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THE ARTIFICIALITY OF OUR LAW OF EVIDENCE¹

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Connecticut.*

The time of an American Judge, in the trial of a case, is largely taken up in excluding evidence which, if admitted, would strengthen the case of the party who offers it. He excludes it generally, not because he thinks it would have no effect on the jury, but because he thinks it would have such an effect; not because he thinks it ought not to be admitted in the interest of justice, but because there is a rule in the books against its introduction.

Who made our rules of evidence? Whence do we derive them? What do they rest on?

The answer is easy. Judges made them—for the most part, English Judges centuries ago, and made them because they had to deal with juries composed of illiterate men of untrained minds, incapable of making nice discriminations as to the weight of testimony.

The English jury also, when the jury system took shape, was under the control of the Judge in all matters, to a degree never known in this country. Down to the era of Vaughan's case, in the seventeenth century, for a verdict in a criminal case that was

¹In writing this article free use has been made of a paper by the author read at the annual meeting of the Missouri State Bar Association September 22, 1911.

deemed by the Crown, or the Judges acting for it, to be clearly wrong, the jurors could be attainted and punished by fine or imprisonment. Not only were they to be kept together, in order to force a verdict, as now, as long as the Judge might think proper, but even down to the eighteenth century they were denied food, light, or heat, and could be carted about after him from one assize town to another. His directions, in all ordinary cases, controlled their decision: the Judge was the deciding factor; simply speaking through the mouth of the foreman.

Let us look candidly at some of the rules of evidence which these English Judges invented from time to time and have been handed down to us.

Consider, first, the doctrine of excluding hearsay.

Most nations make no such distinction as to the admissibility of testimony.

Take the case of book entries made in the natural course of business or employment. The world in general admits them, and treats them practically as the best evidence, if the books appear to have been fairly kept. We hunt around to find the man whose hand actually wrote down the words, and often try to get him, after "refreshing his recollection" by an examination of the page, to testify that the entries were in fact correct.

In one English case it appeared that sales of coal at a mine were reported by a workman to the foreman, who employed a bookkeeper to enter them. The book was offered in evidence to prove the sales, but as the bookkeeper only put down what he was told by the foreman, and the foreman only knew what the workman told him, it was excluded, though workman and foreman were both dead.²

So, in another English case, it was shown to be the duty of a Jewish Rabbi, on circumcising a child, to make an entry of the fact in a book, and such an entry was produced to prove the date of a particular circumcision. The Judges held that it was properly excluded, though the Rabbi was dead.³

Let us suppose, again, that a man of the highest standing and character is the only witness of a murder. He writes a statement of the facts to the prosecuting officer. An indictment is found, but before the case comes on for trial he dies. No country not ruled by Anglo-American law would exclude his written state-

² *Brain v. Preece*, 11 M. & W. 773.

³ *Davis v. Lloyd*, 1 Car. & Kir. 275.

ment. We should; and the murderer, in consequence, would probably go free.

Professor Thayer was right when he said that the main function of our law of evidence is not to exclude irrelevant matter, (plain logic does that, as a matter of course); but to exclude matter which is relevant and logically probative.⁴ Nowhere is this clearer than in respect to the hearsay rule, and we are not to forget that it did not secure an established footing, either in England or America, until the close of the seventeenth century. Certainly it is one that cannot be safely strained beyond its established limits.

No declarations, for instance, ought to be excluded which accompany and serve to characterize or explain conduct of an ambiguous nature, and are offered for the purpose simply of showing that they were made, and not that what was declared was true.⁵

Actuated by these principles, the courts of Connecticut, in recent years, have gone farther than those of most of our States, in the admission both of hearsay and of remote evidence, and leave it more to the discretion of the trial judge.

To illustrate: A real estate broker was employed to sell a lot. The next year he was discharged, and soon afterwards the owner sold it, himself.

The broker promptly sent in a bill for commissions on this sale, and subsequently brought suit on it. He was allowed, in support of his case in chief, to prove that he did send in such a bill, on the ground that it was a natural act of one in the position which he claimed to have occupied. If he had earned such a commission, it would have been contrary to the usual course of business if he had not asked for payment in such a manner.⁶

A plumber sued for services rendered and materials used in fitting up a bath-room. The defence was that he had agreed to fit it up so that it would be supplied with water ready for immediate use. In rebuttal he was allowed to prove that at the date of the contract it was impossible to put any apparatus into the room which could supply water for such use. The Court said that it could fairly be argued that a plumber would be unlikely to make an agreement of that kind, which it was impossible to fulfil.⁷

⁴ Thayer, *Legal Essays*, 308.

