standards of judicial ethics in the late nineteenth century, and to understand these, it is instructive to recall Mason's description of a trip between Fergus Falls and St. Paul. Even after railroads were constructed it took five hours. Not every county seat within

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> of the Executive Committee, to create a committee to draft a code of judicial ethics. This approval was withheld until 1922, when a Committee on Judicial Ethics was appointed, consisting of Chief Justice William H. Taft, Chief Justice Leslie C. Cornish, of Maine, Chief Justice Robert von Moschzisker, of Pennsylvania, and Messrs. George Sutherland, of Utah, and Charles A. Boston, of New York. In 1923 it reported to the Association a complete code of judicial ethics in 34 canons, with the recommendation that its report be referred to the Judicial Section, and that the Chairman of that Section, who was Justice Pierce Butler of the United States Supreme Court, be authorized to appoint a Committee of the Section to consider the canons, present their views to the Section and submit the suggestions and criticisms of the Section to the present Committee. This recommendation was approved, and as a result of the reference to the Judicial Section a single canon, number 13 dealing with Kinship or Influence, was altered. As so amended the canons were approved [in 1924].

Edson R. Sunderland, *History of the American Bar Association and its Work* 113-4 (NP, 1953).

[6] Canon 2 of the ABA's 1990 Model Code of Judicial Conduct provides.

> Canon 2. A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All of the Judge's Activities.
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> A. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
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> B. A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

the Seventh Judicial District was connected by rail; travel between them was subject to disruptions by unpredictable factors such as the weather.

At each session the legislature reshaped most judicial districts, but one feature of the Seventh Judicial District remained constant: its size. It was enormous. In 1892, its nine counties encompassed 8,730.50 square miles: Benton (413 sq. mi.), Douglas (719.94), Mille Lacs (681.77), Morrison (1,153.32), Otter Tail (2,224.91), Pope (717.29), Sherburne (451), Stearns (1,389.93) and Todd (979.34). By 1896, Pope County had been removed while Clay (1,052.74) and Becker (1,445.11) Counties added. Its ten counties now spanned 10,511.06 square miles. The next year, 1897, Sherburne County was removed, leaving it with nine counties, covering 10,060.06 square miles. In 1900, the year of the Luedke divorce, Wadena County (543) was added, bringing it to 10,603.06 square miles. Its size may be compared with several states: Delaware has 2,490 square miles, Connecticut 5,543, New Jersey 8,721, New Hampshire 9,304, and Vermont has 9,620 square miles. [7]

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[7] Its size may also be appreciated by comparing it to Illinois' famous Eighth Judicial Circuit, which Judge David Davis and the circuit bar, including Abraham Lincoln, "rode" in the 1840s and early 1850s. It took three months to ride the circuit's fourteen counties (twice a year). Davis' biographer describes his view of its size:

> With the completion of his circuit the Judge had traversed an area, he informed [his wife] Sarah's father, almost as large as the whole State of Connecticut. Travel had been rigorous, living usually miserable, but, despite his complaints, he thoroughly enjoyed it. Most of the joy came from his relations with his companions, particularly Lincoln, the only lawyer except the State's Attorney who traveled the entire circuit with him.
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> ...
>
> "This Circuit must be lessened or I will resign," Davis declared in a letter to Sarah in the spring of 1852. No other judge in the entire state had to cover so vast a tract, he complained.

Reacting to his pleas the next year, the state legislature reduced the circuit by six counties. Willard L. King, *Lincoln's Manager: David Davis* 87-8 (Harvard Univ. Press, 1960). In contrast, the Seventh Judicial District was almost twice the size of Connecticut; however, the judges never "rode" that district as Davis had.

Two judges were assigned to the Seventh Judicial District from the 1880s through the early twentieth century: Luther Baxter chambered in Fergus Falls, and Dolson B. Searle sat in St. Cloud, Stearns County. The exact dates of their terms in each county seat were set by the legislature.[8] If either recused himself from a particular case, the other would be forced to interrupt the term he was holding, thereby inconveniencing numerous litigants, witnesses and jurors, and travel all or part of a day to another county in the district to preside over a trial or hear a brief motion such as Clara Luedke's application for temporary alimony. For these reasons, it is not likely that either judge recused himself from any case in the 1880s and 1890s.

The same factors barred the lawyers from fling an "affidavit of prejudice" against Baxter. In 1895 the legislature passed a law permitting a lawyer to file an "affidavit stating that on account of prejudice or bias on the part of said presiding judge he has good reason to believe and does believe that he cannot have a fair trial of said action." When this occurred, the "presiding judge shall forthwith secure the services of some other judge of the same or another district to preside at the trial of said action, and said action shall be continued on the calendar until some other judge can be secured to preside at said trial." [9] Significantly, however, the law did not

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[8] The following is the schedule set by the legislature for district court terms in the Seventh Judicial District for 1895: "Benton county, Sauk Rapids, third Monday in January; Douglas county, Alexandria, third Monday in March; first Monday in October; Mille Lacs county, Princeton, first Monday in September; Morrison county, Little Falls, first Monday in March; third Monday in September; Otter Tail county, Fergus Falls, second Monday in May; fourth Monday in November; Judge may adjourn general term of court to village of Perham; Sherburne county, Elk River, fourth Monday in March; Stearns county, St. Cloud, fourth Monday in May; second Monday in December (Judge may adjourn general term of court to village of Sauk Centre); Todd county, Long Prairie, first Monday in May and third Monday in October; Clay county, Moorhead, second Monday in June; second Monday in November; and Becker county, Detroit, second Monday in April and October." 1895 Laws, Appendix, at 829-30 (internal citations omitted). In the nineteenth century other state legislatures also micromanaged their court systems. Roscoe Pound, *The Formative Era of American Law* 54-5 (Little, Brown and Co., 1938).

