# MAYHE CASE

## Full Text of the Supreme Court Opinion

## A NEW TRIAL IS ORDERED

### THE VEXED QUESTION OF ELSIE SHIPTON'S AGE

### Mayne Elated at the Prospect of Being Able to Prove His Innocence

If a man is not altogether corrupt in mind the ordeal of a trial on the revolting charge of having debauched a girl of tender years is such as is calculated to make him review his past. And this whether he be guilty or innocent of the charge preferred.

There are not lacking indications that the supreme court of this state has, in deciding the appeal case of Clifton E. Mayne trenched somewhat upon the province of the clergy, and has made a convert. At least if Mayne hasn't got what during revivals is termed "religion" he has at all events got a much heartier reverence and respect for the Bible than ever he had before. And with cause.

The opinion just handed down by the court of last resort, while reversing the judgment of the trial court and remanding the case for a new trial, arrives at a conclusion on a technicality such as under ordinary circumstances it is difficult to suppose would have occasioned a reversal of the judgment.

This technicality is the Bible episode during the trial of Mayne, when the prosecution sought to reinforce the testimony of Mrs. Shipton regarding her daughter's age by putting in a Bible wherein Elsie's name and age were set forth. The age bore unmistakable indications of erasure and manipulation, but upon the mere fact of that Bible having been introduced at all the supreme court has granted a new trial.

The opinion, which is from Justice Harrison, concurred in by Justices Van Fleet and Chief Justice Beatty, holds that the appeal is dismissed, but the judgment and order denying a new trial are reversed and a new trial is ordered.

REASONING AROUND IT

The opinion reads as follows:

The defendant was convicted of rape in having sexual intercourse with a female child under the age of 14 years, and has appealed from the judgment of conviction, and from an order denying a new trial.

There was sufficient evidence before the jury to authorize them to find the fact of sexual intercourse by the defendant with the child, and that she was at the time under 14 years of age, and their verdict thereon is not open to review.

The crime is charged to have been committed March 30, 1895, and for the purpose of establishing the age of the girl at that date her mother testified that she was born June 14, 1881. The prosecution then offered in evidence a Bible in which was entered the record of the birth of a girl named Elsie Shipton (the name of the prosecuting witness) on the 14th of June, 1881. The court admitted the Bible in evidence against the objection of the defendant.

The mother testified that she made this entry of Elsie's birth some time after the girl was born, she thought some time during that year. There were appearances on the face of the entry that the date 1881 had been changed by being written over after it had originally been written, but it does not appear that any other date was originally in the entry, and the mother testified that she had not changed it. Whether there had been a material alteration in the entry was to be determined by the court when it was offered, and before it should be presented to the jury. In the absence of any showing to the contrary, we must assume that the court was satisfied that the change was immaterial. Like matters addressed to its discretion, its ruling in this respect is not open to review, unless it is made to appear that the discretion was abused. It does not clearly appear that the book in which the entry was made was a family Bible. There was no direct evidence of this fact, and, although the mother testified that it came into her possession in 1876, it was not shown from whom she received it, or in what manner it came into her possession. Nor was it shown that the other persons whose births and deaths were entered therein were members of her family, or that they had the same or similar names. We need not, however, determine whether the character of the book was sufficiently shown (See Jones v. Jones, 45 MD. 160), since the court erred upon other grounds in permitting the entry to be read in evidence.