⁵ *Engel v. Conti*, 78 Conn. Reports, 351, 354; Thayer, *Preliminary Treatise on Evidence*, 522.

⁶ *Bradley v. Gorham*, 77 Conn., 213.

⁷ *McNamara v. Douglas*, 78 Conn. 220.

On a prosecution, for illicit sexual intercourse with a young girl, in April, proof was received of the defendant's like intercourse with her three months later. It was deemed to go to show the existence of relations at that time, which tended to make his commission of the crime charged more probable. If he was under the influence of a sexual passion in respect to the girl in July, which led him then to take advantage of her youth in order to gratify it, this was logically relevant to the question whether he had before given rein to such a passion in respect to her, in the same manner.⁸

It is surely the duty of courts everywhere, to-day, to see that no rule of evidence is applied so as to exclude anything not fully within the reason of the rule.

If, for instance, a memorandum of a transaction be made at the time, in the natural course of things, such as the preparation of a workmen's pay roll, on which the name of each man is checked as he receives his pay, and years after, it becomes important to show that one of them was paid off, and what he got, but the employer and his agents have no recollection in regard to this, the memorandum ought to be allowed to speak for itself. It is a "documentary witness," or becomes such when proof is offered that it was made at the time of the transaction, in the natural or usual course of business.⁹

The starting point, in disposing of an objection to proof of any fact should always be this: "Unless excluded by some rule or principle of law, any fact may be proved which logically tends to aid the trier in the determination of the issue. Evidence is admitted, not because it is shown to be competent, but because it is not shown to be incompetent." The question, also, as to its reception is always one to be answered with a view to practical rather than theoretical considerations. Will or will it not tend to throw light on the justice of the case on trial? This the trial Judge must determine largely as a matter of common sense. He must be armed with a pretty wide discretion.¹⁰

The present tendency of most American courts is in this direction.

We are familiar with the historical fact that jurors were originally, in early England, witnesses, and the only witnesses.

⁸ *State v. Sebastian*, 81 Conn., 1.

⁹ *Curtis v. Bradley*, 65 Conn., 99.

¹⁰ *Plumb v. Curtis*, 66 Conn., 166.

They were selected because they knew the facts. Centuries elapsed before outsiders, who happened to know them, were allowed to testify. But when this was allowed, and the jurors were gradually turned into judges of facts proved by others, they remained, still, ignorant and uneducated men. England had no system of public education. That given by the church was slight. To keep the minds of such men to the point in issue and to the real proof of it, it was probably necessary to shut the door against much that might have helped and also might have confused them. But those times are long past. In this country they never existed.

Why then have not our courts done more towards readjusting our rules of evidence to present social conditions?

Our jurors are now generally intelligent and fairly educated men. There is less and less need to guard them from hearing evidence which is objectionable because remote. They can themselves appreciate its remoteness and weigh it accordingly.

To some extent all courts have met this change of conditions.

The old rule, for instance, was that a corporation could speak only through its records.

Now we even allow its head officers to testify as to its intentions and future purposes, although there be nothing in its books to support it.¹¹

Bentham declared, a hundred years ago, in his work on Judicial Evidence, that, as for England, jurisprudence might be defined as "the art of being methodically ignorant of what everybody knows."

It is to the credit of the English and American Judges that they have so largely, since Bentham's day, avoided this reproach to the science which they profess, by enlarging the scope of judicial notice. It is a master-key, in the hands of a Judge, who breathes the life of his time and generation. It unlocks many a door that counsel have left shut, or have had no other way to open.

As human knowledge and invention extend, the bounds of judicial notice extend also,¹² almost automatically.

But reforms have, in most instances, been due to legislation more than to judicial decisions.

¹¹ *N. Y., N. H. & H. R. R. Co. v. Offield*, 78 Conn., 3.