[9] 1895 Laws, ch. 306, at 720, provided:

apply to judicial districts such as the Seventh with less than three judges. It was tailored to the Second and Fourth districts while excluding rural districts which were geographical large and sparsely populated, and where the disqualification of a judge would wreck havoc on the court calendar.

One certain way to remove a judge from hearing cases was to defeat him at the polls. In 1904, Mason challenged Judge Baxter but lost by a whisker:

An act to enable parties to actions in the district court in this state to secure an impartial judge to hear and preside at the trial of said Actions.

Be it enacted by the Legislature of the state of Minnesota:
SECTION 1. Whenever in any civil action pending in a district court of this state, any party to the action shall, not less than six days before the first day of the term at which said action is noticed for trial, make and file with the presiding judge and serve on the opposite party or his attorney, an affidavit stating that on account of prejudice or bias on the part of said presiding judge he has good reason to believe and does believe that he cannot have a fair trial of said action, said presiding judge shall forthwith secure the services of some other judge of the same or another district to preside at the trial of said action, and said action shall be continued on the calendar until some other judge can be secured to preside at said trial. On making and filing with the presiding judge, such an affidavit by the defendant in a criminal action not less than two days before the expiration of the time allowed to him bylaw to prepare for trial, some other judge shall likewise be secured to preside at the trial of said action and said presiding judge shall in either of such cases be incapacitated to try said action; *provided*, if the judge against whom said affidavit is filed in a criminal action shall so order the place of trial of said action may be changed to another county of judicial district so as to secure a speedy trial before another judge.
Provided that in districts having more than one judge the affidavit above provided for may be filed within one day after it is ascertained which judge is to preside at the trial.
Provided, that this act shall not apply to any judicial district in this state having less than three (3) district judges.
SEC. 2. This act shall take effect and be in force from and after its passage.
Approved April 24th, 1895.

John W. Mason.....13,676
W. F. Valentine.....6,121
Luther L. Baxter.....13,801[10]

Baxter completed his six-year term, but did not run again. In 1910, Carroll A. Nye was elected to the district court.

The professional life and writings of John W. Mason suggest many subjects for further historical research. What types of cases did he handle as a railroad lawyer?[11] If there was bias on the bench or among jurors against the roads, how did he address or overcome it? What was his record as an appellate lawyer? How did Luther Baxter and his two challengers campaign in the election of 1904? And did the county bar take any steps to correct or discipline the "rascals," "delinquents" and "unscrupulous shysters" who engaged in "non-professional conduct." And so much more.

The following chapter on the county bar appeared on pages 350-352 of the first of Mason's two volume history of Otter Tail County. The excerpts from his "Reminiscences" appeared on pages 606-615 (page breaks have been omitted). One of Mason's war stories, "A Romance and a Tragedy," ended with a ruling by the Minnesota Supreme Court in *McArthur v. Craigie*, 22 Minn. 351 (1876), which is posted in the Appendix.

Related articles on the MLHP are "John W. Mason (1846-1927)," "John O. Barke (1850-1921)," "James L. Brown (1853-1929)," "William L. Parsons (1858-1939)," "Judge Frank C. Barnes (1889-1963)," Eben E. Corliss, "Reminiscences of the Early History of Otter Tail County" (1916), and "Melville & Mason: The First Law Firm in Fergus Falls" (1916).

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[10] 1905 Blue Book, at 512.

[11] For an important and widely admired study of this specialty, see William G. Thomas, *Lawyering for the Railroad: Business, Law, and Power in the New South* (Louisiana State Univ. Press, 1999).

“ The Otter Tail County Bar ”

in

HISTORY

OF

Otter Tail County
MINNESOTA

ITS PEOPLE, INDUSTRIES AND INSTITUTIONS

———

JOHN W. MASON
Editor

———

With Biographical Sketches of Representative Citizens and Genealogical Records of Many of the Old Families

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VOLUME I

———

ILLUSTRATED

———

1916
B. F. BOWEN & COMPANY, Inc.
Indianapolis, Indiana

CHAPTER XX.

THE OTTER TAIL COUNTY BAR.

No one cares much for the lawyer except in time of trouble. The members of no profession or calling are subject to such severe criticism as the lawyers. No subject in any book of maxims is so lengthy in condemnatory proverbs as the "Lawyer." It is a popular custom to speak of them as a profession of rascals. People forget that "dishonest clients make dishonest lawyers." It is not hard to find a reason for this general opinion. In a measure, the profession is responsible for this popular estimate. One unscrupulous shyster in a community will characterize, in the minds of the people, the whole bar, and none know his unworthiness better than the bar itself. It is generally believed that there is a sort of "freemasonry" in the profession, obligating its members to hang together, and overlook, if not actually defend, the methods of its delinquents. There is just enough truth in, this to justify the public in such an estimate of the profession.

Knowing, as lawyers do, who are the disreputable members of the bar, they seem to be the last ones willing to complain and apply the adequate existing remedies for non-professional conduct; and their lack of action in such cases justifies many of the criticisms directed against the profession.

Within restricted limits, the competition is as sharp and strenuous among lawyers as in any other business. Every shyster has his friends and followers, and naturally they are as unscrupulous as he. A complaint against him by a brother practitioner for dishonest or unprofessional conduct, subjects the complaining one to the charge of jealousy and a desire to injure a competitor. In ninety cases out of a hundred, the dread of that charge restrains the reputable lawyer from moving in the matter of disbarment. Hence, the unworthy member is permitted to continue his career in "shysterdom," while the public looks and holds the fraternity in sympathy, if not in league, with him in his methods and practice.

But notwithstanding all these jibes and criticisms, there is no more honorable, high-minded and conscientious body of men than those of the legal profession. Their influence for good is everywhere felt, and the moral tone of a community takes its bent from its lawyers, often to a greater extent than it does from its clergymen. This is so because the lawyer comes in closer touch with the practical affairs of a neighborhood than does the minister.

