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PRACTICAL APPLICATION OF RULES OF EVIDENCE*

JOHN S. BARRY

THE fact that parties have found it necessary to submit a matter in dispute to a Court for decision obviously means that there is a more or less wide divergency of opinion between the parties as to just what was said or not said, done or not done at a particular time or place. In order to have the fact of the matter adjudicated, it is necessary for each disputant to marshal the facts and events which he claims support his view and present them to the Court. If litigants were left to their own methods for this presentation, utter chaos and confusion would result, for laymen are prone to exaggerate the importance of non-essentials and in the heat of battle, inflamed by the desire to win, frequently lose, in varying degrees, that strict regard for the truth, which the solemn obligation of the oath ought to assure.

To keep matters in order, to get to as correct a conclusion as possible, to expedite trials and to establish precedents for other cases, rules of evidence have been developed throughout the history of English and American jurisprudence. A few have been made the subject of statutory enactment, but for the most part they are found in court decisions and the words of recognized authorities such as Lord Bacon, Greenleaf and Blackstone, and in modern times Jones and Wigmore. There is a remarkable uniformity in the conclusions reached by the various authorities, and it is to be observed that departures from recognized uniformity are usually abandoned and overruled as further experience shows the soundness of original theories.

Blackstone's definition of evidence tersely expresses the tests that should be applied to a rule of evidence. "Evidence signifies that which makes clear or ascertains the truth of the very fact or point in issue, either on the one side or the other."

There are but two tests included in that definition. The most important is this: Will the application of the given rule guide us to the truth? The second is: Will the application of the rule make the point at issue clear?

The course of evidence in a given case may be likened to a railroad with its parallel tracks, upon which the wheels which carry the vehicle of justice moves. If these tracks are kept straight justice will achieve its aim surely and quickly, if detours, curves and breaks occur, errors and delay result.

* Read before the Board of Circuit Judges at its annual meeting, January 3, 1934; publication urged by Honorable Edgar V. Werner, Judge, Tenth Judicial Circuit.

On the track of truth certain rules have been developed which exclude incompetent testimony and the testimony of incompetent witnesses, hearsay and that which is not the best evidence, and includes recognized presumptions, judicial notice and relevant admissions.

On the track of clarity certain rules have been developed which exclude testimony which is irrelevant to the issue and immaterial to the point in controversy. Included here also are rules relative to procedure at the trial, the aim of which are to expedite trials and prevent beclouding the issues.

The foundation for the evidence in a trial is built by pleading. The complaint, answer, counterclaim and reply constitute the roadbed upon which the tracks are to be laid. Careful pleading and careful study of the pleadings constitute the first essential to the correct development of the evidence. The next important step in the trial is the opening statement—the preliminary survey of the line. Here should be our plan, the blueprint which should be accurate in each detail. Unfortunately, very few lawyers come to trial equipped to make such blueprint intelligible or helpful. A court rule requiring that such statements show that a cause of action or a defense exists would probably compel attorneys to be prepared on rules of evidence and tend to lighten the burden which is too often thrust upon the trial judge.

The ends sought are to bring out the truth and make that truth clear. Here the trial lawyer is required to school himself in the rules of evidence. Nothing can lead more surely to success in trial work than thorough familiarity with the rules of evidence, the reasons for such rules and the exceptions to them. It is important both as the foundation for propounding questions and in the making of objections.

Starkie says, "There is a general tendency among mankind to speak the truth, for it is easier to state the truth than to invent; the former requires simply an exertion of the memory, whilst to give false assertions the semblance of truth is a work of difficulty. It is equally apparent that the suspicion of mankind would usually depend on their ordinary experience of human veracity; if truth were always spoken, no one would ever suspect another of falsity, but if he were frequently deceived he would frequently suspect. Hence, it is that jurors, sitting in judgment, would usually be inclined to repose a higher degree of confidence in ordinary testimony than would justly be due to it in the absence of peculiar guards against deceit; for, as the temptations to deceive by false evidence in judicial inquiries are far greater than those which occur in the course of the ordinary transactions of life, they would be apt to place the same reliance on the testimony offered to them as jurors, to which they would have trusted in ordinary cases,

and would consequently in many instances, overvalue such evidence."¹

To establish such "peculiar guards against deceit" has been and always will be the aim of rules of evidence. Take the prevailing source of much litigation—automobile accidents. We find witnesses who may be classed as decent, respectable citizens confidently informing juries that at the time and place one automobile was proceeding at the rate of forty miles per hour, and another witness, with just as much assurance, countering with testimony that the automobile was proceeding at the rate of fifteen miles per hour. What rule can be invoked to meet that remarkable situation? Some say it is enough to leave it to the judgment of the jury in passing upon the credibility of the witnesses, comparing their testimony and weighing it with the other evidence, direct and circumstantial, in the case. But, experience teaches us that such speculation does not lead to reasonably sure justice. The answer is that either witness A or witness B is not qualified to testify as to the rate of speed of an automobile. Perhaps neither of them is qualified. The rule should be applied that no one be permitted to testify to a rate of speed until it is definitely established that his observation has been of a sufficiently careful nature to qualify him to give an expert opinion.²

