May 2013

The Efficacy of "Falsus In Uno" in Trials Under the Election Law

Denis M. Hurley

Follow this and additional works at: http://scholarship.law.stjohns.edu/lawreview

Recommended Citation

Available at: http://scholarship.law.stjohns.edu/lawreview/vol26/iss2/1
THE EFFICACY OF "FALSUS IN UNO" IN TRIALS UNDER THE ELECTION LAW

DENIS M. HURLEY †

"A liar will not be believed even when he speaks the truth."—AESOP.¹

I. INTRODUCTION

It is universally acknowledged that the word of a disreputable person counts for very little. People generally, judges and lawyers in particular, need no advanced training in psychology to attest to the truth of Aesop’s classic thought. Through the ages, every child has eventually deduced that principle from his daily relations with his companions. Indeed, the fable of the shepherd boy who cried "wolf" once too often performs what might almost be termed a superfluous act of pedagogy, for there are few among us who are not instinctively inclined, and rightly so, to discredit the statements of a known liar.

It follows, therefore, that our courts of justice have urgent need of distinguishing truth from falsehood, honest men from liars. Were it otherwise, our social structure would rapidly disintegrate. How, if not by a rigid and binding adherence to that principle which distinguishes truth from falsehood, exalts the former and condemns the latter, can the individual achieve spiritual well-being from within and a sense of social stability from without? The natural

† Corporation Counsel of the City of New York.
dictates of reason make it mandatory in the interests of harmony that order rule rather than chaos and chance, and that to attain that end the individual members of society can in mutual reliance upon expressed representations “organize the future” \(^2\) by contract.

All of us are familiar with scores of instances, in which grim developments followed in the wake of a transgression of the line of truth. From the start, deliberate falsity is a mode of conduct against which the social sanction points its censure. A person who has been branded a liar is stigmatized in a very real sense. Frequently the fear of social stigma may deter lying. However, it would be undesirable to rely solely on this sort of deterrent for the witness who is tempted to lie during the course of a judicial proceeding, the designed purpose of which is to ferret out and proclaim the truth in issue. A false witness must be, and is, dealt with severely. The law makes it a criminal offense, imposes a punishment \(^3\) and prescribes evidentiary rules to nullify or neutralize the effect of perjury.

One of those rules is the maxim “\textit{Falsus in uno, falsus in omnibus.” It is proposed to consider that maxim here by examining its background, the forms in which it is now known, and its utility in non-jury cases in general and in election law cases in particular.

II. THE BACKGROUND OF THE MAXIM

At this point, a free translation of the maxim will suffice. As Wigmore \(^4\) puts it: “He who speaks falsely on one point

---

\(^2\) See \textit{GARDNER, CASES ON CONTRACTS VI} (1939), where the concept of contract is treated in such terms.

\(^3\) This refers, of course, to perjury which in this state is declared criminal and punishable. \textit{N. Y. PENAL LAW} §§ 1620-1633. Historically, it has always been recognized as a crime for which various punishments have been meted out. In earliest times, the Code of Hammurabi made reference to it. Later in point of time, the Old Testament admonished against it. See, \textit{e.g.}, Exodus 20:16, Leviticus 19:11-12, Deuteronomy 19:15-21. While in Ancient Greece, the offense was recognized, it seems that it merely gave rise to a civil action. \textit{CALHOUN, THE GROWTH OF THE CRIMINAL LAW IN ANCIENT GREECE} 117 n. 33, 131 (1927). Roman Law, on the other hand, did make provisions for criminal punishment and treated the perjurer as it would a forger, \textit{Digest} 48.10.27.1. It would appear that no written legal system is without reference to at least some form of perjury.

\(^4\) \textit{WIGMORE, EVIDENCE} § 1008 (3d ed. 1940) (hereinafter cited as \textit{Wigmore}).
FALSUS IN UNO IN ELECTION LAW

will speak falsely upon all." Developing the thought more fully, just as the destruction or withholding of evidence, or the non-production of a witness who normally would be called, creates a presumption against the party having resorted to such a practice that the tenor of the evidence or the testimony of a witness would be unfavorable, so, a fortiori should the actual fabrication or corruption of the evidence by a witness, who is deliberately and knowingly swearing falsely, cause us to reject all he says.

The "Falsus in uno" maxim is actually a fairly unsophisticated rule of thumb. Undoubtedly, its very universality and matter-of-factness explain why its origin cannot be discovered with any assurance. As a practical guide, it probably is as old as man as a rational animal. Certainly in Biblical times, Daniel must have exhorted thinking along those lines when he secured Sushanna's acquittal of the charged immorality. Any attorney who frequently conducts cross-examinations may have equaled Daniel's feat on many occasions; for in the daily work of our courts, such instances may be multiplied without number.

But no positive source is discernible in seeking the earliest appearance of the maxim nominatim as we know it today. One writer implies that it was taken over from civil law sources and transplanted into the Anglo-Saxon

---

6 Jones, Commentaries on Evidence § 2471 (2d ed. 1926). Therein the rationale of the maxim is considered to be that such a witness is a perjuror and under the old common law a convicted perjuror was wholly incompetent to give testimony.
7 "Any one, upon the first blush, after reading . . . [the case which the court speaking modified] would suppose that he could hardly open an English law book without meeting with the general rule 'falsum in uno, falsum in omnibus,' yet, strange as it may seem, he will not be able to find the rule laid down in any English book of reports or by any writer upon evidence." State v. Williams, 47 N. C. 257, 263 (1855). The writer found to his chagrin that while the latter part of the court's statement is not entirely correct, it comes uncomfortably close to the mark.
8 Particularly glowing examples may be found in Wellman, The Art of Cross-Examination (Rev. ed. 1932) passim, and in Wigmore, The Science of Judicial Proof 586 (3d ed. 1937).
9 Rapalje, Law of Witnesses § 192 (1887).
legal soil. An 1855 North Carolina court 10 and an 1869 Ohio court 11 make the same assertion but cite no authorities in support of that conclusion. While an independent search fails to disclose any reference to the maxim by name, Domat, in his highly respected treatise on the civil law, comes very close to its spirit when he says that "[w]hatever proves the want of probity in a witness is sufficient to make his evidence to be rejected." 12 Nor is the rendition of the maxim in Latin alone an indication of a Roman law or civil law background; for in early common law, legal writings were commonly in Latin—the language of the learned.

