EVIDENCE

A Law Enforcement Officer's Guide

EUGENE J. KAPLAN

Former Special Assistant to the Director
Law Enforcement School
United States Department of the Treasury
Member, New Jersey and United States Supreme Court Bars

This concise guide to evidence law will serve equally well in the classroom or in the field. Individual chapters focus on specific aspects of the officer's daily work. The author has incorporated into the text those features that federal, state and local law enforcement officers require in a book of this type.

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PREFACE

As THE TITLE OF this book suggests, it is intended as a guide, not a treatise, and it is planned for the law enforcement officer, not the lawyer.

The first distinction, guide as opposed to treatise, is simple and earthy, a difference of several pounds, in the hope that the reader will feel more like picking it up, maybe even carrying it some of the time, and a difference of several thousand words, with the hope that he or she will feel like consulting it frequently. (To save words, further general references in this book to "he" or "him" also mean "she" or "her.")

The second distinction, law enforcement officer as contrasted with lawyer, also has practical intent. The lawyer needs and uses a text with case citations for just about every significant statement in it, so that he can find and read all the cases themselves. He must have this, because he can never know when a judge or an adversary will demand in the middle of an argument before the court, "Give me the name of a case." The law enforcement officer will not encounter this kind of problem. His need is more for a set of guidelines to make his work effective and the results legal.

Back to the lawyer—he will generally want a detailed historical and philosophical run down of all the decisions pro and con, so that his briefs and arguments can show why his case fits into the "pro" decisions and should be distinguished from the "con" ones, or vice versa. The officer, as the man on the street confronted with on-the-spot judgment situations that do not afford the luxury of leisurely counsel table argument, does better with a book that tells him the pertinent legal principles in plain talk, with just enough evolution and philosophy to have the law make sense, and a reasonable number of case and statutory citations.

I had to make a judgment about citations. I do not believe

the law enforcement officer wants a citation for every single point or a text overpeppered with footnotes. I feel that his purposes are served if he has the names of landmark cases, especially those of the United States Supreme Court, and if he has their citations so that he can read the opinions and research the law further if he wants to. Accordingly, I have footnoted only certain cases that are particularly emphasized in the discussions that appear in the book.

This book is intended for use by officers in every state. It is also intended for use by federal officers in all eleven of the federal judicial circuits.

The United States Constitution (article III, section 1) states that "The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish." Acting under this constitutional authority, Congress has created District Courts in all the states as well as in the District of Columbia, the Commonwealth of Puerto Rico, and the territories of the Virgin Islands, Guam, and the Canal Zone. The District Courts are courts of original jurisdiction. In criminal law parlance this means that prosecutions for violations of federal criminal laws are initiated in these courts. Most published District Court opinions are reported in a set of volumes called *Federal Supplement* (*F. Supp.*).

To hear appeals from the District Courts and certain other federal inferior courts, Congress created Circuit Courts of Appeals (changed in 1947 to Courts of Appeals) for the First through the Tenth Circuit and a separate Court of Appeals for the District of Columbia. The federal officer will learn quickly the number of the circuit where he works. For instance, District Courts within the State of New York are in the Second Circuit, those of the State of Texas are in the Fifth, the California District Courts are in the Ninth, and the District Court of Delaware is in the Third Circuit. Opinions of the Courts of Appeals are printed in the *Federal Reporter* (*F. or Fed.*) and the *Federal Reporter, Second Series* (*F.2d*). Some of them also appear in a series of sets called the *American Law Reports* (*A.L.R., A.L.R.2d, A.L.R.3d, A.L.R Federal*).

Opinions may differ among the various states and in the

federal jurisdictions. The Courts of Appeals of the eleven federal circuits are independent of each other, and none of them is under obligation to follow a decision of any other. Whenever they disagree, the disagreement continues unless or until it is resolved by a decision of the Supreme Court.

Legal disagreements among state and federal jurisdictions can be a source of confusion. A two-part solution is offered here.

First, whenever a significant legal point does not meet with universal agreement, or nearly so, the prevailing weight of authority as well as the minority view will be stated as fully and clearly as possible. There may not be too many divided views on major points, but wherever they occur they will be labeled.

Second, this book offers something that has never been done before in a book of its kind, to my knowledge. The last chapter provides step-by-step instruction in legal research, so that if any officer wants to go beyond this text to find out how any of the courts in his jurisdiction or any other have ruled on a point, he can do so.