The Otter Tail county bar has been no exception to the general rule. It has contained its full quota of honest, able and, upright members, and possessed its share of shysters and "alleged lawyers," as well. In point of moral worth, it has always ranked with that of any other bar in the state, and in point of ability it has always been considered by the courts—the best judges of the bar's merits — as the equal of any in the state and the superior of many.

Officially, it has furnished the nation and the state with one United States senator, three district court judges, one supreme court justice, two attorney-generals of the state, two assistant attorney-generals, one United States district attorney and one railroad and warehouse commissioner.

The following is a list of the attorneys of the county, with the date of their settlement and the time of their departure therefrom, either through death or removal to other localities, in so far as the facts are obtainable:

E. E. Corliss.....1870
Bert Melville.....1871-1873
Newton H. Chittenden.....1871-1876
John W. Mason.....1871
Peter N. Smith.....1872-1886 Killed
David P. Hatch.....1871-1875
C. E. Chapman.....1878
H. E. Rawson.....1880-1891
Moses E. Clapp.....1881-1891
H. F. Woodard.....1882-1891

James F. Cowie.....1884-1915 Died in California
Edwin M. Wright.....1872-1893
Charles L. Lewis.....1879-1889
Clifford L. Hilton.....1879-1909
A. C. Brown.....1882-1885
John O. Barke.....1880
Riley J. Marden.....1880-1904 Died
F. J. Peterson.....1884-1886
M. R. Tyler.....1880-1906
George W. Frankberg.....Native
Nichola F. Field *.....Native
John L. Townley.....1902
Luther L. Baxter.....1884-1915 Died
J. O. Barke.....1880
Chauncey L. Baxter.....1884-1904
Charles C. Houpt.....1883-1906
Henry W. Childs.....1884-1887
Edward Dampier.....1887-1904
Charles H. Tusley **.....1881-1886 Died
William L. Parsons.....1883
Michael J. Daly.....1882
John P. Winter.....1898-1903
Anton Thompson.....1876
John Thompson.....1876
Henry Thompson.....Native
John Strachen.....
H. R. Day.....1881-1889 Died
Henry Dressler.....1882-1897 Died
Charles L. Alexander.....1906
Harry Bruce.....1881

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* The copy of this book in the library of the Minnesota Historical Society has a handwritten correction that the first name of this lawyer is spelled "Nicolai."

** That copy also has a handwritten correction of the last name of this lawyer as "Tousley."

William P. Bailey……..1886
George C. Olmstead……..1889
P. O. Noben……..1872-1889
Hans Bugge……..1885-1900
George W. Downing……..1890-1905
H. Lord……1880-1885
A. Shannon……1885
James A. Brown……1883
J. P. Shroeder……Native
George F. Shea……Native
Arthur Barke……..Native

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EXCERPTS FROM MASON'S "REMINISCENCES"

APPENDIX

A ROMANCE AND A TRAGEDY.

On the south shore of Otter Tail lake, where the beautiful little stream comes out of the woods to pour itself into the lake, was the scene of a romance and a tragedy back in the early seventies. This lake, about ten miles in length and nearly six in width, is one of the beauty spots of Minnesota. Nearly surrounded by heavy timber and fine, sandy beaches, it was, in an earlier day, the home and haunt of the Indians. In former times many were the battles fought between the Sioux and Chippewas for possession of these favored hunting-grounds. The Chippewas finally conquered and held dominion under their old chief Po-ka-no-ga, the friend of the white man, till removed by the government to the White Earth reservation. At the west end, where the Red river flows out of the lake, there are a number of Indian mounds extending from the top of the hill, on the south side of the river, back over the prairie for a considerable distance. These mounds are as large and distinctly marked as those in Mound park in St. Paul.

At an early day, probably in the late sixties, James G. Craigie, a Scotchman, located his claim, built a house and small flour-mill close to the lake on the small stream above mentioned. His family consisted of himself, wife and daughter, Annie, about eighteen years of age. Annie was a "love" child, conceived in Scotland and born in Canada. Shortly after her birth, James G. Craigie came to Canada, and within two or three years married her mother. There the family lived till shortly before the story opens, when they came to Minnesota and settled on the shore of Otter Tail lake. Craigie had the Scotch thrift and in those times was counted rich.

The daughter Annie was a comely girl, well educated, as schooling went then, and was the pride of her father and mother. The parents were getting on in years, and Annie was considered a very desirable match for the Adonis fortunate enough to win her. Near the Craigie home lived a young man by the name of Archie McArthur. He was of good address, industrious, of Scotch descent on his father's side, with a strain of Indian blood derived from his mother. There was very little in his appearance to indicate the Indian taint. He had light hair and blue eyes, and a stranger would never

suspect from his looks that the blood of the noble red man was in his veins. He paid his addresses to Annie, who reciprocated his affection, and, against the violent opposition of her parents, they were married. From that time on, Craigie disowned Annie, forbade her his house, and it is not known that she ever "darkened the door" of her parents' home again.

At this time there was living in Otter Tail county a man by the name of John Cromb. He was a Scotchman, and came to this country from the same neighborhood where Craigie used to live. He was married, well educated and afterwards filled important state and national offices. Soon after Annie's marriage a woman from the Craigie home in Scotland came to the Craigie home here. Through some item in the local newspaper which fell into her hands in the old country, she learned the whereabouts of John Cromb, her husband. According to her story, vouched for by the Craigies, she was the wife of Cromb, whom he had deserted and come to America with another woman as his wife. After her arrival here she employed counsel to commence proceedings against her husband, but before any legal action was taken all proceedings were terminated by the tragic death of Mr. and Mrs. Craigie and Mrs. Cromb.