As far as its appearance in the common law is concerned, Wigmore 13 feels that the earliest case in which it is found is Hampden's Trial. 14 There in 1684, it was quoted as we know it by the attorney for the defense. It is difficult to go back any further than that, for a reading of the report of that case fails to provide earlier sources, and Bacon, Wingate and Noye, all of whom studiously compiled legal maxims before that date, make absolutely no reference to it. 15 It is extremely significant that this earliest instance concerned a criminal trial in which a jury was the trier of the facts. Even if the maxim were imported from the civil law it must have there been applied by the tribunals which were charged with the investigation of evidence and the determination of issues of fact, since the civilians never developed the jury or adversary system as we know it. 16 Under our system of administering justice only the equity and admiralty courts are akin to continental tribunals for, in the large majority of cases, the function of determining questions of fact is confided to a jury.

Therefore, if we assume that our maxim crossed the

10 State v. Williams, 47 N. C. 257, 262, 271 (1855).
11 Mead v. McGraw, 19 Ohio St. 55, 64 (1869).
12 1 Domat, Civil Law 810, § 2043 (1850 ed.). See also Id., § 2050.
13 3 Wigmore § 1009 n. 1.
14 9 Howell, State Trials 1053, 1101; 1 A Collection of Trials 653, 692 (1775).
15 Bacon, Maxims of the Law (1630); Noye, The Principal Grounds and Maxims of the Laws of England (1808 ed.); Wingate, Maxims of Reason (1658).
English Channel, we must also assume that, while crossing, it was transmuted from a rule for the judge to a charge to a jury. It is as a jury charge that "Falsus in uno, falsus in omnibus" roams the common law terrain and that is largely the reason, as will later appear, why the onslaughts of its critics do not destroy its utility in election law cases. However, it is no more than fitting that we consider it in its general setting before limiting its sphere. Fortunately, in its general application as a jury charge, the frequency with which it turns up would almost appear to compensate for the dearth of materials respecting its origin.

III. HOW THE MAXIM HAS BEEN CHARGED

In the first place, it is clear that like most other rules of law a simple statement (or in this case a literal translation of it) does not suffice to explain it. Despite its hoary presence and the veneration sometimes shown it, it has been met with neither universal acceptance nor uniform application. On the contrary, several centuries of judicial cerebration have engrafted qualifications and produced variously embellished formulations. The decisions make it plain that the maxim goes to the weight rather than to the admissibility of the evidence; that the falsehood which calls it into operation must be conscious or deliberate, and must relate to a material point in issue.

In some jurisdictions, the maxim has been enacted into statute, but where its destiny was left to be worked out by

18 § Wigmore § 1008.
19 Id. § 1013.
20 Id. § 1014.
21 Alaska Comp. Laws Ann. tit. 58, § 5-1 (1949) ("The jury . . . are . . . to be instructed by the court . . . (3) That a witness willfully false in one part of his testimony may be distrusted in others."); Cal. Code Civ. Proc. § 2061(3) (Deering ed. 1949) (". . . a witness wilfully false in one part of his testimony is to be distrusted in others."); Canal Zone Code Civ. Proc. § 2131 (1934) (like California); Ga. Code Ann. § 38-1806 (1937) (". . . if a witness shall swear willfully and knowingly falsely, his testimony shall be disregarded entirely unless corroborated by circumstances or other unimpeachable evidence."); Mont. Rev. Codes Ann. § 93-2001-1(c) (3) (1947) (like California); Ore. Comp. Laws Ann. tit. 1, § 2-1001(3) (1940) (like California).
the courts, we find that it has generally taken one of four forms. The first of these is that attitude which holds that
where a witness speaks falsely the jury must reject his entire testimony.\textsuperscript{22}

The oldest form of that rule is represented in the following words:
As the credit due to a witness is founded in the first instance on general experience of human veracity, it follows that a witness who
gives false testimony as to one particular, cannot be credited as to any, according to the legal maxim, \textit{falsum in uno, falsum in omnibus}.
The presumption that the witness will declare the truth ceases as soon as it manifestly appears that he is capable of perjury. Faith
in a witness's testimony cannot be partial or fractional. . . . \textsuperscript{23}

Or, as Justice Story puts it:
\begin{quote}
\ldots [W]here the party speaks to a fact in respect to which he
cannot be presumed liable to mistake, as in relation to the country of
his birth, or his being in a vessel on a particular voyage, or living
in a particular place, . . . if the fact turn out otherwise, it is extremely
difficult to exempt him from the charge of deliberate falsehood; and courts of justice, under . . . such circumstances, are bound,
upon principles of law, and morality and justice, to apply the maxim \textit{falsus in uno falsus in omnibus}. What ground of judicial belief can
there be left, when the party has shown such gross insensibility
to the difference between right and wrong, between truth and
falsehood? \textsuperscript{24}
\end{quote}

In the second, and what Wigmore considers the most enlightened, form of the rule, the word "\textit{must}" is replaced
by the word "\textit{may}," \textsuperscript{25} for it is thought that once the testimony is before a jury, the weight and credibility of every
portion of it is for them as the triers of the facts and not for the court to determine. To the foregoing two forms,

\textsuperscript{22}3 Wigmore § 1009. The statutes of California, the Canal Zone, Montana
and Oregon, cited in note 21 \textit{supra}, also exemplify this view.
\textsuperscript{23}Starke, A \textsc{P}ractical \textsc{T}reatise \textsc{O}n \textsc{the} \textsc{L}aw \textsc{of} \textsc{E}vidence 766 [*872]
(1869).
\textsuperscript{24}The Santissima Trinidad, 7 Wheat. 283, 339 (U. S. 1822). Note how
similar are the words of St. Thomas Aquinas: "\ldots the evidence of \ldots
[a] witness [ought] to be rejected if he contradict himself when questioned
about what he has seen and about what he knows . . . ." \textit{De Summa \textsc{T}heologica}, II, II, Q. 70, Art. 2.
\textsuperscript{25}3 Wigmore § 1010. The Alaskan statute, cited in note 21 \textit{supra}, also
reflects this attitude.
some jurisdictions have added, "unless corroborated," so that we have as the third and the fourth forms "must reject" 26 and "may reject," 27 unless corroborated by other credible evidence.