There is no magic about legal research or any exclusive fraternity of persons able to do it. It can be fun, and the results can be rewarding as well as exciting. Law libraries are within reach everywhere, for instance, in federal, state, and county court buildings, bar association headquarters, judges' chambers, law schools, and law offices.

Not all of these facilities exist in every location, and some of them are restricted to certain users, but the law enforcement officer will find one or more that he can use. With the law books on the shelves and the guidelines in Chapter XI, plus some patience and perseverance, the officer should find what he is looking for. In addition, he will be amazed and gratified at the extra bits of law he has learned along the way.

Outlining the rules of evidence that the law enforcement officer needs to know for his job and showing him the way to dig deeper into the law if he wants to—these are my intent in writing this book and the obligations I assume in writing it.

INTRODUCTION

DEVELOPMENT OF EVIDENCE RULES

A LOT OF OUR evidence rules in the United States came from the old English common law. That law, in turn, came to England from other, more ancient legal systems: the Norman, brought over by William the Conquerer in 1066; the Roman law; the laws of Ancient Greece; the Hebraic law; the famous Babylonian Code of Hammurabi; and smatterings from many others.

Some of the historians tell us that before our present scientific method of having a jury determine the facts when there is a dispute as to what they are,* factual questions such as guilt or innocence were decided by the accused's ability to survive a ducking or withstand a walk over hot coals. These were variations of trial by ordeal. There was also trial by battle to settle civil disputes, in which the litigants or contestants representing them fought with lances or some other grownup toys. The winner was right, because he had the might.

When the trial process became less violent, trial by compurgation, known also as wager of law, became a way of deciding facts. In criminal cases, the defendant would swear that he was innocent, and witnesses that he produced would swear that they believed him. These witnesses were called compurgators. Their combined oaths, added to that of the defendant, settled his innocence.

Logic dictated that there should be a more scientific way to decide disputed issues, both in criminal and civil cases, and gradually our jury system came to be developed.

The growth of this system is itself a series of surprising

* Where the United States and state constitutions do not provide for jury trial, or where a jury is waived, a case may be tried before a judge alone, who decides not only matters of law as a judge, but also questions of fact in place of the jury. Such a trial is known as a bench trial. Further references to the fact-finding process will apply to bench as well as jury trials.

switches. Relying again on historians, we are told that juries were first used in civil disputes, involving ownership of land, and that a person could not be on a jury unless he knew the facts of the case. Today it is just the opposite. If a prospective juror knows anything about the case from reading or hearing about it, he is more likely not to be allowed to serve, unless he can convince the judge and lawyers during preliminary questioning, called *voir dire* examination, that this will not prevent him from reaching a just verdict. He is expected to learn the facts from evidence produced at the trial.

Just as the jury system is a product of experience, so are the rules of evidence. Researchers would have difficulty trying to fix a date when a particular rule of evidence was first stated. Most of the rules just grew up naturally. It is logical to assume that some judge tried a rule, found that it fitted and seemed to make sense, and included it thereafter in performing his daily functions. Other judges followed his precedent, and from time to time some of them devised additions and modifications that they considered useful and sensible. Throughout all of this process the collection of rules was expanding, sometimes broadening to embrace more situations, sometimes narrowing to meet specific ones.

Even today, and every day, judges in all of our courts are building on already established rules, refining them to fit new situations, improving on them, even sometimes discarding them. The Supreme Court of the United States accurately described the situation with this statement:

> [T]o say that the courts of this country are forever bound to to perpetuate such of its rules as, by every reasonable test, are found to be neither wise nor just, because we have once adopted them as suited to our situation and institutions at a particular time, is to deny to the common law in the place of its adoption a "flexibility and capacity for growth and adaptation" which was "the peculiar boast and excellence" of the system in the place of its origin.[1]

Even if uniform rules are codified, they cannot possibly cover every minute question. Judges will always have to apply them

[1] Funk v. United States, 290 U.S. 371, 54 S. Ct. 212, 78 L. Ed. 369 (1933).

to situations that come up and thus perpetuate the rule-making process. As of January 2, 1975, the federal courts became subject to such a set of rules, the Federal Rules of Evidence. At their very beginning (rule 102) the Federal Rules recognized the function and the obligation of the courts in the evolution of rules by stating that "These rules shall be construed to secure . . . promotion of growth and development of the law of evidence. . . ."