THAT BIBLE ENTRY

An entry in a family Bible is a written declaration of a fact made out of court, not under the sanction of an oath, or with any opportunity to test its correctness by means of cross-examination. It is but a declaration by the person who made the entry, and is of the same character as any other declaration, whether written or oral. Being made in a book where entries of the same nature are often made, it is entitled to greater weight by reasons of formality than would be a similar verbal declaration, but the principles upon which it is received in evidence are the same as govern verbal declarations of the same fact. It it hearsay evidence, subject to the same general rule by which that class of evidence is governed, that the fact sought to be established cannot be otherwise shown. This rule was established by Chief Justice Marshall in Mima Queen v. Hepburn, 7 Cranch, 209, in the following terms: "Hearsay evidence is incompetent to establish any specific fact, which fact is in its nature susceptible of being proved by witnesses who speak from their own knowledge." Such evidence is admitted in matters of pedigree, but, as Mr. Greenleaf says (Section 105): "The rule of admission is restricted to the declarations of the deceased persons who were related by blood or marriage to the person." Taylor, in his treatise on Evidence, 9th Edition, says: "Where, however, the declarant is himself alive and capable of being examined, his declarations will be rejected;" and in the American notes to this edition it is said: "A familiar form of record is the family Bible. Declarations in such form of facts of pedigree, made by deceased members of the family, are competent evidence of the facts therein stated." (See, also, Depoyster v. Gagani, 84 Ky., 405; McCausland v. Flemming, 65 Pa., 36; Laggett v. Boyd, 3 Wend., 376; Greenleaf v. Dubuque & S. C. R. R. Co., 30 Iowa, 301; Campbell v. Wilson, 25 Tex., 252; Robinson v. Blakely, 4. Rich. Law, 586; I Phillips on Ev., *pp. 248, 250.) These principles have been incorporated into the provisions relating to evidence in the statutes of this state. In Part IV. of the Code of Civil Procedure, after declaring the general principles governing the admissibility of evidence, Section 1870, declares: "In conformity with the preceding provisions, evidence may be given at a trial of the following facts: * * * '4. The act or declaration, verbal or written, of a deceased person in respect to the relationship, birth, marriage or death of any person related by blood or marriage to such deceased person. * * *

" '13. Monuments and inscriptions in public places as evidence of common reputation, and entries in family Bibles, or other family books or charts, engravings on rings, family portraits and the like, as evidence of the pedigree.' "

By the preceding sections, which control the admission of evidence of the facts thus enumerated, and which merely declare the rules of evidence previously existing, the declaration or statement of a third person is admissible only in certain exceptional cases the provicion in this section permitting evidence to be received of the written declaration of a deceased person in the instances there mentioned, makes it evident that the declaration of a living person is not to be received. Neither does the section authorize the admission of a written declaration simply because it is made in a family Bible, unless it is otherwise admissible as a written declaration; and such entry when admissible is only to be received "as evidence of pedigree." Although the term "pedigree" includes the facts of birth, marriage and death, and the times when these events happened, and evidence of these facts is pertinent for the purpose of establishing pedigree, the several facts, or either of them, do not of themselves constitute marriage, and in a case in which the age of an individual is the issue to be determined, is not a case of pedigree.

"A case is not necessarily a case of pedigree because it may involve questions of birth, parentage, age or relationship. Where these questions are merely incidental and the judgment will simply establish a debt or a person's liability on a contract, or his proper settlement as a pauper, and things of that nature, the case is not one of pedigree, although questions of marriage, legitimacy, death or birth are incidentally inquired of."

AUTHORITIES BY THE YARD

Legett vs. Boyd (3 Wend, 376,), the defense of infancy was made to an action upon a promissory note, and in support of this defense the family Bible of the parents was offered, in which the entry of his birth had been made by the mother; and its exclusion was upheld upon the ground that the person by whom it was made was in court and could have been examined. Campbell vs. Wilson (23 Tex., 252,), was of the same character, and the evidence was excluded because it was shown that the mother was within reach of the process of the court. Greenleaf vs. Dubuque, etc., R. R. Co., (30 Iowa, 301,), was an action to recover damages for negligence in causing the death of a person, and for the purpose of establishing his age as an element in determining the amount of damages. The plaintiff was allowed to show the date of his birth from an entry in the family Bible. This was held to be error on the ground that it was not shown that the person who made the entry was dead. In Robinson vs. Blakely (4 Rich Law., 586,), the family register of births and deaths was held admissible to show the age of the plaintiff for the purpose of determining whether the action was barred by the statute of limitations, upon the ground that the father, who made the entry, was still alive, the court saying: "These entries stand on no higher footing than other declarations, and are entitled to no higher consideration, except that if made at the time the fact occurred they are more reliable." The admissibility in evidence of these facts is limited in the section above referred to from Greenleaf to cases where they arise incidentally and in relation to pedigree. "Thus an entry by a deceased parent or other relative, made in a Bible, family missal, or any other book, or in any document of paper stating the fact and date of the birth, marriage or death of a child or other relative, is regarded as the declaration of such parent or relative in a matter of pedigree." Taylor says: "Entries made by a parent or relation in Bible, prayer books, missals, almanacs, or, indeed, in any other book, or in any document or paper, stating the fact and date of the birth, marriage or death of a child or other relation, are also evidence in pedigree cases as being a written declaration of the deceased persons who respectively made them."