In New York, it seems, the second (or permissive) form of the rule constitutes a proper charge for, while not adverting to the maxim by name, the Court of Appeals so implied in affirming a charge that the jury might give the testimony of a perjurer "... such credit as they found it deserved...." 28

IV. CRITICISMS OF THE MAXIM

It must be conceded that those who have assailed the "Falsus in uno" rule have been both articulate and persuasive. 29 In the main, they condemn the mandatory form of the rule for its "unrealistic" nature. The maxim, they reason, presupposes that the personality of an individual functions as a unified whole; and this supposition, they say, is utterly opposed to every fundamental principle of modern psychology 30 which teaches that persons are subject to a compartmental thought process which as a rule is directly related to the degree of material interest. The fact that one is motivated to lie in one particular area of his thought processes in no way means that the same predilection or motivation exists for other areas. A single court trial, they point out, always involves more than one area of thought and varying degrees of materiality. Thus, for example, in an action for damages for wrongful death, a witness might intentionally deny that he was speeding when in fact he was, and yet

26 3 Wigmore § 1011. A statutory instance of this view is seen in the section from the Georgia code quoted in note 21 supra.
27 3 Wigmore § 1012.
28 People v. Van Tassel, 156 N. Y. 561, 564, 51 N. E. 274, 275 (1898). It is interesting, but not surprising, to learn that in the trial of the eleven communist leaders, Judge Medina also charged the rule in its permissive form, cautioning the jury not to reject testimony arbitrarily but that on the other hand they "may" disregard all of the testimony of a witness if they find that he has testified falsely on one material point. N. Y. Times, Oct. 14, 1949, p. 15, col. 5.
29 See, e.g., Note, 4 A. L. R. 2d 1077 (1949) where judicial opinions critical of the rule are collected and reviewed.
testify in strict conformity to the truth as to the weather or his visibility.\textsuperscript{31} Even before the availability of psychological data and the support the critics of the rule currently derive therefrom, some thoughtful commentators were wont to base their criticisms of the rule on "... a natural tendency to declare the truth, which is never wholly eradicated, even from the most vicious minds ..."\textsuperscript{32}

Of the moderns, Professor Wigmore in particular has been most incisive in his attack. To quote: \textsuperscript{33}

It may be said, once for all, that the maxim is in itself worthless;—first, in point of validity, because in one form it merely contains in loose fashion a kernel of truth which no one needs to be told,\textsuperscript{34} and

\textsuperscript{31} Contrast with the example given in the text the words of Ranney, J., in Stoffer v. State, 15 Ohio St. 47, 56 (1864):

But it is said that he \textit{may} still speak the truth, upon other points, although perjured as to one or more. This is very true. Very few men are so utterly false as not to be compelled, from the very exigencies of their being, to utter more truth than falsehood. But it must also be admitted, that the motive which has prompted him to commit perjury in one part of his testimony, \textit{may} and is very likely to lead him to make it effectual, by falsifying other material points. At best, it is left entirely uncertain whether he has uttered truth or falsehood; and it is not consistent with that moral certainty of the existence of facts, which the law requires before men are affected in their lives, liberty, or property, to act upon what may be true or false, or to use such corrupt and deceptive instrumentalities in the pursuit of truth.

Although the mandatory form of the maxim, approved by the \textit{Stoffer} case, was replaced by the permissive form in Ohio by \textit{Mead v. McGraw}, 19 Ohio St. 55 (1869), the words quoted above still deserve to be pondered.

\textsuperscript{32} \textit{Starkie}, op. cit. supra note 23, at 726 [*821]. The author continues as follows:

... and the danger of detection, and the risk of temporal punishment, may operate as restraints upon the most unprincipled, even where motives for veracity of a higher nature are wanting.

Lest the reader feel that the criticisms directed against the maxim are confined to commentators shaped by western culture, we must take note of \textit{Monir, Principles and Digest of the Law of Evidence} 504 (3d ed. 1948), where the author, commenting on Section 59 of the Indian Evidence Act of 1872 ("All facts except the contents of documents may be proved by oral evidence") states:

The maxim \textit{falsus in uno falsus in omnibus} ... is everywhere a somewhat dangerous maxim, but it is especially dangerous in this country ... in the great majority of cases, the evidence of a native witness will be found tainted with falsehood. There is almost always a fringe or embroidery to a story, however true in the main .... But the presumption should not be pressed too far ... in this country, where it happens not uncommonly that falsehood and fabrication are employed to support a just cause.

\textsuperscript{33} \textit{Wigmore} 675.

\textsuperscript{34} Here, of course, he is referring to the permissive form.
in the others it is absolutely false as a maxim of life; and secondly, in point of utility, because it merely tells the jury what they may do in any event, not what they must do or must not do, and therefore it is a superfluous form of words.

Gathering momentum, Wigmore goes on to say:

The jury are the part of the tribunal charged with forming a conclusion as to the truth of the testimony offered. They are absolutely free to believe or not to believe a given witness. Once the witness is determined by the judge to be qualified to speak, the belief of the jury in his utterances rests solely with themselves. Hence the judge cannot legally require them to believe or disbelieve any portion of the testimony.

