THE EVIDENCE HANDBOOK

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THE TRAFFIC INSTITUTE, NORTHWESTERN UNIVERSITY

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Foreword

Some 10 years ago a similar prefatory note pointed to an alarming increase in motor vehicle fatalities and injuries. One year later the Federal Government enacted the Highway Safety Act and the National Traffic and Motor Vehicle Safety Act. Attention was called also to the rate of increase of serious crimes as compared to the increase of population. The decision as to whether or not the two aforementioned conditions have improved significantly, the effect of energy crisis on reducing motor vehicle fatalities and injuries notwithstanding, will be left to the reader.

During the intervening years we have also witnessed some significant changes in philosophy for resolving issues of individual rights vs. those of society as interpreted by the "Warren Court" and the "Burger Court". Nevertheless it is fair to say that there appears to be a difference in the Supreme Court decisions since the Burger Court.

In our struggle to be a nation of laws—not men, it is important that those whose work is closely related to our system of justice be as current as possible in developments in the law and divergent legal theories relating to the rules of evidence.

It is to this end that this revised Handbook is dedicated. It is our hope that improved knowledge and use of the rules of evidence will contribute more effectively to making ". . . the inherent, inalienable right to life, liberty and the pursuit of happiness" meaningful to more and more of our fellow citizens.

JAMES M. SLAVIN
Director
The Traffic Institute

Evanston, Illinois
October, 1975

Editor's Preface

Objective

A practical knowledge of the rules of evidence is essential to all persons dealing with the various aspects of criminal law. The judge on the bench, charged with a solemn responsibility to administer justice, must rule on the admissibility of evidence offered for and against persons accused of criminal offenses. He must do this fairly and intelligently with a view to protecting the rights of the accused, as well as those of society to have its laws vindicated. No judge can fulfill his duty in this respect if he lacks knowledge of proper evidentiary principles, or fails to apply them properly. Evidence improperly admitted or excluded will often spell the difference between justice administered and injustice perpetrated.

It generally is accepted as a matter of course that a lawyer knows the rules of law applicable to his cases. This necessarily requires familiarity with the rules of evidence as part of the legal tools of an attorney. Whether he be prosecutor or defense counsel, to him falls the responsibility of proper application of these rules in presenting his cases in court.

A practical acquaintance with evidentiary principles likewise is an essential part of any efficient law enforcement officer's store of knowledge. He should be forearmed with the ability to differentiate between factual material which will be admissible in court in support of his cases and that which is worthless for that purpose. So prepared, he will be able to perform his particular functions in a manner creditable to his department, himself, and his community. As John H. Wigmore, Dean Emeritus of the School of Law of Northwestern University, said:

> "The police officer must look ahead to this barrier of rules that awaits him at the trial. It is the attorneys who have the task of obeying and following those rules in presenting the evidence. But the police officer must be in a position to furnish the attorneys with evidence which will be admissible under the rules. He must therefore have at least elementary and yet practical acquaintance with these rules of evidence. He is, in this respect, like the surgeon's assistant at a major operation, who, knowing in advance the type of the expected operation, must prepare and have ready the precise instruments and other suitable materials which the surgeon will need. A body of evidence-data well collected and arranged beforehand by the police officer is therefore an essential aid to the attorney's effective presentation of the case to court and jury.
>
> "This adds another substantial item, of course, to the police officer's already heavy burden of preparation for his responsible task. But it is an inevitable one. And he will be rewarded for the time spent in studying the rules when he comes to find that the mastery of them will aid materially in the speedy and successful presentation of the attorney's case at the trial."

In this revised edition of *The Evidence Handbook*, the authors have endeavored to present the rules and principles as clearly and succinctly as possible, dependably authoritative in the hands of the legally trained, yet couched in language readily informative to laymen, particularly those engaged in law enforcement.

Footnotes

Case citations in the footnotes are to call attention to illustrative instances of points developed in the text, and are not intended to be exhaustive or complete. References to general authoritative texts are inserted for the benefit of those who would engage in further research relative to particular points of concern.

Publishing History

This book was originally published as *The Evidence Handbook for Police*, 1943, and authored by Franklin M. Kreml, founder of the Traffic Institute. This volume went through six printings between 1944 and 1957. In 1958 the title was shortened to *The Evidence Handbook* and because Robert L. Donigan, General Counsel, and Edward C. Fisher, Associate Counsel, thoroughly revised and rewrote the book, they were named as the authors of the 1958 Edition.