¹² *State v. Main*, 69 Conn., 135; *Knowlton v. N. Y., N. H. & H. R. R. Co.*, 72 Conn., 194; *Arthur v. Northfield Church*, 73 Conn., 731; *Jones Co. v. Davenport*, 74 Conn., 418; *New Haven Trust Co. v. Doherty*, 74 Conn., 472.

The exclusion by the common law of testimony from anyone interested in the event of the suit set up a rule too artificial to endure permanently, and was generally repealed during the nineteenth century. This brought two important witnesses, the plaintiff and the defendant, into the trial of almost every action. But soon it was found necessary to provide that in case of the death of one of them, his statements, previously made, might, within certain limits, be admissible to meet the testimony of the other. How far should these limits go? Here came the occasion for new artificial rules of legislation, raising in turn numerous questions of judicial construction.¹³

A German lawyer, since become a German Judge, was in this country a few years ago, attending a meeting of the American Bar Association. Some one asked him, as he was about to return home, whether he had remarked anything that he thought would improve our American system of civil procedure. There were, he said, just two things lacking to make it perfect. These were to abolish trial by jury in civil cases, and to adopt the German imperial civil code of procedure.

Let us look a moment at how that code (*Zivilprozessordnung*) deals with evidence. It gives to the subject about 140 short sections, occupying 23 octavo pages. The chief rule is that the trier is to be free to give the evidence, and any evidence, such weight as he thinks it merits. Only in a few cases, particularly specified is he bound by any set rules.

Among these I mention the main ones:

Faith is due to properly authenticated copies of records (Sec. 415). The court may order the document itself to be produced, but if the party does not do this, and alleges reasons, the court may still accept a copy, as wholly or partly correct (Sec. 435). Material documents should be presented to the court (Sec. 420), and if they are in possession of the adverse party, he can be compelled to produce them (Sec. 421, Civil Code, Sec. 810). In case of his default, they may be proved by copy, or their substance treated as admitted (Sec. 427). Judicial notice is to be taken of things that are publicly notorious, (Sec. 291). Statutory presumptions cannot be contradicted, unless the statute so provides (Sec. 292). Foreign laws need no proof, if known to the court. This knowledge is not to be circumscribed by any evidence. The

¹³ *Rowland v. Philadelphia, Wilmington & Baltimore Railroad Co.*, 63 Conn., 415.

Judge can notwithstanding investigate for himself, or require the parties to produce further proof (Sec. 293). Documents from foreign offices are admissible when authenticated by a German consul or minister; but may be received if the Court thinks proper, without it (Sec. 438).

Whoever has to prove a thing, can offer any kind of evidence, except that he cannot ordinarily force the adverse party to a disclosure on oath (Sec. 294). The parties cannot by agreement hold the Judge bound by any particular piece of evidence.

Experts are selected by the Court, unless both parties agree; and it may limit the number to one (Sec. 404).

Witnesses are not examined in the presence of each other, unless they contradict one another, when they can be confronted (Sec. 394).

The French codes devote some two hundred and thirty sections to the law of evidence. It is largely concerned with written testimony—depositions and documents, and relates more to the form of trial procedure than to the admissibility of proofs offered.¹⁴

Italy treats of evidence both in her Civil Code and her Code of Civil Procedure. In her Civil Code it comes largely under the head of Personal Relations (Articles 117-122, 170-178,) or of Obligations (Articles 1312-1377). In her Code of Civil Procedure trial evidence occupies a hundred and twelve articles, all brief (Art. 206-318).

A good illustration of the clear modes of statement in these Codes is furnished by the Civil Code in the title which (Title 4, Section 3,) deals with presumptions. They are defined as the consequence which the law or the Judge deduces from a known fact by advancing to an unknown fact.

A leading feature of foreign codes, in general, is the weight given to papers, as against witnesses. The vital principle of our Statute of Frauds appears in an Italian ordinance of 1454. In view of this principle each side is usually put under the obligation of giving copies of any papers, on which he relies, to the adverse party, before trial. Oral testimony comes in more by way of supplement, and frequently takes the shape of affidavits, written out and made known to each party, long before the trial.

¹⁴*Code Civil*, Art. 1315-1369; *Code de Procedure Civile*, Art. 34-43; 193-336; *Code de Commerce*, Art. 41, 49; *Code d'Instruction Criminelle*, Art. 32-39, 73-90, 153-156, 305, 316-326.