The observation just quoted is simply another way of saying that the maxim goes to the weight and not to the admissibility of the evidence. A condemnation of the rule on this very ground was enunciated in the case of Metropolitan Life Insurance Co. v. Wright, where the court held that since it deals only with the weight of the evidence, to charge the maxim would result in a violation of that section of the Mississippi Code which expressly forbids the judge to charge the jury as to the weight of the evidence.

Ingeniously enough, one writer advances the argument that the maxim, when tried by its own philosophy, is found wanting. "If it is false in any particular, the court ought to have and exercise the right to reject it altogether. If the instruction has sufficient substance to rise only to the grade of doubtful merit, or the negative quality of being 'harmless,' it is at best legal rubbish and should be swept away."

No mean objections these. They are not stones thrown gently. Undoubtedly, in the light of them a naïve acceptance of the maxim in all its ramifications is unpardonable. Yet, if after the corrosive effect of these caustic, scholarly criticisms has run its course, a solid residue of truth re-

35 3 Wigmore 676.
36 190 Miss. 53, 199 So. 289 (1940).
38 Alexander, The State Also Is Entitled To a Fair Trial, 12 Miss. L. J. 265 (1940).
39 Id. at 285.
mains, the value of the maxim is greatly enhanced and its utility should be unhesitatingly acknowledged. One cannot have failed to note, and the writer cannot resist pointing out that, without exception, every unfavorable assertion above was predicated on alleged defects in the maxim as a mandatory jury charge.

For that very reason we may still embark confidently upon a discussion of the maxim with relation to non-jury cases in general, and election law cases in particular, secure in the belief that the principle we support can weather any storm.

V. THE MAXIM IN NON-JURY CASES GENERALLY

Inasmuch as the common law has generally regarded "Falsus in uno" as an instruction by the court to aid the jury in determining weight on the sensitive scales of justice, it is to be expected that the case law is almost wholly comprised of jury cases where exceptions were taken to the charging, refusal to charge, or manner of charging the maxim. Nor does it come as any great surprise that the statutory enactments of the maxim are likewise addressed to the jury. But prescinding from those cases in which the jury was obliged to resolve the issues of fact, let us consider some instances where palpably false testimony was given in non-jury cases—where finding the facts was within the province of the judge.

Roughly speaking, actions triable by a judge without a jury may be classified as: (1) cases in which the right to a jury has been waived; (2) admiralty cases; (3) equity cases; and (4) statutory actions.

The first class is obviously not a class at all for the cases within it may be totally dissimilar. For that reason it would be futile to undertake a rationalization concerning it. The fourth class, statutory actions, encompasses election law cases, but we shall consider them under their own heading. Here we shall examine, briefly, specific instances of the maxim's application in admiralty cases, equity suits, and statutory actions other than election law cases.

---

40 See note 21 supra.
The Santissima Trinidad⁴¹ represents an example of the maxim's emergence in courts of admiralty. There, the Supreme Court of the United States denied a claim by the Spanish Government for restitution of cargoes seized on the high seas from two of its ships, in an allegedly piratic and unlawful manner by a squadron representing rebellious Spanish-American colonies. Story, J., in evaluating the libellant's evidence, wrote the opinion we have quoted on page 226 supra; and by applying the maxim according to its terms, rejected the testimony of the libellant's witnesses.⁴²

Chancellors in Equity have frequently pursued the same course. In Hargraves v. Miller's Administratrix ⁴³ the court had before it a bill for the reformation of a deed which, it was alleged, had been fraudulently obtained. The court acknowledged that "... its decision depends principally upon questions of fact," ⁴⁴ and it found the facts contended for by the defendants, thus dismissing the bill. The testimony of the plaintiff's principal witness was deemed so inconsistent and self-contradictory that it "... should have no weight with the court." ⁴⁵

In a related type of equity suit, Adair v. Shallenberger,⁴⁶ where a receiver of an insolvent national bank sued to cancel a deed by which a stockholder had conveyed property to her husband after an assessment against her had been made, the maxim was also efficaciously applied. Note the words of the appellate court:

It is apparent the [trial] court believed that defendants had not been truthful. It found the wife disputed by incontrovertible evidence as to her alleged lack of knowledge of the assessment. It was confronted by the unreasonableness of the testimony of the husband, who, though his office was within a short distance from the bank, testified he did not know why the latter was closed, that it was in-

⁴¹ See note 24 supra, and text thereto.
⁴² Cf. Siu Say v. Nagle, 295 Fed. 676 (9th Cir. 1924), where the plaintiff also spoke falsely of a "... fact in respect to which he cannot be presumed liable to mistake ..." Id. at 677. This plaintiff made false claims of relatives, and consequently his exclusion by the Immigration Commissioner was upheld. To the same effect is Jung Sam v. Haff, 116 F. 2d 384 (9th Cir. 1940).
⁴³ 16 Ohio 338 (1847).
⁴⁴ Ibid.
⁴⁵ Id. at 344.
⁴⁶ 119 F. 2d 1017 (7th Cir. 1941).
solvent or that his wife was liable upon the assessment, notwithstanding that he had written for his wife to the Comptroller, in response to the notice of assessment, saying she had no property and no means of payment. . . . These and other circumstances appearing in and about the testimony of the two witnesses the court had a right to consider in determining their credibility. It seems obvious that, having observed them upon the witness stand, and having concluded that they had testified falsely in certain material respects, it relied upon the rule that a witness once impeached by incontrovertible evidence may be misbelieved in the entirety of his testimony. In such situation courts of review will not interfere with the finding of the trial court, who had full opportunity to observe the witnesses and all surrounding circumstances affecting their credibility.47

Who would deny, that acting on the facts adduced, the trial judge was fairly compelled to permit the maxim to guide his thought processes and to impel him to reach his decision accordingly?