Because of the fact that the rights of individuals are involved in the ultimate decisions, there should be no hesitancy in enforcing rules of evidence which will, as far as humanly possible, be an absolute guaranty that only the truth shall be told. It is not enough to say that this or that testimony is the best that can be produced and leave it to chance that justice will be done. Courts must have the courage to enforce rules of evidence which will eliminate speculation. There must be no let up occasioned by mere expediency.

One writer has said, "The word 'progress' is somewhat ironical when applied to the enormous outpouring of American decisions on evidence. The best proof of progress in this branch of the law would be its virtual disappearance from our appellate courts. It is not concerned with defining human rights and duties, but with the mere mechanics of justice, which ought to have been settled long ago. Instead a considerable portion of the time and thought of our highest courts is diverted from fundamental problems * * * in order to decide whether certain testimony is hearsay or what questions are proper on cross examination. The American decisions on Evidence for one month require thirty double columned pages—seven hundred and fifty headnotes—in the advance sheets of the American Digest. The English

¹ Starkie on Evidence, 20.

² *Wobosel v. Lee*, 209 Wis. 51, 243 N.W. 425 (1932).

Law Reports in twenty-one months contain on this subject twenty-five cases."³

When this subject was assigned it was undertaken with the thought that modern conditions require changes in rules. Search for cases really developing new rules of evidence has proven practically fruitless. There is no real change in rules apparent, and it must be admitted that most of our recent decisions on points of evidence have to do with mere restatements of time honored rules. The recent case of *Schroeder v. State*⁴ is a splendid example of the efficiency of established rules as related to a modern situation.

In Volume 210 of the Wisconsin Reports, we find this record in civil cases.

1. Error in admitting testimony under the *res gestae* rule—held improper but not prejudicial.

2. Error in permitting testimony that a driver was usually careful—held irrelevant, but not prejudicial,⁵

3. No error in receiving testimony that the color gray, blends with the landscape in uncertain light.⁶

4. No error in excluding testimony that a witness had offered to bet on the result of the trial, distinguishing the case from those where the witness had actually placed a wager.

5. Error in excluding testimony that sometime after the accident an automobile was found to be "in gear"—held not to have affected the substantial rights of the parties.

6. No error in rejecting expert testimony on a matter of common knowledge.⁷

7. No error in admitting testimony of mechanic as to the effect of automobile wheels spinning on ice or snow. Held, if a matter of common knowledge, to be harmless, if not, proper as expert opinion evidence.⁸

Perhaps none of these cases are subject to just criticism, but it is noted that in most of them where error is found, either there was other testimony on the same point admissible under correct rules or the testimony was harmless, i.e. that there was involved nothing more serious than a waste of time.

It may be assumed that in some instances the trial court, realizing in advance that no harm can be done, but confronted with the possibility of extended and useless argument with persistent counsel, let that

³ Zechariah Chafee, Jr., "The Progress of the Law, 1919-21, Evidence" 35 Har. Law Rev. 302 (1922).

⁴ 210 Wis. 366, 244 N.W. 599 (1933).

⁵ *Zastrow v. Schaumburger*, 210 Wis. 116, 245 N.W. 202 (1932).

⁶ *Cameron v. Union Automobile Ins. Co.*, 210 Wis. 659, 247 N.W. 453 (1933).

⁷ *Goetz v. Herzog*, 210 Wis. 494, 246 N.W. 573 (1933).

⁸ *Williams v. Williams*, 210 Wis. 304, 246 N.W. 322 (1933).

kind of testimony in with the idea that in the long run time would be saved. Many such instances are clearly efforts on the part of counsel to "sneak in" suggestions which may, by forcing opposing counsel to object, followed by the court's rulings, impress the jury that information is being withheld from them. Particularly should attorneys at fault be sharply curbed when there is danger that the jury will become confused as to the real issues by such worthless by-play.