REASON FOR EVIDENCE RULES

Whether the rules are statute made, such as the Federal Rules of Evidence, or those enacted in many of the states, they are very frequently rules of exclusion. This means that what is offered in evidence will be excluded upon objection of the other side or on the judge's own motion if some rule of evidence says it should be.

The logic of this is to prevent having a jury reach a verdict on evidence that should not have been considered. For instance, if an officer has obtained evidence by improper means and a judge erroneously lets a jury hear or see that evidence, a convicted defendant may make this a ground for appeal and an appellate court may grant a reversal. As a judicial opinion has aptly stated, "The criminal is to go free because the constable has blundered."

Actually, this statement oversimplifies the situation. The general practice is to send the case back to the lower court to retry without using the evidence that should have been excluded. This procedure of sending the case back is called a remand.

The principle that the courts must prevent injustice by excluding improper and prejudicial evidence ranks as possibly the most important reason for rules of evidence.

But there are other reasons, each important in its own right. A few are listed here.

1. There must be order. The chaos would be obvious if two lawyers on opposing sides were allowed to chop away simultaneously at a witness whom one of them had put on the stand. To prevent this travesty we have the rule that the party offering the witness examines him on direct testimony, after which the

other cross-examines, following which the side that put him on the stand may examine him on redirect, which may even be followed by recross.

2. The evidence must be pertinent to the ultimate issue, i.e. be relevant.[2] In a criminal case, for instance, there is only one issue, whether defendant is guilty or not guilty. Evidence unrelated to that issue may be excluded.

3. Hearsay must be limited and controlled. There is sometimes no measuring how far removed the original declarant of a statement may be from the witness who repeats his statement in court. The law has had to consider the basic unfairness of allowing limitless hearsay and has balanced against this the reliability of certain types of hearsay. The result has been a set of rules, some established by the common law and some written down in evidence codes, specifying what items of hearsay are fit to be declared exceptions to the basic hearsay rule.

4. Confidential relationships must be protected. Communications between persons who bear a certain relationship to each other will be excluded from evidence because the relationship is one which "in the opinion of the community ought to be sedulously fostered."[3] Disclosing the communication could hurt a relationship that society believes in preserving, e.g. clergyman-parishioner, husband-wife, so the rules say that the courts should exclude the communication. As with other rules, there are certain exceptions, which are discussed in Chapter V.

APPLICATION OF EVIDENCE RULES

Whether the activity is at trial court or appellate level, it is still a pitched battle between the parties. The rules of evidence are of top concern in both courts. The difference is only in the technique involved. In a trial court the parties present their evidence to the jury, with the judge as referee to see that the rules are followed. In an appellate court the opposing counsel

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[2] As an example, see the statement in rule 402 of the Federal Rules of Evidence: "Evidence which is not relevant is not admissible."

[3] *See* WIGMORE, EVIDENCE, sec. 2285, Revision of Volume 8 by McNaughton. Little, Brown and Co., Boston. 1961.

argue to the judge or panel of judges about whether the rules of evidence were correctly handled in the trial court.

In a criminal case, the party that initiates the action is known as the prosecution. In a federal criminal case it may also be referred to as the Government. In a state criminal case it may be called the State, or the Commonwealth, or the People. The party or parties against whom the proceeding is brought will be formally designated in the records of the court as the defendant or defendants, but may also be called the accused.

Official activities of the law enforcement officer sometimes become involved with various types of civil actions. The parties to these actions are usually known simply as the plaintiff and the defendant, but we come across such designations as petitioner versus respondent, as in some divorce courts, or libelant versus libelee in forfeiture actions.

When a case is appealed, whether it be a criminal or a civil case, most appellate courts designate the party bringing the appeal as the appellant and the other party as the appellee.

Procedures vary among the various state and federal appellate courts. While much of its operation is unique, since it is one of a kind, the appellate procedures of the Supreme Court of the United States will be discussed, since there will be a great many references in this book to cases decided by the Court.*

The Supreme Court's appellate procedure does not differentiate between criminal and civil cases. One procedure, sometimes misunderstood, is by application to the Supreme Court for it to issue an order to the court below to send up its entire record in the case for review. This order is known as a writ of certiorari (pronunciation anglicized as "sur-shur-ahr-ee," with accent on the next to last syllable). Lawyers who spend a lot of their time doing Supreme Court work sometimes toss off the expression familiarly as "surt." The party appealing to the Court is actually filing a petition for certiorari and is therefore called the petitioner. The opposing party is called the respondent.