Proceeding to statutory actions (other than election law cases) we select at random for analysis the case of Evans v. United States.48 There, the plaintiff who operated a trucking line sought to set aside an order of the Interstate Commerce Commission which had denied his application for a certificate as a motor carrier. To support his contention that he came within the "grandfather" clause of the Interstate Commerce Act,49 plaintiff introduced documentary evidence to show that he had been engaged in bona fide operation as a motor carrier before the critical date. The court found these exhibits spurious, saying: "As to his documentary evidence, it is euphemistic to say that many irregularities appear therein. Indicia of actual alteration of documents are numerous."50 After citing illustrative examples of patent falsities, the court summarized:

... the oral testimony is quite vague and indefinite. As to the bills of lading, . . . of the 88 bills covering the period . . . 31 were ques-

47 Id. at 1019.
50 65 F. Supp. at 186.
tionable... Applicant's counsel contends that, even if the 31 questioned bills should be disregarded, the remaining bills constitute uncontradicted evidence upon which "grandfather" rights should have been granted by the Commission. We do not agree.... It is a well-recognized principle that, where a fact-finding body is satisfied that a witness has wilfully testified untruthfully in one particular, it may disregard his entire evidence.61

Again, the writer feels, in the absence of adequate explanation of the 31 questioned bills, that such action conformed precisely to the probabilities and that the conclusion reached was the only conclusion compatible with common sense.

VI. THE MAXIM AND THE ELECTION LAW

Having sped over some generalized instances in which the maxim was fruitfully applied by a jury-less court, we may finally turn to the principal subject matter of this paper and focus attention on the utility of the maxim in cases arising under the election law.52

It cannot be gainsaid that the bulwark and the hallmark of a democratic government is its free and orderly suffrage rendered efficient by sensible election machinery.53 This machinery must respond to the asserted will of an intelligent electorate. The integrity of our electoral process must be vigilantly safeguarded and protection must be afforded from fraud, chicanery and the miscellaneous abuses that bid to destroy the franchise of the individual voter. Every section of our election law points toward that desideratum.

Operating, as we do, under the party system, the law is explicit as to the manner of making party nominations. Party nominations of candidates for all offices to be filled at a general election, except as otherwise provided must be made at the preceding fall primary;54 and, "[t]he designa-

---

61 Id. at 188. Observe the parallel documentary falsity in In re Burns, infra pp. 239-243.
52 Wherever the term "election law" is used hereinafter, the New York statute is intended unless otherwise noted.
53 Compare the one party slates of Communist or Fascist dictatorships.
54 N. Y. Election Law § 131(8).
tion of a candidate for party nomination at a primary election . . . shall be by petition . . . ." The object of requiring a petition is to permit qualified voters to designate or nominate candidates of their own choice. The petition is the source of the designation or nomination of candidates who seek office.

Designation of a candidate for nomination depends, therefore, on the presentation of a petition which is in substantial compliance with the statute. The duty of determining whether a given petition is in accordance with the law, falls in the first instance upon the election officers (or Board of Elections) to whom it is presented and ultimately upon the supreme court. The jurisdiction of the Board of Elections in passing upon the sufficiency of petitions is confined to ministerial as distinguished from judicial duties and permits the board to check names on petitions as to matters such as non-residence or non-registration as disclosed by official records, but it does not authorize the board to pass upon questions of validity requiring determinations of issues.

---

55 Id. § 134.
56 "Signatures for a designating petition and those for a nominating petition should not be confused. The former relates to party primaries at the primary election, and the latter to independent parties at the general election." ABRAHAMS, NEW YORK ELECTION LAW 106 (Perm. ed. 1950) (hereinafter cited as ABRAHAMS). Whenever used herein without a qualifying adjective, the word "petition" is intended to mean designating petition.
57 N. Y. ELECTION LAW § 135 sets forth the form of a designating petition and Section 138 thereof sets forth the form of a nominating petition.
58 N. Y. ELECTION LAW § 145.
59 Id. § 330, which reads in part as follows:

The supreme court is vested with jurisdiction to summarily determine any question of law or fact arising as to . . . .

(1) The designation of any candidate or independent nomination, in a proceeding instituted by any candidate aggrieved or by a person who shall have filed objections pursuant to section one hundred forty-five . . . .

The supreme court will not review a determination of the Board of Elections as to the validity of a petition where there have been no objections to it duly filed with said board. In re Kavesh, 247 App. Div. 175, 286 N. Y. Supp. 590 (1st Dep't 1936); Application of McGovern, 180 Misc. 513, 44 N. Y. S. 2d 138 (Sup. Ct. 1943). From a reading of the section quoted supra, it is clear that this requirement does not apply to aggrieved candidates. See Application of O'Connor, 180 Misc. 630, 43 N. Y. S. 2d 412 (Sup. Ct. 1943). And, of course, the Board of Elections, in the first instance, has authority to determine the validity of a petition regardless of whether objections are filed thereto; cf. Casler v. Board of Elections, 131 Misc. 744, 229 N. Y. Supp. 53 (Sup. Ct. 1928).

For a thorough treatment of the jurisdiction of the supreme court under the section quoted, see ABRAHAMS c. VI.
of fact such as claims of fraud or forgery. In other words, the boards of elections are confined to irregularities appearing on the face of the petition. 60

The jurisdiction of the boards to inquire into patent irregularities may obviously result in the disqualification of defective signatures. For example, signatures may be stricken when initials are used instead of a given name, 61 where married women sign their husbands' first name with the prefix "Mrs.," 62 where there are visible alterations and erasures, 63 where the signer's residence is not set forth, 64 where the signer is not registered or not affiliated, or affiliated with another party, 65 where the signature is written in pencil, 66 where the date of the signing is omitted, 67 or where it is erroneously dated, 68 and finally where one person signs different designating petitions for the same office at the same election, only the first signed will be counted. 69

It is fundamental that in so vital a process the door must be kept tightly closed to fraud, deception and foul play. The foregoing cases need no further justification. In the light of their holdings, it is manifest that patent defects may operate to reduce the valid signatures below the statutory minimum 70 required to designate a candidate for a party nomination.