The so-called smart lawyer is well acquainted with the peculiar susceptibility to prejudice of the particular jury before whom he is displaying his wares. The juror, inexperienced in the practice of deceit, is easily led into error by the skillful manipulation of the artful practitioner.

"True it is that the lawyer occupies something of a dual capacity. He owes a duty to his client and to the court, but the duty which he owes his client never requires him to go to the extreme of manifesting a contemptuous attitude towards the court. He should protect the interests of his client, but he should never forget that he is engaged in a serious undertaking—a search for the truth—and an effort to declare justice. He should not forget that he is one party to a controversy—a controversy conducted in an orderly and dignified manner, and which must be decided by the court or jury. The law invests the court with power and authority to enforce an orderly and dignified investigation, and it is the duty of the attorney to promote rather than frustrate an orderly investigation of the facts involved in the controversy. The law and the rules of court enable him properly to protect the interests of his client, without casting aspersions upon the learning or integrity of the presiding judge. He is entitled to make objections. He is entitled to exceptions to the rulings of the court. He is entitled reasonably to be heard upon questions presented for the decision of the court. The extent to which he shall be heard is a matter which must rest largely in the discretion of the presiding judge. He is not entitled to argue at length all petty and frivolous objections, but courts will always grant counsel opportunity of being heard upon doubtful and serious questions. However, when the court rules upon questions before it, it is the duty of counsel to respectfully acquiesce in such rulings. He owes no duty to his client which will justify him in indulging in flippant, sarcastic, or contemptuous comment upon such rulings. This practice on the part of attorneys is most reprehensible, and brings disrepute upon the institution which it is their sworn duty to respect."⁹

It does seem, moreover, that there are altogether too many cases where the doctrine of non-prejudicial error has to be invoked. Appellate courts are taxed much too severely by the necessity of examining

⁹ *Rubin v. State*, 192 Wis. 1, 8, 211 N.W. 926 (1927).

records to weigh the effect of error in rulings on evidence. Unnecessary expense is caused to litigants because of the tendency of their counsel to overrate the prejudicial effect of plain violation of the rules of evidence.

This being a time for suggestions, it may be well to suggest a modification of the non-prejudicial error rule to the effect that prejudice will be presumed where the error is obviously intentionally injected into the case. Rules of evidence should not be permitted to become mere scraps of paper, lightly to be ignored. A relaxation of the strictness of application of rules can only have a deleterious effect, and the lawyer's sense of responsibility to the court should not in any degree be lessened.

Next in importance to the track of truth is the track of clarity. In the modern administration of justice, there is found a tendency to long drawn out trials. Advances in science and inventions have brought many new subjects and new situations which require a broadening of the scope of inquiry in the ascertainment of the truth of a controversy. Expert opinion is becoming more and more an essential in the explanation of many subjects of litigation. The rules of evidence against the admission of irrelevant testimony need constant application. There is less chance for reversible error on this track, but there is great danger nevertheless in not keeping the track straight. Jurors become confused as to the point in issue when their attention is taken from the main objective. Everything irrelevant, everything extraneous to the ultimate issues in the case, should be excluded and the lawyer who deliberately seeks to bring such matters before judge or jury violates his oath. No conduct can be more contemptuous and no ruling can be too severe which condemns the practice of deliberately instilling prejudice in the minds of the triers of fact. Our Supreme Court has recently said "Trial Courts should discourage such practice by strongly denouncing it whenever it is indulged in without good reason and so handle the matter as to prevent as far as possible any possible resulting prejudice."¹⁰

It is to the discredit of the practicing lawyers that the court also felt called upon to say in the same case, "we note that the complaining lawyers are not infrequently complained against."

A certain lawyer, noted for his piety, as well as for his skill as a trial lawyer, was asked whether he prayed for success in his trials, answered, "No. Before I enter into a trial, I pray to Almighty God that the truth will be heard, so that justice will prevail."

Meeting perjury with testimony of even doubtful color should have no justification.

¹⁰ *Walker v. Posnish*, 206 Wis. 45, 238 N.W. 859 (1931).

The history of the development of rules of evidence will be found ever to follow these two cardinal principles—truth and clarity. Truth is to be found in the testimony of eye witnesses who are subject to cross examination—hence the rule against hearsay. Hearsay is generally excluded because it may not be the truth and the rights of individuals cannot be left to chance or speculation. The speaker, whose words are quoted, if absent, is not subject to cross examination.

Ordinary books of account are strictly speaking both hearsay and self serving, but the rule must be modified to let them in because they are the methods by which the parties have at least tacitly agreed to keep their own record straight, and the truth is most likely to be found in the day by day record of the transaction.