Craigie owned a light sailing yacht, and was in the habit of frequently taking his family for a sail on the beautiful lake. One afternoon, when a fine breeze was blowing, he took Mrs. Craigie and Mrs. Cromb out for a sail. They had not been long on the lake before, through some unknown accident or mismanagement, the boat capsized and all were drowned.

James G. Craigie had several brothers and sisters, part of whom lived in Scotland, part in Canada, and one brother in Minnesota at the time of his death. The brother, Alexander M., living in Scotland, came to Minnesota and applied to the probate court of Otter Tail county for letters of administration of the estate of his deceased brother. This application was resisted by Annie McArthur, who claimed to be the daughter and sole heir of James G. Craigie, deceased, but at the hearing in the probate court Alexander was appointed administrator, and letters were ordered to be issued to him. From such order of appointment, Annie McArthur appealed

to the district court of the county. Alexander Craigie, with his brothers and sisters, claimed that Annie McArthur was not the daughter of James G. Craigie, but was the child of one Falkner, living in Scotland. If this claim were established, then the property of the deceased brother descended to his brothers and sisters. On the other hand, if she were the daughter of James G. Craigie, then she was his sole heir and entitled to the whole of the estate.

As may be easily imagined, everybody was interested in the trial, and public sympathy was mostly on the side of Annie McArthur. Eminent counsel from St. Paul represented each side of the controversy and the question submitted to the jury: "Is Annie McArthur, the appellant, the legitimate child of James G. Craigie, deceased." was discussed at every crossroad and place where frontiersmen gathered for gossip.

The brothers and sisters of James were at the trial, some coming from Scotland and others from Canada, and all testified to facts from which it might be inferred that Annie was the daughter of Falkner. The nature of Mrs. McArthur's evidence may be gathered from the court's instructions to the jury. The jury was instructed that if they believed from the testimony that the plaintiff, Annie, was begotten in Scotland; that James G. Craigie and the mother lived at the same time in the same neighborhood; that the mother soon afterwards came over to Canada, and gave birth to the child; that shortly afterwards James G. Craigie came also to Canada and settled in the same neighborhood with the mother, and within two or three years after the child's birth married the mother; brought Annie up as his child, calling her by his own name, introduced her as his daughter; wrote her name in books given her by him, as "Annie Craigie"; wrote her letters signing himself "Your affectionate father,' and treating her in all respects as his legitimate child; that such facts raised a strong presumption that she is his child, and that such presumption can only be overcome by strong and convincing proof.

The jury promptly answered the question "Yes," thus establishing Annie McArthur's contention that she was the daughter of James G. Craigie, and

sole heir to his estate. The finding of the jury was affirmed by the supreme court of Minnesota, and Annie and Arthur lived "happily together ever after." [12]

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LUEDKE VS. LUEDKE.

The case of Clara M. Luedke vs. August E. Luedke for divorce presented many features which made it celebrated at the time and worthy of record in the history of Otter Tail county.

The defendant for many years was a wealthy merchant of Perham. The plaintiff was an adventuress. After the death of his first wife, Luedke moved from Perham to Fergus Falls, bought the Picket block and opened therein a large, general store.

About the middle of May, 1899, Clara M. Holderbaum came to Luedke's store, being introduced to him by a traveling man whom Luedke had previously met. Her excuse for calling, she said, was her wish to rent the millinery department of Luedke's store. No agreement for that purpose was made, and Miss Holderbaum returned to Minneapolis, which, she said, was her home. In about two weeks later she wrote Luedke, renewing her application to rent. To this letter Luedke made no answer, and shortly she wrote again asking for a reply to her first letter. At the end of this epistle she added this postscript: "What do you say to opening a correspondence?"

From this time on the parties carried on a regular exchange of letters. I never had the pleasure of reading Luedke's letters, but Miss Holderbaum's were love epistles, indeed, burning with the most endearing terms of affection, and very solicitous for Luedke's spiritual welfare. Nearly all pur-

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[12] McArthur v. Craigie, 22 Minn. 351 (1876), is posted in the Appendix on pages 29-33 below.

ported to have been written just before going to church, prayer meeting, Christian Endeavor gathering, or out on some mission of charity. Luedke called on her several times, when she always insisted that they attend some exercises of a religious nature. Luedke not being noticeably devout, always begged off, and proposed a show, instead, but she did not care for those things. Her early training had prejudiced her against such worldly entertainments.

Well, this correspondence, with occasional visits, continued along till about the latter part of September, and they were married on the 26th of that month. After marriage they came to Fergus Falls, occupying rooms in the Pickit block, over the store. The warmth of the courtship soon changed to heat of domestic broils. The first serious misunderstanding occurred within a couple of weeks. Mrs. Luedke demanded, as a proof of her husband's affection, that he deed and set over to her a certain portion of his property. She could not have touched a more tender or sensitive chord in Luedke's harmonious make-up.

The woman was not penniless, as she carried quite a store of wealth, concealed about her person. Of what this consisted, will appear later. From the time Luedke refused to deed any property to his wife, life together was not of that ideal harmony supposed to characterize the honeymoon period of marital bliss. Luedke, himself, was no angel, and if his wife were, she surely came from his satanic majesty's dominions. For several days prior to January 11, 1900, she had all her earthly belongings packed in trunks and the trunks locked. On that day she "moved out," and within a few hours thereafter a summons and complaint were served on Luedke demanding a divorce on the ground of cruel and inhuman treatment, with permanent alimony in the sum of fifty thousand dollars and an allowance for support, expenses of preparing for trial and attorney's fees in the sum of ten thousand dollars. She thought in figures like a Duluth millionaire. C. C. Houpt and Parsons & Brown were her attorneys in the suit.