Questions of fact requiring the intervention of the court may also disclose invalidity—it is at this juncture that we return to the "Falsus in uno" rule. Under the heading of

62 Application of Marion, 174 Misc. 897, 22 N. Y. S. 2d 1 (Sup. Ct. 1940).
64 Fales v. Meisser, 264 App. Div. 949, 36 N. Y. S. 2d 441 (2d Dep't), aff'd, 289 N. Y. 626, 43 N. E. 2d 842 (1942).
65 Application of Marion, note 62 supra.
66 Ibid. N. Y. ELECTION LAW § 136(2) reads: "A petition must be signed in ink . . . ."
67 In re Beggins, 65 N. Y. S. 2d 189 (Sup. Ct. 1936).
68 Nunley v. Cohen, note 61 supra. It should be noted that the date, residence, ward, election district, town or city or assembly district need not be filled in by the signer himself. N. Y. ELECTION LAW §§ 135, 138.
69 N. Y. ELECTION LAW § 136(3).
70 N. Y. ELECTION LAW § 136(2).
invalidating factual issues come fraud and forgery. The presence of forged signatures, however abundant, will not necessarily vitiate the entire petition or any sheet. The reason given is that to reject a petition in toto for defects on that score would be, in effect, to disfranchise qualified signatories whose signing was unaccompanied by any questionable circumstances. Thus, the practice of the courts has usually been to subtract the forgeries from the valid signatures.

However, invalidation in toto does follow where the designatee or candidate himself actively aided or abetted in presenting the forged petition. The language used by the court in enunciating this rule deserves attention:

If designating petitions are to perform their lawful and intended function it is essential that they be kept free from fraud in their making. It is to that end that the legislature has made meticulous requirements with respect to them. The surest way to keep them free from fraud is to let it be known that any taint of fraud will wholly invalidate them, rather than merely set the court to the task of counting up the number of fraudulent instances in order to see whether they reduce the number of signatures below the minimum required by law. Any candidate who is the innocent victim of fraud committed by zealous but unscrupulous supporters may escape such consequences by showing his lack of knowledge of and lack of participation in the fraud. When he does not come forward with such a showing I think he has no just cause of complaint.

Prior to the revision of the Election Law in 1922, Section 123 thereof directed that sheets on which 5% of the signatures were fraudulent or forged must be rejected entirely. This provision was repealed not only as a concession to those who regarded it as an unreasonable disfranchisement but also because the practice arose of presenting petitions with one signature per sheet, which understandably impaired the efficiency of the election boards.


This is sound law. Sufficient basis for the extension of the Weissberger doctrine exists for the voiding of the entire petition sheet when it is found and proven that only one signature affixed therein is fraudulent or forged. At first blush, this may seem a rigid, harsh and non-workable rule, but this opinion may be spared when viewed as a sound, practical and legal proposition. Cf. In re Burns, pp. 239-243 infra.
The argument against such a holding on the ground that it frustrated the choice of proper signers was answered simply (and properly) by stating that, "... if they [the signers] knew that forgery and perjury were being resorted to, we must assume that they would not express the choice they did." 75

As soon as we examine the statutory mandate as to the authentication of these petitions, the direct applicability of "Falsus in uno, falsus in omnibus" becomes transparently clear. We perceive that Section 135 of the Election Law prescribes two methods of authenticating signatures to a designating petition. One method is by requiring each of the signatories, individually, to appear and sign before an officer authorized to take affidavits and administer oaths; the signer must swear that every statement contained in the petition is true; the notary or other officer must swear that the signer is personally known to him and signed before him. The cumbersome, unwieldy characteristics of this first method results in the usual use of the second—or alternative method. The latter prescribes an authenticating affidavit made by a subscribing witness appended to each sheet of the petition. To the extent here material, that affidavit which the subscribing witness must swear to reads as follows:

I know each of the voters 76 whose names are subscribed to the above sheet of the foregoing petition containing ______ signatures and each of them subscribed the same in my presence 77 and upon so subscribing declared to me that the foregoing statement made and subscribed by him or her, was true.

Since this authenticating affidavit is an integral part of the petition, patent defects therein such as the failure to insert the number of signatures 78 or the misstatement of that number 79 may render the petition void. But assuming that,

---

76 Personal acquaintance with the signers is also required in Iowa, IOWA CODE ANN. § 43.17 (1949); and Wisconsin, Wis. STAT. § 5.05(5)(6) (1949).
77 Signing in the presence of the circulator is also required in Illinois, ILL. ANN. STAT. c. 46, § 7-10 (1944); and Ohio, OHIO GEN. CODE ANN. § 4785-71 (Supp. 1951).
on its face, the subscribing witness' affidavit is flawless, it is still necessary to discern if the substance of what he has sworn to is true. It will be observed that he must take an oath that the signers are known to him and that they signed in his presence.

Now assume that "X," a subscribing witness to a designating petition, never had possession of the sheets except to sign as such witness and hence consistently swears falsely, in that the signatories did not sign in his presence, and he did not know the signers whose names were affixed. Have we not then a case where a witness is consciously and deliberately swearing falsely as to a material fact? If, under those circumstances, a proceeding is commenced to invalidate the petition under Section 330(1) of the Election Law, is not a supreme court judge at special term entirely justified in rejecting the credibility of such a subscribing witness and, in the absence of explanation, in disregarding his other sworn affidavits? Fairness and common sense require us to conclude that he is. In a case of that sort, the judge's decision must be determined by the demonstrated verity of "Falsus in uno, falsus in omnibus."