The certiorari procedure of the Supreme Court is in two steps. In the first, the Court decides whether or not it will

* References to the Supreme Court of the United States customarily appear with a capital *C*, even where the full name of the court is not spelled out.

consider the case. If it decides not to, the decision is announced as "certiorari denied," and that is the end of it. If the Court decides that it will hear the case, the decision is announced as "certiorari granted," and the second step becomes operable. The case is set for argument at a later date, and briefs must be submitted by the parties in the meantime. After the case has been argued, the justices meet, reach their decision, and announce it in a written opinion. Any justice may write and file a concurring or dissenting opinion, and it is not at all unusual to find three or more opinions in one case.

Opinions of the Supreme Court, as well as reports of certiorari and other official proceedings, appear in the *United States Reports* (———U.S.———), the *Supreme Court Reporter* (——— S. Ct.———), and the *Lawyers' Edition* of the *Supreme Court Reports* (———L. Ed.———, ———L. Ed. 2d———). These sets are described more fully and their use is discussed in Chapter XI. The officer who wants to refer to a Supreme Court opinion should easily be able to find a library that has one, two, or all three of these sets of books.

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EVIDENCE

Chapter I

GENERAL CONCEPTS

BURDEN OF PROOF

A PARTY BRINGING an action in a court of law must satisfy a certain measure of proof before a jury can say that he is entitled to win the case. The obligation to persuade the jury that the required measure of proof has been met is called the burden of proof.

Criminal Cases

In a criminal case the prosecution must satisfy each member of the jury that the defendant is guilty beyond a reasonable doubt. If any member of the jury has a reasonable doubt, he or she must vote "not guilty." All this is basic and, seemingly, everyone knows it. Yet, it is surprising how few people know what it really means. It is shocking to realize that this even includes persons who sit on juries and have to apply the principle of reasonable doubt in deciding the cases before them. Lawyers sitting in courtrooms often gnash their teeth in helpless chagrin while judges make sincere but completely unsuccessful efforts to tell juries the meaning of the expression "beyond a reasonable doubt."

A criminal investigator needs, more than most other persons, to understand fully the philosophy of the phrase "beyond a reasonable doubt." Since he is the gatherer of the evidence upon which the jury must act, he has to think as a juror would think. When he has collected all the evidence and is ready to report on it, he must assemble the facts in his own mind, both those that point to guilt and those that point to innocence, and decide whether or not he thinks the jury will find the accused guilty beyond a reasonable doubt. In many investigative

agencies, particularly in some departments of the United States Government, he recommends whether or not the case should be prosecuted.

About as clear an explanation as may ever be found is developed in the play and movie *Twelve Angry Men,* written by Reginald Rose. The play (or movie) appears occasionally on television. The pertinent part of the story is as follows.

The jury in a homicide case has just retired to the jury room. The day is hot, there is no air conditioning, and most of the jurors are in a hurry to get finished and get out. One of them even has some tickets he still hopes to be able to use.

The foreman calls for a vote. Immediately, eleven vote "guilty." The twelfth, identified in the script as Juror No. 8 and known as Henry Fonda to those who have seen the movie, calls out "not guilty."

Several of the "guiltys" give Henry the "Are you some kind of nut?" look, and one of them confronts him bluntly, asking if he really believes defendant is not guilty. Henry shrugs off the question by simply saying he does not know. What he is saying, as a supposedly reasonable man, is that he has a doubt on which he can pin a sound reason, and that because of this doubt he cannot conscientiously say the defendant is guilty. He proceeds to explain some item of the testimony that has produced this doubt.

One by one, as they talk and as they think, other jurors recall testimony that puzzles them and makes them hesitate to vote "guilty." As the story finishes, every juror except No. 3 has developed at least one reason why he cannot say in his own mind that the defendant is guilty. These other jurors, every one of whom is by now harboring some reasonable doubt, turn to No. 3. They want to know what his argument is. He has none. The conclusion we are forced to reach is that although he has been stubbornly refusing to admit it, he too is fuzzy about the defendant's guilt. He has to admit, at least tacitly, that he has a reasonable doubt and is obliged to join all the others in the "not guilty" verdict.

For a court definition of reasonable doubt, consider these excerpts from the judge's instructions to the jury in an income tax prosecution. "It is such a doubt as would deter a reasonable

prudent man or woman from acting or deciding in the more important matters involved in his or her own affairs." The court continues to explain what is *beyond* a reasonable doubt. "It is only necessary that you should have that certainty with which you transact the more important concerns in life. If you have that certainty, then you are convinced beyond a reasonable doubt."