Hon. L. L. Baxter was the judge before whom the case would be tried, and his son, Chauncey L. Baxter, was an attorney living in Fergus Falls and

practicing before his father. The importance of these facts will appear a little later, and serve to point a moral and help adorn the tale.

Luedke was, of course, perturbed. The figures in the complaint were staggering. He, at once, came to my office to retain me in the case. I read the complaint and heard the story of introduction, courtship and subsequent married life. After going over these, he asked: "Well, what do you think?" I said: '"We must retain Chauncey Baxter." To this he objected in strongest terms. Anyone but Chauncey he was willing to consider, but he had no use for him. I told him he probably thought so, but that it struck me entirely different; that if he wanted my services he must rely on my judgment and follow my advice. He finally consented, but with rather poor grace. As soon as that was settled, I stepped to the phone and called for C. L. Baxter at his office, and was told that he had just gone home. Getting him on the line there, I told him that I wanted to retain him for Luedke in a suit for divorce which Mrs. Luedke had just commenced. Knowing the defendant's financial ability, he was not slow to accept, and said he would come to my office at once. On his way there he met Mr. Houpt, of counsel for Mrs. Luedke. Houpt told Baxter that he wanted to retain him for Mrs. Luedke in her divorce case. Chauncey told him that he was too late — that he had just been retained by Luedke and was on his way for a consultation. This circumstance shows how much better a phone is than walking when one is in a hurry.

After defendant's answer was served, the plaintiff's attorneys gave notice of an application to the court for an order commanding defendant to pay temporary alimony as demanded in the complaint. Before the day fixed for such hearing, Chauncey had a filial interview with his father.

The motion for temporary alimony came on for hearing, and plaintiff's counsel made an able and pathetic appeal for liberal allowance in view of the great wealth of defendant. They claimed as reasonable, under the circumstances, one thousand dollars retainer for plaintiff's attorneys; five hundred dollars for preparing for trial, and twenty dollars per week to plaintiff for maintenance during the pendency of the action.

At the close of their argument, counsel for defendant arose to reply, when the court stopped him and said "I don't care to hear any argument on this question. I have a rule of my own which I always follow on these applications for temporary alimony, and which I shall follow in this instance. It is hereby ordered that the defendant pay to the attorneys for plaintiff, as retainer in the suit, the sum of fifty dollars, that he pay to the plaintiff the sum of four dollars a week for maintenance during the pendency of the action, and the further sum of twenty-five dollars for expenses in preparing for trial." It was easy to see on whom the "wet blanket" fell, and Luedke commenced to feel better about retaining Chauncey.

I felt that we had a hard case to combat. The defendant was not popular. The plaintiff was a good-looking woman, and at that time nothing was known against her here, and an adroit campaign was started to create a prejudice in her favor. Public sentiment was strongly against the defendant. I became convinced that, if possible, some compromise should be effected, whereby the plaintiff be allowed to take her divorce, and a reasonable sum paid her, as it was evident money was what she was after. She was not unlike the Irishman who listened to the street free-silver orator who told his hearers how, when we had free coinage of silver, every man would have work. At this the Irishman interrupted with "To hell wid y'r wor-r-k; it's money we wa-ant." After much consultation, Luedke finally consented to pay five thousand dollars if such an arrangement could be made. I tried to get him to make a little better offer, but he refused. Five thousand dollars was all the "blood money" he would pay.

Plaintiff's counsel, on being notified that defendant would like to effect some kind of settlement, came to my office to negotiate. Mr. Houpt and Mr. Parsons were the ones who called. After some talk, I concluded best to violate instructions, as I felt sure they would not accept the amount named by Luedke; so I offered, first, not to oppose the divorce, and, second, to pay Mrs. Luedke six thousand dollars. They stepped into a side room to consider the proposition. Returning shortly, they said my offer was rejected; that twenty-five thousand dollars was the least sum they would

consider, and that if Luedke would not pay that amount, negotiations were ended.

Well, negotiations closed, all right, and I realized that the fight was on. Taking the conduct of the plaintiff as revealed by statements of the defendant, and her devout and saintly correspondence preceding the marriage, I became convinced that she was an adventuress and a very different person from what she held herself out to be, but the thing was, how to prove it. Her public conduct here during the fifteen weeks of married life gave no clew to her real character. Information must be sought in Minneapolis, where she formerly lived.

It was agreed to employ the Pinkerton detective agency at St. Paul. For that purpose, I went to see Mr. Vallens, superintendent of the agency there. I laid the whole case, insofar as I had information, before Vallens and succeeded in enlisting his interest and sympathy; but he told me that it was a rule of the Pinkerton agency not to undertake investigations in divorce cases. He said that this case was peculiar, and that if the facts were fully laid before the head office, they might consent to let him undertake it. He then told me that if I would wait over until the next day, he would telegraph a full report to the office in Chicago, and that if they would not let him undertake the work, then he would introduce me to a good, private detective who would. The next day, late in the afternoon, I was called to Vallens' office, when he told me he had permission to investigate the Luedke case.

This investigation went on for two weeks. It disclosed that Miss Holderbaum worked in a store as clerk during the daytime. She had a room, but never received visitors there, and was generally absent from her room evenings. She was never known to attend church or other religious functions. She was frequently in St. Paul at night. There she was traced to a house of ill fame on several occasions with different men, but as soon as the proprietress learned what the detective was after, she refused to give any particulars, and said if subpoenaed in the case, she would deny ever having seen the plaintiff.

At the end of two weeks Vallens wrote that there was no use of spending more time or money in tracing Miss Holderbaum's movements in the Twin Cities, as they could find nothing further than as stated.