Such an approach goes to the credibility and veracity of the subscribing witnesses rather than to the intrinsic validity of the petition sheets themselves. The case of Lefkowitz v. Cohen \(^8^0\) serves to illustrate this distinction. There, the candidate required 5,000 signatures. Twenty-seven subscribing witnesses testified that as to 3,482 signatures they had not signed before a notary. This testimony was challenged by the notary, and her testimony was corroborated. It is plain that the theory of the contestant was an attack upon the numerical sufficiency of the signatures in the petition. The trial court ruled out the disputed signatures but the Appellate Division, First Department, taking a different view of the facts, reversed that finding, and the Court of Appeals affirmed the holding of the Appellate Division. Apparently, after the reversal by the Appellate Divi-

\(^8^0\) See note 72 supra.
sion, the appellant despaired of the likelihood of invalidating admittedly genuine signatures on the mere showing that they were commingled with irregular signatures. Therefore, in arguing the case before the highest court, he advanced the theory that in the absence of some explanation by the discredited canvassers, there could be no basis for finding that the other signatures on the sheets procured by them were genuine. Chief Judge Lehman and Judge Finch voted to reverse the Appellate Division on that ground, but a majority of the Court were of the opinion that the case could not be reviewed on that ground since it was inconsistent with the theory of the trial and the corresponding disposition of the issues made by both lower courts.

After this tacit vindication of the "Falsus in uno" rule by the Court of Appeals, it seemed clear that the contestant in a parallel case could succeed provided he were sufficiently well advised to conduct his case along that theory from the outset. That parallel case was the recent case of In re Burns.81

The material facts in the Burns case were not in issue; the only issue was concerning the legal effect that flowed from the unchallenged facts and uncontradicted testimony. On July 17, 1951, a petition was filed with the Board of Elections of The City of New York, purporting to designate the then District Attorney, Charles P. Sullivan, as a candidate for the office of County Judge, Queens County—an office requiring 2,500 signatures.82 The petition comprised 845 sheets allegedly containing a total of 6,323 signatures. Burns, the petitioner, duly filed objections to the Sullivan petition as required by Section 145 of the Election Law and a hearing on these objections was held before the Board of Elections. This hearing culminated in a determination by the Board that a total of 2,204 signatures were invalid for

81 126 N. Y. L. J. 262, col. 4 (Sup. Ct. August 15, 1951) (opinion by Hill, J.), aff'd, 126 N. Y. L. J. 273, col. 5 (App. Div. 2d Dep't, August 17, 1951), aff'd, 126 N. Y. L. J. 286, col. 6 (Ct. of App. August 21, 1951). The Petitioner-Respondent's brief in the Court of Appeals has been resorted to for the material employed in the textual discussion which follows. A slight variance exists between the figures respecting the number of signatures referred to in the opinion of the trial court, and those used in the brief. The discrepancy, alluded to on pp. 2, 8 of the brief, in no way affected the outcome of the case.

82 N. Y. ELECTION LAW § 136(2).
defects within its jurisdiction to consider and when the signatures so voided were subtracted from the original 6,323, a balance of 4,119 signatures remained.

As previously indicated, the reliability of the remaining 4,119 signatures—not being discernible on the face of the petition—was a question to be resolved by a special term of the Supreme Court in the course of a proceeding instituted pursuant to Section 330, subdivision one, of the Election Law.

The petitioner called 420 witnesses on his behalf. No witnesses were called or testified on behalf of the candidate. Throughout the course of the trial, lasting six days and far into several nights, the petitioner adopted and undeviatingly adhered to the theory adverted to by Chief Judge Lehman and Judge Finch in the *Lefkowitz* case, *supra*. In other words, rather than calling upon the court to perform a mere arithmetical function, the petitioner asked that it exercise its broad equitable jurisdiction. Direct evidence was presented, through the testimony of hundreds of wholly innocent signatories, of unremitting, wholesale, false swearing of the most flagrant nature on the part of seventy-five subscribing witnesses who purportedly obtained 4,237 signatures of the total of 6,323 allegedly contained in the Sullivan petition.88

---

88 See Brief for Petitioner, p. 15, *In re Burns*, 126 N. Y. L. J. 286, col. 6 (Ct. of App. August 21, 1951):

The incessant parade of witnesses, who had no desire to impeach the subscribing witnesses since they had declared themselves in favor of the appellant Sullivan, formally testified to instance after instance of signers who never knew, heard of, met, spoke to or saw the subscribing witnesses who nevertheless swore they had secured those signatures; of signers who knew the persons who asked them to sign and in whose presence they signed, but the solicitors of such signatures were not recorded as the subscribing witnesses appearing on the sheets thereof; of persons who admitted that they had solicited signatures on sheets to which they did not sign as subscribing witnesses but instead handed such sheets to other persons who represented themselves as the subscribing witnesses; of numerous signers who testified that their signatures had been obtained by a person of the male sex when the proof showed that in fact the signatures were obtained by a female; of many signers who testified that they signed the petition in the presence of a white person whereas the alleged subscribing witness was a colored person; of the indiscriminate distribution of sheets and solicitation of signatures by bartenders and owners of bars and grills as well as employees and habitués of race tracks although the names of such persons do not appear as subscribing witnesses on such sheets.

The picture thus unfolded by the testimony of the witnesses called on behalf of the petitioner reveals a degree of fraud and perjury that truly
At no time was the testimony against any one of the seventy-five subscribing witnesses explained or refuted and consequently the court was asked to reject each and every sheet authenticated by these subscribing witnesses whose veracity and credibility was so thoroughly destroyed. The trial court was urged to so rule even as to the sheets of such discredited subscribing witnesses which had not been directly attacked by the testimony of witnesses.

From the evidence at the trial, the special term found that the seventy-five who had purportedly procured 4,237 signatures in all, were individually rendered utterly unworthy of credence. Recapitulating, we find that of the 4,237 signatures obtained by them, 1,412 had been voided by the Board of Elections and 1,310 were directly impeached by evidence of fraud and perjury. As to the balance, the court said:

The Supreme Court has broad powers to correct irregularities in primary petitions. A fair and honest petition should be of the utmost importance; but one that is permeated with fraud and mistake should be condemned. Where, as here, 420 witnesses testified to petitions involving 256 sheets... and directly affecting 1310 (signatures), the court is entitled to some explanation from the person or persons charged with the fraud.... There comes a time when the respondent should be called upon to come forward with the proof of the remaining petitions. The Court finds this time has arrived.84

shocks the conscience of the court and shows a callous disregard of the provisions of the Election Law and the sanctity of the oath prescribed thereby.