Civil Cases

General

Although the enforcement officer works primarily on criminal cases, he does sometimes get involved in civil matters such as automobile accident damage suits, so he should know about burden of proof in civil cases. Here the plaintiff must persuade the jury that he has proved his case by a preponderance of the evidence or, stated another way, by the greater weight of the evidence.[1]

A greater number of witnesses on one side or the other does not of itself create a preponderance of the evidence. The jury determines the credibility of each witness and decides what weight it will give to his or her testimony.

Credibility, which is measured the same way whether the witness is to appear in a criminal or civil case, is another of the investigator's ever present work problems. Since he is usually the one who first finds the witnesses, whether the case is a criminal or civil one, questions them before anyone else does, and gets to know them best, it is essential for him to appraise them objectively and estimate how they will shape up in contributing to meet the burden of proof. In fact, he may be the only one to do this. Sadly, the lawyer who tries the case may never get to talk to every one of his witnesses before the trial. The subject of credibility is discussed in the next chapter.

Civil Cases Where Fraud Is Alleged

The officer may have occasion to investigate a civil case where a plaintiff alleges fraud, as where the victim of a scheme

[1] A defendant who files a counterclaim in a civil suit has the same burden of proof. The counterclaim is considered the same as a separate action in which he is the party bringing the action.

that is the basis of a criminal prosecution brings a separate suit to be reimbursed for the financial loss he claims to have sustained.

Even if the defendant has already been found guilty in the criminal case, this does not automatically determine the civil case, because the parties are different (plaintiff versus defendant in the civil case as opposed to prosecution versus defendant in the criminal case) and the issues are different (suit for reimbursement for damages in the civil case as opposed to prosecution for violation of a criminal statute). In fact, courts in virtually every jurisdiction bar any evidence of criminal conviction in the civil trial.

Just as the issues and parties are different, so is the burden of proof different. It is less than the "beyond a reasonable doubt" required in a criminal case, but at the same time it is more than the preponderance that suffices to decide an ordinary civil trial. When the plaintiff brings a suit alleging that he suffered damage because the defendant cheated him, he is asking the jury to delve into defendant's mind and find fraudulent intent. Since the jury has to operate in such a cloudy atmosphere when it tries to discover defendant's state of mind from things he did or said, the law has raised the required measure of proof, as a protection to the defendant, from the mere preponderance required in the ordinary civil case to "clear and convincing."

"Clear and convincing" has been defined as follows:

> [T]hat measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal.[2]

INTENT IN CRIMINAL CASES

Many criminal statutes make willfulness, intent, or knowledge an essential element of the crime. Some of such crimes are: accepting bribes or kickbacks, passing counterfeit money, embezzlement, passing bad checks, obtaining money or property by false pretenses, and attempting to evade income taxes.

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[2] Hobson v. Eaton, 399 F.2d 781, 784 (6th Cir. 1968).

For instance, consider this Colorado shoplifting law:

> Any person who shall willfully and unlawfully take possession of any goods, wares, or merchandise owned or held by and offered or displayed for sale by any store or other mercantile establishment, with the intention of feloniously converting such goods, wares, or merchandise to his own use, without paying the purchase price therefor, shall be guilty of the crime of shoplifting.[3]

Another example is this Arkansas statute concerning false pretense violations:

> Every person, firm or corporation who with intent to defraud, cheat or avoid payment therefor, shall designedly by color of any false token or writing, or by any other written or oral false pretense, obtain a signature to any written instrument, or obtain any money, personal property, right of action, service, information or other valuable thing or effects whatever, upon conviction thereof, shall be deemed guilty of larceny, and punished accordingly.[4]

Note that in the Colorado statute the offense does not exist unless the taking is done *willfully*, with the *intention* of converting the property to the taker's own use, and that in the Arkansas statute the magic words are *with intent to defraud, cheat or avoid payment*, and *designedly*.

Since each of these statutes has made willfulness or intent a component of the offense, a person charged with the offense must be found not guilty unless the jury is satisfied beyond a reasonable doubt that the defendant acted willfully or with the intent prescribed in the law.

Even earlier in the trial, the defense has the right to make a motion for judgment of acquittal after the prosecution has presented its case and before the defense begins its presentation. The ground for such a motion is that even if the facts brought out by the prosecution were to be considered in the light most favorable to the prosecution, they would be insufficient, as a matter of law, to support a guilty verdict.