The information so gained, while it showed that the plaintiff was a woman of bad character, would be of little use in the trial. About the time this search was abandoned, I incidentally heard that at Grand Forks, North Dakota, where Miss Holderbaum had worked as a dining-room girl in a hotel, she was called the "little widow." This was a small thing, but "Tall oaks from little acorns grow," and Luedke was not in a position where he could afford to overlook anything, however diminutive. Mrs. Luedke had told that her home was in Bucyrus, Ohio, where her folks lived, and had spoken of being in Pittsburgh, Pennsylvania, once upon a time.

I telegraphed Vallens to continue investigations at those two points, and in response to this instruction, he sent a man from Chicago to Bucyrus. The detective had not been there a day before he struck the "lead" and the "showing was rich." He there learned that at the time of Mrs. Luedke's marriage her name was Mrs. Clara M. Burns. Her former husband kept a large retail jewelry store at Bucyrus, and that shortly before the plaintiff came to Minneapolis he had obtained a divorce from her on the ground of adultery. Like "favorable" reports came from Pittsburgh.

With this information in hand, I determined to go to those two cities and personally follow up the leads. For this purpose it was necessary to have photographs of Mrs. Luedke, but she had taken all such with her on leaving defendant's "bed and board." Luedke said she had recently had some taken at a studio in Minneapolis. He went there and asked for some photographs of his wife, recently taken, and procured two of cabinet size, one a front, the other a side view. Armed with these and the detective's report, I started for Pittsburgh. It is unnecessary to go into particulars, but at Pittsburgh I was put in communication with a man — a widower — with whom the plaintiff had promised to go to Europe as his wife, and did go with him as far as New York, where she left him, taking with her a trunk of his former

wife's clothing and some jewelry. He traced her back to Pittsburgh, recovered his stolen property, but did not prosecute her criminally.

When I saw this man he was married again in good faith and in accordance with the forms of law. He was a German and about to start on another trip to his native country, but, for a consideration, agreed to defer the journey and come to Minnesota as a witness for Luedke in the divorce suit. In addition to his own expenses, I had to agree to pay those of his.

I further found a boarding-house keeper in Allegheny with whom Miss [13] Holderbaum lived with a man as her husband for several weeks, and to whom, to prove their respectability, they exhibited their marriage certificate, made, as it afterwards appeared, for the occasion. This woman could not come to Minnesota, and I arranged to have her deposition taken. I found McGonna, the big Irish policeman in Pittsburgh, who had arrested the pious plaintiff for drunkenness on the public streets, and who told me of her having jumped out of the "Black Maria" on the way to jail, and the chase she gave him before he recaptured her. With this information, properly codified, indexed and arranged, I started for Bucyrus, Ohio, to interview her former husband, Mr. Burris

The next morning after reaching Bucyrus, I called at a large, fine retail jewelry store kept by this man, and inquired if Mr. Burris was in, and was told that it was to him I was talking. After some general conversation I handed him the photographs and asked if he knew the original. He said he did and asked "What has she been doing now?"

I told him the story of her history in Minnesota. He called to a good-looking young woman in the farther end of the store and as she came forward introduced her as his wife. Handing her the photographs, he said "That's the woman." Mrs. Burris said nothing, but showed in her face that she was interested, though she did not ask to keep the pictures.

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[13] The original text (on page 613) is garbled. A phrase has been omitted to make this paragraph intelligible.

Mr. Burris told me that the original of the photos was his one-time wife, and that he got a divorce from her on the ground of adultery. He said that the man who was witness to the fact was living in Bucyrus and kept a restaurant; that he would introduce me to this man, and to the clerk of the court in whose office the decree of divorce was filed. When I asked him to come to Minnesota as a witness, he stepped back and had a consultation with his wife. After that was over he told me that his wife did not want him to go, but that he would give me his deposition and aid me in any way he could.

He said that when Mrs. Luedke left him she stole three gold watches, of the value of one hundred dollars each, and took about one thousand dollars' worth of diamonds, but that he was so glad to be "shut" of her that he had never tried to prosecute her, criminally. These diamonds Mrs. Luedke had with her here and carried them in a chamois skin sack attached to a cord around her neck. He then took me to the clerk of the court, from whom I procured a certified copy of the decree of divorce. That stated the ground on which it was granted. From there he took me to the man who was the eye-witness in his suit for divorce. This man agreed to come to Minnesota as a witness in the case.

My work being finished in Bucyrus, I started for home with grateful feelings towards the Pinkerton detective agency. I reached home Friday night and the next day served an amended answer on plaintiff's attorneys, in which was set up in legal form the facts above related. The amended answer demanded a divorce for defendant on the grounds of fraud, deception and adultery, and cruel and inhuman treatment of defendant by the plaintiff.

Oh the next Saturday, just one week from the time the amended answer was served, the court granted Luedke his divorce, and revoked the former order for temporary alimony and no permanent alimony was allowed plaintiff. The plaintiff did not appear at the hearing, which made it unnecessary to procure the witnesses from Bucyrus and Pittsburgh. The plaintiff had to be satisfied with what she got out of two thousand five

hundred dollars, privately agreed to be paid her through the hands of her attorneys.

Thus ended Mrs. Luedke's beautiful dream of thousands. At the request of her attorneys, nothing was said in the papers about the decree till Mrs. Luedke had time to take her departure for fresh fields the next Monday morning.

In about two months after she left I received a letter from a firm of lawyers in Wisconsin, asking me for such information as I could give them about a late resident of Fergus Falls — a Mrs. Luedke. For reply I sent them the documents I had gathered in the case of Luedke vs. Luedke, since when nothing has been heard here of her further adventures in matrimony.

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A SAD TALE WITH A HAPPY ENDING.

Billy, an early pioneer of Fergus Falls, was an individual such as is often found among the settlers of a frontier. He was shiftless, smooth of tongue and a ne'er-do-well. He was a prolific multiplier of the earth, but did little toward replenishing it in an economic sense.