In early Massachusetts this was the practice, the witnesses testifying, not in the presence of the Court, but of a magistrate.¹⁵

Our modern American law is, however, no doubt right in preferring oral testimony in court, and justifies itself amply by thus giving opportunity for cross-examination—a great discoverer of truth, in skilful hands.

The usages of nations having a different system of evidence may sometimes be legitimately relied on as helping to constitute a rule for us.

Thus, if a party desires to introduce a copy of a document recorded in a public office in a foreign country, that mode of authenticating it may properly be accepted which is in conformity to the general practice of nations; that is, which is sanctioned by Private International Law.

“The object of any such authentication is to afford satisfactory evidence by the official custodian of the original of which it purports to be a copy, having due authority to make such certification. Any evidence is sufficient for this purpose which is calculated to give reasonable assurance of the facts in question.”¹⁶ If then, by Private International Law, as generally accepted, an attestation by a notary public verified by a certificate from a consul, would be accepted as sufficient, it would be sufficient in an American court, in the absence of a statute prescribing a different mode of procedure.

The law of Evidence is a part of the law of Procedure. It belongs, to use the forcible expression of Lord Justice Lush, to the machinery of remedial right, as distinguished from its product. Unless the machinery works true, the product will be ragged and unsatisfactory. The most effective machinery is apt to be the simplest. To simplify our law of evidence is to restore things to a natural basis of relation. Certainty in procedure, Sir Frederick Pollock declares, in his *First Book of Jurisprudence*, is almost more important than certainty in the substance of law. Simplicity brings certainty.

Here is one of the greatest opportunities of the English or American Judge. Let him make his mark on the law of evidence, as his predecessors made theirs. He has as much power as they

¹⁵ *Select Essays in Anglo-American Legal History*, 378; *Documents Relative to the Colonial History of New York*, IV, 929.

¹⁶ *Barber v. International Co. of Mexico*, 73 Conn., 602; Cf. *the Italian Code of Civil Procedure*, Art. 208.

had, to shape rules to reason. He has also the power to emphasize or to attenuate the relation of a rule to an exception.

One solvent of difficulties that lies ready at hand, is that already mentioned:—to give more and more range to the discretion—the sound discretion, of course—of the trial judge. This is really the redemptive factor of our law of evidence. Let us take more pains to secure the choice for the bench of men that are capable of exercising this prerogative wisely, and then give it its fullest force. It will open many a door heretofore shut, or half shut. It will shut many a door which there is no reason for leaving open; for it is always to be remembered that because evidence is logically admissible, it does not necessarily follow that it must be admitted in any particular case.¹⁷

The first American book on legal evidence was published in Connecticut in 1810, and the author, Chief Justice Swift, remarks in his preface that the rules of evidence are of an artificial texture not capable in all cases of being founded on abstract principles of justice, and sometimes result in rejecting testimony which, in the ordinary occurrences of life, might be relied on.

The term *res gestae*, which only won an established place in our law about 1800, had then recently been invented. The rule which it implies has often been helpful, in avoiding the result which Swift deprecated, but it is hedged about with unending technicalities.

The general public have not much patience with a trial resulting in a miscarriage of justice, because evidence, that seems to those who are not lawyers material and proper, was excluded.

Public sentiment is as vital a force behind judgments as behind laws. The community, as a whole, and after taking second, sober thought, must be fairly well satisfied that justice has been administered, or there will be a smouldering fire of criticism that may some day flare up into a source of serious danger to the stability of our judicial institutions. The popular recall of Judges would never have been thought of, anywhere, had there not been judgments rendered, which public opinion condemned.

Reversals on appeal of criminal convictions, because of some ruling on evidence, have often offended public opinion, as a substitution of technicality for justice.

The English Judges, by a rule of Court under the Judicature Act, refuse a new trial on account of the improper admission or

¹⁷ *Barry v. McCollom*, 81 Conn., 293, 299.

rejection of evidence, unless in the opinion of the court to which the application is made, some substantial wrong or miscarriage of justice was the result.

Congress, in 1909, on the recommendation of the American Bar Association, passed a statute similar in effect. In several of our states, the practice under their common law has been the same. In civil cases, I believe it should be the rule everywhere.

In criminal cases there is more reason for adherence to form. Matters of form have often saved an innocent man from conviction.