Applied to the two statutory examples, if counsel for a defendant in a Colorado shoplifting trial can persuade a trial judge that his client absentmindedly pocketed the item, or if

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[3] COLO. REV. STAT. 40-5-28.

[4] ARK. STAT. 41-1901.

under the Arkansas law the lawyer can convince the judge that there was no intent to defraud, the judge should grant the motion and not even give the jury a chance to consider the case.

Going a step further, if the judge denies the motion and then later on, during the defense, excludes evidence offered on behalf of the defendant suggesting lack of willfulness or intent, an appellate court may reverse the conviction for judicial error, either for denying the motion for acquittal or for excluding the evidence of lack of willfulness or intent, or both.

Some case examples may best illustrate the types of acts from which a jury is likely to infer that a defendant had the intent to commit the crime with which he is charged.

The defendant in one case answered a newspaper ad for sale of a used Cadillac® automobile. He paid the $3,000 purchase price by check. In a prosecution for obtaining property under false pretenses, the State showed that the account on which defendant drew the check never had a balance of more than ten dollars. The jury convicted and an appellate court affirmed, holding that the necessary element of intent was properly inferred from the facts.

Another case involved the use of mails to defraud. Defendant was president and directing force of a land development company. The company bought a tract of barren, arid land of limited accessibility in New Mexico for twenty-five dollars an acre. It then plotted the land into ¼- and ½-acre lots and set up booths at various shows, fairs, and exhibitions, where the public was induced to register for drawings of free lots.

The company held some drawings in which the prizes were little poodles, but never held any drawings for lots. Instead, it screened the registrations to eliminate all persons who were considered too young to be eligible or too old to be interested, and those who lived nearby. Then it sent letters to the others, telling them that they had won free lots and could get the lots by sending closing costs, which varied from $49.30 to $52.50. Salesmen visited the persons who sent in the closing costs and tried to induce them to buy additional lots.

Among other statements that the salesmen made to urge the purchase of lots was the representation that water was available

at a depth of 75 feet. Actually, to defendant's knowledge, the land was on a lava floor covered by a few feet of fill, and there was no water anywhere from 400 to 700 feet below the surface.

The defendant was convicted of mail fraud. The Court of Appeals affirmed the conviction, holding that there was adequate evidence of intent.

A man arrested for bank robbery in New Jersey had on his person a driver's license with his own photograph but a fictitious name and a piece of paper on which were written the phone numbers of airline reservations offices for reservations to Fort Lauderdale, Florida. The court instructed the jury that this evidence was "[A] circumstance which may tend to prove consciousness of guilt and should be considered and weighed . . . in connection with all the evidence. The weight to be given evidence of flight depends upon the motive that prompted it and all the surrounding circumstances."

The jury found defendant guilty. Affirming the conviction, the Court of Appeals quoted the above jury instructions and said that concealment and flight are relevant to prove both commission of the act and intent with which it was committed.

Cases that discuss criminal intent all agree that since it is a state of mind it almost invariably has to be proved by circumstantial evidence, i.e. acts or statements by the defendant that, in effect, lead the jury to delve into his mind and infer that intent was present. As if anyone needs to be reminded, finding and putting together these acts and statements is just another of the responsibilities of the investigating officer.

A list of acts supporting inference of intent, suggested by the Supreme Court of the United States in a tax evasion prosecution, would also apply to other crimes where intent is a component, particularly where fraud is involved:

> [C]onduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or conceal.[5]

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[5] Spies v. United States, 317 U.S. 492, 63 S. Ct. 364, 87 L. Ed. 418.

Other acts showing intent include placing property in names of others, depositing proceeds from crime in secret bank accounts, attempting to influence witnesses, and making false statements to an investigating officer.

ADMISSIBILITY

Whatever the burden of proof may be in any case, or whatever the defense attempts to introduce in opposition, no evidence may be properly introduced except what is admissible. We can say in short that admissibility is that quality which makes evidence acceptable in court.

Evidence codes have generally rejected the impulse to give any expansive definition of what is and is not admissible and have left that responsibility to the courts, to be applied consistently with the principles of evidence, as set forth in the codified rules and as developed by common law.