The entry in the Bible in the present case, shown to have been made by Mrs. Shipton, as she was present in court and had testified to the date of the child's birth, it was not competent for the prosecution to introduce as a piece of substantive evidence in support of this issue her written declaration, made several years previously. It cannot be said that the error was harmless. The evidence was not cumulative, but was of an entirely different character from any other evidence in reference to the child's age, and the jury may well have given it a credit by reason of its formality and apparent authenticity, which they would not grant to the living witness who testified respecting the age.

THE SUMMING UP

The motion for a new trial was denied and judgment sentencing the defendant to imprisonment in the state's prison rendered and entered November 23, 1895, and on the same day the present appeal was taken from this judgment and order. September 21, 1896, the defendant made a motion to set aside the order denying his motion for a new trial, and offered to read affidavits in support of his motion. The court refused to entertain the motion or to hear or consider the affidavits. From the order thus refusing to hear his application the defendant has taken an appeal. The attorney general has moved to dismiss this appeal. This motion must be granted. By the appeal from the order denying a new trial the subject matter of that order was removed from the superior court, and while the appeal was pending that court had no jurisdiction to change the order. Besides, an order refusing to hear a motion to set aside a former order denying a new trial is not appealable.

The appeal from the order of September 21, 1896, is dismissed. The judgment and order denying a new trial are reversed and a new trial is ordered.

AS THE CASE STANDS

Very naturally Mayne is pleased at the chance of making his innocence appear. In the early stages of the case his pertinacious and continuous reiteration of his innocence was accepted as the brazenness of guilt; but that time has long gone by. And during his incarceration in the county jail an altogether new mass of evidence has been accumulating tending rather to corroborate his contention that there existed hidden depths to the case that have not yet been plumbed. As an attache of the supreme court yesterday said: "It will probably never be known what powerful influences were brought to bear in San Francisco in the attempt to secure the final conviction of Mayne." What interests are to be subserved by having Mayne barred in at San Quentin is a moot point, but the many and varied facts in the case would seem at least to indicate that other and ulterior ends were sought to be obtained by some person or persons using the machinery of law and justice.

## THE CEMETERY ORDINANCE

### Privilege of a Private Graveyard no Longer Exists

A rather important ruling was made yesterday by Judge Allen in an opinion given in the case of the county of Los Angeles vs. Hollywood Cemetery association.

A short time ago the board of supervisors passed an ordinance prohibiting the establishing of any cemetery or graveyard in the county without permission. The defendant association is now locating a cemetery without having obtained the permission of the supervisors and the county sought by injunction to restrain the association from further proceeding with their plan.

The defendant raised the following questions on demurrer: That this ordinance is invalid in that it is in violation of the fourteenth amendment of the United States constitution, by virtue of the fact that it deprives the citizen of the use of his property without due process of law; second, that the subject matter of the ordinance is not a thing within the police or sanitary regulations conferred upon boards of supervisors of counties by article 2, section 2, of the constitution of California; third, that it arbitrarily places the right to a legitimate, useful and necessary use of private property under the control of the board of supervisors; fourth, that it is unequal in its operations, permitting present owners of a cemetery already dedicated to unrestrictedly use their property, while forbidding the same rights to others.

"We are first led to inquire," says Judge Allen, "whether or not the establishment of a cemetery for the purpose of interring therein dead human bodies is a business or vocation which may be well presumed to have an injurious tendency. Whatever may have been the accepted theories of the past, it is safe to say that the opinions at the present date of those best able to determine are well settled that the interment of animal matter in the soil is a menace to public health. The great weight of authority, in my opinion, indicates that the manner of the interment of dead bodies, the place of their interment and the establishment of cemeteries for such interment, are all matters within the power conferred upon the boards therein named by article 2, section 2, of the constitution of this state.

"Is this ordinance, then, violative of the fourteenth amendment to the Constitution of the United States. The constitutional protection to property necessarily includes the use of such property, but the use of property must be held to be such a use as shall not interfere with the vested rights, privileges, health and welfare of the general public. The constitution does not attempt, nor can it be construed to confer upon a citizen the right to the use of his property in an unlawful manner, nor to the use of it in such a manner as would interfere with the rights of his neighbors and those around him.

"It is urged, on behalf of the defendant in this case, that this ordinance is unequal in its operations. I find nothing in the ordinance, nor the record, which supports this theory. The ordinance is general in its terms. It includes the whole county, and all the lands therein, and the right of every citizen in the county owning land is, in my mind, equally affected by this ordinance. It simply is an assertion of the right of the board to the police power which I think is reposed in that board.

