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# EXTENT TO WHICH COURTS UNDER THE RULE MAKING POWER MAY PRE- SCRIBE RULES OF EVIDENCE

GEORGE H. SEEFELD\*

**D**URING the last decade American legislatures and courts have responded with enthusiasm to the cry for reassertion by the courts of the rule-making powers. Engendered by the inadequacy of elaborate codes, and encouraged by the assurances of legal scholars, rules purporting to regulate practice and procedure have been adopted without hesitancy. Conjectures as to their validity have been resolved by decisions declaring the existence of constitutional powers to make such rules.

A detailed study of the principles of constitutional law which have been invoked to sustain the rule-making power would be unnecessary as well as out of place in this discussion. Conceding the existence of such power, we, nevertheless, should direct some attention to one limitation which seems to be universally recognized. This is the principle that no power exists in the courts to make rules which affect substantive rights.<sup>1</sup> Like many other principles this one is more easily stated than applied. Rules which clearly related to the mechanics of court conduct were accepted almost without question. As a result, the practice, procedure and conduct of courts have formed the verdant field in which the exercise of the rule-making power has been permitted full sway. English judicial history offers justification for such regulation,<sup>2</sup> and in fact the very origin of the rule-making power lies in the necessity of ego-centric regulation of judicial functions.<sup>3</sup>

Granting the validity of the above limitation for the time being, the question as to which rules of evidence may be created and modified under the rule-making power is not easily answered. It is apparent at once that any answer is impossible if rules of evidence are considered categorically without separate analysis. The general classification "evidence" has some rules which so affect substantive rights as to prevent the use of judicial rule-making power either to create or modify them. Failure to recognize this fundamental proposition may account, at least in part, for the conflict which exists among opinions of judges as

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<sup>1</sup> *In re* Constitutionality of Statute Empowering Supreme Court to Promulgate Rules, 204 Wis. 501, 236 N.W. 717 (1931); *Washington-South Navigation Co. v. Baltimore & Philadelphia Steamboat Co.*, 263 U.S. 629, 44 Sup. Ct. 220, 68 L.Ed. 480 (1924). Other cases asserting this doctrine are legion.

<sup>2</sup> Pound, *The Rule-Making Power of the Courts*, 12 A. B. A. J. 599, 601 (1926).

<sup>3</sup> Tyler, *The Origin of the Rule-Making Power*, 22 A. B. A. J. 772, 773 (1936).

well as scholars. The question has often arisen where courts have been called upon to interpret statutes granting power to make rules regulating "procedure." Generally the term has been considered broad enough to include evidence, and justification for this view may be found in the fact that many so-called rules of evidence are procedural in their nature.<sup>4</sup> Among such are found rules relating to burden of proof and inferences of guilt from failure to testify. Clearly, any exposition of the power of judges to make rules covering matters of evidence must begin with an analysis of the scope of what is known as the law of evidence.

### I.

Analytic definitions of evidence are rarely found in legal tomes, undoubtedly because of the great difficulty encountered in their formulation. In a simple form one definition has characterized the word "evidence" as a relative term which signifies the relation between a proposition to be established and the material demonstration of that proposition.<sup>5</sup> The proposition of which evidence may be offered is defined and limited by the rules of substantive law and pleading.

A perusal of the kinds of questions generally classified as questions of evidence indicates that at least four groups<sup>6</sup> are fairly well outlined. They may be stated as follows:—

- A. What facts may be presented as evidence?
- B. By whom must evidence be presented?
- C. To whom must evidence be presented?
- D. Of what propositions in issue need no evidence be presented?

In strictness, the first group above is the only group which involves evidentiary questions. They center about the admissibility of offered facts and thus fall within our definition. On the other hand, the rest of the groups set out in the foregoing list are really concerned with larger aspects of procedure and find their way into the general classification of rules of evidence only because their material is chiefly evidential and because they are constantly being treated as problems of evidence. Consider, for example, the question of burden of proof. It is closely tied in with the question of who shall open and close the argument, which is a question of procedure. One of the classes of rules relating to burden of proof is that relating to judicial notice, yet most courts, as well as most text writers, include that topic as properly one of evidence.