Since determination of what is properly admitted concerns the proper conduct of the trial, we can readily see that the judge, who sits as umpire, must decide what is admissible. This is a vital decision. A defendant who is convicted in a criminal trial or a party who loses a civil trial may ground his appeal completely or partially on the argument that the judge improperly let the jury hear or see evidence that was legally inadmissible, or that he refused to let it hear or see evidence that was admissible. In either event the argument is that the jury would have decided differently if the court had ruled properly as to the admissibility of the evidence.

Relevancy

One of the basic rules of evidence is that courts should exclude evidence offered at a trial by either party if it does not relate to the issue. This has long been a common law concept, and evidence codes endorse it fully and without reservation.

The terms *irrelevant, immaterial,* and *incompetent* have been thrown together as a package for so long that they often serve as a substitute for thinking in making objections to evidence. Even television trials, when they have a few spare seconds to

use up, manage to have one of the lawyers sound off with the trilogy.

Competency will be discussed in later paragraphs. As to relevancy and materiality, any distinction between them is getting to be generally discarded, especially in evidence codes and rules.

In the past, relevancy was understood as the tendency to relate generally, and materiality as the quality of relating to the principal issue sufficiently to have some influence in deciding it. Today it is well recognized in all courts that if evidence does not relate to what the case is about, namely, the principal issue, it has no place in the proceeding. Consequently, materiality has been merged into the definition of relevancy, and we should not be hearing about materiality in the courtroom except from the occasional lawyer who still likes to hear himself declaim "irrelevant and immaterial."

For a codified example of the merger of the two elements, note the following:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.[6]

Note particularly the phrase "that is of consequence to the determination of the action." This is the part that was formerly included in the definition of materiality.

Sometimes relevancy is not immediately apparent when counsel offers the evidence, and opposing counsel may object to it on the ground that it is irrelevant. In such event, if the lawyer making the offer of evidence tells the court that he will show relevancy by evidence he will offer later, most courts will admit the evidence subject to later connection. The courts recognize the impossibility of throwing in a whole caseload of evidence all at once so that the relevancy of each item is immediately apparent. However, the court is expected to be vigilant, and opposing counsel had better be likewise, for his client's protection. If the later connection does not materialize

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[6] FEDERAL RULES OF EVIDENCE, rule 401.

as promised, the judge is required to have the evidence removed from the record and instruct the jury to disregard it, as though it had never been admitted.

An officer making an investigation has a problem with the practical operation of relevancy. Obviously, he cannot possibly know at the investigative stage how the court is going to rule at the trial stage, any more than the lawyer can know when he offers the evidence. The investigator's safest bet when confronted with an item of uncertain relevancy is to include it and not prejudge what the judge will do.

Competency

Relevancy is only the beginning of the admissibility requirements. Evidence will not be admitted unless it is relevant, but it will by no means be admitted just because it is. Evidence can be relevant, yet have been obtained by illegal search and seizure. It can be relevant but violate the husband-wife privilege. It can be relevant but inadmissible under the *Miranda* rule, or because it is hearsay. There are many other exclusionary rules, and if admission of evidence will violate any of them, all the relevancy in the world will not get it admitted. The evidence has become incompetent.

A broad definition of competency of evidence is that the evidence has been obtained from a source, in a manner, and in a form that is proper under the law. If we put it the opposite way, the definition is even broader, and shorter. We would just say that competency means the evidence is not barred by some exclusionary rule.

PRESUMPTIONS

Although it is a product of common law evolution, the definition of the word *presumption* has been codified by statutes or rules of evidence in a number of the states. The Laws of Puerto Rico spell it out clearly and simply. "A presumption is a deduction which the law expressly directs to be made from particular facts."[7]

The California Evidence Code states that, "A presumption

[7] Laws of Puerto Rico, title 32, sec. 1883.

is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action."[8]

The Federal Rules of Evidence concern themselves only with presumptions in civil cases. The Advisory Committee that wrote the Rules included a rule for presumptions in criminal cases, but this was left out of the final draft. Consequently, the common law rules about presumptions still prevail in federal criminal cases.

The law of presumptions is particularly illuminating in showing how rules develop. It is purely a product of common sense. From repetitive observation that if one fact exists a second fact follows almost invariably, the law evolved a rule that the second fact should be assumed to exist without the need to prove it.

The law has also developed a safeguard for some of the presumptions. It lets them be disproved by factual evidence that what may be assumed in most cases happens not to be true in this particular case. Presumptions that are allowed to be disproved in this fashion are referred to as rebuttable presumptions. This distinguishes them from conclusive presumptions, which can never be rebutted.