Truth is likely to be spoken at the immediate happening of an event—so the statements of persons at such time are admissible, in spite of the hearsay rule because of the presumption that words spoken as a part of the *res gestae* are the truth. But, how zealously the principle of excluding anything that may not be the strict truth is guarded is well exemplified in the language approved by our own Supreme Court.

In discussing the subject of *res gestae* it is said by Professor Wigmore¹¹ that the typical case presented is a statement or exclamation, by an injured person, immediately after the injury, declaring the circumstances of the injury, or by a person present at the affray, a railroad collision or other exciting occasion, asserting the circumstances of it as observed by him, and in Sec. 1749: "The utterance, it is commonly said, must be 'spontaneous,' 'natural,' 'impulsive,' 'instructive,' generated by an excited feeling which extends without let or breakdown from the moment of the event they illustrate." And in Sec. 1750, "There must be some shock, startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting. The utterance must have been *before there has been time to contrive and misrepresent*, i.e. while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance."¹²

The general rule is that declarations against interest made by a person who is unavailable as a witness, if relevant to the controversy, may be received in evidence, but the receipt of such testimony must be coupled with proof that there was no motive to misrepresent, that the person had adequate knowledge of the subject, and that the fact cannot be proven in any other way.¹³ Here is a splendid example of the flexibility of rules of evidence in the interests of justice. A restatement of all of the incidents of this rule would be impractical here. Its appli-

¹¹ Wigmore on Evidence, Vol. III, §1747 (1905 Ed.).

¹² *Kressin v. C. & N. W. R. Co.*, 194 Wis. 480, 485, 215 N.W. 908 (1928).

¹³ *Truelsch v. Miller*, 186 Wis. 239, 202 N.W. 352 (1925).

cation to a given case requires much study and preparation. It is in fact a rule which presents more intricacies than any other rule of evidence. But it is a rule of strict necessity and courts have never hesitated to evolve rules of evidence which will let in any testimony which to a certainty has every appearance of being the truth.

A voluntary and certain statement amounting to an admission of the existence of any relevant matter of fact is competent evidence against the party by whom it was made, as a fact tending to show the truth of the statement and the existence of the facts to which it relates, and is not objectionable as hearsay.¹⁴

But an admission of one of several defendants may not be received where it would affect the rights of other defendants for whom the one claimed to have made the admission had no right to speak. In such a case the courts hold that "where evidence of the declarations of one of several parties on the same side in litigation could only affect legitimately, in any event, himself and could not affect him without affecting his coparties it is not admissible."¹⁵

We have rules by the score pertaining to the admission or exclusion of parol evidence offered to vary or explain written documents. While it has been said that the general rule favoring exclusion is the most flexible of all rules of evidence, such evidence has only been admitted properly in any case after preliminary proof that for some reason the whole truth is not to be found in the written document.

Justice Marshall says: "* * * All negotiations leading up to and resulting in a written contract are, subject to some exceptions, conclusively presumed to be merged therein and, therefore, oral testimony, varying or contradicting the writing is not permissible. * * * The object thereof is prevention of fraud. Where the object would clearly not be promoted but application of the principle, arbitrarily, would promote instead of protect against a fraudulent purpose, the tendency has been to create an exception. In this way, by a long course of judicial administrative experience, several exceptions have been wrought out and restrictive boundaries placed about the rule, illustrating the maxim that, in general, a good rule admits of good exceptions and, necessarily, limitations. In my own judgment the rule under discussion, beneficent as I concede it to be, has quite as much dignity in its exceptions and limitations as in its entirety. The former vindicates that crowning conception of the law which the broadminded courts constantly struggle to vitalize. *Ubi jus, ibi remedium.*"¹⁶

We should not easily reject or modify any rule of evidence which is the result of sound judicial reasoning from the experience of thou-

¹⁴ 22 C. J. 297, Evidence §324.

¹⁵ *Samnes v. M. & S. L. R. Co.*, 131 Wis. 85, 109 N.W. 925 (1907).

¹⁶ *Harmon v Kelley*, 156 Wis. 509, 146 N.W. 512 (1914).

sands of cases which have brought the Judiciary into close contact with human relations, for in litigation more than in any other human experience, such frailties as greed, vindictiveness, pride and selfishness are sadly ever present. Where new experience shows conclusively that a good rule has lost its force or cannot safely be applied, and that adherence to it most surely will lead to abuse, search should first be made for an apt exception for usually it will be found. If not found, courts should be ready to apply the tests of truth and clarity, find the straight road to sure justice and create the exception which the situation demands.