<sup>4</sup> Callahan and Ferguson, *Evidence and the New Federal Rules of Civil Procedure*, 45 YALE L. J. 622 ff. (1936).

<sup>5</sup> WIGMORE, EVIDENCE, (1904 ed.) p. 5, par. 2, Introduction. See also, *Lapham v. Marshall*, 51 Hun. (N.Y.) 561, 3 N.Y. Supp. 601, 603 (1889).

<sup>6</sup> WIGMORE, EVIDENCE, (1904 ed.) pp. 8, 9, Introduction.

In some respects many questions which fall within the above mentioned groups B, C, and D, as well as many so-called procedural points, have an indirect bearing upon the admissibility of evidence. To the extent that they affect admissibility, they are properly considered rules of evidence. However, for purposes of discussion of the application of the rule-making power, those rules which deal primarily with procedural questions, and only secondarily affect evidentiary principles, should be sustained under the recognized power of the courts to regulate matters of procedure and practice.

Thus, such subjects as burden of proof, presumptions, relation between judge and jury,<sup>7</sup> judicial notice, and judicial admissions, all of which involve larger aspects of procedure and are independent of the evidential material, should be subject to the rule-making power.<sup>8</sup> Justification is found for this proposition in the comparison of advantage and disadvantage of exercise of that power.

First, the members of the bench are much better able to determine whether judicial notice, for instance, should be taken of constantly changing facts.<sup>9</sup> They are the closest observers of the way in which rules are working under the pressure of application to ever-different cases. They can discover the chance inequities of placing the burden of going forward with the evidence upon one or the other of the parties and can more readily adjust the rules to meet such problems.

Secondly, they can receive and act with facility and intelligence upon suggestions from members of the bar regarding possible improvements. This is a nearly impossible feat for legislatures, especially since many details receive legislative attention because of the personal interest of some legislators, while other more important details escape attention because of lack of a sponsor.

Lastly, knowing the intent and purpose of the rule, the jurist will be able to give it an understanding interpretation.

On the other hand, the fears of the objectors that the courts have no time to make rules and no disposition to make any rules, or only convenient ones, have already been dispelled by the excellent applications of the rule-making power appearing wherever it is encouraged. Adequate protection against abuse lies in such constitutional safeguards as due process of law, right to jury trial, and others well known to all.

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<sup>7</sup> This does not refer to the right to jury trial. In so far as questions of division of functions between judge and jury interfere with the right to a jury trial they are, of course, unconstitutional and so not properly within the control of the rule-making power. *Cleveland Ry. v. Halliday*, 127 Ohio 278, 188 N.E. 1 (1933).

<sup>8</sup> A rule which provided that the court must instruct the jury that no inference of guilt arises from failure of accused to testify was upheld. *State v. Pavlich*, 163 Wash. 379, 279 Pac. 1102 (1929).

<sup>9</sup> Consider the recent economic depression, for instance.

## II.

Our major problem revolves around that group of evidentiary principles relating to admissibility. The rules of evidence dealing with admissibility are intrinsically the only rules properly classified under the subject of "Evidence." These form a larger and more important group than any thus far considered.

For purposes of study of the rule-making power as applicable to this part of the law of evidence, four subdivisions have been adopted. They are:—

- A. Rules relating to relevancy.
- B. Rules relating to privilege.
- C. Rules relating to secondary limitations.
- D. Parol Evidence Rule.