"It is my opinion that the complaint states a cause of action; that no cause is shown why an injunction should not issue; and it is ordered that the demurrer be overruled, and that an injunction issue as prayed for in the complaint."

## THE WAGNER INSOLVENCY

### Pleading His Discharge No Protection in Case of Fraud

In the case of Wunich et al. against Wagner, involving a sum of $13,770.50, Judge Clark yesterday rendered an opinion, in which he passes upon an objection raised by the defendant.

The defendant pleaded a discharge under the insolvent act of 1880, and put in his certificate of discharge. It was stipulated that defendant was indebted to plaintiffs on September 28, 1892, for goods to the amount of $13,770.50; that on that day defendant filed his petition in voluntary insolvency, and was adjudged insolvent; that plaintiffs filed against the estate of the defendant, which claim was allowed, and two dividends, aggregating $2409.83, were paid and received on account; that on March 6, 1893, an order of discharge was made under the provisions of the insolvent act.

"As I understand the briefs of counsel," says the court, "the plaintiff now offers evidence for the purpose of showing that the debt in question was created by fraud of the defendant. The defendant objects to the offer, and urges the discharge is a complete defense. Defendant's counsel contend that to admit the testimony in question would be to permit a collateral attack upon the judgment or order of the court discharging the defendant as an insolvent, which, it is claimed, cannot be done.

"Section 52 of the insolvent act of 1880 provides (and the same provisions are found in Section 55 of the act of 1895) that: 'No debt created by fraud or embezzlement of the debtor or by his defalcation as a public officer, or while acting in a fiduciary capacity, shall be discharged under this act, but the debt may be proved, and the dividend thereon shall be a payment on account of said debt, and no discharge granted under this act shall release, discharge or affect any person liable for the same debt for or with the debtor, either as partner, joint contractor, indorser, surety or otherwise.' It would seem apparent, therefore, that if the purpose of the offer is to prove, and the testimony does, in fact, prove that the debt was conceived in fraud, it is admissible, not as an attack upon, or attempt to set aside, the order of discharge, but as showing that the debt is one not affected thereby. And if the purpose is to prove, and the evidence does, in fact, tend to prove, that the dischargre was fraudulently obtained, and that the fact constituting the fraud was discovered subsequent to the discharge, the same discharge ruling should be made." The objection of defendant is overruled and an exception noted.

## THE SUPREME COURT

### New Material Looming Up at the Local Bar

The justices of the supreme court, excepting Justice Henshaw, who only arrived in the city last night, sat in bank yesterday afternoon to pass upon motions.

When Mrs. Clara Foltz removed from Los Angeles to San Francisco several years ago the local bar was bereft of one who had, while in Southern California, occupied the unique position of being the only lady attorney. Mrs. Foltz has reversed the dictum of Horace Greeley to young men and has gone east instead, and has established herself in New York. But now Los Angeles is to have another lady lawyer, for yesterday before the supreme court, on motion of Walter Rose and presentation of her certificate from the supreme court of Illinois, Miss Elizabeth L. Kinney was admitted to practice.

Other practitioners were admitted as follows:

Horatio J. Fargy, on motion of E. W. Fargy and presentation of certificate from the supreme court of Ohio.

John G. Mott, on motion of Frank P. Flint and presentation of certificate from the supreme court of Indiana.

Theron Leslie Lewis, on motion of W. H. Fuller and presentation of certificate from the supreme court of Iowa.

William R. Henderson, on motion of Shirley C. Ward and presentation of certificate from the supreme court of Indiana.

George F. Page, on motion of Shirley C. Ward and presentation of certificate from the supreme court of Kansas.

Charles M. Hansen, on motion of W. J. Murphy and presentation of certificate from the supreme court of Illinois.

Today twenty-three applicants for admission to practice will come before the court for examination, and tomorrow the court, again sitting in bank, will pass upon several criminal cases of interest, including the Durrant case, the murder case of Chew Wing Gow, wherein so much perjury was committed in this city, and the Barthleman case.