One winter, when little was doing, a revival started in town and, as salvation was free, Billy availed himself of the privilege of getting something for nothing; got religion and joined the church. Converts were something of a novelty in these days, and Billy's venture gave him a sort of quasi-respectability, which was more than he had enjoyed prior to his "change of heart." In a way it did him some good. He quit drinking, to excess at least, and showed a disposition to work at odd jobs, if not too strenuous, which contributed to the support of his numerous and ever-increasing family. But the confidence of the elders and brethren generally, in Billy's regeneration, was a little too precipitate. If the "ruling passion" be strong in death, it is more vigorous and active in robust life.

Some months after he had become a member in good and regular standing in the church honored by his membership, Billy was arrested on complaint of a Scandinavian servant girl, charging him with being the putative author and father of her child. The offense has a statutory name with which we will not mar the page of this chaste tale. Billy was haled before the justice court, issuing the warrant of arrest, to answer the wicked charge set out in the complaint. There he asked the privilege of consulting counsel. This being granted, the officer conducted him to the office of the attorney of his choice, where they appeared, with Billy in tears. He was so overcome with the weight of his sin that he refused to further blacken his soul by a false denial of guilt. The enormity of his offense, he said, had prayed upon him for some weeks, while the volume of condemnatory evidence was daily increasing.

He was contrite, indeed, and willing to do anything to get rid of the disgrace. It was the "disgrace" that troubled him most. His lawyer asked him why he had not consulted him earlier, when something in the way of compromise might have been effected. "Because," said Billy, "Elder Pickit and Elder Compton told me to 'live it down.'"

Billy's father being out of town, he was unable to give bail of five hundred dollars fixed by the justice for his appearance next day, so the sheriff had to take charge of him in the meantime. Billy asked the officer to take him home, as he wanted to see his wife. On reaching there, they found, as was natural, the wife in tears. Billy, in his best prayer-meeting tone, put his arm around her and said: "Let's forget it, Mary; let's forget it."

The final outcome of the case was less solemn. Billy was placed under bonds for his appearance at the next term of the district court to answer the charge. Before that court convened, a Norwegian farmer fell in love with the girl, and wanted to marry her. She, Barkis-like, was "willin'."

This farmer, being of a thrifty bent of mind, not content with possessing the idol of his heart, alone, bethought him to see if he could not get something out of Billy at the same time. With that end in view, he came to

town and opened negotiations with the father of a part, at least, of his future family.

Billy, impecunious, of course, was ready and willing to amicably adjust matters. It was finally agreed between the high contracting parties that Billy should give the farmer his note for fifty dollars, due the next year, in consideration of which the farmer was to hold the county harmless, for the support of the child.

The note fell due, as notes have a way of doing, when the payee called to collect it. Billy was on top of a building, shingling, and saw the farmer approaching. He drew up the ladder — closed the portcullis as it were. The farmer from below made known his business. He had come to get his fifty dollars. Strange as it may appear, Billy did not have the money to meet his obligation. He expressed great sorrow and regret that he had overlooked the due day of his note. The farmer was disappointed, too. He wanted to buy a mower from Stordock & Springen, and lacked just fifty dollars of enough to pay for it.

“Well, that’s all right,” said Billy. “Just go down to Stordock & Springen and turn the note in toward payment for the machine. I am perfectly willing for you to do that, though as a general thing I dislike to have my paper hawked around, but it will be all right in this instance.”

The farmer was happy at having his financial difficulties removed, and started for Stordock & Springen. He soon returned and found Billy still on the barn with the ladder drawn up. He said Stordock & Springen refused to take the note at any price — that it wasn’t worth the ink used to write it.

“Did my friends, Stordock & Springen, say that?” said Billy. “I never looked for such unkindness from them. It hurts me more to hear that than it does you not to get the money. I shall make it a point to see them about this. I surely will.”

“Well,” said the farmer, “come down and let us go and see them now.”

“No,” replied Billy, “I haven’t time. I am very busy.”

“Well, come down and see me, then. I won’t take more than five minutes of your time.”

“Not now,” Billy said, “I am very anxious to finish this job.”

There is a rumor current that the note was never paid.

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APPENDIX

ANNIE McARTHUR vs. ALEXANDER M. CRAIGIE, Adm’r, etc.

22 Minn. 351 (January 27, 1876)

Question Ordered to be Tried by Jury—Harmless Error in Terms of Question.— A question submitted to a jury under the provisions of Gen. St. ch. 68, §199, considered. *Held*, 1. That if the question was in terms too broad, and involved a question of law, no actual prejudice could have resulted to the defendant from the submission under the circumstances of this case.

Same—Error in Question Cured by Express Consent of Parties to the Order.—2. That, as the question was submitted with the express consent of both parties upon the trial below, no objection to it for irregularity or defect of form or substance, which did not make the verdict absolutely null for its failure to determine the material and substantial question of fact involved, should be regarded.

Charge of Court—Expression of Opinion as to Weight of Certain Evidence.— In its charge the court instructed the jury that certain facts, if

proved, would "raise a strong presumption" that plaintiff was the child of a certain person, and, again, that certain facts, if proved, would "raise a strong presumption" that plaintiff was the legitimate child of such person, a presumption which could "only be overcome by strong and convincing proof." *Held*, that the expressions quoted, taken in the connection in which they occur, and as used by the court below, are, in effect, equivalent to the expressions, "are strong evidence," or "evidence of great weight," and that in this construction they are unobjectionable in this case.

Appeal by defendant from an order of the district court for Otter Tail county, Stearns, J., presiding, refusing a new trial.

Bigelow, Flandrau & Clark, for appellant.

Chas. D. Kerr, *Knute Nelson*, and *Reynolds & Ball*, for respondent.