## A. RELEVANCY

The problem of proof involves at the outset a question as to whether or not a fact offered has any value as an indication of the existence of the ultimate facts to be proved. This question of admissibility originates because of the separation between judge and jury. The former assumes the role of watch-dog to prevent any evidence being introduced which is not worth considering. In addition, the judge is the preliminary tester whose duty it is to see that the matters introduced have an appreciable value in the proof of the proposition at issue. This function has caused the growth of a vast number of rules which are characterized as relating to relevancy. They are the united logic of a great many judges and lawyers in a great many instances in which the bearing of particular facts on particular issues has been repeatedly discussed and decided.<sup>10</sup>

Circumstantial evidence has played the most important part in a large percentage of cases. If it were not for the great latitude allowed in the reception of such evidence, it would be impossible to prove many justified claims. By nature it is indirect and gains its force through references deducible from prior experience alone, from reason alone, or from both experience and reason. The relevancy of such evidence is not dependent upon the conclusiveness of such inferences, but merely upon a determination that the inferences reasonably drawn tend to a slight degree or more to elucidate or assist in a final determination of a disputed fact. For example, proof of good character of the defendant in criminal cases is permitted to evidence the improbability of his doing the act charged.

So long as the jury remains in use as an integral part of the court system, the need for sifting circumstantial evidence will remain. Jurymen, unused to the fine discriminations as well as the persuasive tac-

<sup>10</sup> State v. Lapage, 57 N.H. 245, 288 (1876).

tics of lawyers, cannot do this for themselves. Advocates of the jury system would be prone to indulge in the excess precaution of keeping the power out of the hands of judges to control the relevancy of circumstantial evidence by rules of court. Their argument is that to control the relevancy of offered proof is to have a power approaching dictatorship and to destroy the effectiveness of the jury. This is particularly true in their opinion since the right to appeal may bring the case before the very court which has created the rule, thus minimizing the possibility of non-partisan treatment of objections to the rule.

The underlying reasons center about the general principle heretofore mentioned that the courts cannot make rules which control substantive rights, yet we see a host of administrative boards and commissions given wide powers of rule-making, some of which include working out the details of substantive law. It must be apparent that the idea of not affecting substantive law by rules of court is tied to some purpose. That purpose, though not expressed, is the protection of the jury system. The theory seems to be that if the judges were given rule-making power over substantive law, besides having power to control practice and procedure, it would be an easy matter for the courts so to control the proof that the jury might be forced to reach a decision predetermined by judicial opinion.

There are indications on every side that the jury system is fast losing its popularity. The reason for this need not be discussed here—but the effect on the law of evidence is bound to be far-reaching. With the present strong tendency to simplify issues by prior disclosure and concession of facts, to get at the kernel of the dispute as quickly as possible, the need for strict rules of evidence controlling relevancy of circumstantial evidence is not present.<sup>11</sup> If confidence can be placed in the competency and attentiveness of judges, and there is no reason in experience why it shouldn't, no fear need arise that the balance of government will be upset or democratic institutions impaired. Administrative boards or commissions have functioned under such relaxed rules with no menacing results of that kind.

A discussion of the principles of relevancy would not be complete without consideration of those covering testimonial evidence. In determining the admissibility of testimonial assertions, the judge again plays the role of preserver and protector of the jury, his first task being to determine if the assertion is *prima facie* worth considering. In making this decision he must decide whether sanity, experience, knowledge,

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<sup>11</sup> This tendency is shown in cases sustaining rules which require affidavits denying certain facts in order to put the plaintiff to proof of such facts: *Odenheimer v. Stokes*, 5 Watts & S. (Pa.) 175 (1843); *Mills v. Bank of United States*, 11 Wheat 431, 6 L.Ed. 512 (1826); *Fox v. Conway Fire Ins. Co.*, 53 Me. 107 (1865); *Hellfrich v. Greenbarg*, 206 Pa. 516, 56 Atl. 45 (1903).

etc., of the witness warrant the trustworthiness of the offered statement of facts.

Such questions as mental derangement or immaturity of the witness and experiential capacity are within the discretion of the judge. They involve observation of the witness and consideration of particular peculiarities in different cases, matters which cannot be adequately covered in detail by statutes. As to such questions there should be no doubt that, whether or not jury trial is involved, they are particularly suited to rules of court. The experience of judges in daily contact with witnesses fits them exceptionally well for the duty of making such rules.

The common law early developed extensive rules of disqualification of witnesses largely because of the assumption that persons having a pecuniary interest in the outcome of the case would be likely to speak falsely, and consequently their testimony should be excluded entirely. Realizing the error in that assumption, statutes have been passed modifying or removing entirely the disqualification of interest and relating it to credibility.