Treating each subscribing witness and the total number of signatures obtained by him as a distinct entity, petitioner then proceeded to illustrate the abuses indulged in, by separately discussing in detail the practices of eleven typical subscribing witnesses. Id. at pp. 16-24.

Cf. Starkie, op. cit. supra note 23, at 767 [*873]. Speaking of a witness who has been detected in a falsehood, it is there said:

The rejection of the witness may not be the only consequence of detection; for if there be reason to suppose, from the circumstances, that his perjury or prevarication is the result of subornation, it affords a reasonable ground, in a doubtful case, for suspecting the testimony of other witnesses adduced by the same party.

84 Compare the language used in the case of Weissberger v. Cohen, quoted supra, p. 236. Note, too, the following words from Collins v. Heffernan, 187 Misc. 165, 167, 63 N. Y. S. 2d 692, 694 (Sup. Ct. 1946):

The courts have hesitated in depriving a citizen from being a candidate in a primary or general election.... Nevertheless, where it is clearly apparent that wholesale fraud and unexplained wrongdoing have been com-
And since no refutation was forthcoming, the balance was likewise ruled invalid. If the result reached in the 
Burns case requires any fortification outside of the facts of that case, such will be found in the following words quoted from Abrahams' treatise on the New York Election Law:

If a candidate knows that a forgery or forgeries appearing upon a petition sheet may serve to deprive him of the benefit of other signatures upon that sheet, and that widespread forgeries appearing upon many sheets may operate to reduce the total valid signatures below the statutory number required, he will advise his supporters that the proper safeguards be employed . . .

The rule is a fair and just one. It imposes no undue hardship upon an honest candidate . . . . The protection of the petition from this recognized abuse would lighten the burden upon the electorate and the Courts, and further intensify public interest in the designation and nomination of candidates, through the purification of the election process.85

The Burns case was decided by the Court of Appeals by a vote of four to three. Undoubtedly, the dissenting judges were influenced by the fact that the majority decision would mean the disfranchisement of thousands of innocent citizens who had honestly attempted to express their choice of a candidate and that such a result would not have a salutary effect in future contests. They must have felt that the application of "Falsus in uno" by the trier of the facts was too far-reaching an extension of the rule in such circumstances. On the other hand, the majority of the Court by their ruling definitely established that an election case was no different from any other kind of non-jury case so far as the right and the power of the trial justice to determine issues of fact upon

---

85 Abrahams 123-124.
the basis of the credibility of witnesses was concerned.

As to the salutary effect of the Burns decision, suffice it to say that when the same candidate later sought to run independently for District Attorney of Queens County, his workers were thoroughly instructed by lawyer-chairmen and members of law committees with respect to the requirements of the Election Law for obtaining valid petitions. Where 2,500 signatures are required, is it not far better and more in accord with the spirit and the letter of the Election Law for a candidate to procure 2,500 valid signatures with a margin of say five hundred or a thousand more for safety, rather than that 10,000 signatures should be obtained by questionable means followed by all of the attending difficulties involved in invalidating such a petition by reason of sheer numbers coupled with the short time permitted by law to conduct an investigation and to bring on the necessary proceeding? Should not the safeguarding of the electoral process by our courts be simplified and made easier, rather than made more difficult or rendered entirely futile?

VII. CONCLUSION

Manifestly, notwithstanding the fact that the maxim was not referred to by name in either the Lefkowitz or the Burns case, its philosophy and mandate were directly applied in the latter case. For that reason, it would seem that the ancient maxim "Falsus in uno" has come alive as a vital, fruitful, and intelligent truism in election law cases. However, to exclude all doubt of its pertinent applicability that thesis will be scrutinized in the light of the trenchant criticisms discussed earlier in this paper.

(1) "The maxim is unscientific as it assumes that if a witness lies in one area of testimony he will lie in all." As for that species of election law case represented by the Lefkowitz or the Burns case, there is only one area of testimony. The sole question is: has the subscribing witness perjured himself in his affidavit? An enlightened and realistic attitude persuades us to conclude that if the witness has sworn falsely to one affidavit, he has sworn falsely to many.

(2) "In its permissive form, 'it merely contains in loose fashion a kernel of truth which no one needs to be told'"—
standing alone, this is at best a flimsy criticism. How many times a day are truths which no one needs to be told, retold? How often in a courtroom is a request made preliminarily to charge some rule that would have been charged in any event? Supererogation can be a virtue as often as it can be a vice.86

(3) "It violates that principle which requires that the jury alone must determine the weight of the evidence." Surely the potency of this objection has already been overcome, but we nevertheless may point out once again that election law cases are triable before a judge without a jury.

(4) "Tested by its own philosophy, the maxim must be scrapped." In the sphere to which it has been circumscribed, the maxim undoubtedly survives its own test for in non-jury cases in general, and in election law cases in particular, logic fails to reveal the initial instance of its falsity.

At the outset, it was forthrightly stated that while the historical background and general applicability of "Falsus in uno, falsus in omnibus" would be treated, no attempt would be made to justify its ubiquitous efficacy. None was. An attempt has been made, however, to vindicate that ancient principle to the extent of its empirical value in election law contests. At least to the extent suggested here, the maxim need no longer be deemed vestigial or anachronistic. Rather than consign the rule to the scrap heap, we should labor to resurrect it for it promises to be an effective guardian of our cherished democratic processes by ensuring that the expressed will of a qualified electorate will not be nullified or jeopardized by fraudulent or questionable practices.

Even if the maxim's utility ceases precisely at that point, there is ample justification for retaining it as a rule of evidence and renewing our respect towards it as such; for it is every bit as true today as it was when written by Aeschylus in ancient Greece, that "... it is not the oath that makes us believe the man, but the man the oath."

86 The reader may recall that in the eyes of the Roman Catholic Church, works of supererogation are those good deeds believed to have been performed by Saints, or capable of being performed by men, over and above what is required for their own salvation.