BERRY, J. * Application was made to the probate court of Otter Tail county, by Alexander M. Craigie, for his appointment as administrator of the estate of his brother, James G. Craigie, deceased. The application was resisted by Annie McArthur, who claimed to be the daughter and sole heir of the deceased; but, upon a hearing, said Alexander was appointed administrator, and letters ordered to be issued to him upon giving the requisite bond. From the order of appointment Annie McArthur appealed to the district court on questions of law and fact. The case having been called for trial in the district court, "a jury was duly sworn to try the following issue made up by the court, * * * to wit: Is Annie McArthur, the appellant in this action, the legitimate child of James G. Craigie, deceased?" The record states that the court instructed the jury, by consent of the parties in open court, that if they found for Annie McArthur they should answer the foregoing question, Yes, and if for Alexander M. Craigie, No. The jury brought in a verdict answering the question submitted, Yes. From an order denying a new trial said Alexander appeals to this court.

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* Gilfillan, C. J., did not sit in this case.

In this court it is contended on behalf of Alexander M. Craigie that the issue submitted to the jury was improperly made up. The submission was made under Gen. St. ch. 66, §199, by the provisions of which the parties may consent, or the court may order, "that the whole issue, or any specific question of fact involved therein, be tried by a jury." There were no pleadings in the case, but the controversy was as to whether Annie McArthur was the next of kin of James G. Craigie, and therefore entitled to administer upon his estate. There was no dispute as to the fact that she was the daughter of Margaret Craigie, and that after her birth said Margaret became the lawful wife of James G. Craigie, and there was no claim or pretence that she was born in lawful wedlock, or that she had been made the heir of James G. Craigie by an acknowledgment in writing, under the provisions of Gen. St. ch. 46, §2. Practically, and in fact, the controversy was then narrowed down to the question whether Annie McArthur was the child of James G. Craigie. If she was his child, it followed necessarily, upon the undisputed facts in the case, that she was his legitimate child, since, by Gen. St. ch. 61, §17, "illegitimate children are legitimatized by the subsequent marriage of their parents with each other." Practically, then, the real and only question left to, and determined by, the jury was the pure question of fact, whether Annie McArthur was the child of James C. Craigie. If the question submitted to the jury was in terms broader than this, and involved a question of law, no actual prejudice can have resulted.

It is, besides, to be observed that this issue or question was submitted to the jury, not only without objection, but with the express consent of both parties upon the trial be1ow. Under such circumstances no objection to the issue for irregularity, or for defect of form or substance, which does not make the verdict absolutely null for its failure to determine the material and substantial question of fact involved, should be regarded.

It is further contended by the appellant that the verdict is against the evidence. Without recapitulating the testimony reported in the case, it is only necessary to say upon this point that there was testimony pro and con. upon the issue submitted, and not only some, but a great amount of

pointed and cogent, testimony tending to sustain the verdict of the jury. The fact that there was also strong testimony against the verdict does not authorize us to interfere with the action of the jury.

It was claimed by the appellant upon the trial below that one Falkner was the father of Annie McArthur, and there was some evidence in the case tending to support this claim. The court, in charging the jury, made the following remark: "Considerable has been said about one Falkner, but, as I remember, a very little evidence given about him." So far as we can discover, this statement is literally true. The quantity of the evidence relating to Falkner was certainly small; as to its importance, the court does not appear to have expressed any opinion. Besides this, the court spoke only of its own recollection in the matter, while it charged the jury as follows: "You must rely upon your own recollection as to what evidence has been given, and not upon the recollection of the court or attorneys." It is further proper to be observed that, as appears from the record, the appellant simply "duly excepted." As the court had not undertaken to make a positive statement of fact, but to state its remembrance only, if counsel thought this remembrance was at fault, the better course would have been to call the attention of the court particularly to those portions of the testimony which, in his opinion, the court had overlooked or forgotten.

The court further charged the jury as follows: "If the jury believe from the evidence that the plaintiff Annie was begotten in Scotland; that James G. Craigie and the mother lived at the time in the same neighborhood; that the mother shortly after came over to Canada, and gave birth to the child; that shortly afterwards James G. Craigie came also to Canada, and settled in the same neighborhood with the plaintiff's mother, and within two or three years after the child's birth married the mother, and always afterwards, until his death, brought plaintiff up as his child, calling her by his own name, introducing her as his daughter, and treating her in all respects as his legitimate child, this raises a strong presumption that the plaintiff is the child of James G. Craigie, deceased.

The writing of plaintiff's name by her reputed father, James G. Craigie, in books given to her by him, as 'Annie Craigie,' and the signing himself, in letters written to her, as 'your affectionate father,' raise a presumption that the plaintiff was his child. The marrying of the mother shortly after plaintiff's birth, the receiving of the plaintiff at that time into his own family as his own child, the treatment of plaintiff as his daughter from that time on to his death, the acknowledgment and assertion, in terms, that she was his child, and would inherit his property, the writing of her name in books as Annie Craigie, and the writing of letters to her, signed 'your affectionate father,' if done by the reputed father, raise a strong presumption that the person so treated is his legitimate child, and such presumption can only be overcome by strong and convincing proof."

These portions of the charge were excepted to by the counsel for Alexander M. Craigie. In the connection in which they occur, and as used by the court below, the expressions, "raise a presumption," "raise a strong presumption," and "raise a strong presumption, and such presumption can only be overcome by strong and convincing proof," are, in effect, equivalent to the expressions, "are strong evidence," or "evidence of great weight," and in this construction of them the expressions and the instructions in which they occur are entirely unobjectionable. If the matters recited and referred to by the court in these instructions were found by the jury to be facts, they certainly made out a very strong case in favor of the proposition that Annie McArthur was the child of James G. Craigie, a case which could only be overcome by strong evidence to the contrary—evidence strong enough to produce a contrary conviction in the minds of a reasonable jury.

Order affirmed. ■

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