The next revision was made in 1965, and that Edition has had three Pocket Supplements to keep it current because of the changing rules of evidence.

In the 1975 Edition all four authors have contributed to the revision and extensive rewriting.

Credits

Alice E. Gibbs, Legal Secretary, has been responsible for the proofreading, checking citations, and the style. Without her assistance it would never have been completed. Her faithful attention to detail and sound advice are deeply appreciated.

Vivian Carlson, Graphic Arts Specialist, contributed her talents in supervising layout and production, and we thank her for these efforts.

Lenore Krasner has assisted with the proofreading and prepared the page makeup. She has been most helpful, and it is appreciated.

The comments in the text of an editorial nature are those of the authors and they accept responsibility.

Finally, we acknowledge the encouragement and support of Mr. James M. Slavin, Director of the Traffic Institute. It was greatly appreciated.

October, 1975
Evanston, Illinois

Robert H. Reeder
Editor

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Chapter 1

Introduction to Rules of Evidence

Sec. 1-1 Methods of Trial in Primitive Times

In olden times various methods were employed in attempting to determine the truth of accusations and charges brought against persons, both in civil and criminal matters. Most of these primivative methods of "trial" seem fantastic and barbaric today, and in fact were found unreliable and ineffective even before the present judge-trial-jury system was developed several centuries ago in England. The jury idea, conceived as a group of persons gathered to administer justice according to existing custom, had been in use in one aspect or another throughout northern Europe from time immemorial.[1] But it was not brought to any semblance of its modern form until about the time of Magna Charta,[2] in which the right to jury trial by one's peers was expressly recognized and guaranteed, although following that time there were periods of interruption in its use.

All of the ancient systems of trial depended upon divine intervention in the affairs of men. The most ancient species of trial, at least in Saxon and old English law, was the trial by physical ordeal,[3] on the supposition that supernatural intervention would protect a person from physical harm if he were innocent.[4] The ordeal by fire was performed either by taking up in the hand a piece of red-hot iron, or by walking barefoot and blindfolded over red-hot plowshares laid lengthwise at unequal distances. The *hot-water* ordeal consisted of plunging the bare arm up to the elbow in boiling water. If the person escaped unscathed in such tests it was considered that supernatural forces had intervened in his behalf to hold him innocent of the charges brought against him.[5] The *cold-water* ordeal was performed by throwing the accused into a river or pond of cold water, and if he floated *without any act of swimming* it was held evidence of his guilt but if he sunk he was acquitted.[6] Such ordeals could be performed by proxy but the accused person himself was bound to answer for an unfavorable outcome. As Blackstone wrote in the mid-eighteenth century:

> "One cannot but be astonished at the folly and impiety of pronouncing a man guilty, unless he was cleared by a miracle; and of expecting that all the powers of nature should be suspended by an immediate interposition of Providence to save the innocent, whenever it was presumptuously required."[7]

Another species of primitive trial, somewhat similar to trial by ordeal and also of great antiquity, was the trial by battle—"judicial combat." This probably originated in a combination of the religious zeal and military ardor of the warlike clans and tribes which overan Europe in medieval times. The system of trial by battle called for the accused to do battle with his accuser, the winner of the fight to be pronounced in the right of the dispute. Here again there was something akin to dependence upon the God of Battles to lend strength to the arm of the innocent party and give him victory over his opponent. The actual fight could be carried on by *champions* of the parties and these could well be experts in the use of weapons, so that in the absence of a miracle, victory no doubt went mostly to the superior warrior. Traces of this savage method of administering justice are to be found in the later custom of fighting duels to settle private arguments.[8]

In nearly all early English trials the oath played a dominant role and in all primitive civilizations, an appeal to the supernatural figured largely in the administration of justice. There was a deeply imbedded conviction that an appeal to Deity, according to the religious beliefs of the period, was a most serious step, not to be taken with impunity, for one who swore falsely surely risked eternal damnation.[9] In the so-called trial by *compurgation,* one against whom a charge was made could *purge* himself of guilt by securing enough *compurgators* to swear they believed him on his oath,[10] the theory being that these people would not jeopardize their immortal souls by taking false oath in his behalf if he were guilty.[11]

These means of establishing guilt or innocence were not only crude, some were actually vicious. As civilization progressed they gradually gave way to the present system

of trial by judge and jury, the judge interpreting the law and the jury determining the facts. This did not come about suddenly. The jury system underwent many changes and variations during its long course of development. In its earliest stages a jury seems to have been something comparable to our present grand jury, but composed of persons who knew the facts of the case at hand. Proving quite unwieldy because of the tendency to call in as many witnesses as possible, the "grand" jury as a trial jury gave way to the "petit" (small) jury composed of persons who knew nothing of the facts but depended mainly upon sworn information brought before them by those who could give them the facts.