A court opinion written some years ago borrowed this picturesque language from an anonymous philosopher to describe rebuttable presumptions:

> "Presumptions," as happily stated by a scholarly counselor, . . . "may be looked on as the bats of the law, flitting in the twilight, but disappearing in the sunshine of actual facts."

Distinction Between Presumption and Inference

Earlier in this chapter there was some discussion about inferences, in connection with intent. Since the words *inference* and *presumption* are related, they both must be analyzed to see how they differ.

An inference is a purely permissible deduction that a jury

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[8] CALIFORNIA EVIDENCE CODE, sec. 600(a). The language of the CALIFORNIA CODE has also been adopted with slight variation by the following: KANSAS STATUTES ANNOTATED (K.S.A.), 60-413; NEW JERSEY RULES OF EVIDENCE, rule 13; UTAH RULES OF EVIDENCE, rule 13.

may draw after considering the evidence. The inference can be one way or the other. No one, not even the members of the jury, can predict what the inference will be. On the other hand, a presumption is a conclusion at the very outset, even if it is later rebutted. In the law of presumptions, the existence of Fact No. 1 tells us that Fact No. 2 must therefore follow.

Every rebuttable presumption that the party against whom it is offered fails to disprove goes into the jury room the same as a proved fact. Of course the jury, as trier of the facts, decides whether the presumption has been rebutted or remains as a fact. Stated another way, it could be said that the presumption remains unless the jury reaches the inference that it has been rebutted.

Conclusive Presumptions

Most of the common law conclusive presumptions have been abandoned by evidence codes, statutes, and case law. The small number that still remain are unshakeable in the jurisdictions where they are law, and no evidence can ever be admitted to disprove them. In some jurisdictions the term *conclusive presumptions* has been replaced by the term *rules of substantive law*. This is a distinction without a difference, and this text need not be concerned with it. This discussion will be limited to conclusive presumptions in criminal cases.

Evidence statutes in some states have declared that a malicious and guilty intent is conclusively presumed from the deliberate commission of an unlawful act done for the purpose of injuring another.[9]

At first glance this presumption may seem inconsistent with the "beyond a reasonable doubt" burden of proof that is applied in criminal cases. But let us analyze it more closely and see if it really is inconsistent. The prosecution still has to show beyond a reasonable doubt that there was *deliberate* commission of the unlawful act, and that the act was done *for the purpose* of injuring another. Does not proof of these two elements in any case fulfill the prosecution's burden of proving the act and

[9] *See* NEVADA REVISED STATUTES, sec. 47.240; NORTH DAKOTA CENTURY CODE, sec. 31-11-01; LAWS OF PUERTO RICO, title 32, sec. 1886.

the intent in every criminal case beyond a reasonable doubt? If it has met that burden, is not the jury obliged to find the defendant guilty?

If we agree that the answer to both of the questions is yes, the conclusive presumption seems fully consistent with what has to be done anyway. It might even be argued that the presumption is unnecessary.

Two common law conclusive presumptions mentioned as examples probably more than any others are that a child under seven is (mentally) incapable of committing a felony, and that a boy under fourteen is (physically) incapable of committing rape.

When the law presumes conclusively that a child under seven is mentally incapable of committing a crime that was a felony at common law or has been made one by statute, it is shutting its eyes tight and stubbornly refusing even to consider the possibility that some especially precocious child under that age could have the mental capacity to form felonious intent.

However, this presumption appears to be only academic. My own research failed to turn up even one court opinion where the court applied the presumption to a specific set of facts that was before it. Many court opinions have mentioned the presumption, usually as an addendum or "by the way," while deciding cases involving the "under fourteen" presumption in rape cases. Such a pronouncement of law, not necessary to decide the specific facts about which the opinion is written, is called dictum, or obiter dictum.

Nevertheless, some of the states have written it into their laws. There are even some variations as to age, and sometimes the presumption is not even confined to felonies. For instance, the statutes of the State of Washington state flatly, without limitation or qualification, "Children under the age of eight years are incapable of committing crime."[10]

Reversing the situation, a court in Maryland has said that the common law presumption governs simply because there has never been a statute in the state to the contrary.[11]

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[10] REVISED CODE OF WASHINGTON, sec. 9.01.111.

[11] Adams v. State, 8 Md. App. 684, 262 A.2d 69 (1970), *cert. denied,* 400 U.S. 928, 91 S. Ct. 193, 27 L. Ed. 2d 188.