Again the question arises whether or not such matters should not be left to the judge. With the waning frequency of jury trials, the need for statutory control lessens. The trend toward increased responsibility on the part of judges is part of a larger tendency to make the judiciary a really independent and separate branch of government.<sup>12</sup> Experience shows that such responsibility has not been misused and has resulted in greater flexibility in the treatment of individual cases. This is particularly true when impeachment and counter-impeachment are made subject to the rule-making power.

The last type of evidence to be considered from the point of view of relevancy is real evidence. This kind of evidence differs from circumstantial and testimonial evidence in that it does not require an inference to be drawn from one fact to prove another. The very nature of this type of evidence eliminates the necessity of restrictions and preliminary inquiries involved in the two kinds of evidence previously considered. However, such limitations as unfair prejudice in a criminal case, or in a civil personal injury case, indecency, physical or mechanical inconvenience of production, are variously present in individual cases. In jury cases the judge is best able to decide whether such limitations should operate, depending upon the individual circumstances. In non-jury trials, the purpose of such limitations is largely lost, except in the case of physical or mechanical inconvenience or impossibility. Adequate statutory control over such limitations would be practically an impossibility. In fact, control by rules of court would also be very

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<sup>12</sup> McCormick, *Tomorrow's Law of Evidence*, 24 A. B. A. J. 507, ff. (1938).

difficult, due to the diversity of situations in which real evidence might be offered. Certainly the better of the two courses would be to extend the rule-making power to cover these rules of evidence.

### B. PRIVILEGE

Closely associated with the duty of witnesses to respond to compulsory process and reply to questions asked, are the privileges attached to certain topics and communications. These privileges are characterized as personal in the sense that they may be claimed or waived by the parties to whom they are extended.

The privileges, covering such subjects as spouses testifying against each other, self-incrimination, and communication between attorney and client, are obscurely rooted in the 16th and 17th centuries. Communications between physician and patient and priest and penitent have become privileged by statute. The justification for many of them is just as obscure as their origin. If the need for determining the true facts in the administration of justice is balanced against the protection of a relationship or condition by such privilege, a reasonable basis for the existence of many privileges will be found wanting. Yet changes by statutory enactments have been infrequent.

From the historical point of view it is obvious that recognition and development of privileges was a matter of judicial opinion and decision on questions of practice. To deny the right of modern courts to make rules covering such matters is to deny the established criterion for determining whether a power is legislative, executive or judicial.<sup>13</sup>

### C. SECONDARY LIMITATIONS

This group is comprised of those rules which apply specific safeguards to meet special dangers after evidence has satisfied the requirement of relevancy. Among them are preferential rules requiring documentary originals and attesting witnesses, the hearsay rule, rules requiring oath and publicity, the opinion rule, and rules relating to kinds and numbers of witnesses.<sup>14</sup>

By the beginning of the 19th century, the rule requiring production of original documents was crystallized and distinct from the rule of *profert* in pleading from which it developed. It has suffered little change during the last century largely because common sense and long experience have dictated the simple and obvious reasons for its existence. Control over it by rules of court has been justified by the declaration that it is a regulation of the conduct of the business of the court.<sup>15</sup>

<sup>13</sup> State v. Pavelich, *supra*, Note 8.

<sup>14</sup> A rule which required explanation for calling every witness over 15 in number was held invalid. State v. Gideon, 119 Mo. 100, 24 S.W. 748 (1893).

<sup>15</sup> Sellars v. Carpenter, 27 Me. 497 (1877). But where common law limitations on documentary proof are increased by court rules, such rules are frowned upon. Patterson v. Winn, 5 Pet. (U.S.) 233, 8 L.Ed. 108 (1831); Pelz v. Bollinger, 180 Mo. 252, 79 S.W. 146 (1904).

One distinct feature of preferential evidence is that other evidence may be admitted if the preferred evidence cannot be introduced. To determine when and under what conditions such "secondary" evidence may be admitted should be entirely within the rule-making power of the court. Such questions depend largely upon the circumstances of individual cases and are best controlled and decided by the judges under their general duty to pass upon admissibility.