Sec. 1-2 Development of Rules of Evidence

Prior to the inception of the present judge-jury system there were no rules of evidence. Under the primitive trial practices described above, proof of guilt or innocence depended upon a revelation of the supernatural—an Act of God. The judge or court merely confirmed the "finding" thus made manifest and entered judgment accordingly. There was no element of persuasion involved, no concern about the reliability of the tests administered, and there was no thought given to the credibility of witnesses who swore in compurgation of their friend and neighbor. Their oath alone was all that mattered.[1]

During the 13th and 14th centuries an English trial was beginning to involve some element of persuasion, but only through consideration of evidentiary factors known to the jurors themselves, who thus had both knowledge of the facts and the power of decision thereon in their own hands. By the 16th and 17th centuries, however, the jury's chief source of information had come to be that furnished them by the sworn testimony of witnesses. Eventually, of course, juries came to be chosen from those who had *no* first-hand knowledge of the facts, but were *wholly* dependent upon the testimony of others in making their decisions. It was concurrent with these developments that the need arose for some means by which the jury could be protected against the introduction of false or otherwise undependable testimony. Rules of evidence were devised for this purpose. Questions were arising relative to the admissibility of various types of evidence. Since the reliability of evidence brought before a jury by witnesses was necessarily dependent upon the credibility and trustworthiness of those witnesses, it was imperative that rules of admissibility be established, otherwise the evidence would be nothing more than a hopeless jumble of hearsay, conclusions, and prejudicial remarks. The interests of justice demanded more than this for a "fair and impartial trial."

Also, matters of privilege began to arise, along with questions relating to the right to compel witnesses to appear in court and give testimony. Participation of witnesses in the primitive compurgation trials, and even in the various other early "trials," had been on a purely voluntary basis. Compulsory attendance and testimony at trials were entirely new concepts, and several centuries were to pass before it came to be recognized that if the truth were to be discovered and real justice administered, it was essential that those having knowledge of facts pertaining to the case be brought in to testify.[2]

The considerations forced the judges to adopt rules to control the conduct of trials with order and efficiency, as well as to govern the admissibility of evidence presented to juries.[3] Such rules developed by gradual evolution through the ensuing centuries and are still in process of development today.[4] The law has never become static and this is especially true of the rules of evidence, which are adaptable to changing times and conditions.

> "The law of evidence is a constantly expanding phase of our jurisprudence and its rules are moulded and applied according to the needs of justice, to meet changes made by the progress of society."[5]

Thus it was concurrent with the gradual shaping of the modern jury system that we find the rules of evidence coming into being. Extraneous matter which might safely be submitted to a learned judge without danger of misuse or misconstruction had to be kept from a jury composed of ordinary laymen, unacquainted with the law and its intricacies, apt to be highly impressionable, easily misled by irrelevancies appealing to their sympathies, passions and prejudices, yet charged with the responsibility of deciding the rights and liberties of those who came before them.[6]

Obviously there were logical and compelling reasons for the growth of evidentiary rules. Evidence which was untrustworthy, irrelevant, or too remote, had to be barred so that the jury could hear "the truth and nothing but the truth." The primary purpose of rules of evidence is to make possible a fair and impartial trial. Most of the evidentiary rules as we now know them have been formulated by courts at various stages of judicial history and thus come to us as part of our common law heritage.

There is no *universal* set of rules of evidence as such. Rulings of courts as to some of the rules may vary from one state to another. Common law rules still exist in some states, but have been modified by statute in others, and to an increasing extent the rules of evidence are being codified by legislative enactments. It is well recognized that state legislatures have power to prescribe rules of evidence for their courts as well as to establish methods of proof, if not in violation of constitutional rights or requirements. This authority extends to the establishment of presumptions, prima facie evidence, burden of proof, and the like.[7] "The due process clause has always been interpreted as permitting the states wide latitude in fashioning rules of evidence and procedure."[8]

For the Federal Courts, the "Rules of Evidence for