## THE DIVORCE MILL

### A Local Marriage That Has Ended in Disaster

A decree divorcing Narcisse Guiol from Adolph F. Guiol was granted by Judge York yesterday on the default of defendant and on the ground of failure to provide. The couple were married in this city in 1884, Mrs. Guiol being a daughter of Jean Sentous, the old-time wealthy resident. At the time the young wife had property yielding a small income of about $85 per month, but the husband, in profligacy and dissipation, soon made it disappear. Now the end has come and, while the wife has been permitted to resume her maiden name of Narcisse Sentous, to her has been confided the custody of Juanita Guiol, the 9-year-old daughter.

Judge York also granted a decree to Alice Beard Hess, divorcing her from Benjamin L. Hess, on the ground of intemperance and failure to provide. The parties married at Lancaster, Penn., in 1877, and have been residing in Los Angeles for nine years. The husband was in the employ of the Los Angeles Furniture company at a salary of $125, and was given an excellent character as a salesman. But he took to heavy drinking and was discharged. Then he ill-treated and neglected his wife and now he has lost her altogether.

In the suit of Violet D. Robinson against William H. Robinson, Judge Clark yesterday continued the case for further hearing. The couple intermarried in Los Angeles in September, 1893, and in September, 1895, the husband deserted his home.

A decree was granted by Judge Clark, divorcing Joseph Chester from his wife, M. R. Chester, on the ground of desertion.

The suit of Rachel M. S. Gardiner against Francis I. Gardiner was heard by Judge Allen in department six. The plaintiff married one of the veterans at the Soldiers' home, and at his request came to Los Angeles and started a boarding house. The husband not only failed to assist in supporting his wife, but altogether abandoned her. In granting the decree Judge Allen held that the desertion had not been proved, for the reason that the wife had not, confessedly, gone back to Santa Monica and sought to resume marital relations with her husband. On the other point, however, the divorce was granted, and the wife allowed to resume her maiden name of Rachel M. Sherer. Mrs. L. J. H. Hastings, wife of "Dr." Hastings of electric fame, was a witness in the case.

## THE PHELAN FAILURE

### That Temporarily Stopped the Tunnel Work at San Bernardino

E. F. Phelan was the contractor who undertook to do the tunneling work on the big water power development plant of the Southern California Power company, at San Bernardino. He became insolvent and yesterday his creditors met in Department five to select an assignee.

And they had a gay old time doing it. One party of creditors wanted Gregory Perkins, jr., appointed and the remainder wanted J. Holcomb. The attorneys representing the several parties interested lined up and talked themselves hoarse, while they quoted figures enough to make one's head swim. Finally Judge Shaw called a halt and plainly intimated he did not intend sitting on the bench for a month while the contending factions had a monkey and parrot time over the appointment of an assignee. The court took the matter in hand and, as the larger amount of the insolvent's indebtedness was to creditors who favored Mr. Perkins, that gentleman was declared the assignee of the estate. The total indebtedness will range about $25,000.





### New Suits Filed

Carrie M. Worthen vs. Rachel Stoy et al.—A suit to recover $1000 on a note, $150 attorney's fee, and decree of sale against lots 8 and 9, block 5, of the Brooklyn tract.

Joseph S. Clapp vs. L. V. Carr—A suit to recover $35 as rent, and restitution of premises at 717 Wall street.

### Court Notes

There have been 636 marriage licenses taken out since May 1st.

The arguments of counsel in the case of A. E. Davis, charged with forgery, occupied all of the day yesterday. Deputy District Attorney McComas will close for the prosecution this morning and the case will then be given to the jury.

In the suit of T. J. Higgins et al. against the city of San Diego et al., defendants and respondents, and the San Diego Water company, appellant, he supreme court has reversed the judgment of the superior court and the cause has been remanded for further proceedings in accordance with the previous opinion rendered and which has now been modified.

Arguments were begun yesterday in the circuit court in the case of Rand Mountain Gold Mining company vs. Surdight Gold Mining company et al., on a motion to appoint a receiver on an order to show cause.

### An Unnatural Mother

Mrs. J. E. Robinson, the colored woman arrested on complaint of her husband for failing to care for her children, was arraigned in the police court yesterday, and had her trial set for today at 1:30.



## JOTTINGS



### FUNERAL NOTICE

TO THE OFFICERS AND MEMBERS OF Banner tent No. 21: You are respectfully requested to attend the funeral of J. A. De Lude. Services at Peck & Chase undertaking parlors, 325 S. Broadway, Wednesday, October 13, 1879, at 10 a. m. All Maccabees invited. E. F. RICHARDS, Commander. 12