The hearsay rule is based upon two of the most vital features of our law—namely, the right of cross-examination and confrontation. Ever since the early 1700's it has been recognized as a settled rule, though exceptions to it have been numerous. Its theory is that many sources of error and undisclosed facts may be brought to light if the person whose assertion is offered as evidence is cross-examined. The theory of the exceptions is that, where necessary, evidence which has some trustworthiness through force of circumstances will be admitted though it would otherwise be inadmissible as hearsay.

Considerations such as these are peculiarly suited to the judicial mind. The rule and its exceptions were developed by conscientious jurists in an effort to get the true facts as nearly as possible. Is there any reason to fear that judges of this day and age would not exercise the same care and attention if they were given the power to make rules governing the hearsay principle? The rigor with which the rule has been adhered to is due in great part to the interest in preserving the right of trial by jury. As such interest weakens, added reason is found for permitting the judge to determine the extent and scope of the rule.

As already noted, the principal considerations of a judge in determining admissibility involve protection against influencing the jury by untrustworthy evidence. The same considerations have led to the development of rules relating to oath, publicity and opinions. The latter rule owes its existence primarily to the fear of usurping the function of the jurors as the only persons of the judicial scheme outside of expert witnesses who are privileged to draw inferences from facts. Its soundest justifications now lie in the necessity of saving time and avoiding confusion in court hearings. Such matters should also be within the control of the judges.

#### D. PAROL EVIDENCE RULE

Confusion has often arisen in legal theories because of the laxity in the use, if not complete absence, of legal terminology. Frequently a rule of substantive law is given the appearance of a rule of evidence because its operation is phrased in terms of prohibiting proof. The parol evidence rule falls within that class of rules. It is really a rule

of substantive law which declares certain kinds of facts legally ineffective. It does not exclude facts because they are untrustworthy or undesirable means of evidencing some fact in issue.<sup>16</sup> For the above reason we need give no further consideration to this rule.

#### CONCLUSION

If the premise is accepted that no exercise of the rule-making power can affect substantive rights, it becomes necessary at once to decide whether or not rules of evidence are part of the substantive law. The trend of opinion seems to be that the substantive law does not include what may strictly be called rules of evidence. Assuming the correctness of that opinion, the conclusion is reached that rules of evidence are properly controlled by rules of court under the now generally accepted power to regulate the procedure and practice of courts by such rules. Exercise of such power is justified by the clear preponderance of the advantages over the disadvantages.

The theory that rules of court cannot affect the substantive law appears very early in the judicial history of this country. Undoubtedly it owes its inception to the doctrine of separation of powers. An exact, well defined line of demarcation between each of said powers has been found impossible in the practical operation of government. A certain fusion of powers in various agencies of government has been found the most productive means for dealing with the ever-growing mass of governmental business. In the judicial branch, the gradually increasing disuse of the jury has operated to relax the rigid separation of intra-court functions. The pressure of work has not only added to the necessity of expeditiously reaching and disposing of the essential issues, but of controlling in some measure the substantive rights of the parties. Logic alone cannot fix definite limits for such control. The recognition of substantive rights created by common law decisions, and the crystallization of such rights into rules of law by the doctrine of precedents is proof of some power in the courts to regulate and control substantive rights.<sup>17</sup> Pragmatic factors must shape the outlines of such control during the course of experience.

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<sup>16</sup> 4 WIGMORE, EVIDENCE, (1904 ed.), § 2400; THAYER, PRELIMINARY TREATISE ON EVIDENCE AT COMMON LAW (1898), 409; MCCORMICK, *Parol Evidence Rule as a Procedural Device*, 41 YALE L. J. 365 ff. (1931).

<sup>17</sup> Gertner, *The Inherent Power of Courts to Make Rules*, 10 U. OF CIN. L. REV. 33 (1936); Wigmore, Editorial Note, 23 ILL. L. REV. 276 (1928).

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