Nevertheless, here our system of procedure, when compared with that of other countries, seems to me hardly to assure to the community at large the protection they deserve. The whole trend is towards favoring the accused at the expense of the State.

The presumption of innocence has been sadly overworked.

The germ of it is to be found in this passage in the Digest of Justinian:¹⁸ "But neither ought anyone to be condemned on suspicion. The late Emperor Trajan wrote to Assidius Severus: 'It is more satisfactory that the crime of an evil doer go unpunished, than that an innocent man be condemned for it.'"

No one can find any objection to make to this. But the English Judges, in making it, about a hundred years ago, the source of a definite legal presumption, raised the doctrine to a height which lets many a guilty man go free, without any serious attempt to discover the real author of the wrong.¹⁹

In England there has been a reaction in this respect, and under the Criminal Evidence Act of 1898, as practically administered in court, the burden of proving his innocence often seems to rest virtually on the accused. This is the result of allowing him to testify in his own behalf, and if he has previously during the trial "personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defense is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution," permitting his cross-examination as to his character and as to any previous conviction.

English criminal justice is surer than ours.

¹⁸ *D. 48. 19. de Poenis* 1. 5.

¹⁹ *Coffin v. U. S.*, 156 U. S. 432, 453.

The "reasonable doubt" doctrine is, in its modern shape, an American innovation. Unquestionably it has been often the cause of verdicts of acquittal which have lessened public confidence in the courts. This is particularly true since we have allowed the accused to be a witness in his own behalf, without his having made any preliminary statement before a magistrate with which his testimony at the trial can be compared.

This right, acquired only during the last half century, is given by statute, and so may be recalled or modified in any State, at any legislative session.

Why not modify it by giving every man arrested on a charge of crime, an opportunity, before consulting an attorney, to make a statement to a magistrate and answer such questions as he may put, and in case of his refusal to avail himself of it, refusing him the right to testify in his own behalf?

It may be said that this would often virtually compel him to criminate himself. But it certainly does not compel him in terms, and it is time for the courts to construe the constitutional guaranty in the light of twentieth century conditions rather than of seventeenth century conditions.²⁹

It is only because we have been bred up under such an artificial system of judicial procedure that we are content to tolerate it.

Lovers of Goethe will recall the brilliant scene in Faust's study, when Mephistopheles dons a Professor's cap and gown, and grants an interview to a student who wishes advice as to whether he should study law for his profession. "My dear boy," he replies, "keep clear of that. Laws and notions of right are inherited like an inveterate disease: they slide themselves along from generation to generation, and spread imperceptibly from place to place. Reason becomes nonsense, and the best actions are called wrong. Wo to thee that thou art somebody's grandson! Of the legal notions that we are born with there is unfortunately never any question made."

This is really the main cause why we keep on enforcing in trials to the court the same rules of evidence which we have adopted in trials to the jury. We have not stopped to think that in equity causes, and wherever a jury is waived, the reasons for keeping remote or doubtful evidence from untrained minds do not apply.

We cannot maintain, side by side, two inconsistent rules of right; but we may have two inconsistent rules of procedure, where the

²⁹ *State v. Bartlett*, 55 Maine, 215.

question is one as to the limits of proof, and the triers are men having different spheres of duty, and selected under different standards of qualification.

In a bill for a Workingmen's Compensation Act, to apply when the consent should be given of both employer and employee, favorably reported this Summer, by the Judiciary Committee of the Connecticut legislature (though not adopted,) was a provision that any cases arising under it should be tried without a jury, and that the Judge might, at his discretion, admit evidence not receivable under the ordinary rules of evidence.

Such has been also, and very properly, the practice in some of the States in trying appeals to courts from the action of administrative bodies.

The poet Coleridge said that in infancy the body and the spirit are in unity, but with years the spirit pulls away from the body, and dominates it. In the infancy of our law of evidence it was all harmonious with itself. Its body and its spirit were in unity. But now the spirit which once animated that body has gone. It has gone higher. The body must be revitalized. Rules remain after their reason has vanished. New ones, then, must take their place, else we of the bar are untrue to the lawyers and judges of former generations. We must act as sincerely as they did. We must be as purposeful as they were. We can be, only by undoing some of their work, good for their times, but not for ours.

Simeon E. Baldwin.